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# ASSET FORFEITURE: GIVING UP YOUR CONSTITUTIONAL RIGHTS

## I. INTRODUCTION

Congress has responded to its losing the war on crime with the threat of asset forfeiture, especially in the areas of organized crime and the drug trade.<sup>1</sup> These areas are thought to be a threat to National Security and therefore Congress has given them the utmost priority. Congress has added and then expanded asset forfeiture provisions for law enforcement. Congress intended to take the profit out of crime, deter further illegal activity and to produce revenue to further finance the battle.<sup>2</sup> As a result, forfeiture has become a self-financing process.<sup>3</sup> Forfeiture has since expanded and now has crossed the boundaries of constitutional limitations in both federal and state forms.

For these very reasons, asset forfeiture has come under tremendous fire in the past several years. Critics describe the power of asset forfeiture as the "full weight of the Government" bearing

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1. "There were 55,000 addicts in N.Y.C. Today there are over 335,000 addicts, and we are losing the war! . . . in 1968, we used to seize kilos of cocaine and heroin. Today, we seize it by the ton. Gentlemen, we are losing the war." 135 CONG. REC. E2162-02, E2162 (1989) (statement of Francis J. Wolfe, retired New York policeman); "It can be won only if we have the courage to use every weapon at our disposal." 136 CONG. REC. E735-01, E736 (1990) (statement of Rep. Gingrich).

2. Speaking in favor of limiting the power of governmental asset forfeiture, Mark J. Kappelhoff, testified before the Judiciary Committee and stated "it was thought of as some form of poetic justice: seizing the assets of major drug traffickers and using these assets to fund legitimate law enforcement initiatives." *The Civil Asset Forfeiture Reform Act: Hearings On H.R. 1916 Before The House Committee On The Judiciary*, 104th Cong., 2d Sess. (1996) (statement of Mark J. Kappelhoff, Legislative Counsel ACLU).

3. The Anti-Drug Abuse Act of 1988 established the Special Forfeiture Fund, to be administered by the Director of the Office of National Drug Control Policy. The Special Forfeiture Fund supports high-priority drug control programs, as defined by the Director of the Office of National Drug Control Policy. This Fund, which began operation in fiscal year 1990, receives deposits from the Department of Justice Assets Forfeiture Fund and the Department of the Treasury Assets Forfeiture Fund. The monies in the Fund are transferred to the drug control agencies in accordance with the priorities articulated in the National Drug Control Strategy. *Appendix: Proposed 1996 Budget of the United States Government*, Office of Management and Budget, February 1995.

against a criminal defendant.<sup>4</sup> Even though forfeiture finds its roots in English law<sup>5</sup> and this country has recognized it since the colonial period,<sup>6</sup> an unprecedented expansion in the power of law enforcement to seize property has occurred in recent years.<sup>7</sup> Consequently, forfeiture has become one of the greatest weapons in the war on crime.<sup>8</sup> The defense bar has strongly opposed these broad powers of the government, especially the government's ability to bring civil actions in conjunction with criminal ones.<sup>9</sup> The

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4. U.S. Amicus Brief at 19, *United States v. Ursery*, 116 S. Ct. 2135 (1996) (Nos. 95-345, 95-346). The term "Government" is used to represent the executive branch, specifically the United States Attorney's Office and the power given to it by Congress.

5. See *United States v. Saccoccia*, 823 F. Supp. 994, 1000 (D.R.I. 1993); See generally *Avery v. Everett*, 18 N.E. 148 (N.Y. 1888).

6. Abuses of the bill of attainder by the English monarchy led the Framers of our Constitution to limit the application of criminal forfeiture. Thus Article III, Section 3 prohibits forfeiture as a penalty for treason except during the life of the person attainted. U.S. CONST. art. III, § 3. In 1790, the First Congress extended that prohibition by eliminating forfeiture of one's estate and corruption of blood as penalties for all felonies. Act of April 30, 1790, Ch. 9, § 24, 1 Statutes at Large 117. See *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

7. The United States has received from asset forfeitures (in millions)

1986—\$93.7
1989—\$580.8
1992—\$531
1987—\$177.6
1990—\$459.6
1993—\$555.7
1988—\$205.9
1991—\$643.6
1994—\$549.9

(Source: Department of Justice.)

Sharon Walsh, *Give and Take on the Hot Issue of Asset Forfeiture*, WASH. POST, March 11, 1996, at F07.

8. "In 1994 the Justice Department's asset forfeiture fund totaled \$549.9 million. The fund has taken in \$2.7 billion in the past five years, and much of it is distributed to law enforcement agencies or victims of crimes." *Id.*

9. The motivation this set-up provides for law enforcement to zealously - or overzealously - pursue cases that involve forfeitable property is clear. And dangerous. Abuses are common both in civil and criminal cases. Police and prosecutors become bounty hunters. The assets of suspects, including the innocent, become the bounty. Law enforcement agents not only lust after the assets of the accused, they have come to depend on the revenues they get through forfeiture.

says David B. Smith, co-chair of the forfeiture abuse task force of the National Association of Criminal Defense Lawyers and an attorney in Virginia. Smith

Second Circuit has also expressed its deep concern that the power of forfeiture has gone too far.<sup>10</sup>

Forfeiture is “[a] comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by taking away some preexisting valid right without compensation.”<sup>11</sup> Historically, the government can not take property without constitutional restraints such as just compensation or due process of law. However, modern developments in asset forfeiture have given the government almost unbridled power to seize nearly any assets related to illegal activity. The constitutional protection this country once enjoyed has given way to Congress’ belief that they must employ this weapon in the war on crime.<sup>12</sup> The purpose

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knows the issue from both sides. He was formerly deputy chief of asset forfeiture at the U.S. Department of Justice.

*Legal Extortion Drug Seizure Laws*, ARIZ. REPUBLIC (PHOENIX GAZETTE), November 27, 1995, at B6.

“‘If you want to use that ‘war on drugs’ analogy, then forfeiture is like giving the troops permission to loot,’ says Thomas Lorenzi, president-elect of the Louisiana Association of Criminal Defense Lawyers.” 137 CONG. REC. E3059-03, E3060 (1991).

10. *United States v. All Assets Of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) (stating “[w]e continue to be enormously troubled by the government’s increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes”).

11. BLACK’S LAW DICTIONARY 650 (6th ed. 1990).

12. See S. REP. NO. 98-225, 98TH CONG., 2D SESS., reprinted in 1984 U.S.C.A.N. 3182, 3374-404 (forfeiture section) (noting that enhanced forfeiture was necessary because “the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs . . . .

It is an enforcement tool with notable interrelated benefits. It pays for its own property management costs and relieves additional burdens that otherwise would fall to our law abiding citizens and taxpayers. It strengthens law enforcement by rechanneling forfeited value back into this most fundamental societal purpose. It promotes cooperation among federal, state and local police around the country through our ability to equitably share forfeited assets with those who have assisted in our investigations. It allows for victim restitution by permitting us to return the forfeited assets of criminals to those who were once their prey. Under the Weed and Seed Program, it turns tainted properties back to constructive community use. It even sanctions the donation of forfeited assets to charitable organizations and the transfer of forfeited monies to support our national effort to reduce the demand for illegal drugs. Judiciary Committee of the United States House of Representatives: Hearing on H.R. 1916 The Civil Asset Forfeiture Reform Act July 22, 1986, 104th Cong. 2d Sess. (1996) (opening

of this article is to provide a comprehensive explanation of the development of forfeiture, the legal procedures and the infringement on Constitutional rights. The current forfeiture laws, however justified, infringe upon the United States Constitution. This infringement forces us to consider whether we, as a country, are willing to pay this cost for the war on crime?<sup>13</sup>

This article will discuss both criminal and civil forfeiture, the related issues and recent developments as well as the unique issues presented when a civil forfeiture action follows a criminal action in the same case.<sup>14</sup> Section I will provide a brief history of forfeiture and the current status of the law in this area. Section II will illustrate the procedures which the government follows in forfeiture actions. Section III will discuss the defenses against forfeiture. Section IV will discuss how forfeiture has survived the many constitutional challenges. The last two sections illustrate how Congress has balanced the need for powerful weapons in combating crime against the constitutional rights of this country and found the balance in favor of forfeiture.<sup>15</sup>

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statement of Jan P. Blanton, Director, Treasury Executive Office for Asset Forfeiture.

13. "It behooves us to think that it may profit us very little to win the war on drugs if in the process we lose our soul." 136 CONG. REC. S8997-02, S9014 (1990) (quoting Judge William Schwarzar).

14. "Forfeitures, a cornerstone of the government's war on drugs, enable prosecutors to take a double-barreled approach by allowing civil penalties in addition to criminal charges." Joy Powell, *Trial to Put Spotlight On Forfeiture Laws Seizure Case to Look At Constitutionality Seizures, Forfeitures*, OMAHA WORLD-HERALD, August 6, 1996, at 1.

15. "The ACLU believes that all civil forfeiture schemes inherently violate fundamental constitutional rights, including the right not to be deprived of property without due process of law and the right to be free from punishment that is disproportionate to the offense." *The Civil Asset Forfeiture Reform Act: Hearings on H.R. 1916 Before the Judiciary Committee*, 104th Cong. 1995-96 Sess. (1996) (statement of Mark J. Kappelhoff, Legislative Counsel American Civil Liberties Union). Contrary to this position, the United States Attorney's Office believes that forfeiture is constitutional and a necessary element in the war on crime. See generally U.S. ATTORNEY'S MAN. 9-111.210 (1990); U.S. ATTORNEY'S MAN. 9-111.220 (1990); Petitioner's Brief, *Libretti v. United States*, 116 S. Ct. 356 (1995) (No. 94-7427); Respondent's Brief, *Austin v. United States*, 509 U.S. 602 (1993) (No. 92-6073).

## II. THE HISTORY AND MODERN DEVELOPMENTS OF ASSET FORFEITURE

The roots of asset forfeiture can be traced to biblical times when forfeiture was based upon the theories of punishment and restitution.<sup>16</sup> It also existed in English common-law and has been recognized in the United States since the colonial period.<sup>17</sup> Although original forfeiture principals were narrow in scope, Congress has transformed forfeiture into broad powers which the Government wields today in its war on crime.

### A. *The Historical Origin of Asset Forfeiture*

Asset forfeiture was recognized in this country when the Framers drafted the Constitution.<sup>18</sup> This concept is derived from English Law and was well known to the early United States.<sup>19</sup> At English common law, property which was the direct or indirect cause of death was forfeited to the Crown as a deodand and distributed for pious uses.<sup>20</sup> This concept can be traced to Biblical times where *in rem* actions were first recognized.<sup>21</sup> Eventually,

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16. See *Exodus* 21:28 (stating "if an ox gore a man or woman, and they die, he shall be stoned and his flesh shall not be eaten"). See also Oliver W. Holmes, *THE COMMON LAW C.L.* (1881), reprinted in *The Collected Works of Justice Holmes* (Sheldon M. Novick ed. 1995).

17. See Act of April 30, 1790, Ch. 9, § 24, 1 Statutes at Large 117. See also *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

18. U.S. CONST. art. III, § 3, cl. 2 (stating "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

19. The court stated:

[T]hat the party indicted of a capital offense, not yielding his body to the sheriff at the return of the *capias*, shall be, by the Justices of the Supreme Court, pronounced outlawed, and attainted of the crime whereof he is so indicted. And from that time shall forfeit all his lands and tenements, goods and chattels: which forfeiture, &c. after debts paid, shall go, one half to the Governor for the time being, &c. and for defraying the charges of prosecution, trial and execution of such criminals.

*Respublica v. Doan* Supreme Court of Pennsylvania, 1 U.S. (1 Dall.) 86, 91 (1784).

20. Deodand derives from Latin *deo dandum* meaning "a thing to be given to God." BLACK'S LAW DICTIONARY 436 (6th ed. 1990). Once the property was forfeited to the crown, it was to be applied to pious uses and to be distributed to the alms by the high almoner.

21. See *Exodus* 21:28.

the deodand ceased being applied to "pious uses," and became a source of revenue for the Crown.<sup>22</sup> The forfeiture actions of today originated from the English law transformation of the deodand concept.<sup>23</sup>

As forfeiture developed in the early United States, property became subject to seizure in connection with felonies or treason.<sup>24</sup> The basis of these forfeitures was that violations of criminal laws were offenses against the sovereign and therefore, justified denying the offender the right to own property.<sup>25</sup> These forfeitures were considered criminal forfeiture,<sup>26</sup> and eventually were expanded to include violations of customs and revenue laws based upon the belief that a wrongdoer could be denied the right to own property.<sup>27</sup>

Although the deodand did not become part of the common law in the United States,<sup>28</sup> the Constitution specifically recognized forfeiture but limited it to the estate of a party who commits treason.<sup>29</sup> Before the adoption of the Constitution, the Colonies and then the states of the Confederation were exercised *in rem* jurisdiction in forfeiture actions which involved violations of customs and revenue statutes.<sup>30</sup> The majority of these statutes were civil in nature.<sup>31</sup> After the adoption of the United States Constitution,

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22. *Calero-Toledo v. Pearson Yatch Leasing Co.*, 416 U.S. 663, 680 (1974). See 1 M. HALE, *PLEAS OF THE CROWN* 419, 423-24 (1st Am. ed. 1847); HANDSARD'S *PARLIAMENTARY DEBATES*, 3D SERIES 1031 (1845).

23. See 3 W. BLACKSTONE, *COMMENTARIES* 261-62; *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-38 (1943); 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 68-71 (3d ed. 1927); 1 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 352 (2d ed. 1909).

24. *Calero-Toledo*, 416 U.S. at 682.

25. *Id.* England eliminated most of the forfeitures for convictions of felonies and treason in 1870. See generally 1 W. BLACKSTONE, *COMMENTARIES* 299.

26. See generally *Avery v. Everett*, 18 N.E. 148 (N.Y. 1888).

27. *Calero-Toledo*, 416 U.S. at 682.

28. See *Parker-Harris Co. v. Tate*, 188 S.W. 54 (Tenn. 1916); *State v. Champagne*, 538 A.2d 193, 197 (Conn. 1988); *Calero-Toledo*, 416 U.S. at 683.

29. U.S. CONST. art. III, § 3, cl. 2. See *Wallach v. Van Riswick*, 92 U.S. 202 (1876).

30. See *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 145-48 (1943); *Boyd v. United States*, 116 U.S. 616, 623 (1886).

