[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10312

D.C. Docket No. 1:15-cv-23616-DPG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

$70,670.00 IN U.S. CURRENCY, et al.,

Defendants,

KURVAS SECRET BY W,
WILSON COLORADO,
MILADIS SALGADO,

Interested Parties-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(July 8, 2019)

Before WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether the district court abused its discretion when it permitted the government to dismiss its complaint for forfeiture without prejudice and whether the dismissal entitled the claimants to attorney's fees under the Civil Asset Forfeiture Reform Act, *see* 28 U.S.C. § 2465(b)(1). The government filed a complaint for forfeiture against certain funds as the proceeds of criminal activity. Wilson Colorado and his business Kurvas Secret by W claimed most of the funds, and Miladis Salgado claimed the remainder. During the litigation, AnnChery Fajas USA, the victim of the alleged criminal activity, obtained a state judgment against Colorado and Kurvas Secret. To satisfy the judgment, the state court transferred the judgment debtors' interests in the funds to AnnChery. The government then moved to dismiss its complaint voluntarily without prejudice on the ground that the state-court judgment made the outcome of the forfeiture action irrelevant. The district court granted the motion, denied the claimants' motion to dismiss the action *with* prejudice, and denied the claimants' motion for an award of attorney's fees. Because the district court did not abuse its discretion in dismissing the action without prejudice and the claimants did not "substantially prevail[]," *id.*, we affirm.

I. BACKGROUND

AnnChery Fajas USA, Inc., a company based in Colombia and Florida, manufactures and sells fajas, a

genre of garments that includes corsets, girdles, and waist cinchers. In response to growing demand—apparently a result of unofficial endorsements by celebrities such as Kim Kardashian—AnnChery instituted a policy limiting the number of fajas a retailer could purchase to 1,500 per week.

In late 2014, Wilson Colorado moved from Spain to Miami, where he resided with his ex-wife, Miladis Salgado. At the suggestion of Tatiana Narvaez-Caicedo, the general manager of AnnChery in Florida, Colorado decided to enter the faja retail business. He established Kurvas Secret by W, Inc., a Florida corporation, for that purpose.

In April 2015, AnnChery determined that Narvaez-Caicedo was helping Colorado and Kurvas Secret circumvent its quota system and receive AnnChery merchandise without paying for it. AnnChery fired Narvaez-Caicedo; sent Colorado a demand letter alleging that he had stolen its merchandise; and filed a complaint in Florida court against Narvaez-Caicedo, Colorado, Kurvas Secret, and two other defendants alleging that they had conspired to steal from and defraud the company.

After receiving the demand letter, Colorado liquidated his Wells Fargo and Chase bank accounts and secured the funds at his home. These withdrawals consisted of a Wells Fargo cashier's check for $101,629.59 and a Chase cashier's check for $30,000, both made payable to Colorado. Colorado purchased these checks using proceeds from the sale of AnnChery fajas.

Meanwhile, the Drug Enforcement Administration received a tip asserting that Colorado was a cocaine distributor and money launderer and that he used several south Florida residences to store currency and narcotics. The tipster said that Narvaez-Caicedo lived in one of the "stash houses" and provided her address and an accurate description of her car, including the license-plate number. Law-enforcement officers searched Narvaez-Caicedo's home and found no currency or contraband. But she provided them with the address of the residence where Colorado was living with Salgado.

The officers searched Salgado's home. There, they discovered and seized potential drug paraphernalia and—more importantly for this appeal—both cashier's checks and $15,070 in cash in Salgado's master bedroom closet. They found and seized $55,600 more in cash beneath a nightstand in Colorado and Salgado's daughter's bedroom.

The government filed a complaint *in rem* against the $70,670 seized in cash, the value of the Wells Fargo cashier's check, and the value of the Chase cashier's check, stating three claims for forfeiture. First, the complaint alleged that the funds were the proceeds of drug crimes, *see* 21 U.S.C. §§ 841(a), 846, 881(a)(6). Second, it alleged that the funds were derivative proceeds either of drug trafficking or of the interstate transportation of stolen property, *see* 18 U.S.C. §§ 981(a)(1)(C), 2314; 21 U.S.C. §§ 841(a)(1), 846. Third, it alleged that the funds were property involved in or traceable to knowing monetary transactions or attempted transactions

involving the proceeds of criminal activity, *see* 18 U.S.C. §§ 981(a)(1)(A), 1956(a)(1), 1957.

Colorado, Salgado, and Kurvas Secret filed claims to the funds. Colorado and Kurvas Secret claimed ownership of the cashier's checks and the $55,600 seized from the nightstand, as well as a possessory interest in the $15,070 seized from Salgado's bedroom closet. Salgado claimed ownership of the cash seized from her closet and a possessory interest in the rest of the funds.

While this action was being litigated in the district court, the state court entered a default judgment in favor of AnnChery's second amended complaint based on what the state court found was Colorado and Kurvas Secret's "willful and deliberate failure to comply with [its] Orders on discovery." And the state court entered a permanent injunction against Colorado and Kurvas Secret that required them to "preserve and segregate any funds in their financial and bank accounts or elsewhere that constitute[d] proceeds from the sale of AnnChery products and merchandise."

Under Florida law, the default judgment against Colorado and Kurvas Secret conclusively established "all factual allegations in [AnnChery's] Second Amended Complaint." *See N. Am. Accident Ins. Co. v. Moreland*, 53 So. 635, 637 (Fla. 1910) ("A judgment by default . . . operates as an admission by the defendants of the truth of the definite and certain allegations and the fair inferences and conclusions of fact to be drawn from [them]."); *Ellish v. Richard*, 622 So. 2d 1154, 1155 (Fla. Dist. Ct. App. 1993) ("[A] party against whom a default

judgment is entered admits all well-pleaded facts as true."). AnnChery had alleged that any and all funds in Colorado's bank accounts or to which he had access were derived from the sale of stolen fajas. So, after entry of the state judgment and injunction, Colorado and Kurvas Secret could no longer dispute in that proceeding that any of the defendant properties they owned were subject to the preservation-and-segregation order in the permanent injunction.

The government moved for summary judgment in favor of two of its forfeiture claims and, in the alternative, for leave to dismiss the complaint without prejudice, *see* Fed. R. Civ. P. 41(a)(2), because the state judgment and permanent injunction "effectively render[ed] the outcome of th[e] [civil forfeiture] case moot." The government explained that, regardless of the outcome of its *in rem* action, the funds would be transferred to AnnChery:

> In the unlikely event that Claimants prevail on any of their claims, the Defendants *In Rem* would be subject to the Miami-Dade Circuit Court's permanent injunction, resulting in such funds being awarded to AnnChery, and not Claimants. If the United States were to prevail, the United States would return, in accordance with the Department of Justice victims' policy, any forfeited funds required to make AnnChery, the victim, whole. Consequently, in an effort to avoid unnecessary litigation, the United States seeks, in the alternative, leave to permit the United States to voluntarily dismiss this matter so that

> ownership of the Defendants *In Rem* can be resolved by the Miami-Dade Circuit Court.

In their joint response to the government's motion for summary judgment or voluntary dismissal, the claimants protested that a voluntary dismissal without prejudice would be "contrary to law and a manifest injustice," but they failed to explain how they would be prejudiced by such a dismissal. The state court later entered judgment in favor of AnnChery against Colorado and Kurvas Secret in the amount of $318,019.70 plus costs, and the government filed the state judgment in the district court as a supplement to its motion for summary judgment or voluntary dismissal.