31. Examples of modern civil forfeiture statutes rooted in tradition forfeiture are: ALA. CODE § 32-5A-201(5) (1975) (civil forfeiture of vehicle driven without license); CAL.VEH. CODE § 14607.4(f) (West 1996) (civil forfeiture of vehicle driven without license); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 1990) (civil forfeiture for violation of civil rights); PA. STAT. ANN. Tit. 40, § 991.1410 (Supp. 1996) (failure of insurance company to register); N.C. GEN. STAT. § 19-6 (1981)

forfeiture actions were almost immediately enacted under federal law and continue to proliferate today.<sup>32</sup> The theory of civil forfeiture was based upon the belief that the property itself was tainted and thus subject to forfeiture even when it was not owned by the person who perpetrated the crime.<sup>33</sup> Currently the difference between criminal and civil forfeiture has become blurred.<sup>34</sup>

### *B. Modern Asset Forfeiture and the Current Status of the Law*

Congress broadened the power of forfeiture due to its opinion that the enacted laws and law enforcement resources were inadequate to successfully fight crime.<sup>35</sup> Although over 200 forfeiture statutes exist (combining federal<sup>36</sup> and local<sup>37</sup> statutes), forfeiture was not broadened until Congress heightened its war on crime. In 1984, Congress amended the Comprehensive Drug Abuse and Control Act of 1970 to include forfeiture of real property because

(civil forfeiture as part of abatement of nuisances); WYO. STAT. § 30-5-119 (1995) (violation of Wyoming oil and gas act of 1977).

32. Act of July 31, 1789, §§ 12, 16, 1 Stat. 39, 47; Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176; Act of Mar. 22, 1794, 1 Stat. 347; Act of Mar. 2, 1807, 2 Stat. 426. *See supra* note 31. *See also infra* part II.B.

33. *Saccoccia*, 823 F. Supp. at 1000.

34. For example, civil forfeiture is considered a penalty under the Excessive Fines clause but not a penalty under the Double Jeopardy clause. *United States v. Ursery*, 116 S. Ct. 2135, 2140 (1996) (civil forfeiture not a penalty for purposes of Double Jeopardy); *United States v. Austin*, 509 U.S. 602, 613 (1993) (dealing with forfeiture as punishment).

35. 137 CONG. REC. S3021-02, S3043 (1991) (statement of Senator Biden) (stating "Our streets are unsafe because our police forces are undermanned and overwhelmed. They can never be safe again until we reverse this imbalance."). "The nation's state and local law enforcement officers-our front lines in the 'war' against violent criminals and drug traffickers-are out-gunned, under-manned and ill-equipped for the new challenges of law enforcement in the 1990s." 137 CONG. REC. S3021-02, S3071 (1991) (statement of Sen. Biden).

36. Examples of Federal Asset Forfeiture Statutes include: Federal Aviation Act of 1958, the Contraband Seizure Act, The Copyrights Act, the customs laws, the Export Control Act of 1949, the Federal Alcohol Administration Act, the Federal Seed Act, the Gold Reserve Act of 1934, the Hours of Service Act, the Animal Welfare Act, the Immigration and Nationality Act, the neutrality laws, laws relating to cigarettes, liquor, narcotics and dangerous drugs, other controlled substances, gambling, war materials, pre-Columbian artifacts, coinage, firearms, locomotive inspection (45 U.S.C. §§ 22, 23, 28 to 33 repealed Pub. L. 103-272, § 7(b), July 5, 1995, 108 Stat. 1579), the Organized Crime Control Act of 1970, prison-made goods (18 U.S.C. §§ 1761-62 (1994)), the Safety Appliance Act, standard barrels (15 U.S.C. §§ 231-42 (1994)), the Sugar Act of 1948, and the Twenty-Eight Hour Law. *See* 28 C.F.R. § 0.55(d).

37. *See supra* note 32 and accompanying text.

the "traditional criminal sanctions of fines and imprisonment [were] inadequate to deter or punish the enormously profitable trade in dangerous drugs."<sup>38</sup> This expansion in forfeiture power was enacted in, among other areas, money laundering, sexual exploitation of children, and protection of intellectual property.<sup>39</sup>

The United States Attorney's Office (USAO) responded to Congress' expansion of forfeiture power by increasing its emphasis upon forfeiture as well.<sup>40</sup> The amount of assets which have been seized due to this broadening of forfeiture power has jumped dramatically over the years.<sup>41</sup> Additionally, forfeitures have increased to such a volume that the USAO has been forced to reorganize in order to manage seized assets.<sup>42</sup>

Modern asset forfeiture falls into two basic categories, criminal and civil.<sup>43</sup> Although both amount to the taking of property without compensation, the legal theories and legal processes associated with both are quite different. Additionally, either action or

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38. S. Rep. No. 225, 98th Cong., 1st Sess. § 225 (1983).

"The asset forfeiture program was begun in 1984 to help pay a portion of the costs of the war on drugs with funds seized from drug traffickers. In addition, the forfeiture program was intended to increase deterrence by confiscating the illegally earned property and wealth of drug dealers, who viewed imprisonment as the cost of doing business. Since its inception, the asset forfeiture program has grown and expanded through the increased use of civil and administrative forfeitures."

(H.R. REP. NO. 884, 103d Cong., 2d Sess. §103 (1995). See also H.R. REP. NO. 1030, 98th Cong., 2d Sess. 215, § 306 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3398.

39. See discussion *infra* part II.B.3.

40. In response to the increase on asset forfeiture, the Attorney General formed the Asset Forfeiture Office. In addition to other responsibilities, this office has responsibility for all civil forfeiture proceedings assigned to the Criminal Division. This office also advises and assists regional offices in the handling of forfeiture cases and making decisions regarding petitions for remission or mitigation of forfeiture. U.S. ATTYS. MAN. 9-3.601 (1992). "As the Department of Justice has placed greater emphasis on Asset Forfeiture, the need for an accurate accounting system of the assets being forfeited by the United States Attorney's offices has arisen." U.S. ATTYS. MAN. 3-7.111 (1992).

41. See *supra* note 8.

42. The USAO has created a Asset Forfeiture Office to provide for a more effective use of civil and criminal forfeiture proceedings to deprive criminals of the proceeds of their crimes. U.S. ATTYS. MAN. 9-3.400(L).

43. See *infra* part II.B. (discussing the blurred distinction between civil and criminal forfeiture actions).

both actions can be brought based upon the same facts or occurrences.<sup>44</sup>

### 1. Criminal Forfeiture

Criminal forfeiture is an *in personam*<sup>45</sup> action. As such, the defendant must be convicted of or plead guilty to violations of certain federal statutes before the government gains title. The most powerful federal forfeiture statutes are in four primary areas: money laundering;<sup>46</sup> obscene material, sexual exploitation and other abuse of children;<sup>47</sup> RICO;<sup>48</sup> and drug trafficking.<sup>49</sup>

Criminal forfeiture must meet the higher burdens of due process placed upon the criminal justice system.<sup>50</sup> One such burden on the government is that criminal forfeiture requires that the indictment or information list the property subject to forfeiture.<sup>51</sup> Additionally, the disposition of a criminal forfeiture is to be accomplished by special verdict.<sup>52</sup> These requirements force the

44. See discussion *infra* part II.B.1-3.

45. "Against the person. Action seeking judgment against a person involving his personal rights and based on jurisdiction of his person." BLACK'S LAW DICTIONARY 791 (6th ed. (1990)).

46. 18 U.S.C. § 982 (1994).

47. 18 U.S.C. §§ 1467, 2253 (1994).

48. 18 U.S.C. § 1963 (1994).

49. 21 U.S.C. § 851 (1994).

50. In a criminal forfeiture proceeding, under the common law, the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. This has been codified in FED. R. CRIM. P. 7(c)(2), 31 and 32.

51. FED. R. CRIM. P. 7(c)(2) (stating "No judgment of forfeiture may be entered in a criminal proceeding, unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture."). Initially, the Department of Justice did not recommend including a forfeiture provision in an indictment even when the Government did not intend to pursue the criminal forfeiture. The case which originally prompted this recommendation by the Department was *United States v. Hall*, 521 F.2d 406 (9th Cir. 1975) (involving an indictment dismissal for violation of FED. R. CRIM. P. 7(c)(2)). Rule 7(c)(2) has since been amended in specific response to the *Hall* decision. See Advisory Committee Notes to 1979 amendment. Additionally, subsequent case law has further negated *Hall's* authority. See *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993); *United States v. Seifuddin*, 820 F.2d 1074 (9th Cir. 1987); *United States v. Bolar*, 569 F.2d 1071 (9th Cir. 1978); *United States v. Rupley*, 706 F. Supp. 751 (D. Nev. 1989); *United States v. Veliotis*, 586 F. Supp. 1512 (S.D.N.Y. 1984); *United States v. Brigrance*, 472 F. Supp. 1177 (S.D. Tex. 1979); *United States v. Bergdoll*, 412 F. Supp. 1308 (D. Del. 1976).

52. FED. R. CRIM. P. 31(e) (stating "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special

government to identify the property to be seized prior to trial or stay the proceeding and return a superseding indictment when property is later identified. Practically however, property which is not identified pre-indictment does not usually become subject to criminal forfeiture.<sup>53</sup>

Once the property is identified and the case has gone to trial, there is much confusion as to the burden of proof which the government must bear to prove the criminal forfeiture count.<sup>54</sup> due process requires that the beyond a reasonable doubt standard be applied to the elements of a criminal offense.<sup>55</sup> Therefore, the question becomes whether the criminal forfeiture count is a part of the substantive offense or merely part of the sentencing process.<sup>56</sup> A less strenuous standard for criminal forfeiture will arise only if Congress intended criminal forfeiture to be a part of the sentencing process.<sup>57</sup> A discussion of the manner in which federal circuit courts have struggled with the correct burden of proof when applying forfeiture in drug trafficking statutes is helpful to highlight the controversy.

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verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."). The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. FED. R. CRIM. P. 31, notes to 1972 amendments. See FED. R. CRIM. P. 7(c)(2), advisory committee notes. A criminal forfeiture "is plainly a criminal, as opposed to civil, matter." *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), *aff'd*, 471 U.S. 773 (1985).) The Eleventh Circuit held that "under the Sixth Amendment, a criminal defendant is entitled to a jury trial on the issue whether a particular asset is forfeitable." *Id.*

53. However, the risk of civil forfeiture is always present since it does not depend upon criminal forfeiture or a criminal conviction. *United States v. Ursery*, 116 S. Ct. 2135, 2140 (1996); *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1972); *In re Various Items of Personal Property*, 282 U.S. 577, 581 (1931).

54. Some early cases required the government to show that it would more likely than not to convince a jury beyond a reasonable doubt that the defendant was guilty and the assets were forfeitable. See *United States v. Crozier*, 674 F.2d 1293, 1297-98 (9th Cir. 1982), *vacated*, 468 U.S. 1206 (1984), *aff'd on reh'g*, 777 F.2d 1376 (9th Cir. 1985); *United States v. Spilotro*, 680 F.2d 612, 616-18 (9th Cir. 1982); *United States v. Mandel*, 408 F. Supp. 679, 283-83 (D. Md. 1976). The 1984 amendments significantly overhauled the drug statutes, clearly establishing that the government should be required to show no more than probable cause that assets are subject to forfeiture. *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), *cert. denied*, 112 S. Ct. 382 (1991).

55. *Patterson v. New York*, 432 U.S. 197, 204 (1977).

56. See *Libretti v. United States*, 116 S. Ct. 356 (1995).

57. *United States v. Elgersma*, 971 F.2d 690, 692 (11th Cir. 1992).

The Fourth Circuit addressed this question and reasoned that if criminal forfeiture under the drug trafficking statutes<sup>58</sup> is an element of the underlying violation or is a separate substantive offense, then it must be proven beyond a reasonable doubt.<sup>59</sup> On the other hand, if forfeiture is a question of sentencing, then the government need only prove the forfeiture count by a preponderance of the evidence.<sup>60</sup>

According to the Fourth Circuit's interpretation criminal forfeiture under the drug trafficking statute is punishment. First, the language of the statute plainly indicates that criminal forfeitures are intended as punishment for substantive offenses laid out elsewhere in Title 21. In particular, the statutory language provides that forfeitures apply to "[a]ny person convicted of a violation"<sup>61</sup> of the drug laws, which presupposes that the defendant has already been tried and convicted of the substantive offense. The section goes on to state that "[t]he court, in imposing sentence on such person, shall order in addition to any other sentence imposed pursuant to this subchapter . . . that the person forfeit to the United States all property described in this subsection."<sup>62</sup> This language assumes that forfeitures are a penalty and are to be imposed just like any other penalty. Thus, the statute leads directly to the conclusion that the preponderance standard should govern forfeiture questions.<sup>63</sup> The majority of the other circuits have agreed with the Fourth Circuit and held that the government must prove the drug offense beyond a reasonable doubt, but only prove forfeiture by a preponderance of the evidence in drug

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58. 21 U.S.C. § 853 (1994).

59. *See Winship*, 397 U.S. 358, 364 (1970).

60. *United States v. Johnson*, 54 F.3d 1150, 1156 (4th Cir. 1995).

61. 21 U.S.C. § 853(a) (1994).

62. *Id.*

63. *United States v. Tanner*, 61 F.3d 231, 234 (4th Cir. 1995).

cases.<sup>64</sup> The same conclusion has been held for RICO,<sup>65</sup> money laundering,<sup>66</sup> and most other criminal forfeiture provisions.

Under the Fourth Circuits' reasoning, the government must follow a two step approach to successfully obtaining criminal forfeiture. First, the required elements of the criminal offense must be proven beyond a reasonable doubt.<sup>67</sup> Second, the fact that the property was involved, furthered or was proceeds from illegal activities must be shown by a preponderance of the evidence.<sup>68</sup> The 1984 amendments to the drug statutes codified this reasoning and the Fourth Circuit's procedure exists today.

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64. See *United States v. Michell's Tavern*, 39 F.3d 684, 696 (7th Cir. 1994). See also *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir., 1994) (stating that although charged as a count in the indictment, criminal forfeiture is neither an element of a criminal offense nor a criminal offense itself. Therefore, proof beyond a reasonable doubt is neither constitutionally nor statutorily mandated); *United States v. Elgersma*, 971 F.2d 690, 693 (11th Cir. 1992) (stating that the preponderance of the evidence standard applies to forfeiture under section 853(a)(1)); *United States v. Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992) (holding that the government must prove that property is subject to criminal forfeiture under section 853(a) by a preponderance of the evidence); *United States v. 228 Acres of Land and Dwelling*, 916 F.2d 808, 814 (2d Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989) (stating that the legislative history makes clear that Congress sought to make the government's burden of proof in criminal forfeitures the same as that in the civil realm).

65. *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994) (stating that the government's burden of proof in forfeiture proceeding under Racketeer Influenced and Corrupt Organization (RICO) Act, with respect to relationship between criminal conduct and property interest to be forfeited, is beyond a reasonable doubt standard, and that if Congress intended such standard for RICO forfeiture proceeding, inasmuch as if it had wanted a preponderance standard, it would have so stated specifically as it did when it created a similar criminal forfeiture mechanism in 18 U.S.C. § 853 (1994)).

66. *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (ordering forfeiture of two pieces of jewelry, finding by a preponderance of the evidence that they were items of personal property traceable to the money involved in the money-laundering violations); *United States v. Myers*, 21 F.3d 826, 828 (8th Cir. 1994) (stating that the preponderance standard of proof applies to forfeiture under 18 U.S.C. § 982(a)(1) (1994) as well as under section 853(a)(2)).

67. See *Tanner*, 61 F.3d at 234.

68. *Id.*

## 2. *Civil Forfeiture is an in rem action*

Civil Forfeiture is an *in rem* action.<sup>69</sup> Many of the protections afforded the criminal defendant are not present in civil forfeiture actions.<sup>70</sup> The drug trafficking statutes are again useful in illustrating civil forfeiture. For civil forfeiture, the Government must make an initial showing of probable cause that property is subject to forfeiture.<sup>71</sup> This showing does not require proof by preponderance of the evidence, but rather the Government need only establish reasonable grounds, which rises above the level of mere suspicion, to believe that certain property is subject to forfeiture.<sup>72</sup>

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69. "In the strict sense of the term, a proceeding 'in rem' is one which is taken directly against property or one which is brought to enforce a right in the thing itself." BLACK'S LAW DICTIONARY 793 (6th ed. (1990)). "[I]n a larger and more general sense, the [term is] applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein." *Id.*

70. *United States v. Real Property Commonly Known as 16899 S.W. Greenbrier, Lake Oswego, Clackamas County, Oregon*, 774 F. Supp. 1267, 1271 (D. Or. 1991) (recognizing that there are distinctions between civil forfeiture and criminal forfeiture, and that some of the protections available in criminal forfeiture actions are not present in civil forfeiture actions). See *United States v. Tax Lot 1500*, 861 F.2d 232, 234-35 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989) (stating that the proportionality requirement of Eighth Amendment is not applicable in civil forfeiture cases). See also *United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 959 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989) (stating that where both civil and criminal forfeiture statutes applied to the importation of drug paraphernalia, neither statute was exclusive and that the government could choose to proceed under the civil forfeiture provision, despite the existence of a related criminal case against the claimant).

71. 19 U.S.C. § 1615 (1994). This section governs the burden of proof in forfeiture proceedings under § 881 and § 981 and provides that once the Government has shown probable cause the property is subject to forfeiture. *United States v. Ursery*, 116 S. Ct. 2135, 2148 (1996).

72. *United States v. Two Parcels of Property Located at 19 and 25 Castle Street*, 31 F.3d 35 (2d Cir. 1994); See *United States v. \$5000.00 in U.S. Currency*, 40 F.3d 846 (6th Cir. 1994); *United States v. \$31,990 in U.S. Currency*, 982 F.2d 851 (2d Cir. 1993); *United States v. \$121,100.00 in U.S. Currency*, 999 F.2d 1503 (11th Cir. 1993) (stating that in a civil forfeiture proceeding respecting property allegedly to be used or traceable to be used to purchase a controlled substance, once the claimant has established standing as owner of contested property, the government then bears the burden of establishing probable cause for belief that the property to be forfeited is substantially connected to drug dealing); *United States v. One Parcel of Real Property With Bldgs., Appurtenances, and Improvements, Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, R.I.*, 960 F.2d 200 (1st Cir. 1992); *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327 (5th Cir. 1990); *United States v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908, (2d Cir.), *cert. denied*, 495

These reasonable grounds can be supported by less than prima facie proof but require more than mere suspicion.<sup>73</sup> The government may satisfy its burden through circumstantial evidence.<sup>74</sup> Once the government has met its burden, the burden then shifts to the claimant to show by a preponderance of evidence that the property was not subject to forfeiture.<sup>75</sup>

The claimant opposing forfeiture must first establish standing to challenge the forfeiture.<sup>76</sup> Next, the claimant must show by a preponderance of evidence that either the property was not used for an illegal purpose or that any the illegal use was without the

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U.S. 958 (1990); *United States v. Premises and Real Property at 4492 South Livonia Rd., Livonia, N.Y.*, 889 F.2d 1258 (2d Cir.), *reh'g denied* 97 F.2d 659 (1989); *United States v. Twenty-Two Thousand, Two Hundred Eighty Seven Dollars* (\$22,287.00), U.S. Currency, 709 F.2d 442 (6th Cir. 1983).

73. U.S. ATTORNEY'S MAN. 9-111.520.

74. *United States v. One 1976 Ford F-150 Pick-Up VIN F14YUB03797*, 769 F.2d 525 (8th Cir. 1985).

75. *United States v. Certain Real Property 566 Hendrickson Blvd., Clawson, Oakland County, Mich.*, 986 F.2d 990 (6th Cir. 1993).

76. *See United States v. Various Computers And Computer Equipment*, 82 F.3d 582, 585 (3d Cir. 1996) (stating that colorable claim to ownership of the computers allowed defendant to at least challenge the forfeiture proceedings); *Torres v. \$36,256.80 U.S. Currency*, 25 F.3d 1154, 1157 (2d Cir. 1994) (Forfeiture challenger asserted an ownership interest sufficient to confer standing to contest the forfeiture.); *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994); *United States v. Amiel*, 995 F.2d 367 (2d Cir. 1993); *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794 (3d Cir. 1994) (Nominal or straw owners lacked standing to challenge forfeiture proceeding under drug forfeiture statutes.); *United States v. \$20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994) (Unsecured creditor lacked standing to challenge civil forfeiture of property that government seized from businesses.); *United States v. Eng*, 951 F.2d 461, 468 (2d Cir. 1991) (The filing of a verified claim is an essential element in establishing standing to challenge a forfeiture under Rule C(6).); *United States v. Currency \$267,961.07*, 916 F.2d 1104, 1107 (6th Cir. 1990) (A claimant must possess Article III and statutory standing pursuant to Rule C(6) in order to contest the government's forfeiture action.); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630 (7th Cir. 1990); *United States v. \$38,000 in United States Currency*, 816 F.2d 1538, 1544 (11th Cir. 1987) ("A claimant need not own the property in order to have standing to contest its forfeiture; a lesser property interest, such as a possessory interest, is sufficient for standing."); *United States v. Certain Red Property and Premises known as 218 Panther St. Newfoundland, Pa.*, 745 F. Supp. 118, 120 (E.D.N.Y. 1990) (claimant lacked standing to contest forfeiture because he did not timely file claim and answer).

knowledge or consent of the claimant.<sup>77</sup> This defense, most commonly called the “innocent owner defense” is discussed below.<sup>78</sup>

Civil forfeiture allows the government to instigate a forfeiture action under a lesser burden of proof than required to defend the forfeiture action. This allowance is in contrast with the basic theory that the plaintiff must prove its case.<sup>79</sup> Additionally, since the innocence of the property owner is irrelevant, the Government can seize assets even when there is not enough evidence to convict the owner.<sup>80</sup> This ability to seize assets becomes a very powerful tool for prosecutors.<sup>81</sup> One can imagine the position of the “drug dealer” when he has had his house seized because it was used in the furtherance of drug trafficking. The burden now shifts to this “defendant” to show by a preponderance of the evidence that the house was not used in drug trafficking or that it was not used with his knowledge. In order for the defendant to assert this defense, he must make a court appearance and more than likely take the stand. Therefore, most of these drug dealers will not contest the forfeiture for fear of future involvement with law enforcement officers.<sup>82</sup> As explained, this allocation of burden worked a hardship upon property owners who wished to challenge a civil forfeiture.<sup>83</sup>

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77. *United States v. Two Parcels of Property Located at 19 and 25 Castle Street*, 31 F.3d 35 (2d Cir. 1994).

78. *See infra* part IV.

79. FED. R. EVID. 301; *see generally* *Brown v. Selfridge*, 224 U.S. 189 (1912); *Dunlap v. Schofield*, 152 U.S. 244 (1894); *Railroad Co. v. Gladmon*, 82 U.S. (15 Wall.) 401 (1872); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

80. *Calero-Toledo*, 416 U.S. at 683-87.

81. “It has been estimated that 80% of those who lose property to the government through civil forfeitures are never charged with any crime.” Henry J. Hyde, CIVIL ASSET FORFEITURE REFORM: HOUSE REPORT NO. 879 LETTER TO THE COMMITTEE OF THE JUDICIARY. H.R. Rep. No. 879, 104th Cong., 2d Sess. (1997).

82. “Judicial forfeitures of cash are almost always uncontested.” 135 CONG. REC. S12622-01 (1989).

83. *See United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C*, Brooklyn, NY, 760 F. Supp. 1015 (E.D.N.Y. 1991) (The fact that the person who contested the forfeiture of a public housing apartment was the leaseholder of record and asserted the “innocent owner” defense for all intervenor-residents was sufficient to give her standing to contest drug forfeiture action.); *United States v. All That Lot of Ground Known as 2511 E. Fairmont Ave., Baltimore Md.* 21224, 737 F. Supp. 878 (D. Md. 1990) (Claimants did not meet the burden of proving that they were innocent owners of subject property, in light of evidence that they knew their son was dealing in drugs and that proceeds of drug trafficking were used to build home on property.).

This article will concentrate primarily upon the drug trafficking and money laundering statutes. However, the issues related to these statutes are identical to issues dealing with the exploitation of children and intellectual property and are also relevant to the criminal forfeiture statutes of the Racketeer Influence and Corrupt Organization Act (RICO).<sup>84</sup>

### 3. *The Statutes*

Prior to the enactment of RICO, the majority of the federal forfeiture statutes were civil in nature.<sup>85</sup> In 1970, Congress enacted RICO which was followed by statutes further designed to combat money laundering, copyright and trademark violations, obscene material, sexual exploitation of children, and the drug trade.<sup>86</sup> Through this legislation, Congress has attempted to heighten its efforts in the war on crime and has expanded forfeiture power in these areas. Not only has this expansion of criminal and civil actions taken place, but the latter three areas allow criminal forfeiture to be instigated in combination with civil forfeiture.<sup>87</sup> Given the current policy of the United States Attorney General,<sup>88</sup> Congress, and the White House, along with recent Supreme Court decisions, the controversy surrounding asset forfeiture will continue to grow.

Forfeiture has four primary goals: (1) to recover the proceeds of a crime; (2) to remove the economic incentive to crime; (3) to

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84. 18 U.S.C. § 1963 (1994) (involving criminal penalties); 18 U.S.C. § 1964 (1994) (involving civil penalties).

85. 7 U.S.C. § 1379i (1988) (Agricultural Act of 1938); 12 U.S.C. § 1463 (1996) (June 13, 1933, c. 64, § 4, as added Aug. 9, 1989, Pub.L. 101-73, Title III, § 301, 103 Stat. 280); 15 U.S.C. § 50 (1973) (enacted in Sept. 26, 1914, 38 Stat. 723, as amended Jan. 4, 1975, Pub.L. 93-637, Title II, § 203(c), 88 Stat. 2199; May 28, 1980, Pub.L. 96-252, § 6, 94 Stat. 376); 19 U.S.C. § 1436 (1994) (enacted June 17, 1930, c. 497, Title IV, § 436, 46 Stat. 711); 33 U.S.C. § 1320 (1986) (June 30, 1948, c. 758, Title III, § 310, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 860); 47 U.S.C. § 504 (1991) (enacted June 19, 1934, c. 652, Title V, § 504, 48 Stat. 1101).

86. 18 U.S.C. §§ 981, 982 (1994) (money laundering); 18 U.S.C. §§ 1467, 2253, 2254 (1994) (sexual exploitation and other abuses of children); 21 U.S.C. §§ 851, 853 (1994) (drug related crimes); 17 U.S.C. § 506 (1994) (intellectual property).

87. A civil forfeiture action can be filed before, during or after a criminal forfeiture action due to the independent nature of each.

88. See generally the U.S. ATTORNEY'S MAN. 4-4.120 (1988).

dismantle criminal organizations and (4) to punish the crime.<sup>89</sup> Although these goals have proven to be a highly effective weapon in combating crime, they can have a significant impact on “innocent” third party property owners as well as infringe upon constitutional rights.<sup>90</sup>

The five primary areas in which the government utilizes forfeiture are: racketeer influenced and corrupt organizations, drug trafficking, money laundering, intellectual property, and obscenity and sexual exploitation of children.

*a. Racketeer Influenced and Corrupt Organizations*

RICO provided the first powerful criminal forfeiture statutes for the war on crime. This statute allows for the forfeiture of any property, real or personal, which is derived from or are proceeds from violations of the Act.<sup>91</sup> Additionally, this statute specifically states that property can be subject to forfeiture even when it has been transferred unless the transferee can show he was a bona fide purchaser for value.<sup>92</sup> Although there is no specific civil forfeiture provision, many RICO violations can also lead to civil forfeiture under the money laundering statutes.<sup>93</sup>

*b. Drug Trafficking*

Drug trafficking vests authority for criminal and civil forfeiture in the Government. The criminal section specifically allows for the forfeiture of any real or personal property obtained directly or indirectly from illegal proceeds,<sup>94</sup> used to facilitate the commission of any violation,<sup>95</sup> or involved in the control over a continuing criminal enterprise.<sup>96</sup> In addition, the criminal forfeiture provision creates a presumption that the property is subject to forfei-

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89. Anthony G. Hall, *The Effect of Double Jeopardy on Asset Forfeiture*, 32 IDAHO L. REV. 527, 528-29 (1996). Mr. Hall is an Assistant United States Attorney for the District of Idaho.

90. See *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (after husband was convicted of gross indecency in connection with his sexual activity with a prostitute in a car, which he and his wife owned jointly, county prosecutor filed a complaint alleging that the car was a public nuisance subjecting the car to forfeiture which wife was unable to challenge).

91. 18 U.S.C. § 1962 (1994).

92. 18 U.S.C. § 1963(c)(1) (1994).

93. 18 U.S.C. § 981 (1994).

94. 21 U.S.C. § 853(a)(1) (1994).

95. 21 U.S.C. § 853(a)(2) (1994).

96. 21 U.S.C. § 853(a)(3) (1994).

ture if the government proves by a preponderance of the evidence that the property was acquired within a reasonable period of time near the illegal act<sup>97</sup> and that there was no other likely source for the property other than in violation of the Drug Prevention and Control chapter.<sup>98</sup>

The civil forfeitures provide for the forfeiture of any property used in furtherance of illegal drug activity and is broader in scope than the criminal provisions.<sup>99</sup> On its face, this section gives the government broad power to seize property which is connected to or is in furtherance of illegal drug activity. Drug trafficking and money laundering are two of the most powerful statutes and have created the bulk of modern controversy.<sup>100</sup>

### c. *Money Laundering*

The money laundering civil provision provides for a multitude of property types which the government can seize.<sup>101</sup> Such property types include that property involved in a transaction or attempted transaction in violation of requirements for money transactions;<sup>102</sup> transactions intending to promote illegal activity,<sup>103</sup> any property traceable to such activity;<sup>104</sup> property derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance;<sup>105</sup> and a list of statutes under Title 18.<sup>106</sup>

The criminal section allows for forfeiture of money connected with traditional money laundering.<sup>107</sup> In addition to the many other sections included, the drug trafficking forfeiture provision has been incorporated,<sup>108</sup> thus showing Congress' recognition of

97. 21 U.S.C. § 853(d)(1) (1994).

98. 21 U.S.C. § 853(d)(2) (1994).