The district court granted the government's motion in part, "find[ing] good cause to permit the United States to voluntarily dismiss this action without prejudice based on the parallel state action" and "order[ing] that th[e] action [be] closed administratively." The government filed a proposed final order of dismissal and, with it, an order in which the state court had assigned and transferred to AnnChery, in satisfaction of its judgment, "[a]ny and all rights, title, claims, or interests of any kind of [Colorado and Kurvas Secret] in the seized cash and cashier's checks at issue in the Forfeiture Action."

The claimants filed a notice of objection to the order dismissing the action without prejudice and moved that the district court "dismiss th[e] forfeiture action *with prejudice* so that [the claimants' attorney could] pursue attorney[']s fees pursuant to the Civil Asset

Forfeiture Reform Act and 28 USC § 2465." The claimants argued that they would "suffer legal prejudice in the form of a denial of attorney fees . . . if this action [were] dismissed without prejudice, rather than *with prejudice*." *See McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986) (explaining that a district court should deny a motion for voluntary dismissal without prejudice when to grant it would cause "plain legal prejudice" to the defendant). And they suggested that they were eligible for an award of attorney's fees even if the dismissal remained without prejudice.

The next day, the district court entered an order of dismissal. The order stated that "the Miami-Dade Circuit Court has entered decisions in a parallel state action . . . which effectively render the outcome of this action moot." It also provided, "Should the United States re-file this action, the Court will award costs to the Claimants pursuant to Rule 41(d) of the Federal Rules of Civil Procedure." *See* Fed. R. Civ. P. 41(d)-(d)(1) ("If a plaintiff who previously dismissed an action . . . files an action based on or including the same claim against the same defendant, the court . . . may order the plaintiff to pay all or part of the costs of that previous action. . . .").

The claimants moved to alter or amend the order to dismiss the action with prejudice. They argued that the duration of the action, the amount of resources expended, alleged dilatory tactics by the government, and the pendency of dispositive motions all counseled in favor of a dismissal with prejudice. They construed the government's assertion that the action was "effectively"

moot as an admission of jurisdictional mootness, and they argued that this admission too supported a dismissal with prejudice. And they repeated their argument that they were entitled to attorney's fees in any event but insisted that, if the label on the dismissal mattered, the district court should consider their loss of a right to attorney's fees sufficient legal prejudice to require a dismissal with prejudice. Concurrently, the claimants moved for attorney's fees, costs, and interest under the Civil Asset Forfeiture Reform Act, *see* 28 U.S.C. § 2465(b)(1).

Before the district court ruled on the claimants' motions, Salgado, AnnChery, and the claimants' attorney executed and filed a "Stipulation for Settlement in Forfeiture Action," in which the signatories "stipulate[d] to the entry of an Order in the Forfeiture Action" distributing $10,387.92 of the defendant funds to Salgado, $128,920.61 to AnnChery, and $62.991.06 to the claimants' attorney to hold in escrow pending the resolution of the motion for attorney's fees. The district court ordered the release of the funds and directed the parties to distribute them in accordance with the stipulation.

The district court denied the claimants' motion to alter or amend the order of dismissal and their motion for attorney's fees. The district court reasoned that the length of the litigation and that it had progressed to the summary-judgment stage did not require that the voluntary dismissal be with prejudice because "[n]othing suggest[ed] . . . that the government acted in bad faith or that the government did not believe it had a

meritorious case for forfeiture." And it stated that it had made the government responsible for the claimants' costs if the government refiled the action.

The district court also rejected the claimants' argument that the dismissal prejudiced them because it barred their statutory right to attorney's fees. The district court deemed the argument forfeited because the claimants had not raised it in their response to the government's motion for voluntary dismissal. The district court also stated that it was an open question "whether loss of an argument for attorney's fees . . . constitutes legal prejudice that should preclude voluntary dismissal without prejudice," but it concluded "that the facts of this case [did not] warrant that determination" because the government had not acted in "bad faith" but, instead, had chosen to forgo "trial on what it believed to be a meritorious forfeiture complaint in light of the alleged victim's state court judgment." And the district court denied the motion for attorney's fees on the ground that a dismissal without prejudice does not alter the legal relationship of the parties, so the claimants had not "substantially prevail[ed]," 28 U.S.C. § 2465(b)(1).

II. STANDARD OF REVIEW

"Dismissal on motion of the plaintiff pursuant to Rule 41(a)(2) is within the sound discretion of the district court, and its order may be reviewed only for an abuse of discretion." *McCants*, 781 F.2d at 857. We also "review the denial of a motion for attorneys' fees and

costs for abuse of discretion." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012). Under the abuse-of-discretion standard, "[a] district court's underlying legal conclusions are reviewed *de novo* and its factual findings for clear error." *Bradley v. King*, 556 F.3d 1225, 1229 (11th Cir. 2009). A district court abuses its discretion when it applies an incorrect legal standard, relies on clearly erroneous factual findings, or commits a clear error of judgment. *See id.*; *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that the district court did not abuse its discretion when it granted the government's motion to dismiss the action without prejudice. Second, we explain that the district court did not abuse its discretion when it denied the claimants' motion for attorney's fees.

A. The District Court Did Not Abuse Its Discretion when It Allowed the Government to Dismiss Its Complaint Without Prejudice.

The claimants argue that the district court abused its discretion when it permitted the government to dismiss its complaint voluntarily without prejudice instead of with prejudice. After an opposing party has served an answer or a motion for summary judgment, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers

proper." Fed. R. Civ. P. 41(a)(2). In considering such a request, "the district court must exercise its broad equitable discretion under Rule 41(a)(2) to weigh the relevant equities and do justice between the parties in each case, imposing such costs and attaching such conditions to the dismissal as are deemed appropriate." *McCants*, 781 F.2d at 857.

We have explained that "in most cases a dismissal should be granted unless the defendant will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit, as a result." *Id.* at 856-57 (emphasis omitted). "The crucial question to be determined is, Would the defendant lose any substantial right by the dismissal." *Pontenberg v. Boston Sci. Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001) (quoting *Durham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967)). We have made clear that "the sanction of dismissal [with prejudice] is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion." *Durham*, 385 F.2d at 368 (alteration adopted) (emphasis omitted) (quoting *Durgin v. Graham*, 372 F.2d 130, 131 (5th Cir. 1967)). In *Durham*, we explained that "[t]he decided cases . . . have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Id.*

The district court did not abuse its broad discretion when it granted the government's motion for a voluntary dismissal without prejudice. Although the claimants opposed the motion in the district court as "contrary to law and a manifest injustice," they

identified no "substantial right" that they "would . . . lose . . . by the dismissal," *id.* At most, their protest that the district court should not "allow the government to abuse the federal forfeiture laws . . . and walk away as if nothing had happened" might liberally be construed as an argument that the litigation had continued too long for the government to be allowed to back out of it. But it is well settled that "delay alone, in the absence of bad faith, is insufficient to justify a dismissal with prejudice, even where a fully briefed summary judgment motion is pending," *Pontenberg*, 252 F.3d at 1259, and indeed even on the eve of trial, *see Durham*, 385 F.2d at 368-69. The district court found that nothing in the government's conduct evinced bad faith, and nothing in the record proves that the district court clearly erred in so finding.

Although the claimants argue that the government litigated in bad faith, their contention makes little sense. They argue that the government unreasonably delayed the litigation by failing to interplead the funds in the state action. But the two actions were of entirely different kinds: AnnChery sued Colorado and Kurvas Secret *in personam* for alleged civil torts under Florida law, and the government sued the funds *in rem* as subject to forfeiture for alleged violations of federal law. The success of AnnChery's suit *in personam* would—and ultimately did—result in Colorado and Kurvas Secret being personally liable to AnnChery with respect to the obligations and in the amounts imposed by the state judgment. By contrast, the success of the federal suit *in rem* would have "determine[d] the

Government's title to the property as against the whole world." *United States v. Certain Real & Pers. Prop. Belonging to Hayes*, 943 F.2d 1292, 1295 (11th Cir. 1991). AnnChery's *in personam* suit asserted no property interest in any of the funds because AnnChery had none to assert. Its property interest in the funds came into being only *after* it had secured a judgment of liability *in personam* against Colorado and Kurvas Secret and only after the state court had transferred their *in rem* interests in the funds to AnnChery in satisfaction of that personal judgment. Even then, the respective claims to the funds remained unsettled, and the government could have persevered in this forfeiture action to establish its "title . . . as against the whole world," *id.*

The government made clear that even if it prevailed in this forfeiture action, it intended to transfer the funds to AnnChery, so the district court reasonably concluded that the state judgment made the action "effectively . . . moot." The claimants argue that this conclusion was a legal error because the action was not "moot" in the jurisdictional sense of the word. But it is obvious from the record that the government never argued, and the district court never ruled, that the state judgment eliminated the *in rem* case or controversy. Instead, the district court reached the commonsense conclusion that it no longer mattered whether the government or the claimants had superior title to the funds because, either way, the money would end up with AnnChery.

The claimants contend that the dismissal without prejudice deprived them of their right to collect

attorney's fees upon "substantially prevail[ing]," 28 U.S.C. § 2465(b)(1), but the district court acted within its discretion to reject this argument as untimely. The claimants made no reference to attorney's fees in their opposition to the government's motion. They raised the issue for the first time only after the district court had entered an order granting the motion for voluntary dismissal without prejudice and administratively closing the case. District courts have the discretion not to consider belated arguments, *see, e.g.*, *Young v. City of Palm Bay*, 358 F.3d 859, 863-64 (11th Cir. 2004), and the district court did not abuse its discretion to do so in this case.

Even if we overlook the untimeliness of the claimants' argument, it does not entitle them to a dismissal with prejudice. The parties dispute whether the right to statutory attorney's fees is a "substantial right" the deprivation of which by a plaintiff's voluntary dismissal without prejudice constitutes "legal prejudice." We agree with the district court that "the facts of this case" do not require a definitive answer to this question. Even if we assume that a meritorious claimant's loss of a right to statutory attorney's fees constitutes legal prejudice, it cannot constitute *clear* legal prejudice unless it is in turn clear that the claimants would indeed "substantially prevail[]," 28 U.S.C. § 2465(b)(1), were the action litigated to judgment. *See United States v. $32,820.56*, 106 F. Supp. 3d 990, 997 (N.D. Iowa 2015) ("Finding plain legal prejudice on th[is] basis would necessarily presume that the party resisting voluntary dismissal would have prevailed on the merits if the

case continued to a conclusion."), *aff'd*, 838 F.3d 930 (8th Cir. 2016). And in this appeal, it is not clearly apparent from the record—nor have the claimants bothered to argue on appeal—that they ultimately would have prevailed, so the district court did not abuse its discretion in dismissing the complaint without prejudice.

The claimants also contend that, because the government had no intention of refiling the complaint, "there is no reason why the action should not have been dismissed *with prejudice,*" but this argument misses the mark. Dismissal without prejudice is the general rule, not the other way around. *See* Fed. R. Civ. P. 41(a)(2) ("Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."). And we have explained that a district court should depart from the general rule only when failing to do so would work "clear legal prejudice" to the opposing party. *McCants*, 781 F.2d at 856-57.

The claimants' one remaining argument is that the state judgment and levy provided no basis for the dismissal of the federal action with respect to Salgado's claim of ownership in the $15,070 found in her closet because Salgado was not a party to the state action and the state judgment affected none of her rights to the funds. But the claimants did not raise this argument in their one timely response to the government's motion for voluntary dismissal. Their untimely motion for dismissal with prejudice, filed after the government's motion had been granted, "raised" it only in an oblique fashion. And the claimants did not raise this argument

at all in their motion to alter or amend the order of dismissal. The district court did not abuse its discretion by ignoring an argument that was not squarely presented to it.

In any event, Salgado has not established that she suffered clear legal prejudice by the government's voluntary dismissal. She belabors the argument that the state judgment did not "moot" her claims in the jurisdictional sense of the word, but we have explained that this argument is beside the point. And she has established no more than the other claimants that she would have prevailed if the action had been fully litigated, so she was not clearly prejudiced by the loss of her potential claim for attorney's fees. The district court did not abuse its discretion when it granted the government's motion to dismiss this action without prejudice.

B. The Claimants Are Not Entitled to Attorney's Fees.

The claimants argue that they are entitled to attorney's fees on three grounds. First, assuming that the district court should have dismissed the action with prejudice, they contend that they would be entitled to statutory attorney's fees because they would have "substantially prevail[ed]," 28 U.S.C. § 2465(b)(1). Second, they contend that they have substantially prevailed even under the existing order of dismissal without prejudice because the government did not prevail on any of its claims for forfeiture. Third, the

claimants argue that the district court should have made the government responsible for their attorney's fees and costs as a condition of voluntary dismissal under Rule 41(a)(2).

The claimants' first argument fails because, as we have explained, the district court did not abuse its discretion by permitting the government to dismiss its complaint without prejudice, and their second and third arguments fare no better. We consider the latter arguments in turn.

The claimants have not substantially prevailed because a dismissal without prejudice places no "judicial *imprimatur*" on "the legal relationship of the parties," which is "the touchstone of the prevailing party inquiry." *CRST Van Expedited, Inc. v. Equal Emp't Opportunity Comm'n*, 136 S. Ct. 1642, 1646 (2016) (citations and internal quotation marks omitted); *see also Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 307 F.3d 1318, 1322 n.4 (11th Cir. 2002) (explaining that we interpret "substantially prevailed" fee-shifting statutes consistently with "prevailing party" fee-shifting statutes). A voluntary dismissal without prejudice "renders the proceedings a nullity and leaves the parties as if the action had never been brought." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (alterations adopted) (quoting *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996)). As the government points out, the order of dismissal poses "no legal bar precluding the government from refiling the same forfeiture action in the future." True, the government admits that, "as a practical matter, it might be difficult

for the government to pursue a subsequent civil forfeiture action against the defendant properties . . . because they may be difficult to bring back within the district court's *in rem* jurisdiction." But this practical difficulty is irrelevant. What matters is that the claimants have not obtained a "final judgment reject[ing] the [government's] claim" to the defendant funds. *CRST Van Expedited*, 136 S. Ct. at 1651; *cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (holding that "[a] defendant's voluntary change in conduct"—the mirror image of a plaintiff's voluntary decision to withdraw a claim—"lacks the necessary judicial *imprimatur*" to qualify the defendant as a prevailing party).