99. 21 U.S.C. § 881 (1994).

100. *See infra* part IV.

101. *See* 18 U.S.C. § 981 (1994).

102. 31 U.S.C. §§ 5313(a) and 5324(a) (1994).

103. 18 U.S.C. §§ 1956 and 1957 (1994).

104. 18 U.S.C. § 981(a)(1)(A) (1994).

105. 18 U.S.C. § 981(a)(1)(B) (1994).

106. 18 U.S.C. §§ 215, 471-74, 476-81, 485-88, 501-02, 510, 542, 545, 656, 657, 842, 844, 1005-07, 1014, 1028-30, 1032, 1341, and 1343-44 (1994).

107. 18 U.S.C. § 982(a) (1994) (incorporating 31 U.S.C. §§ 5313(a), 5316, and 5324 and 18 U.S.C. §§ 1956, 1957, and 1960 (1994)).

108. 18 U.S.C. § 982(b) (1994).

the importance of removing the financial, as well as other assets, from the drug trade.

Traditionally, money laundering was only concerned with the concealment of funds or the "cleaning" of money to convert illegitimate funds into legitimate funds.<sup>109</sup> However, these sections have expanded "money laundering" to much more than mere concealment. Under the money laundering sections, real and personal property can be seized if it is directly or indirectly related to or derived from the proceeds of any of the offenses listed in the text of the statutes.<sup>110</sup> Some of the offenses which are covered are: federal program fraud,<sup>111</sup> major fraud against the United States,<sup>112</sup> concealment of assets,<sup>113</sup> mail fraud<sup>114</sup> and wire fraud.<sup>115</sup> As previously stated, these statutes are among the most powerful forfeiture statutes in federal law.<sup>116</sup>

#### *d. Intellectual Property*

One method in which federal law protects intellectual property is by providing for forfeiture of both the infringing copies of copyrighted works and all the equipment used in the manufacture of these infringing copies.<sup>117</sup> Both criminal and civil forfeitures exist under this protection. The criminal forfeiture provisions are mandatory and require that "the court in its judgment of conviction shall . . . order the forfeiture" of the assets specified.<sup>118</sup> Therefore, district courts have no discretion to decline to order for-

109. See generally *United States v. LaFatch*, 565 F.2d 81 (6th Cir. 1977); *United States v. Carrillo*, 561 F.2d 1125 (5th Cir. 1977); *United States v. Papa*, 533 F.2d 815 (2d Cir. 1976); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975); *United States v. McCord*, 509 F.2d 334, (D.C. Cir. 1974); *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977).

110. 18 U.S.C. §§ 981 and 982 (1994).

111. 18 U.S.C. §§ 981(a)(1)(D)(i) and 982(a)(3)(A) (1994).

112. 18 U.S.C. §§ 981(a)(1)(D)(iii) and 982(a)(3)(C) (1994).

113. 18 U.S.C. §§ 981(a)(1)(D)(iv) and 982(a)(3)(D) (1994) (concealment of assets is traditional money laundering).

114. 18 U.S.C. §§ 981(a)(1)(D)(v) and 982(a)(3)(E) (1994).

115. 18 U.S.C. §§ 981(a)(1)(D)(vi) and 982(a)(3)(F) (1994).

116. In addition to the power expressed in the specific forfeiture statutes, Congress has also enacted 18 U.S.C. § 984 (1994). The government is not required to identify the specific property involved under civil forfeiture. Additionally, this section also provides that "it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property." 18 U.S.C. § 984(b)(1)(A)-(B) (1994).

117. 17 U.S.C. § 506 (1994) (incorporating 18 U.S.C. § 2318 (1994)).

118. 17 U.S.C. § 506(b) (1994); 18 U.S.C. § 2318(d) (1994).

feiture as part of a judgment or conviction. Both provisions do, however, grant to the district court some discretion over the disposition of the forfeited property. Under the criminal forfeiture provisions, the court may order the "destruction or other disposition" of this property.<sup>119</sup> Forfeiture reaches not only the infringing copies but also the equipment used in the manufacture of those copies.<sup>120</sup> Three general categories of property are subject to forfeiture: (1) all criminally infringing copies or phonorecords; (2) all plates, molds, masters and other means by which such copies may be reproduced; and (3) all devices for manufacturing, reproducing or assembling such copies or phonorecords.<sup>121</sup>

Novel issues will continue to arise considering the current power and breath of forfeiture and the rapid development in technology, especially with the increased use of electronic storage and computer systems.

*e. Obscenity and Sexual Exploitation of Children*

The obscenity statutes make it a criminal offense to cause a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, to advertise child pornography, or to traffic in child pornography.<sup>122</sup> The transportation and coercion of any individual with the intent that the person will engage in any criminal sexual activity is also prohibited.<sup>123</sup>

The power of both civil and criminal forfeiture has been provided to law enforcement to combat both obscenity and exploitation of children.<sup>124</sup> Although these statutes will not be stressed in this article, it is sufficient to note the same discussions applying to drug trafficking and money laundering apply to these offenses.

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119. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 n.20 (1974).

120. 17 U.S.C. § 506(b) (1994).

121. 17 U.S.C. § 509(a) (1994).

122. 18 U.S.C. §§ 2421 and 2422 (1994).

123. *Id.*

124. 18 U.S.C. § 1467 (1994) (providing for criminal forfeiture with regard to obscenity); 18 U.S.C. § 2253 (1994) (providing for criminal forfeiture with regard to sexual exploitation and other abuses of children); 18 U.S.C. § 2253 (1994) (providing for civil forfeiture with regard to sexual exploitation and other abuses of children).

### III. THE LEGAL PROCESS

#### A. *The Pleadings*

The legal process of federal criminal and civil forfeitures conducted by the government have several conflicts with state legal systems and processes. These conflicts primarily involve recording statutes for real property. The following material discusses the general forfeiture process, real property, personal property and actual seizures.

The government begins its process by identifying property to be seized during the investigation of the illegal activity. This identification is necessary since the Federal Rules of Criminal Procedure require that for a criminal forfeiture to occur, the property must be listed in an indictment.<sup>125</sup> Then, the government may file a *lis pendens* when it wishes to seize property.<sup>126</sup> Filing a *lis pendens* effectively places a lien on the property by providing notice of a potential forfeiture action against the property. This notice protects the government's interest in the property by preventing transfers. However, the majority of states require an action be filed before the *lis pendens* can be filed. This produces a timing problem for the government. Once a defendant has been served an indictment or information, he may quickly transfer the property before the *lis pendens* can be filed or the property can be seized.<sup>127</sup> Therefore, it becomes possible to transfer the property to a third party and the government's forfeiture action may be defeated.

Next, a Preliminary Order is issued and anyone can assert a defense against the forfeiture action. The burden is placed upon the party asserting the defense to show title should not pass to the government. The government then publishes a notice in local newspapers and will also send Third Party Notices to inform

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125. FED. R. CRIM. P. 7.

126. Even though not legally required, the United States Attorney's Office has made filing the *lis pendens* a policy of the office. This policy is in respect of state legal systems since the filing greatly benefits real property title searches. Additionally, as discussed, the filing of a *lis pendens* places potential transferees on notice of forfeiture actions and will significantly prevent an "innocent-owner" defense from being successful. If the party is on notice, then the party is not an innocent owner. Therefore, these reasons have given the Government a strong interest in filing a *lis pendens* whenever appropriate.

127. This process has great implications when viewed in light of the "innocent owner" defense.

others of the forfeiture action.<sup>128</sup> Lastly, unless a party successfully asserts a defense, a Final Order is issued and the government obtains title over all others. Pursuant to the "relation-back" doctrine, title vests in the government back to the time of the illegal activity.<sup>129</sup>

### 1. *Real Property*

The fact that the filing of the *lis pendens* is optional creates several issues for parties performing title searches. When a *lis pendens* is filed in the land records office, it places parties on notice that the property may be subject to forfeiture. Once this filing exists in the records office, the "innocent-owner" defense become much more difficult, if not impossible, to assert.<sup>130</sup> This filing places third party transferees on notice of the potential forfeiture and greatly reduces the success of the "innocent-owner" defense if when the property is transferred after the *lis pendens* is on record.

To clarify the potential problems involving forfeiture and third party transfers, it is helpful to view five points in time which are associated with the legal process. When considering these points, assume the property was used to facilitate drug trafficking and was not purchased with drug proceeds. These assumptions allow for a period of time where the property was used solely for legal purposes before the illegal act. Also, assume the transferee is a true "innocent-owner."

(1) The property owner can transfer valid title any time before the illegal act is commenced.

(2) Property transferred after the illegal act, but before the filing of a *lis pendens* allows the title to remain in the transferee once the "innocent-owner" defense is successfully asserted. The transferee has the best chance of successfully asserting the "innocent-owner" defense at this juncture.

(3) After the *lis pendens* has been filed with the lands records office, a transferee is on notice that the property may be subject to forfeiture. This filing greatly reduces the chances of a third party successfully asserting the "innocent-owner" defense.

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128. The government obtains a title opinion on real property and will send a Third Party Letter to anyone appearing in the chain of title who the Government feels should have notice, especially lien holders or financial institutions.

129. See *infra* part III.c.

130. The government has an interest in filing a *lis pendens* for this very reason.

(4) The Preliminary Order is issued, notifying all parties who may wish to assert a defense. At this point, the third party must assert a defense or title will vest in the government.

(5) If no party successfully asserts a defense, title vests in the Government and relates back to the illegal act through a Final Order. This Final Order is recorded with the land records office where the property is located and placed in the chain of title.<sup>131</sup>

## 2. Personal Property

In comparison to real property, personal property presents less legal problems, but more logistical problems. The movable and readily concealable nature of personal property offers a greater chance that a property owner may be able to "hide" the property to prevent seizure. Such problems can be illustrated with bank accounts. In some states, property can not be seized unless there is an indictment or information. Therefore, the government must be in a position to take custody of property immediately upon service of the indictment or information in these jurisdictions.<sup>132</sup> Once served, property owners may attempt to transfer funds from United States accounts into off shore accounts such as the Cayman Islands, Bimini Island and the traditional Swiss Bank Account.<sup>133</sup> The nature and mobility of personal prop-

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131. There is also an area of concern when a *lis pendens* has been filed and the government has failed to prove its case. In this situation, the Government should file a *lis pendens* withdrawal to clear the title. However, this withdrawal is not always filed and a title searcher should check with the United States Attorney's Office to see if one exists.

132. One procedure utilized by the government is to send an agent to the bank with a radio. Once the indictment is filed, the agent is notified and will immediately seize the account. This practice is in response to the actions of defendant property owners who pre-arrange transfer processes which can be quickly initialed with a single phone call.

133. Although the Swiss Bank Account has been the traditional "safe haven" for illegal funds, the United States and the Swiss Government have signed a treaty which allows the United States to access Swiss accounts in order to seize funds. However, this treaty provides that the Swiss Government will receive 50% of the assets if the United States obtains a Final Order. This treaty has led to a practice by the United States to include a provision in a plea agreement which forces the property owner to transfer the money back to the United States. Therefore, the United States seizes 100% of the funds. Even if the United States provided transportation for the property owner and the agents to Switzerland, the money saved by not splitting the assets makes this expense economically prudent. (Agreement Between the United States and Switzerland Relating to the Treaty of May 25, 1973, on Mutual Assistance in Criminal Matters, November 3, 1993, U.S. - Switz., KAV No. 3708). The United States has also signed treaties

specifically dealing with forfeitures with Trinidad and Tobago. (Agreement Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning Maritime Counter-Drug Operations, March 4, 1996, U.S. - Trin. & Tobago, KAV No. 4549), Russia (Agreement Between the United States and Russia on Cooperation in Criminal Law Matters, With Annex., June 30, 1995, U.S. - Russia, KAV No. 4518), Hong Kong (Agreement Between the United States and Hong Kong Extending the Agreement of Nov. 23, 1990, as Extended, Concerning the Confiscation and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking, July 10, 1995, U.S. - H.K., KAV No. 4380); Grenada (Agreement Between the Government of the United States of America and the Government of Grenada Concerning Maritime Counter-Drug Operations, May 16, 1995, U.S. - Gren., KAV No. 4249); St. Lucia (Agreement Between the Government of the United States of America and the Government of St. Lucia Concerning Maritime Counter-Drug Operations, April 20, 1995, U.S. - St. Lucia, KAV No. 4240); Antigua and Barbuda (Agreement Between the Government of the United States of America and the Government of Antigua and Barbuda Concerning Maritime Counter-Drug Operations, April 19, 1995, U.S. - Ant. & Barb., KAV 4238); Dominica (Agreement Between the Government of the United States of America and the Government of Dominica Concerning Maritime Counter-Drug Operations, April 19, 1995, U.S. - Dominica, KAV No. 4239); St. Kitts and Nevis (Agreement Between the Government of the United States of America and the Government of St Kitts and Nevis Concerning Maritime Counter-Drug Operations, April 13, 1995, U.S. - St. Chris.-Nevis, KAV No. 4231); Dominican Republic (Agreement Between the Government of the United States of America and the Government of the Dominican Republic Concerning Maritime Counter-Drug Operations, March 23, 1995, U.S. - Dom. Rep., KAV No. 4213); Canada (Agreement Between the Government of the United States of America and the Government of Canada Regarding the Sharing of Forfeited Assets and Equivalent Funds, March 22, 1995, U.S. - Can., KAV No. 4212); Venezuela (Agreement for Mutual Assistance in Administration of Justice in Connection with Certain Banking, Financial and Other Institutions, March 17, 1995, U.S. Venez., KAV No. 4205); Austria (Treaty with Austria on Mutual Legal Assistance in Criminal Matters, February 23, 1995, U.S. - Aus., S. TREATY DOC. NO. 104-21); Hungary (Treaty with Hungary on Mutual Legal Assistance in Criminal Matters, December 1, 1994, U.S. - Hung., S. TREATY DOC. NO. 104-20); Philippines (Treaty with the Philippines on Mutual Legal Assistance In Criminal Matters, November 13, 1994, U.S. - Phil., S. TREATY DOC. NO. 104-18); Paraguay (Agreement Between the Government of the United States of America and the Government of the Republic of Paraguay to Cooperate in the Prevention and Control of Money Laundering Arising from Illegal Trafficking in Narcotics and Psychotropic Substances, November 30, 1993, U.S. - Para., KAV No. 4010); Netherlands (Agreement Between the Government of the United States of America and the Government of the Kingdom of the Netherlands Regarding Mutual Cooperation in the Tracing, Freezing, Seizure and Forfeiture of Proceeds and Instrumentalities of Crime and the Sharing of Forfeited Assets, November 20, 1992, U.S. - Neth., KAV No. 3548); Republic of Korea (Treaty with The Republic of Korea on Mutual Legal Assistance in Criminal Matters, November 23, 1993, U.S. - Korea, S. TREATY Doc. No. 104-1); Belize (Agreement Between the Government of Belize and the

erty and the issues which arise surrounding the seizure require the government to identify assets early and to obtain physical seizure as quickly and quietly as possible.

### *B. Methods of Seizure*

The Government has several methods to seize property. Before discussing the constitutional issues raised by forfeiture, it is helpful to understand the methodologies employed by the government when it seizes property.

#### *1. Restraining Order or Injunction*

The government may obtain a restraining order or injunction which will prevent the defendant from transferring the property.<sup>134</sup> This court order requires a hearing in which the government must show there is a substantial probability that the Government will prevail on the issue of forfeiture, that failure to enter the order will result in the property being destroyed or removed from the jurisdiction, or otherwise made unavailable,<sup>135</sup> and that the need to preserve the availability of the property outweighs the hardship on any party against whom the order is entered.<sup>136</sup> This order will preserve the property for a seizure probable cause hearing.

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Government of the United States of America Concerning Maritime Counter-Drug Operations, December 23, 1992, U.S. - Belize, KAV No. 3468); Colombia (Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Colombia, July 24, 1990, U.S. - Colom., KAV No. 2693); India (Mutual Co-Operation Agreement Between Government of the United States of America and Government of India for Reducing Demand, Preventing Illicit Use of and Traffic in Drugs, and for Matters Relating to Licit Trade in Opiates, Etc., March 29, 1990, U.S. - India, KAV No. 2537); Cartagena (Declaration of Cartagena Concerning the Production of, Trafficking in and Demand for Illicit Drugs., February 15, 1990, U.S. - Cartagena, KAV No. 2908); United Kingdom of Great Britain and Northern Ireland (Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds And Instrumentalities of Drug Trafficking, February 9, 1988, U.S. - U.K. & N. Ir., T.I.A.S. No. 11649).

134. 21 U.S.C. § 853(e)(1)-(2) (1994); 18 U.S.C. §§ 982, 1963(d)(1)-(2) (1994).

135. 21 U.S.C. § 853(e)(1)(B)(i) (1994); 18 U.S.C. § 982 (1994) (incorporating 21 U.S.C. § 853(e) (1994)); 18 U.S.C. § 1963(d)(1)(B)(i) (1994).

136. 21 U.S.C. § 853(e)(1)(B)(ii) (1994); 18 U.S.C. § 982 (1994) (incorporating 21 U.S.C. § 853(e) (1994)); 18 U.S.C. § 1963(d)(1)(B)(ii) (1994).

## 2. *Seizure Warrants - Criminal*

The government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture in the same manner as provided for a search warrant.<sup>137</sup> However, this procedure only applies to money laundering and drug trafficking statutes. If the government shows probable cause that the property to be seized would, in the event of conviction, be subject to forfeiture and that a restraining order or injunction may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a criminal seizure warrant.<sup>138</sup>

The Fourth Amendment also applies to seizure warrants since the Constitution specifically protects citizens against unreasonable seizures and warrants unsupported by probable cause.<sup>139</sup> The Supreme Court has consistently held that a "seizure of property occurs where there is some meaningful interference with an individual's possessory interests in that property."<sup>140</sup> A seizure warrant is certainly the type of process which the Framers intended to include in the Fourth Amendment.

## 3. *Administrative Civil Seizure Actions*<sup>141</sup>

The government may also gain title to property through an administrative forfeiture action.<sup>142</sup> These seizures do not involve assets with a value greater than \$500,000.<sup>143</sup> However, if the asset is currency or monetary instruments, then the asset may be

137. 21 U.S.C. § 853(f) (1994); 18 U.S.C. § 982 (1994) (incorporating 21 U.S.C. § 853(f) (1994)).

138. 21 U.S.C. 853(f) (1994).

139. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

140. *United States v. Jacobson*, 466 U.S. 109 (1984). See *Horton v. California*, 496 U.S. 128, 133 (1990); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987); *Maryland v. Macon*, 472 U.S. 463, 469 (1985); *Texas v. Brown*, 460 U.S. 730, 747-748 (1983) (Stevens, J., concurring); *United States v. Salvucci*, 448 U.S. 83, 91 n. 6 (1980).

141. See 21 C.F.R. § 1316.71 (1984) (incorporating 19 U.S.C. § 1607 (1994), amended by Pub. L. No. 104-237, 110 Stat. 3099 (1996)).

142. 21 C.F.R. § 1316.77.

143. 21 C.F.R. § 1316.75(a) (1996) (incorporating 19 U.S.C. § 1607 (1994), amended by Pub. L. No. 104-237, 110 Stat. 3099 (1996)).

forfeited regardless of its value.<sup>144</sup> Property which can be forfeited under this procedure does not include real property since Congress has defined property under this section as “a controlled substance, raw material, product, container, equipment, money or other asset, vessel, vehicle, or aircraft within the scope of the Act.”<sup>145</sup> Administrative forfeiture actions have greatly reduced the burden upon the Courts, especially when considering the large number of uncontested forfeiture actions.<sup>146</sup>

#### 4. *In Rem Civil Forfeiture*<sup>147</sup>

In civil forfeiture, the government may bring an action before, during, or after a criminal forfeiture action. As explained, this action is instigated by filing a suit against the property. As a practical matter, however, when the government is preparing for a criminal action, it usually does not bring a civil forfeiture action pre-indictment since it may have to engage in civil discovery and reveal too much of its criminal case.

Congress expanded civil forfeitures in 1992 to provide original jurisdiction in any district where the act or omission giving rise to the forfeiture occurred.<sup>148</sup> Also, a court with jurisdiction may issue and serve process on a nationwide basis.<sup>149</sup>

#### 5. *Seizure of Electronic or Computer systems.*

With developments in technology, the use of the computer has become worldwide. The “information age” has caused more and more activity to be transferred from traditional media to electronic media. This information includes pornography, drug trafficking records, money laundering records and other illegal activity. With the broad reaches of the forfeiture statutes, much of this electronic hardware, specifically computers, can be seized.

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144. 21 C.F.R. § 1316.75(a) (incorporating 31 U.S.C. § 5312(a)(3)(A)-(C) (1994)). Bank accounts are not monetary instruments or currency under 31 U.S.C. § 5312 and are limited by the \$500,000 cap under 19 U.S.C. § 1607 (1994).

145. 21 C.F.R. § 1316.71(c) (1984).

146. See *supra* note 82.

147. 21 U.S.C. § 881 (1994); 18 U.S.C. § 981 (1994).

148. 28 U.S.C.A. § 1355(b)(1)(A) (1994), *amended by* Pub. L. 102-550 effective Oct. 28, 1992, section 2 of Pub.L. 102-550, set out as a note under section 5301 of Title 42.

149. 28 U.S.C. § 1355(d) (1994) (stating “Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.”).

However, the government is faced with a unique problem when legal activity is commingled with illegal activity. For example, a person engaging in child pornography on his computer may also be running an "on-line" magazine over the Internet. Therefore, the computer hardware may contain mostly legitimate First Amendment protected activity but also have illegal material.

The Fourth Amendment prohibits issuance of general warrants allowing law enforcement officers to browse through a person's possessions looking for random evidence.<sup>150</sup> A warrant must particularly describe the place to be searched and the person or things to be seized.<sup>151</sup> With today's technology, computer material, especially files, can be quickly moved from location to location and; in many cases, the exact physical location can not be known.<sup>152</sup> In cases where warrants seek to seize material presumptively protected by the First Amendment, the level to which the items to be seized must be particularly described is heightened.<sup>153</sup> The United States can not seize material without showing probable cause. The government is presented with a problem when a computer contains legal material and illegal material, because probable cause can only be shown for the illegal material.

A case involving the communication of indecent language occurred in *United States v. Maxwell*,<sup>154</sup> in military court. In this case, the defendant had several "user-names"<sup>155</sup> but only conducted illegal activity with one of the names. If the authorities

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150. *Andersen v. Maryland*, 427 U.S. 463, 480 (1976).

151. *Id.*; *United States v. Layne*, 43 F.3d 127, 132 (5th Cir.), *cert. denied*, 115 S. Ct. 1722 (1995).

152. The popular "news groups" are contained in an area where files are uploaded and downloaded without the users knowledge as to whether one, two or thousands of computers are involved. The computers involved can and are surrounding the globe. Therefore, knowing the exact location of any one file is nearly impossible. America On-Line, CompuServe and Internet e-mail generally store information "on-line" and the exact location of the files are unknown based upon the large number of computers these providers maintain. In order for the Government to obtain a search or seizure warrant, it must have specific knowledge as to the location of the files it wishes to obtain. See *A.C.L.U. v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

153. *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

154. 42 M.J. 568 (U.S. Air Force Court of Criminal Appeals 1995).

155. The defendant had at least the names Reddel, Launchboy, and Zirloc. The warrant was only issued for Reddel, but authorities searched the e-mail boxes for the other names also. Even though each name was the same defendant, this example shows one of the potential problems associated with the virtual world.

has not known the illegal name, their search and seizure efforts would have failed.<sup>156</sup> This case illustrates one of the many issues which will develop when the Government attempts to seize electronic or computer systems.<sup>157</sup>

### C. The Relation Back Doctrine

The relation-back doctrine has been codified in the drug trafficking,<sup>158</sup> money laundering,<sup>159</sup> and sexual exploitation of children statutes.<sup>160</sup> This doctrine was recognized as early as 1889 in a Supreme Court decision, *United States v. Stowell*.<sup>161</sup> This doctrine creates the legal fiction that when the Government gains title pursuant to a Final Order, this title relates back to the illegal act. The question becomes what effect does this doctrine have on transfers which occur between the illegal act and the Final Order, especially in light of the "innocent owner" defense. The Supreme Court has recently spoken on this issue in *United States v. Parcel of Land, Buildings, Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*<sup>162</sup> This case resolved the split between the circuits in interpreting the relation back doctrine and allowed the innocent owner defense to be successful even when the transfer occurs after the illegal act. However, confusion remains between the circuits, despite *92 Buena Vista Ave.*. The Third Circuit has commented that "*92 Buena Vista Ave.* raises considerable doubt as to whether the forfeiture statutes are meant to reach post-illegal-act transferees who did not know about the act causing the taint until after it transpired."<sup>163</sup>

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156. The search and seizure was valid under an exception to the exclusionary rule since there was no question concerning the user's e-mail address in which the illegal conduct was associated.

157. Many other issues will develop concerning computer storage of illegal material and their seizure. However, a full discussion of this specific area is beyond the scope of this article.

158. 21 U.S.C. § 881(h) (1994).

159. 18 U.S.C. § 981(f) (1994).

160. 18 U.S.C. § 2254(g) (1994).

161. 133 U.S. 1, 15-16 (1889). This case also prevented the possibility of a post-illegal act transferee invoking the innocent owner defense, because title to a defendant's property vests in the government at the time the drug crime occurs. However, this proposition was specifically rejected in *United States v. Parcel of Land, Buildings, Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 113 S. Ct. 1126 (1993).

162. 113 S. Ct. 1126 (1993).

163. *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 801 (3d Cir. 1994).

The relation back doctrine also creates problems with recording statutes and title searches. Assuming the Government does not file a *lis pendens*, there will be no indication in the land records office that the property is under investigation for forfeiture or even involved in a forfeiture action. This problem occurred in *United States v. Colonial Nations Bank, N.A.*<sup>164</sup>

#### IV. THE "INNOCENT-OWNER" DEFENSE.

Owners wishing to contest a forfeiture action have primarily two theories on which to base their defense. First the property owner may contest the facts. For example, the property owner may contest that the property was misidentified and the wrong property was seized. However, for obvious reasons, this theory is rarely used. The second and more useful defense is the "innocent-owner" defense. This defense developed in the common-law and has become codified in modern forfeiture statutes.

The "innocent-owner" defense provides the best protection for third party owners who have had property seized in connection with illegal activity. Of all the parties involved, an innocent third party has the greatest risk of unjust property loss and Constitutional rights infringement. Although this article focuses upon the culpable property owner, the innocent third party owner is placed in the most precarious position. The material which follows discusses the history of this defense, its codification in modern federal forfeiture statutes, and examples of harsh results against third parties despite the codification of the defense.<sup>165</sup>

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164. 74 F.3d 486 (4th Cir. 1996). Although this case involved a Bank purchasing property three months after the Final Order, these facts illustrate the importance of a *lis pendens* to any party searching title for purchase, sale or title insurance. As explained above, the Final Order is recorded in the land records office and should establish title in the United States. Since the Bank did not purchase the property until after the Final Order, the Court correctly held that title did not pass to the Bank since title was vested in the United States by the Final Order. This case does establish that the *lis pendens* is not required to be filed by the United States.

165. Although briefly addressed in this article, many law review articles have specifically addressed the "innocent owner" defense in relation to forfeiture statutes. See Michael J. Wietzychowski, *Civil Forfeiture—Protecting Innocent Donees Under 21 U.S.C. § 881(A) (6)—United States V. 92 Buena Vista Avenue, 937 F.2d 98 (3d Cir. 1991), cert. granted, 112 S. Ct. 1260, and cert. denied sub nom., Goodwin v. United States, 112 S. Ct. 1264 (1992)*, 65 TEMP. L. REV. 245 (1992); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner"*, 70 NOTRE DAME L. REV. 369 (1994); Damon Garrett Saltzburg, *Real Property Forfeitures as a Weapon in the Government's*

### A. History of the "Innocent-Owner" Defense and Its Modern Codification.

The innocent owner defense was recognized in English common law and was incorporated in this country's common-law. Historically, this defense arose in maritime law concerning the liability of ships when navigated negligently by a pilot. Pilot acts of the early states required ships in piloted waters to employ or hire a pilot to steer into port. These statutes required the ship owners and crew to retain a pilot once they reached port. The issue arose whether an *in rem* action arose against the ship when injury was caused by the ship through the pilot's negligence.<sup>166</sup> This defense was also allowed in the earliest forfeiture actions. When a ship ran a blockage, the ship and its cargo were subject to forfeiture.<sup>167</sup> However, if "the owner stood clear from even a possible intention of fraud, their property will be excepted from the penal consequence of the cargo."<sup>168</sup> From these early cases, this defense protected the innocent owners.

However, as this defense developed, the common-law innocent owner defense lost strength. As civil forfeiture developed, it was generally held that the innocence of the owner was never a defense since the property was the subject of the action.<sup>169</sup> In

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*War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217 (1992); Moshe Heching, *Civil Forfeiture and the Innocent Owner Defense: United States v. 92 Buena Vista Ave.*, 113 S. CT. 1126 (1993), 16 HARV. J.L. & PUB. POL'Y 835 (1993); Robert E. Blacher, *Clearing the Smoke from the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. § 881 (A)(7)*, 85 J. CRIM. L. & CRIMINOLOGY 502 (1994); Allison A. Cornelius, *Civil Forfeiture Under 21 U.S.C. § 881(A)(7): The Problem of the Innocent Owner Spouse*, 39 VILL. L. REV. 1351 (1994); George T. Pappas, *Civil Forfeiture and Drug Proceeds: The Need to Balance Societal Interests With the Rights of Innocent Owners*, 77 MARQ. L. REV. 856 (1994); Alice Marie O'Brien, *"Caught in the Crossfire": Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. § 881(A)(7)*, 65 ST. JOHN'S L. REV. 521 (1991).