The claimants suggest that Salgado obtained a judicially sanctioned recognition of her right to the funds because the district court instructed "[t]he parties [to] distribute the funds pursuant to their Stipulation," but this argument is unpersuasive. The settlement stipulation embodied an agreement between AnnChery, Salgado, and the claimants' attorney concerning their rights to the funds *as to one another*, but it said nothing about *the United States'* right to the funds, which was the whole subject of this civil forfeiture action. *See Prop. Belonging to Hayes*, 943 F.2d at 1295. With or without the settlement stipulation, Salgado has not substantially prevailed because the government's claim of superior title to her share of the funds remains unadjudicated.

Finally, we agree with the government that the district court lacked the authority to make the government

responsible for the claimants' attorney's fees as a condition of dismissal under Rule 41(a)(2). Any provision of law that "renders the United States liable for attorney's fees for which it would not otherwise be liable . . . amounts to a partial waiver of sovereign immunity." *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 137 (1991). And "any waiver of the National Government's sovereign immunity must be unequivocal." *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *accord United States v. Mitchell*, 445 U.S. 535, 538 (1980). The general language of Rule 41(a)(2)—which provides only that the district court may impose "terms that [it] considers proper" on the grant of a motion for voluntary dismissal by leave of the court—is not an "unequivocal" waiver of the sovereign immunity of the United States. The claimants cite some nonprecedential decisions suggesting that Rule 41(a)(2) permits an award of fees against the government, but those decisions overlook the sovereign-immunity problem entirely. *See, e.g.*, *United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 955 (N.D. Ohio 2009) (assuming that a discretionary award of attorney's fees is possible under Rule 41(a)(2), but declining to grant it). And in any event, even if the district court had the authority to award fees, it was no abuse of its discretion not to do so. *See* 9 Charles Alan Wright et al., *Federal Practice and Procedure* § 2366 (3d ed. May 2019 update) ("The district judge is not obliged to order payment of the fee.").

IV. CONCLUSION

We **AFFIRM** the orders dismissing this action without prejudice and denying the claimants' motion for attorney's fees.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 18-10312

District Court Docket No.
1:15-cv-23616-DPG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

$70,670.00 IN U.S. CURRENCY, et al.,

Defendants,

KURVAS SECRET BY W,
WILSON COLORADO,
MILADIS SALGADO,

Interested Parties - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: July 08, 2019
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23616-GAYLES/TURNOFF

UNITED STATES OF AMERICA,

Plaintiff,

v.

$70,670 IN U.S. CURRENCY, *et al.*,

Defendants. /

ORDER

(Filed Jan. 3, 2018)

THIS CAUSE comes before the Court on Claimants' Motion to Alter or Amend Order Dismissing Case Entered on August 10, 2017 [ECF No. 139] and Claimants' Motion for Attorney Fees, Costs, and Interest [ECF No. 141]. The Court held a hearing on the motions on December 15, 2017. [ECF No. 165]. The Court has carefully reviewed the motions, the record, arguments of counsel, and the applicable law, and is otherwise fully advised. For the reasons that follow, the motions are denied.

I. BACKGROUND

In September 2015, the government filed its Complaint for Forfeiture *In Rem* [ECF No. 1], alleging that

over $200,000 in cash and cashier's checks were the proceeds of or traceable to drug trafficking, transportation of stolen goods in interstate commerce, and money laundering by Wilson Colorado ("Colorado"). [*Id.* at 6-7]. The assets were found and seized when law enforcement officers conducted a search of the home Colorado shared with Miladis Salgado ("Salgado"), his ex-wife. In November 2015, Colorado, Salgado, and a company owned by Colorado, Kurvas Secret by W, Inc. ("Kurvas Secret") (collectively, "Claimants"), entered verified claims for the assets. [ECF No. 22].

Meanwhile, AnnChery Fajas USA, Inc. ("AnnChery") —a company that employed an associate of Colorado's, Tatiana Alejandra Narvaez-Caicedo ("Narvaez-Caicedo") —filed an action in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, alleging that Colorado had aided a scheme to steal clothing from AnnChery. [ECF No. 110-3]. The stolen goods counts alleged in the federal forfeiture action are related to AnnChery's claims—in other words, AnnChery is the victim of some of the alleged crimes forming the basis of the federal forfeiture action. In November 2016, the state court entered judgment in favor of AnnChery and against Colorado and Kurvas Secret, but reserved ruling on the award of damages and attorney's fees. [ECF No. 110-8]. In April 2017, the state court awarded AnnChery $318,520.70 in damages and attorney's fees. [ECF No. 117-1]. In July 2017, the state court authorized AnnChery to levy on property of Colorado and Kurvas Secret, including its claims in this federal

forfeiture action, and assigned Colorado's rights in the Defendants *In Rem* to AnnChery. [ECF No. 134-1].

On March 27, 2017, Claimants moved for summary judgment. [ECF No. 108]. Four days later, the government filed its Motion for Summary Judgment on Second and Third Claims of the Verified Complaint, or in the Alternative, Motion for Leave to Dismiss Action Without Prejudice [ECF No. 110]. The government argued that in light of the state court action, there were no genuine issues of triable fact as to the second and third forfeiture counts relating to stolen property, but argued in the alternative that the Court should allow the government "to voluntarily dismiss this matter so that ownership of the Defendants *In Rem* can be resolved by the Miami-Dade Circuit Court." [*Id.* at 4]. The Court granted the motion in part, finding good cause to permit the government to voluntarily dismiss the action without prejudice in light of the parallel state court action. [ECF No. 133]. Only after the Court granted the government's motion, Claimants objected that the dismissal should be *with prejudice* so that they could seek statutory attorney's fees. [ECF No. 136]. The Court entered a final order of dismissal *without prejudice* on August 10, 2017. [ECF No. 138].

In the instant motions, Claimants seek (1) to alter the dismissal without prejudice to a dismissal with prejudice and (2) to be awarded attorney's fees in light of the dismissal with prejudice.

II. MOTION TO ALTER OR AMEND ORDER DISMISSING CASE

A. Legal Standard

Under Rule 41 of the Federal Rules of Civil Procedure, a plaintiff may unilaterally voluntarily dismiss an action only before the opposing party has served either an answer or a motion for summary judgment. *See* Fed. R. Civ. P. 41(a)(1). After the defendant has answered or moved for summary judgment, a plaintiff seeking to voluntarily dismiss her complaint must obtain a court order, which the court may issue "on terms that the court considers proper." *See id.* 41(a)(2). "Unless the order states otherwise, a dismissal under [Rule 41(a)(2)] is without prejudice." *Id*. "The purpose of Rule 41(a)(2) 'is primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.'" *Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015) (quoting *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 856 (11th Cir. 1986)).

In most circuits, the district courts must apply some variation of a multi-factor test to determine if voluntary dismissal under Rule 41(a)(2) should be permitted. *See* 9 FED. PRAC. & PROC. CIV. § 2364 (3d ed.), Westlaw (database updated April 2017). Unlike other circuits, however, "the Eleventh Circuit does not rely on a list of factors to examine when considering a Rule 41 motion." *Bradley v. MARTA*, 2014 WL 4449874, *1 (N.D. Ga. 2014). Instead, in the Eleventh Circuit, a "district court must 'weigh the relevant equities and do

justice between the parties in each case, imposing such costs and attaching such conditions to the dismissal as are deemed appropriate.'" *Pontenberg v. Bos. Sci. Corp.*, 252 F.3d 1253, 1256 (11th Cir. 2001) (quoting *McCants*, 781 F.2d at 857).

Thus, "[t]he district court enjoys broad discretion in determining whether to allow a voluntary dismissal under Rule 41(a)(2)." *Pontenberg*, 252 F.3d at 1255. "Generally speaking, a motion for voluntary dismissal should be granted unless the defendant will suffer clear legal prejudice other than the mere prospect of a second lawsuit." *Arias*, 776 F.3d at 1268.

B. Discussion

Claimants point out that although no set list of factors must be weighed, in determining whether legal prejudice precludes a Rule 41 dismissal without prejudice, courts in this circuit have frequently considered "the length of time and amount of resources spent by the defendant in litigating the case, dilatory tactics by the plaintiff, and whether the defendant had a motion for summary judgment pending when the dismissal was requested." *Jones v. Smartvideo Techs.*, No. 06-cv-2760, 2007 WL 1655855, *3 (N.D. Ga. 2007). Here, Claimants argue that the duration of the litigation and their pending dispositive motion at the time the government requested dismissal weigh against voluntary dismissal without prejudice. They further argue that loss of a basis for statutory attorney's fees constitutes plain legal prejudice.

It is true that the government's request for voluntary dismissal in the instant action came after eighteen months of litigation. But while the duration of the litigation may be relevant to determine whether the balance of equities makes voluntary dismissal without prejudice appropriate, it is not dispositive. *See Pontenberg*, 252 F.3d at 1256 ("Neither the fact that the litigation has proceeded to the summary judgment stage nor the fact that the plaintiff's attorney has been negligent in prosecuting the case, alone or together, conclusively or per se establishes plain legal prejudice requiring the denial of a motion to dismiss."). Here, the voluntary dismissal also came after the alleged victim of the fraud underlying one of the bases for forfeiture prevailed in a private civil suit in state court. The government then sought either summary judgment or voluntary dismissal without prejudice to allow the funds to be distributed to the alleged victim. So while Claimants indeed had a motion for summary judgment pending at the time of dismissal, so too did the government. Nothing suggests to the Court that the government acted in bad faith or that the government did not believe it had a meritorious case for forfeiture. Rather, it determined that in light of the state court judgment and AnnChery's claim to the assets, voluntary dismissal without prejudice would be an adequate alternate resolution. In the interests of justice and to limit waste of both judicial resources and the resources of the parties, this Court found voluntary dismissal without prejudice to be the appropriate resolution of the instant action.

The cases Claimants rely on are inapposite. In *United States v. Certain Real Property*, 543 F. Supp. 2d 1291 (N.D. Ala. 2008), for instance, the district court found a dismissal with prejudice appropriate where the claimant had been acquitted of the alleged offense that formed the basis for the forfeiture action. *Id.* at 1292. The facts here are readily distinguishable. Although the government did not ultimately indict Mr. Colorado for offenses relating to the bases for forfeiture, he was found liable to the alleged victim in a related state court action.

Further, here, as in other cases upheld by the Eleventh Circuit, the Court imposed "curative conditions" on the voluntary dismissal. *See, e.g.*, *Pontenberg*, 252 F.3d at 1256 ("Although the district court found dismissal appropriate, it ordered that the court 'should assess costs against Plaintiff pursuant to Fed.R.Civ.P. 41(d)' if Pontenberg re-files her action against Boston Scientific."). The Court's Order Dismissing Case [ECF No. 138] mandated that if the government refiles the case, Claimants will then be entitled to costs expended in defending this dismissed action. The Court believes that under the unique circumstances here, this condition was all that was necessary to do justice among the parties.

Finally, Claimants argue that a dismissal without prejudice here plainly prejudices Claimants because it prevents them from obtaining statutory attorney's fees pursuant to the Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. § 2465(b)(1) (2012) ("CAFRA"). First, this argument is untimely. Claimants did not raise the

issue of attorney's fees in response to the government's motion. Rather, they raised the issue for the first time only after the Court had granted the motion for voluntary dismissal without prejudice. Thus, the Court finds that Claimants waived this argument and that reconsideration on this basis is inappropriate.[1] But even absent waiver, the Eleventh Circuit has not addressed whether loss of an argument for attorney's fees pursuant to CAFRA constitutes legal prejudice that should preclude voluntary dismissal without prejudice, and the Court does not believe that the facts of this case warrant that determination. Nothing before the Court indicates bad faith on the part of the government. Here, the government determined that it was willing to forego trial on what it believed to be a meritorious forfeiture complaint in light of the alleged victim's state court judgment.

For the foregoing reasons, the Court determines that its dismissal without prejudice pursuant to Rule 41(a)(2) was appropriate given the equities in this case, and therefore declines to alter or amend its Order.

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[1] *See United States v. $32,820.56 in U.S. Currency*, 106 F. Supp. 3d 990, 996-97 (N.D. Iowa 2015) ("In resisting the Government's motion to dismiss without prejudice, the Claimants did not argue that they would suffer legal prejudice in the form of a denial of fees under CAFRA. . . . If the Claimants would have raised this issue in response to the Government's motion to dismiss, it could have been fully briefed and argued at that time. Unfortunately, that did not happen and the case has been dismissed without prejudice. . . . I find that the Claimants waived this argument and that reconsideration is therefore not appropriate.").

III. MOTION FOR ATTORNEY'S FEES

Pursuant to 28 U.S.C. § 2465(b)(1), a claimant who "substantially prevails" in a civil forfeiture action is entitled to collect from the United States "reasonable attorney fees and other litigation costs reasonably incurred by the claimant," together with statutory post-judgment interest. The parties agree that CAFRA's "substantially prevails" standard is equivalent to a "prevailing party" standard. Thus, a dismissal without prejudice cannot trigger the statutory entitlement because such a dismissal lacks the necessary "material alteration of the legal relationship of the parties" with a corresponding "judicial imprimatur on the *change.*" *Buckhannon Bd. & Home Care, Inc. v. W. Va. Dept. of Health & Hum. Servs.*, 532 U.S. 598, 604-05 (2001) (quoting *Tex. State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)). Having determined that a voluntary dismissal without prejudice was appropriate given the equities in the instant matter, the Court finds no basis on which to award statutory attorney's fees.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Claimants' Motion to Alter or Amend Order Dismissing Case Entered on August 10, 2017 [ECF No. 139] is **DENIED**; and

2. Claimants' Motion for Attorney Fees, Costs, and Interest [ECF No. 141] is **DENIED**. **DONE**

AND ORDERED in Chambers at Miami, Florida, this 3rd day of January, 2018.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23616-GAYLES/TURNOFF

UNITED STATES OF AMERICA,

Plaintiff,

v.