166. See *The China*, 74 U.S. (7 Wall.) 53 (1868). In *The China*, a New York law required ships to employ a pilot to bring ships to the harbor. The pilot assigned was negligent and caused injury to another brig. Since a pilot must be assigned under New York law, it was troubling for the court to assign liability under master servant when the State required the pilot to be on the ship. Therefore, the Court found that the vessel itself was liable and avoided the agency analysis.

167. See *The William Bagaley*, 72 U.S. (5 Wall.) 377 (1866).

168. *Id.*

169. See *Dobbin's Distillery v. United States*, 96 U.S. (6 Otto.) 395 (1877) (Lessee was in violation of revenue laws which led to forfeiture of real and personal property of the lessor without regard to the personal misconduct or responsibility of the owner/lessor.); *United States v. Brig Malek Adhel*, 43 U.S. (2

1926, the Supreme Court, in *Van Oster v. Kansas*<sup>170</sup> stated “[i]t has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.”<sup>171</sup> Recently, the Supreme Court has held that there is no constitutional right to the “innocent-owner” defense,<sup>172</sup> thus acknowledging the limited application of the common-law “innocent-owner.”

The diminishing protection of this defense prompted Congress to codify the “innocent-owner” defense in many of its forfeiture laws, thereby creating a statutory “innocent-owner” defense.<sup>173</sup> This defense has specifically been added to the drug trafficking<sup>174</sup> and money laundering<sup>175</sup> statutes. The language in the drug trafficking statutes is “no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”<sup>176</sup> This language has raised several issues: what is an owner, what constitutes innocence, did Congress mean for the “or” between “knowledge or consent” to be an “and”, and does this only apply to bone fide purchasers? However, the inclusion of this defense has made the results under modern forfeiture statutes less harsh to

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How.) 210, 238 (1844) (innocence of the owner was fully established); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (A conviction for piracy was not a prerequisite for a proceeding to forfeit a ship engaged in piracy in violation of federal law.); see also *United States v. Stowell*, 133 U.S. 1, 13-14 (1890).

170. 272 U.S. 465 (1926).

171. *Id.* at 468; see *Dobbins's Distillery v. United States*, 96 U.S. (6 Otto.) 395 (1877); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921); *United States v. Stowell*, 133 U.S. 1 (1890).

172. *Bennis v. Michigan*, 116 S. Ct. 994, 997 (1996).

173. *Id.*

The innocent owner defense does not keep the government from seizing a vessel, but only allows the owner of the conveyance to prove his innocence later in the forfeiture proceeding. The House has voted overwhelmingly to support the innocent owner defense provisions in the bill. To assure consistency in the law, an additional change needs to be made to the forfeiture laws under title 19, United States Code. This will ensure that our forfeiture laws are consistent and that the innocent owner defense will be available in forfeiture cases regardless of the Federal agency handling the case.

134 CONG. REC. H7704-01 (1988) (statement of Senator Davis).

174. 21 U.S.C. § 881(a)(6)-(7) (1994).

175. 18 U.S.C. §981(a)(2) (1994).

176. 21 U.S.C. § 881(a)(6) (1994).

third party owners. Unfortunately, not all forfeiture statutes have this defense codified.<sup>177</sup>

In light of the many articles in this area,<sup>178</sup> this article will only briefly address some of these concerns. Generally, courts have followed a liberal interpretation of "owner" under these statutes and have included anyone with a "legal or equitable interest in the property seized."<sup>179</sup> Therefore, most property owners are afforded an opportunity to challenge the forfeiture action.

Until recently, the Circuits have been split as to what "innocent" means. The Fourth Circuit held the rigid view than any transfer after the illegal act was invalid since the government's title relates back to this act.<sup>180</sup> However, the Supreme Court later held that the mere fact the transfer occurs after the illegal act does not bar the assertion of the "innocent owner" defense.<sup>181</sup> The Supreme Court held that even though title relates back to the illegal act, the property does not belong to the government until the Final Order. This holding stresses the need for the Government to take advantage of such tools as *lis pendens*, restraining orders, injunctions and seizure warrants to protect the property between the time the action is filed and the Final Order. In addressing the statutory construction of the "and" versus "or" debate, Congressional intention seems to require the "and" conjunction.<sup>182</sup> The split remains among the circuits.<sup>183</sup>

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177. See *Bennis*, 116 S. Ct. 994.

178. See *supra* note 164.

179. *United States v. One Single Family Residence Located at 15603 85th Ave. N., Lake Park, Palm Beach County, Fla.*, 933 F.2d 976, 981 (11th Cir. 1991).

180. *In the Case of One 1985 Nissan, 300ZX, VIN: JN1C214SFX069854*, 889 F.2d 1317 (4th Cir. 1989).

181. *92 Buena Vista Ave.*, 113 S. Ct. 1126.

182. "It is intended that, in order to establish the innocent owner exemption, the property owner must establish all three circumstances-i.e., that the owner lacked knowledge, consent, and willful blindness as to the offense giving rise to forfeiture." *United States v. Parcel of Real Property Known as 6109 Grub Rd.*, 886 F. 2d 618 (3d Cir. 1989) (holding that by using the word "or" in 21 U.S.C. 881(a)(7) (1994) Congress intended to give the owner the choice of proving either lack of knowledge or lack of consent). 136 CONG. REC. S6586-01, S6605-06 (1990).

183. The following are circuit court interpretations which imply a conjunctive Reading: *United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Conn.*, 75 F.3d 118, 121 (2d Cir. 1996); *United States v. Nineteen and Twenty-Five Castle St.*, 31 F.3d 35, 39 (2d Cir. 1994); *United States v. 890 Noyac Rd.*, 945 F.2d 1252, 1255 (2d Cir. 1991); *United States v. Land Known as Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990); *United States v. 15603 85th Ave.*, 933

*B. The Effect of Asset Forfeiture upon Third Party Property Owners.*

The effect upon the innocent third party owner can be dramatic. In the prohibition, it was common for a court to allow forfeiture of a car used to transport moonshine in the prohibition-era by a person to whom the third party owner had entrusted the car even when the owner had no knowledge that the culpable party would violate the law.<sup>184</sup>

In one case, a \$20,000 yacht was seized because marijuana was found on board.<sup>185</sup> The yacht was leased by two Puerto Rico residents and the third party innocent owner was the yacht's leasing company.<sup>186</sup> The yacht was forfeited.<sup>187</sup> The leasing company only found out about the forfeiture when the lessee's defaulted on their lease payments.<sup>188</sup>

In another case, a car was forfeited when a man engaged in criminal sexual behavior with a prostitute.<sup>189</sup> Despite acknowledging that the wife did not have any knowledge that her husband had used their jointly owned automobile in illegal activity, the Supreme Court permitted the forfeiture.<sup>190</sup>

The following scenarios portray the dramatic effect of asset forfeiture on innocent third party owners:

(1) Just ask Willie Jones, owner of a Nashville landscaping business. In 1991, he made the mistake of paying for an airplane ticket in cash—behavior that was deemed to fit a drug courier profile. Mr. Jones was detained and his luggage searched. No drugs were found. But his wallet contained \$9,600 in cash. The money

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F.2d 976, 981 (11th Cir. 1991); *United States v. 4492 South Livonia Rd.*, 889 F.2d 1258, 1267 (2d Cir. 1989).

The following are circuit court interpretations which imply a disjunctive reading: *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 (11th Cir. 1992) (the Eleventh Circuit has determined both readings apply with the disjunctive reading being the latest decision); *United States v. Certain Real Property and Premises, Known as 890 Noyac Rd., Noyac, N.Y.*, 945 F.2d 1252 (2d Cir. 1991); *United States v. 141st St. Corp.*, 911 F.2d 870, 877-80 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 398 (3d Cir. 1990); *Grubb Rd.*, 886 F. 2d 618 (1989).

184. *Van Oster v. Kansas*, 272 U.S. 465 (1926).

185. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Bennis v. Michigan*, 116 S. Ct. 994, 997 (1996).

190. *Id.*

was seized, but Mr. Jones was not charged with any crime. After two years of legal wrangling, his money was finally returned.”<sup>191</sup>

(2) In 1989, during a fruitless seven hour search for drugs aboard Craig Kline’s new \$24,000 sailboat, Federal agents wielding axes, power drills and crowbars nearly destroyed the boat. No evidence of contraband was found. The boat was sold for scrap, and only after Congress intervened did Mr. Kline receive a reimbursement of \$9,100 - a third of the boat’s value.<sup>192</sup>

(3) Over the course of several years, Florida police routinely confiscated cash (an estimate \$8 million total) from hundreds of motorists who supposedly fit profiles of drug couriers. Criminal charges were rarely filed in these cases, and in only three instances did the individuals successfully have funds returned.<sup>193</sup>

Although these are the unusual cases, they illustrate the sever impact of asset forfeiture upon third parties and show how the “innocent-owner” defense does not afford the protection one might expect.

## V. CONSTITUTIONAL CHALLENGES

The Constitutional challenges against asset forfeiture, especially civil forfeiture, have largely been unsuccessful. Congress has made it clear that in balancing the need to fight the war on crime, Constitutional rights may take a back-seat.<sup>194</sup> Congress has stated that

[t]he severity of our society’s drug abuse problem is painfully obvious. Each and every day illegal drugs are cited as a root cause of most of our nation’s serious crime statistics. The problem of

191. *News Committee on the Judiciary, Statements concerning H.R. 1916 By The Honorable Henry J. Hyde*, 104th Cong., 1st Sess. (F.D.C.H. 1996).

192. *Id.*

193. *Id.* Note that neither the number of contested forfeitures, nor the culpability of the property owners is provided by this statute.

194. Congress has been advised of the problems with asset forfeiture, both for recent and previous legislation. See *Current Federal Asset Seizure and Forfeiture Program: Hearing on H.R. 1916 Before the United States House Committee on the Judiciary*, 104th Cong., 1st Sess. (1996) (written statements of E.E. Edwards, III, David B. Smith, and Richard J. Troberman co-chairs National Association of Criminal Defense Lawyers Asset Forfeiture Abuse Task Force); *Crime Prevention and Criminal Justice Reform Act: Hearing on H.R. 3315 Before the House Judiciary Committee, Subcommittee on Crime and Criminal Justice*, 102th Cong. 1st Sess. (1994) (statement of Rep. Henry Hyde); *Crime Prevention and Criminal Justice Reform Act: Hearing on H.R. 3315 Before the House Judiciary Committee, Subcommittee on Crime and Criminal Justice*, 102th Cong., 1st Sess. (1994) (statement of Laura Murphy Lee Director of the A.C.L.U.)

drug abuse is so deeply ingrained in the daily activities of so many people that efforts to lessen the use of dangerous drugs have to be comprehensive and far reaching.<sup>195</sup>

As this article will explain, when balancing constitutional rights against the need to combat crime, the constitutional rights side has been the side outweighed by the need to fight crime. Although forfeiture is targeted toward illegal activity, the current statutes of this area allow the principals that this country was founded upon, the Constitution, to be cast aside.

#### A. *Due Process and Notice of Seizure*<sup>196</sup>

In 1972, the Supreme Court stated that "[f]or more than a century the central [sic] meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"<sup>197</sup> The Court went on to state that "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"<sup>198</sup> These concepts are deeply rooting in American Jurisprudence. However, modern *in rem* forfeiture<sup>199</sup> does not require notice before personal property can be seized and has only

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195. H.R. REP. NO. 446, 101st Cong., 2d Sess. (1990).

196. In discussing whether notice is required before seizure, it is helpful to understand the three basic categories of property which can be seized. The first category is contraband, which is the illegal material itself. This category includes property such as drugs, drug manufacturing equipment, and counterfeit money printing plates. The second category is proceeds from illegal activity, such as a house purchased with drug money or a car purchased with laundered money. These two types of property present the least constitutional problems since they cannot be legally owned at all. However, the third category is property which is used in furtherance of illegal activity such as a house where drugs are sold, a legitimate business which is also used to launder money or a computer which contains financial records of illegal activity as well as other legal material. The property in this third category presents the most constitutional problems since the property is used for legal and illegal purposes. This third category of property is the focus of the following discussion on whether due process requires notice and a hearing before the government can seize property.

197. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). See *Grannis v. Oredean*, 234 U.S. 385 (1914); *Hovey v. Elliott*, 167 U.S. 409 (1897); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).

198. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

199. As previously discussed, FED. R. CRIM. P. 7(c)(2) requires that criminal forfeiture be included in the indictment or information and therefore notice is given to the defendant of the forfeiture action. Accordingly, this section is only concerned with civil forfeiture actions.

recently required notice for the seizure of real property.<sup>200</sup> In *Fuentes*, the Court established the general rule that all property seizures require notice and an opportunity to be heard. However, the Court noted that notice and a hearing could be postponed if "extraordinary situations" existed to justified postponement.<sup>201</sup> The Court used the three factors stated in *Mathews v. Eldridge*<sup>202</sup> to determined whether "extraordinary" circumstances exists. These factors are: the nature of the "private interest" at stake; the risk of error associated with the procedure used; and the United State's interest, including the administrative burden, if a more elaborate procedure is used.<sup>203</sup> From these factors, the exception has expanded to cover most, if not all, personal property.<sup>204</sup> As discussed, the movable and readily concealable nature of personal property creates the situation that supports the traditional reason for seizing personal property - to insure that the court retains jurisdiction<sup>205</sup> - therefore, placing most all personal property under this exception. In interpreting *Calero-Toledo*, the Eleventh Circuit stated "it is well settled that no prior judicial determination that seizure is justified is required when the government seizes items subject to forfeiture."<sup>206</sup> This interpretation is shared by several other courts.<sup>207</sup> Additionally, Congress amended the

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200. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

201. *Fuentes*, 407 U.S. at 90.

202. 424 U.S. 319 (1976).

203. *Id.* at 335.

204. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). (stating that where the government's interest in immediate seizure of a yacht subject to civil forfeiture justified dispensing with the usual requirement of prior notice and hearing. The Court based its ruling on two essential considerations: first, immediate seizure was necessary to establish the Court's jurisdiction over the property; and second, the yacht might have disappeared had the Government given advance warning of the forfeiture action). *See also* *United States v. Von Neumann*, 474 U.S. 242, 251 (1986) (stating that no preseizure hearing is required when customs officials seize an automobile at the border).

205. *James Daniel Good*, 114 S. Ct. at 502.

206. *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale*, 803 F.2d 625, 632 (11th Cir. 1986); *see* *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555, 562 n.12 (1983); *United States v. Kemp*, 690 F.2d 397 (4th Cir. 1982); *United States v. One 1975 Pontiac Lemans, Vehicle I.D. No. 2F37M56101227*, 621 F.2d 444 (1st Cir. 1980).