$70,670 IN U.S. CURRENCY, *et al.*,

Defendants. /

ORDER REGARDING RELEASE OF DEFENDANTS *IN REM*

(Filed Dec. 19, 2017)

WHEREAS, on July 31, 2017, the Court entered an Endorsed Order [ECF No. 133], finding good cause to permit the United States to voluntarily dismiss the above-captioned action and granting, in part, the United States' motion for summary judgment or for leave to dismiss the action without prejudice [ECF No. 110];

WHEREAS, on August 10, 2017, the Court entered an Order Dismissing Case [ECF No. 138], which dismissed the above-captioned action without prejudice and denied as moot all other pending motions [ECF No. 138];

WHEREAS, on or about November 6, 2017, AnnChery, Berrio & Berrio P.A., and Salgado, reached a Stipulation for Settlement in Forfeiture Action [ECF No. 155], memorializing their agreement regarding the release of Defendants *In Rem* from the custody of the United States; and

WHEREAS, the Debt Collection Improvement Act of 1996, as codified at 31 U.S.C. § 3716 and administered through the Treasury Offset Program ("TOP"), requires the United States Treasury to offset federal payments to collect certain delinquent debts owed by a payee to the United States, a United States agency, or a state, including delinquent child-support obligations enforced by the states;

It is **ORDERED** that:

1. The U.S. Marshals Service, or any duly authorized law enforcement official, is authorized and directed to release the Defendants *In Rem*, which total $202,299.59 in U.S. currency in value, in the following manner:

   a. The sum of **$128,920.61** in U.S. currency (plus proportionately accrued interest and less the amount of any delinquent debt that the United States Treasury is required to collect through the Treasury Offset Program) shall be released to **Salazar Law's Trust Account**, c/o Luis Salazar, Esq., Salazar Law, 2000 Ponce de Leon Boulevard, Penthouse Suite, Coral Gables, Florida 33134 ("Salazar Law"); and

b. The sum of **$73,378.98** in U.S. currency (plus proportionately accrued interest and less the amount of any delinquent debt that the United States Treasury is required to collect through the Treasury Offset Program) shall be released to **Berrio & Berrio, P.A.'s Trust Account**, c/o Juan D. Berrio, Berrio & Berrio, P.A., 2333 Brickell Avenue, Suite A-1, Miami, Florida 33129 ("Berrio Berrio P.A.");

2. Salazar Law and Berrio & Berrio, P.A. shall each provide the requisite documentation to process the transfer of funds, including a completed United States Department of Justice's Unified Financial Management System ("UFMS") Vendor Request Form.

3. The parties shall then distribute the funds pursuant to their Stipulation for Settlement in Forfeiture Action [ECF No. 155].

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of December, 2017.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23616-GAYLES/TURNOFF

UNITED STATES OF AMERICA,

Plaintiff,

vs.

$70,670 IN U.S. CURRENCY, $101,629.59 IN U.S. CURRENCY SEIZED FROM WELLS FARGO BANK CASHIER'S CHECK NO. 6648201039, AND $30,000.00 IN U.S. CURRENCY SEIZED FROM CHASE BANK CASHIER'S CHECK NO. 1178710368,

Defendants *In Rem*. /

STIPULATION FOR SETTLEMENT IN FORFEITURE ACTION

(Filed Nov. 6, 2017)

THIS STIPULATION is made and entered into by and among (i) Miladis Salgado ("**Salgado**"); (ii) Juan D. Berrio and the law firm of Berrio & Berrio, P.A. (together, the "**Berrio Firm**"); and (iii) AnnChery Fajas USA, Inc. ("**AnnChery**"). Salgado, the Berrio Firm, and AnnChery are each referred to as "Party" or collectively referred to as the "Parties."

RECITALS

WHEREAS, on April 28, 2015, AnnChery commenced a civil action to obtain an emergency injunction and other relief against defendants, Wilson Colorado ("**Colorado**"), Kurvas Secret By W, Inc. ("**Kurvas Secret**") (together, the "**Colorado Entities**"), Tatiana Alejandra Narvaez-Caicedo, Wilmer Ocampo, and Wilmer Ocampo Investments Corp. (the "**State Court Action**"),[1] arising from an alleged scheme to defraud AnnChery and to steal thousands of AnnChery's high-quality luxury garments, including, among other things, waist trainers, waist cinchers, hourglass body shapers, powernet body girdles, designer fajas, and other merchandise. AnnChery ultimately filed its Second Amended Complaint on September 3, 2015 asserting multiple claims against defendants for (i) Injunctive Relief (as to all defendants); (ii) Breach of Fiduciary Duty (as to defendant Narvaez-Caicedo); (iii) Aiding and Abetting Breach of Fiduciary Duty (as to defendants Colorado and Ocampo); (iv) Civil Conspiracy (as to all defendants); (v) Constructive Fraud (as to all defendants); (vi) Conversion (as to all defendants); (vii) Tortious Interference with Business Relationship (as to all defendants); (viii) Violation of Florida Deceptive and Unfair Trade Practice Act (as to all defendants); and (ix) Unjust Enrichment (as to all defendants);

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[1] **State Court Action.** AnnChery Fajas USA, Inc. filed a civil action in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida styled *AnnChery Fajas USA, Inc. v. Tatiana Alejandra Narvaez-Caicedo, et al.*, Case No. 2015-009539-CA-05.

WHEREAS, on or about September 28, 2015, the United States of America filed its *Verified Complaint for Forfeiture In Rem* (the "**Forfeiture Action**"), alleging, among other things, that cash and cashier's checks seized from the residence of Salgado (totaling $202,299.59) are subject to forfeiture, pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. §§ 981(a)(1)(C), (A), calculated as follows:

a. $70,670.00 in U.S. currency seized on or about May 11, 2015, in Miami, Florida ("**Defendant Cash**");

b. $101,629.59 in U.S. currency seized on or about May 13, 2015, from Wells Fargo Bank Cashier's Check No. 6648201039, made payable to Wilson Colorado and dated April 25, 2015 ("**Defendant Wells Fargo Cashier's Check**"); and

c. $30,000.00 in U.S. currency seized on or about May 13, 2015, from Chase Bank Cashier's Check No. 1178710368, made payable to Wilson Colorado and dated April 25, 2015 ("Defendant **Chase Cashier's Check**").

(collectively, the "**Defendant Currency**").

WHEREAS, the Colorado Entities claim an ownership and possessory interest in the Defendant Currency as evidenced by the Verified Claims dated November 3, 2015 and Amended Verified Claims dated February 3, 2016 filed in the Forfeiture Action;

WHEREAS, Miladis Salgado, Colorado's former spouse, claims a possessory and/or ownership interest in all of the Defendant Currency but in the interest of resolving this matter without the need for further litigation hereby limits her claims to a portion of the Defendant Cash (or **$15,070.00**), as evidenced by the Verified Claim dated November 3, 2015 and Amended Verified Claim dated February 3, 2016 filed in the Forfeiture Action;

WHEREAS, on April 24, 2017, a Final Judgment in the amount of **$318,520.70** (plus interest at the rate prescribed by law) was entered in favor of AnnChery and against the Colorado Entities in the State Court Action;

WHEREAS, on July 13, 2017, an Order Invoking Proceedings Supplementary was issued in the State Court Action and authorized AnnChery to levy on property of the Colorado Entities subject to execution of the Final Judgment, and found that such property includes the Colorado Entities' claims to and interests in the Defendant Currency at issue in the Forfeiture Action. The Order Invoking Proceedings Supplementary further provides that any and all rights, title, claims, or interests of any kind of the Colorado Entities in the seized cash and cashier's checks vested in AnnChery and deemed assigned and transferred to AnnChery, effective immediately;

WHEREAS, on September 1, 2017, the Colorado Entities and Salgado along with their counsel Juan D. Berrio, Esq. of the law firm of Berrio & Berrio, P.A. filed

their Motion to Alter or Amend Order Dismissing Case Entered on August 10, 2017, and Request for Fifteen (15) Minute Hearing [ECF No. 139], Motion for Return of Property [ECF No. 140], and Motion for Attorney Fees, Costs, and Interest [ECF No. 141] in the Forfeiture Action;

WHEREAS, the Parties desire to avoid the further costs, burdens, or distractions associated with litigating the rights, title, claims, and interests in the Defendant Currency being held by the United States and in order to avoid the cost and uncertainties of litigation, the Parties desire to settle the claims asserted as to the Defendant Currency; and

WHEREAS, the Parties agree that AnnChery shall be entitled to enforce the Final Judgment entered in the State Court Action by execution, garnishment, or other appropriate process or proceeding as permitted under applicable law to satisfy any portion of the Final Judgment that remains unpaid after application of the Defendant Currency to be disbursed to AnnChery under this Stipulation.