207. *United States v. Premises and Real Property At 4492 South Livonia Rd., Livonia, N.Y.*, 667 F. Supp. 79 (W.D.N.Y. 1987); *United States v. 678 Acres of Land, More or Less In Mecklenburg County, N.C.*, 671 F. Supp. 413 (W.D.N.C. 1987).

drug trafficking<sup>208</sup> and money laundering<sup>209</sup> civil forfeiture sections so they now state that actual notice of the impending forfeiture is unnecessary when the government cannot identify any party with an interest in the seized article,<sup>210</sup> and that property is subject to forfeiture through a summary administrative procedure if no party files a claim.<sup>211</sup>

Under this interpretation, the government is allowed to seize real and personal property without notice to the property owners. The government would hold an *ex parte* hearing in front of a magistrate and obtain a seizure warrant without notice to the property owner or an adversary proceeding.<sup>212</sup> However, in 1993, the Supreme Court held that absent exigent circumstances, the government is required to afford notice and meaningful opportunity to be heard before seizing real property under civil forfeiture.<sup>213</sup> This holding is based upon the Fifth Amendment Due Process Clause<sup>214</sup> and specifically the *Mathews* factors.<sup>215</sup> The Court limited its holding in *James Daniel Good* (to real property) by stating "[t]he constitutional limitations we enforce in this case apply to real property. . . ."<sup>216</sup> The general rule developed that the government must afford notice and a hearing to a real property owner

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208. 21 U.S.C. § 881 (1994).

209. 18 U.S.C. § 981 (1994).

210. 19 U.S.C. § 1607 (1994).

211. 19 U.S.C. § 1609 (1994); see *United States v. Ursery*, 116 S. Ct. 2135 (1996).

212. *Id.*

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

214. "[n]o person shall . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend V.

215. (1) consideration of the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; (3) and the Government's interest, including the administrative burden that additional procedural requirements would impose. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

216. *James Daniel Good Real Property*, 510 U.S. at 61 (1993). Although Justice Kennedy states the general rule that "individuals must receive notice and an opportunity to be heard before the Government deprives them of property", *James Daniel Good*, 114 S. Ct. at 498. See *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555, 562, n.12 (1983); *Fuentes v. Shevin*, 407 U.S. 67, 82, *reh'g denied*, 409 U.S. 902 (1972); *Sniadach v. Family Finance Corp.* of Bay View, 395 U.S. 337, 342 (1969); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); see also *Calero-Toledo*, 416 U.S. at 679. However, the *Good* decision was based upon *Calero-Toledo*, which was decided before real property was subject to forfeiture under the drug trafficking statutes.

before executing a seizure warrant.<sup>217</sup> However, an exception exists when the government can show that an extraordinary situation is present which justifies postponement of notice and a hearing.<sup>218</sup> To establish "exigent circumstances" the government must show that less restrictive measures<sup>219</sup> would not suffice to protect the United States' interest in preventing the sale, destruction, or continued unlawful use of the real property.<sup>220</sup> Again, this holding does not have any application to personal property.

In balancing the necessity to seize assets in the war on crime against the due process right to notice, the Supreme Court has sacrificed constitutional rights in order to better arm this country's law enforcement. Even though the classification of property as personal seems to exempt seizure from the due process requirement of notice, real property is at least afforded some constitutional protection.<sup>221</sup>

### B. *Double Jeopardy*<sup>222</sup>

The practice of instigating criminal and civil forfeiture actions against the same party has produced a multitude of double jeopardy challenges.<sup>223</sup> This practice creates a "double edged sword" which the government can wield in the war on crime.<sup>224</sup> Recently,

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217. *James Daniel Good*, 114 S. Ct. at 501.

218. *Id.* See *supra* note 163.

219. Such less restrictive measures include *lis pendens*, restraining order, or bond. *James Daniel Good*, 519 U.S. at 62.

220. *Id.* at 505.

221. The dissent in *James Daniel Good* does express some concern that the classification of property should not turn the decision. The Framers were more concerned with the rights of the United States citizens rather than the classification of property interests. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 75 (1993).

222. Although the Fifth Amendment text mentions only harms to "life or limb," it is well settled that the Amendment covers imprisonment and monetary penalties. See *United States v. Halper*, 490 U.S. 435 (1989); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

223. Over 250 cases in the federal system exist dealing with forfeiture and double jeopardy at the time of this writing.

224. Even when the United States fails to get a conviction based upon a criminal forfeiture, the civil forfeiture action can still be instigated. The United States can and has seized property involved in conduct which the property owner has been acquitted. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (stating that a gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding against those firearms under the Gun Control Act); *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235-37 (1972) (finding no double

the Supreme Court has spoken on this issue and held that "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable."<sup>225</sup> The Court went on to determine that the civil forfeiture provided for under the drug statutes and money laundering statutes was not punishment and therefore not barred by Double Jeopardy.<sup>226</sup>

In discussing the Court's recent decision in *United States v. Ursery*,<sup>227</sup> it is helpful to review *Helvering v. Mitchell*,<sup>228</sup> which was decided in 1938. In *Helvering*,<sup>229</sup> the Supreme Court addressed whether a civil penalty for tax deficiency when the defendant was acquitted on the charge of intentional tax evasion violated double jeopardy. In finding no violation, the Court held "that acquittal on a criminal charge is not a bar to a civil action by the government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."<sup>230</sup>

However, in 1989, the Supreme Court blurred the distinction between civil and criminal penalties in *United States v. Halper*.<sup>231</sup> The Court stated "the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served

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jeopardy bar on a forfeiture of illegally imported jewels under 19 U.S.C. § 1497 (1994), after the owner had been acquitted on criminal charges); *United States v. One 1953 Oldsmobile 98 4 Door Sedan, Motor Number R257687*, 222 F.2d 668 (4th Cir. 1955) (stating that the acquittal in criminal action of a driver of an automobile for acts specifically alleged as grounds for forfeiture of the automobile in the libel proceeding did not constitute a bar to a civil forfeiture proceeding of the automobile in which the claimant was not the driver but the titled owner of the automobile); *Helvering v. Mitchell*, 303 U.S. 391 (1938) (holding that recovery of the civil penalty by the Government was not barred by the acquittal of the defendant in the criminal case and that the doctrines of res judicata and double jeopardy were not applicable).

225. *United States v. Ursery*, 116 S. Ct. 2135, 2141-2142 (1996).

226. *Id.*

227. *Id.*

228. 303 U.S. 391 (1938).

229. *Id.* at 397.

230. *Id.*; see *Murphy v. United States*, 272 U.S. 630, 631 (1926); *Stone v. United States*, 167 U.S. 178, 188 (1879); compare *Chantangco v. Abaroa*, 218 U.S. 476, 481 (1910).

231. *United States v. Halper*, 490 U.S. 435 (1989).

by criminal penalties.”<sup>232</sup> The *Halper* Court determined that a civil penalty of \$130,000, in light of the \$595 violation of the defendant, was sufficiently disproportionate to constitute a second punishment in violation of double jeopardy.<sup>233</sup> This holding led many to believe that the possibility of forfeiture under the drug trafficking and money laundering statutes could be found to be so disproportionate as to constitute a second penalty.

In *Austin v. United States*,<sup>234</sup> the Supreme Court added weight to this belief and held that “the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under [the drug statutes].”<sup>235</sup> Therefore, if the civil forfeiture violated the Eighth Amendment, the forfeiture could be called a penalty and double jeopardy protection would exist. In 1994, the Supreme Court merged these two concepts when it decided in *Department of Revenue of Montana v. Kurth Ranch*.<sup>236</sup> that since the tax assessment involved “not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place.”<sup>237</sup> Thus, the tax was punishment and not revenue raising in nature. Therefore, the tax was fairly characterized as punishment.<sup>238</sup>

In reviewing these cases in light of the legislative history of the drug and money laundering statutes, it would appear that congressional intent was to provide, at least in part, punishment. Therefore civil forfeiture following an acquittal in a criminal charge should be barred by double jeopardy.<sup>239</sup> However, the Supreme Court held otherwise.<sup>240</sup>

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232. *Id.* at 447

233. *Id.* at 452.

234. 509 U.S. 602 (1993).

235. *Id.* at 604.

236. 511 U.S. 767 (1994).

237. *Id.* at 1947.

238. *Id.* at 1948.

239. See 135 CONG. REC. S12622-01 (1989) (statement of Senator Biden) (stating that the Attorney General is to share the proceeds of any civil or criminal forfeiture with any state or local law enforcement agency that participated in the forfeiture to help defer the cost of law enforcement); 132 CONG. REC. S4286-02 (1986) and 132 CONG. REC. H1912-02 (1986) (amending 21 U.S.C. § 881 because the current forfeiture authority is an inadequate tool against money laundering thus indicating stiffer punishment to further deter money laundering). Typical of the Congressional Record, the discussions of Congress can be interpreted to illustrate several different intentions.

240. *Ursery*, 116 S. Ct. at 2141.

In 1995, the Sixth Circuit decided *United States v. Ursery*<sup>241</sup> and recognized the decision in *Halper* that a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial.<sup>242</sup> The second sanction would be punishment under the analysis for Double Jeopardy if its only characteristics were as a deterrence or retribution.<sup>243</sup> By following the reasoning of *Halper* through *Kurth Ranch* the Sixth Circuit found that the civil forfeiture judgment followed by his criminal conviction constituted Double Jeopardy.<sup>244</sup> The Sixth Circuit also recognized the Ninth Circuit's decision in *United States v. 405,089.23 U.S. Currency*<sup>245</sup> which concluded that civil forfeiture constituted "punishment" and thus triggered protections of the Double Jeopardy Clause.<sup>246</sup> The Sixth Circuit did, however, criticize the Ninth Circuit's analysis as too rigid.<sup>247</sup>

The Supreme Court consolidated the Sixth and Ninth Circuit cases in *United States v. Ursery*<sup>248</sup> and held that for Double Jeopardy to be invoked, the defendant must meet the test developed in *United States v. One Assortment of 89 Firearms*.<sup>249</sup> The Court first found that there was little doubt that Congress intended proceedings under drug trafficking and money laundering to be civil, since those statutes' procedural enforcement mechanisms are themselves distinctly civil in nature.<sup>250</sup> The Court then found that there was little evidence, much less the "clearest proof" that the Court requires, suggesting that forfeiture proceedings under

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241. 59 F.3d 568 (6th Cir. 1995).

242. *Id.* at 573.

243. *Id.*

244. *Id.* at 576.

245. 33 F.3d 1210 (9th Cir. 1994). This case involved the United States seeking civil forfeiture following a criminal conviction.

246. *Ursery*, 59 F.3d at 575 (citing *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994)).

247. *Ursery*, 59 F.3d at 575. The Sixth Circuit believed the Ninth Circuit suggested that parallel civil forfeiture and criminal proceeding always violated the Double Jeopardy Clause) *Id.* (citing *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994)). In fact, the Sixth Circuit specifically stated that "a forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time". *Ursery*, 59 F.3d at 571.

248. 116 S. Ct. 2135 (1996).

249. 465 U.S. 354 (1984).

250. *Ursery*, 116 S. Ct. at 2149.

those sections are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary.<sup>251</sup>

The Supreme Court made a clear statement that the civil forfeiture provisions of drug trafficking and money laundering are neither "punishment" nor "criminal" for purposes of the Double Jeopardy Clause.<sup>252</sup> Although the tests exist under *Halper* to determine whether double jeopardy protects from subsequent civil forfeiture, the pressing need to fight the war on crime has again tipped the scales against constitutional rights and left little meaning to the *Halper* test.<sup>253</sup>

### C. *Excessive Fines*

The Supreme Court has held the Excessive Fines clause of the Eighth Amendment applies to civil forfeitures under the drug and money laundering statutes.<sup>254</sup> The Supreme Court has left to the lower courts to determine whether a specific forfeiture action is excessive.<sup>255</sup> The Court rejected a proportionality test, reasoning that if "the constitution allows in rem forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures."<sup>256</sup>

In determining whether the Eighth Amendment applies, the Court focused not upon whether forfeiture under the drug statutes<sup>257</sup> were civil or criminal, but rather whether forfeiture is punishment.<sup>258</sup> Although the Supreme Court has held forfeiture is not "punishment" as to double jeopardy, it stated in *Austin* that nothing in the drug trafficking or money laundering statutes or their legislative history exists to contradict the historical understanding of forfeiture as punishment.<sup>259</sup> The Court quoted the

251. *Id.*

252. *Id.*

253. The Supreme Court has effectively reversed previously holdings which stated that statutory *in rem* forfeiture imposes punishment. *Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808).

254. *Austin v. United States*, 509 U.S. 602, 604 (1993).

255. *Id.* at 603.

256. *Id.* at 606; see *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

257. 21 U.S.C. §§ 881(a)(4), (7) (1994).

258. *Austin*, 509 U.S. at 610.

259. *Id.* at 619.

legislative history of the drug statutes in support of the proposition that forfeiture is a form of punishment.<sup>260</sup>

After deciding *Austin* the Fourth Circuit had an opportunity to determine whether a forfeiture was excessive under the Eighth Amendment in *United States v. Chandler*.<sup>261</sup> In *Chandler*, the Fourth Circuit held that forfeiture of a 33-acre farm was not excessive even though the illegal activity could only be shown to have been conducted in the house situated on this property.<sup>262</sup> The court adopted a three part test to determine whether *in rem* forfeiture violates the Eighth Amendment and stated that lower courts must first consider the nexus between the property and the offense,<sup>263</sup> the role and culpability of the property owner,<sup>264</sup> and the possibility of separating offending property from the remainder.<sup>265</sup> Therefore, the Fourth Circuit has adopted the view that the "question of excessiveness is thus tied to the guilt of the property or the extent to which the property was involved in the offense, and not its value."<sup>266</sup>

Regardless of the holding in *Austin*, several Circuits have adopted a proportionality test for reviewing forfeiture.<sup>267</sup> The Fourth Circuit correctly held the principle of proportionality in the Eighth Amendment has been associated with the Cruel and Unusual Punishment Clause, rather than the Excessive Fines Clause,<sup>268</sup> emphasizing its adoption of an instrumentality test.<sup>269</sup>

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260. *Id.* When it added subsection (a)(7) to § 881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S. REP. NO. 98-225, p. 191 (1983).

261. 36 F.3d 358 (4th Cir. 1994).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* This element of the test has led to a practice of portioning land into small sections in order to prevent to entire forfeiture of property. For example, had *Chandler* portioned his land, the severability may have bolstered his excessive fine challenge and perhaps only subjected a much smaller portion of his property to forfeiture.

266. *Id.* at 364.

267. See *United States v. R.R. # 1*, 14 F.3d 864, 874-75 (3d Cir. 1994); *United States v. One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 330-31 (8th Cir. 1994) (expressing, obiter, dissatisfaction with a pure instrumentality).

268. See *Weems v. United States*, 217 U.S. 349, 366-67 (1910).

269. The Fourth Circuit was expressly joined by the Second Circuit in *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995).