NOW, THEREFORE, in consideration of the foregoing facts and the terms, agreements, representations, and covenants set forth herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

TERMS AND CONDITIONS

1. **Incorporation of Recitals.** The Recitals and prefatory phrases and paragraphs set forth above are hereby incorporated in full and made a part of this Stipulation.

2. **Effective Date.** This Stipulation shall become effective as of the date when the last signature is placed on this Stipulation, subject to entry of an Order in the Forfeiture Action approving the Stipulation.

3. **Allocation and Distribution of Defendant Currency.** The Parties stipulate to the entry of an Order in the Forfeiture Action as to the allocation and distribution of the Defendant Currency in the sum of $202,299.59, being held by the United States, on the following terms and conditions:

   a. **Miladis Salgado:** $10,387.92 plus any and all proportionately accrued interest from May 11, 2015.

   b. **AnnChery Fajas USA, Inc.:** $128,920.61 plus any and all proportionately accrued interest from May 11, 2015.

   c. **Berrio & Berrio, P.A. Trust Account:** $62,991.06 plus any and all proportionately accrued interest from May 11, 2015. This amount includes $2,301.18 in out-of-pocket costs incurred by the Berrio Firm.

4. **First Disbursement.** Payments to be made to Salgado and AnnChery in accordance with paragraph 3(a) and 3(b) above shall be delivered to their

respective counsel at the addresses set forth below in paragraph 11 immediately upon entry of an Order in the Forfeiture Action approving this Stipulation. Payment to be made to BERRIO & BERRIO, P.A. TRUST ACCOUNT in accordance with paragraph 3(c) above shall be delivered to BERRIO & BERRIO, P.A. to be held in escrow pending resolution of the Motion to Amend Order of Dismissal [ECF No. 139], Motion for Return of Property [ECF No. 140], and Motion for Attorney Fees, Costs, and Interest [ECF No. 141] filed by the Colorado Entities, Salgado, and the Berrio Firm in the Forfeiture Action.

5. **Second Disbursement.** In the event that the Colorado Entities, Salgado, and the Berrio Firm ***prevail*** on their Motion for Attorney Fees, Costs, and Interest [ECF No. 141], Salgado and the Berrio Firm agree that they *shall waive any claims of entitlement* to receive any portion of the $58,308.98 from the Defendant Currency held in the BERRIO & BERRIO, P.A. TRUST ACCOUNT in accordance with paragraph 3(c). In such event, the funds held in escrow by BERRIO & BERRIO, P.A. in an amount of $58,308.98 plus any accrued interest shall be disbursed to AnnChery upon entry of an Order in the Forfeiture Action on the Motion [ECF No. 141] and the expiration of all applicable appeal time periods for the Motions [ECF No. 139], [ECF No. 140], and [ECF No. 141]. The remaining funds held in escrow by BERRIO & BERRIO, P.A. in an amount of $4,682.08 plus any accrued interest shall be disbursed to Salgado upon entry of an Order in the Forfeiture Action on the Motion [ECF No. 141] and the

expiration of all applicable appeal time periods for the Motions [ECF No. 139], [ECF No. 140], and [ECF No. 141]. In the event that the Colorado Entities, Salgado, and the Berrio Firm ***do not prevail*** on their Motion [ECF No. 141] in an amount that is at least equal to 30% of the Defendant Currency (or equal to or greater than $60,689.88), AnnChery agrees that it *shall waive any claims of entitlement* to receive any funds held in escrow by BERRIO & BERRIO, P.A. In such event, the funds held in escrow by BERRIO & BERRIO, P.A. in the amount of $62,991.06 plus accrued interest shall be disbursed to the Berrio Firm upon entry of an Order in the Forfeiture Action on the Motion [ECF No. 141] and the expiration of all applicable appeal time periods for the Motions [ECF No. 139], [ECF No. 140], and [ECF No. 141].

6. **Escrow Account.** The Parties agree that payment to be made to BERRIO & BERRIO, P.A. TRUST ACCOUNT in accordance with paragraph 3(c) above shall be delivered to BERRIO & BERRIO, P.A. to be held in escrow pending resolution of the Motion to Amend Order of Dismissal [ECF No. 139], Motion for Return of Property [ECF No. 140], and Motion for Attorney Fees, Costs, and Interest [ECF No. 141] filed by the Colorado Entities, Salgado, and the Berrio Firm in the Forfeiture Action. The Berrio Firm shall, upon request of any party to this Agreement, furnish to such party and counsel statements of transactions regarding the portion of the Defendant Currency held in trust, pursuant to paragraph 3(c) above, and include

an acknowledgement as to the accuracy of the reporting contained therein.

7. **Release of AnnChery.** Except as otherwise set forth herein, Salgado and the Berrio Firm on behalf of themselves and on behalf of their respective present, former, and future agents, affiliates, accountants, attorneys, directors, employees, officers, parents, predecessors, principals, representatives, shareholders, subsidiaries, heirs, and successors and assigns (the "**Releasors**"), release and forever discharge AnnChery and its present, former, and future agents, affiliates, accountants, attorneys, directors, employees, officers, parents, predecessors, principals, representatives, shareholders, subsidiaries, and successors and assigns (the "**Releasees**") from any and all actions, causes, claims, demands, proceedings, or suits of any kind whatsoever, in law or in equity, for damages or any other relief, monetary or otherwise, whether known or unknown, direct or indirect, asserted or unasserted, contingent, absolute, or matured, that the Releasors ever had, now have, or may ever claim to have against the Releasees, relating to or arising from the Defendant Currency, the Forfeiture Action, or the State Court Action; *provided*, that nothing contained herein shall be deemed or construed to be a release or discharge by the Releasors of any action, cause, claim, demand, proceeding, or suit with respect to the obligations and liabilities of the Releasees under this Stipulation.