Even though constitutional protection exists, the factual determinations that forfeiture is excessive in a particular case may be difficult to find in light of the theory that the question of excessiveness is tied to the guilt of the property and not the guilt of the property owner.<sup>270</sup>

#### *D. Self-Incrimination*

In *Boyd v. United States*,<sup>271</sup> the Supreme Court made it clear, that forfeiture pursuant to an offense committed by a property owner, though civil in form, is criminal for Fifth Amendment purposes and the defendant will be protected from self-incrimination.<sup>272</sup> However, this principal presents a great difficulty to the property owner.

This difficulty is best illustrated by the Sixth Circuit case, *United States v. Certain Real Property 566 Hendrickson Boulevard, Clawson, Oakland County, Michigan*.<sup>273</sup> In this case, the Court found that the Government had met its burden of showing probable cause that the defendant's house should be forfeited. Therefore, the defendant bore the burden of showing the house was not subject to forfeiture. However, the defendant also had criminal proceedings based upon the same facts and occurrences. The defendant alleged that any attempt by him to depose his wife, children, or his associate, or to obtain their affidavits to challenge the civil forfeiture would have effectively waived his right against self-incrimination.<sup>274</sup> The defendant was faced with the choice to remain silent and allow the forfeiture or testify against the forfeitability of his property and expose himself to incriminating admis-

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270. See *United States v. Real Property Located at 24124 Lemay Street, West Hills, Ca.*, 857 F. Supp. 1373 (C.D. Cal. 1994) (home owner was convicted and sentenced to three years in prison as well as forfeiture of his \$195,000 home); *United States v. \$288,930.00 In U.S. Currency*, 838 F. Supp. 367 (N.D. Ill. 1993) (property illegally aquired and possessed was not punishment and therefore the Eighth Amendment does not apply); see *contra* *United States v. Real Property Located at 6625 Zumirez Drive, Malibu, Ca.*, 845 F. Supp. 725 (C.D. Cal. 1994) (property owner's house was forfeited when son was selling narcotics from home even though property owner was acquitted, motion to reverse forfeiture was granted).

271. 116 U.S. 616 (1886).

272. *Id.* at 634; see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

273. 986 F.2d 990 (6th Cir. 1993).

274. *Id.* at 996.

sions.<sup>275</sup> Effectively, this dilemma removes his right to self-incrimination if he wishes to keep his property. This apparent violation of a constitutional right, has largely been downplayed. As the Sixth Circuit explained, "[t]his does not mean, however, that the forfeiture action should be barred because there is a possibility the claimant will be disadvantaged by remaining silent."<sup>276</sup>

Although, this situation does infringe upon the constitutional rights of a claimant, he does have at least one remedy. The claimant can ask the court to stay the civil forfeiture action pending the resolution of the criminal proceedings.<sup>277</sup> Nevertheless, the importance of winning the war on crime has again outweighed the protection of the Constitution.

### *E. Sixth Amendment*<sup>278</sup>

The process used in seizure creates a unique timing problem for defending property owners. As we have seen, the notice and opportunity to a hearing can be postponed most, if not all the time, in cases involving personal property.<sup>279</sup> This personal property also involves funds, meaning the government can seize funds needed to provide for a defense against the forfeiture. The defend-

275. *Id.*

276. *Id.*; see *United States v. Certain Real Property Commonly Known as 6250 Ledge Road, Egg Harbor, WI*, 943 F.2d 721, 729 (7th Cir. 1991); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 900-01 (1st Cir. 1987). It is interesting that the Sixth Circuit's stated the loss of a Constitutional right is a mere disadvantage.

277. *United States v. United States Currency*, 626 F.2d 11 (6th Cir. 1980).

278. Understandably the United States Attorneys Office has taken a strong view, understandably, that seizure does not violate the right to counsel: Moreover, in the absence of a restraining order, the inability to retain counsel when forfeiture is alleged is due solely to counsel's desire to be guaranteed payment of his/her fee. In this regard, the third party forfeiture provisions are not unlike other economic limitations. They mean only that the government's claim to forfeitable assets is superior to any other claims arising after commission of the offense, including counsel's claim to a fee. This does not interfere with a defendant's ability to retain counsel any more than a prior mortgage or tax lien which may encumber a defendant's assets. If counsel refuses to represent a prospective client because he/she believes that the client does not have the financial ability to pay as a result of these prior encumbrances there is no interference with the right to counsel of choice. Likewise, the forfeiture provisions do not impermissibly deny a defendant his/her counsel of choice.

U.S. ATTYS. MAN. 9-111.220 n.1 (1990).

279. See *supra* part V.A.

ing property owner is asked to rebut the presumption that the property is forfeitable in a civil action<sup>280</sup> or to prepare a defense in a criminal action without the availability of monetary assets.<sup>281</sup> This dilemma is heightened since in civil forfeiture, the defendant is not allowed a court appointed attorney.<sup>282</sup> The Sixth Amendment requires the appointment of counsel in every trial for a serious crime,<sup>283</sup> but according to the courts, civil forfeiture is not a criminal matter.<sup>284</sup>

The criminal defendant whose assets have been seized via civil forfeiture is deprived of a significant interest just as if the assets were restrained pursuant to criminal forfeiture. However, if the defendant successfully rebuts the government's showing of probable cause and the government does not to bring forth additional evidence, due process requires that sufficient assets be released to pay a defense attorney's reasonable fees.<sup>285</sup>

The legislative history indicates that Congress explicitly rejected the idea that attorney fees are exempt from forfeiture.

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280. Even when the defendant rebuts the government's showing of probable cause, the government may introduce more evidence to bolster its case and further prevent the defendant from accessing funds. The most serious infringement on this Constitutional right is when the defendant has commingled legal and illegal funds. The government seizes these funds and the defendant must carry the burden to defend legal funds without their use. Additionally, this burden creates Fifth Amendment issues for the defendant.

281. *Accord* United States v. Caplin & Drysdale, 837 F.2d 637, 646 (4th Cir. 1988); United States v. Moya-Gomez, 860 F.2d 706, 725 (7th Cir. 1988); United States v. Nichols, 841 F.2d 1485, 1505 (10th Cir. 1988); *see contra* United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium, 853 F.2d 1445, 1450-1452 (8th Cir. 1988), *mandate stayed by* United States v. Unit No. 7 and No. 8, 864 F.2d 1421 (8th Cir. 1988) (Sixth Amendment requires exemption of assets sufficient to compensate counsel of choice); United States v. Monsanto, 852 F.2d 1400, 1402-04 (2d Cir. 1988) (en banc), *cert. granted*, United States v. Monsanto, 109 S. Ct. 363 (1988) (Sixth Amendment requires exemption of attorneys fees from pretrial restraints and forfeiture).

282. United States v. Doe, 743 F.2d 1033, 1038 (4th Cir. 1984) (stating that "only offenses where a sentence of imprisonment is imposed give the defendant a right to appointed counsel").

283. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

284. *See* 18 U.S.C. § 3006A (1994). The "full panoply of constitutional protections afforded criminal defendants is not available in the context of such forfeiture proceedings." United States v. One 1982 Chevrolet Crew-Cab Truck Vin LGCHK33M9C143129, 810 F.2d 178, 183 (8th Cir. 1987). However, this proposition does not lie well with the holding that civil forfeitures are criminal for Fifth Amendment purposes.

285. United States v. Michelle's Lounge, 39 F.3d 684, 697-98 (7th Cir. 1994); *See* United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991).

Congress cited with approval *United States v. Long*,<sup>286</sup> when it stated that "holding that property derived from a violation of 21 U.S.C. § 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction. Additionally, an order restraining the attorney from transferring or selling the property was properly entered."<sup>287</sup>

Courts have stated that the exemption of attorney fees would substantially undermine the purpose of the third party forfeiture provisions. As the district court in *In Re Grand Jury Subpoena*,<sup>288</sup> stated:

[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds. . . . To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power."<sup>289</sup>

Therefore, forfeiture of an asset given to counsel as payment of legal fees may be pursued by the government. The money paid can be sought by the government as long as the government can prove probable cause.<sup>290</sup> The current status of seizure creates a tremendous disadvantage to a defendant. Government argues that this is simply the same problem when the defendant has substantial debt and a large mortgage upon his home. However, those specific financial burdens were self-created and not imposed by the mere showing of probable cause. Once again, the need to seize assets has outweighed constitutional rights.

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286. 654 F.2d 911 (3d Cir. 1981).

287. COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. Rep. No. 225, 98th Cong., 1st Sess. 209, n.579 (1983) (citing *United States v. Long*, 654 F.2d 1186 (2d Cir. 1981)).

288. 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

289. *Id.*

290. See *Monsanto*, 924 F.2d 1186; *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Unit No. 7 & 8*, 853 F.2d 1445 (8th Cir. 1988); *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359 (11th Cir. 1994) (citing *Monsanto* favorably); *United States v. McKinney*, 915 F.2d 916 (4th Cir. 1990) (citing *Monsanto* favorably); *Fed. Trade Comm'n. v. World Wide Factors, Ltd.*, 882 F.2d 344 (9th Cir. 1989).

*F. First Amendment - Freedom of Speech*

When a defendant engages in First Amendment protected activity and illegal activity, issues arise concerning whether the seizure of the property can be constitutionally performed. Such issues were raised in the Supreme Court case of *Fort Wayne Books, Inc. v. Indiana*,<sup>291</sup> where two adult bookstore operators were charged with violating a state RICO statute. Accordingly, an injunctive order providing for padlocking of stores and seizure of the contents was issued. The defendants argued that the seizure violated the First Amendment since applying RICO's forfeiture provisions to businesses dealing in protected materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech. The Supreme Court recognized this argument in *Alexander v. United States*,<sup>292</sup> by stating "[n]o doubt the monetarily large forfeiture in this case may induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves out of the fear that those materials could be found obscene and thus subject them to forfeiture."<sup>293</sup> However, the *Alexander* Court found *Fort Wayne* dispositive and held that the deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'<sup>294</sup> For obscene material, it seems well settled that the First Amendment will not protect a property owner from forfeiture.<sup>295</sup> Based upon the above examples, it is doubtful that the First Amendment will offer much, if any, protection against asset forfeiture.

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291. 489 U.S. 46 (1989).

292. 509 U.S. 544 (1993).

293. *Id.* at 555-56.

294. *Id.* at 556 (quoting *Smith v. California*, 361 U.S. 147 (1959)).

295. See *Action For Children's Television v. Federal Communications Comm'n*, 59 F.3d 1249 (D.C. Cir. 1995); *Adult Video Ass'n v. Reno*, 41 F.3d 503 (9th Cir. 1994); *Adult Video Ass'n v. Barr*, 960 F.2d 781 (9th Cir. 1992); *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990); *Sequoia Books, Inc v. Ingemunson*, 901 F.2d 630 (7th Cir. 1990).

*G. Nor shall private property be taken for public use, without just compensation*<sup>296</sup>

Given the failed Constitutional challenges discussed above, the property owner may be offered protection under the Taking Clause of the Fifth Amendment. Although there are few cases concerning forfeiture and the Takings Clause, we can expect to see more in the future. Both the expansion of forfeiture and failed Constitutional challenges will produce more Taking Clause challenges as defense attorneys struggle to find some way to protect their clients. This section will discuss the issue concerning property which is contraband or proceeds from illegal activity and also property which is merely in furtherance of illegal activity.

It has long been held that the government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.<sup>297</sup> Governmental authority has been created under each of the above discussed forfeiture statutes. The purpose of forfeiture provisions is to prevent the property from continued use in illegal activity, deter illegal activity, and compensate society for injuries.<sup>298</sup> These purposes make forfeiture a "police action" and therefore the taking of property is not subject to compensation. Lawmakers are free to determine that certain uses of property are undesirable and that forfeiture is the proper response.<sup>299</sup> Accordingly, many circuits have concluded that "if the federal government's actions comport, procedurally and substantively, with the terms of a lawfully enacted forfeiture statute, it may seize private property without compensating the owner."<sup>300</sup> Other circuits have stated that "all property owners currently hold their property subject to the restriction that if they use it in the commission of a criminal offense it is forfeitable."<sup>301</sup> Therefore, property which has been

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296. U.S. CONST. amend. 5, cl. 5.

297. *United States v. Fuller*, 409 U.S. 488, 492 (1973); see *United States v. Rands*, 389 U.S. 121, 125 (1967); *Calero-Toledo*, 416 U.S. at 680.

298. *Calero-Toledo*, 416 U.S. at 682-83.

299. *Van Oster*, 272 U.S. 465.

300. *United States v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements, Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, R.I.*, 960 F.2d 200, 209 (1st Cir. 1992); see *Bolt v. United States*, 944 F.2d 603, 610 (9th Cir. 1991); *Redford v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 691 F.2d 471, 473 (10th Cir. 1982).

301. *Bowman v. United States*, 35 Fed. Cl. 397, 406 (Fed. Cl. 1996).

found to be forfeitable under a criminal or civil forfeiture process is not subject to compensation.

The Takings Clause may offer protection when the government cannot prove its case. Additionally, this clause may provide protection to the “innocent-owner” who successfully asserts this defense. As stated by the U.S. Federal Court of Claims,

[I]t is plausible that an improper *in rem* forfeiture could give rise to a taking claim. In cases where property is determined to have been improperly forfeited because it is found that it was not used for illicit purposes, it would seem that a property owner legitimately may harbor an expectation of compensability.<sup>302</sup>

As such, the time in-between the taking and returning of the property in unsuccessful forfeiture actions may be compensatable by the government as a taking.

Although the “innocent-owner” may be allowed some compensation for the taking of the property, only when the government fails in its case does this seem to offer any protection.<sup>303</sup> Therefore, this protection is only available to those in little need. The property owner who has recovered his property may be allowed compensation, but the property owner who does not prevail will not be allowed any compensation. Again, this clause offers little, if any, protection to culpable or innocent property owners.

## VI. CONCLUSION

Although Congress has expanded and the Supreme Court has supported the efforts against the war on crime, the country has suffered through the removal of constitutional protection. By recognizing the balancing between the war on crime and Constitutional rights, perhaps this country can put the controversy to rest by simply admitting the sacrifice of rights is necessary if we are to win this battle. The Supreme Court is willing to call forfeiture punishment in some cases and not punishment in others and to call civil forfeiture civil in some cases and criminal in others. These gross inconsistencies purportedly insure that law enforcement has this “great weapon” to fight crime. The issues discussed are examples of the magnitude and effect crime has on this society and show that we, as a country, are willing to go very far to prevent it.

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302. *Id.*

303. *Bennis v. Michigan*, 116 S. Ct. 994 (Wife was not allow compensation even though is was stipulated that wife was an innocent owner of a car).

Although in most cases, the culpable party is required to forfeit assets, this does not justify the infringement upon the fundamental principals embodied in the Constitution to be cast aside. In balancing the war on crime against protecting Constitutional rights, Congress has determined that the Constitution will be outweighed. However, Congress has merely responded to the tremendous magnitude of crime and the damage it has done to this country.

We must ask ourselves, which is the worst evil, the destruction and damage done by criminal activity or the eroding of the foundation of this country, our constitutional rights?

*Douglas Kim*