8. **Release of Salgado and the Berrio Firm.** Except as otherwise set forth herein, AnnChery and its present, former, and future agents, affiliates, accountants,

attorneys, directors, employees, officers, parents, predecessors, principals, representatives, shareholders, subsidiaries, and successors and assigns (the "**Releasors**"), release and forever discharge Salgado and the Berrio Firm and their respective present, former, and future agents, affiliates, accountants, attorneys, directors, employees, officers, parents, predecessors, principals, representatives, shareholders, subsidiaries, and successors and assigns (the "**Releasees**") from any and all actions, causes, claims, demands, proceedings, or suits of any kind whatsoever, in law or in equity, for damages or any other relief; monetary or otherwise, whether known or unknown, direct or indirect, asserted or unasserted, contingent, absolute, or matured, that the Releasors ever had, now have, or may ever claim to have against the Releasees, relating to or arising from the Defendant Currency or the Forfeiture Action; *provided*, that nothing contained herein shall be deemed or construed to be a release or discharge by the Releasors of any action, cause, claim, demand, proceeding, or suit with respect to the obligations and liabilities of the Releasees under this Stipulation.

9. **Enforcement of Final Judgment in State Court Action.** Except as expressly set forth herein (i) nothing contained in this Stipulation nor in any of SALAZAR LAW's discussion with representatives or agents of the Colorado Entities before or after the date hereof shall be a waiver, limitation, or release of any rights or remedies available to AnnChery with respect to enforcement of the Final Judgment entered in favor of AnnChery in the State Court Action to satisfy any

portion of the Final Judgment that remains unpaid after application of funds received by AnnChery in accordance with this Stipulation (*all of which rights and remedies are expressly reserved*); (ii) nothing contained in this Stipulation nor in any of SALAZAR LAW's discussions with representatives or agents of the Colorado Entities either before or after the date hereof shall constitute an agreement to adjourn, delay, or refrain from any action to enforce the Final Judgment entered in the State Court Action by execution, garnishment, or other appropriate process or proceeding as permitted under applicable law.

10. **Covenant of Further Assurances.** The Parties covenant and agree to execute and deliver such other and further documents and instruments as may be reasonably necessary, required, or requested by the other Party or the United States to obtain approval of or to implement the terms of this Stipulation.

11. **Notices.** Any and all notices or other communications required or permitted to be given under any of the provisions of this Stipulation shall be delivered by first class U.S. mail, postage prepaid, and electronic mail as follows:

If to AnnChery Fajas USA, Inc.:
Luis Salazar, Esq.
SALAZAR LAW
2000 Ponce de Leon Boulevard
Penthouse Suite
Coral Gables, Florida 33134
Telephone: (305) 374-4848
Facsimile: (305) 397-1021
Email: Luis@Salazar.Law

If to Wilson Colorado, Kurvas Secret By W, Inc., Miladis Salgado, and/or the Berrio Firm:
Juan D. Berrio, Esq.
BERRIO & BERRIO, P.A.
2333 Brickell Avenue, Suite A-1
Miami, Florida 33129
Telephone: (305)358-0940
Facsimile: (305)359-9844
Email: jdberrio@hotmail.com

12. **Entire Agreement.** This Stipulation constitutes the entire agreement of the Parties as to the subject matter addressed herein. Each Party represents that they have full power and authority to execute and deliver this Stipulation, to incur and perform the obligations provided for herein, and to compromise the claims or potential claims referred to herein. The Parties acknowledge that there are no communications or oral understandings contrary, different, or that in any away restrict this Stipulation, and that all prior agreements or understandings within the scope of the subject matter of this Stipulation are, upon the execution and delivery of this Stipulation, superseded, null, and void. In the event any dispute arises among the Parties as to the interpretation of this Stipulation, all Parties shall be considered collectively to be the drafter of this Stipulation and any rule of construction to the effect that ambiguities are to be resolved against the drafter shall be inapplicable.

13. **Waiver of Conditions.** To the extent that they are not otherwise required by law, any or all of the conditions for making this Stipulation effective may be

waived by written agreement of the Parties; provided, however, that the agreement to waive any condition or to waive a condition in any particular instance shall not be construed as an agreement to waive any other condition or to waive a condition in any other instance.

14. **Attorneys' Fees and Costs.** The Parties and their respective counsel acknowledge and agree that each Party shall bear their own costs, expenses, and attorneys' fees arising out of, or connected with, or related to their respective prosecution or defense of claims as to the Defendant Currency, as well as those costs, expenses, and attorneys' fees incurred in connection with negotiating the terms of this Stipulation, drafting, revising, and finalizing this Stipulation, and obtaining court approval of this Stipulation. Notwithstanding the foregoing, nothing contained in this Stipulation is or shall be construed as a waiver, limitation, or release of the rights of the Colorado Entities, Salgado or the Berrio Firm to recover attorney fees and costs in this Forfeiture Action from the United States Government including attorneys' fees and costs incurred in negotiating this Stipulation. In any enforcement action relating to this Stipulation, the prevailing party shall be entitled to recover from the non-prevailing party its reasonable costs, reasonable expenses, and reasonable attorneys' fees.

15. **Jurisdiction and Governing Law.** The Parties agree that any dispute regarding the interpretation, effectuation, and enforcement of the terms and conditions set forth in this Stipulation shall be adjudicated in a court of competent jurisdiction in

Miami-Dade, Florida. The Parties further agree that this Court has jurisdiction to dispose of their respective claims to the Defendant Currency, approve this Stipulation, and that jurisdiction will remain vested in this Court to enforce the terms of this Stipulation should it be deemed necessary..

16. **Binding Effect.** This Stipulation shall be binding upon and inure to the benefit of the parties and their respective heirs, successors, assigns, and personal representatives.

17. **No Assignment.** The Parties expressly represent and warrant that they have not assigned to any third party any claims being released pursuant to this Stipulation.

18. **Modifications, Amendments, and Waiver.** No waiver, modification, or amendment of the terms of this Stipulation shall be valid or binding unless made in writing, signed by the Parties, and then only to the extent as set forth in such written waiver, modification, or amendment.

19. **Division, Headings, and Counterparts.** The division of this Stipulation into sections and subsections and the use of captions and headings in connection therewith are solely for convenience and shall have no legal effect in construing the provisions of this Stipulation. This Stipulation may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. The exchange of a fully executed Stipulation (in counterparts or otherwise) by

facsimile or by electronic delivery in PDF format shall be sufficient to bind the parties to the terms and conditions of this Stipulation, subject to entry of an Order in the Forfeiture Action approving this Stipulation.

20. **Parties.** This Stipulation is intended to confer rights and benefits only on the Parties to this Agreement. No entity, person, nor the United States of America shall have any legally enforceable rights under this agreement or by reason of its existence. Specifically, this Stipulation is not and shall not be interpreted or construed as creating any rights or benefits in the United States Government and the United States Government is not an intended beneficiary in any way to this Stipulation.

Dated: November 3, 2017 **ANNCHERY FAJAS USA, INC.**

/s/ Angelica M Riveros
By: Angelica Maria Riveros
Its: President and Authorized Representative

Dated: November 3, 2017

/s/ Miladis Salgado
Miladis Salgado,
individually

Dated: November 3, 2017 **BERRIO & BERRIO, P.A.**

/s/ Juan D. Berrio
By: Juan D. Berrio
Its: Partner and Authorized Representative

Dated: November 6, 2017

SALAZAR LAW

By: /s/ Luis Salazar
Luis Salazar
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Dated: November 3, 2017

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-23616-GAYLES

UNITED STATES OF AMERICA,
Plaintiff,

v.

$70,670 IN U.S. CURRENCY, et al.,
Defendants *in rem*. /

WILSON COLORADO, KURVAS SECRET BY W, and MILADIS SALGADO
Claimants. /

ORDER DISMISSING CASE

(Filed Aug. 10, 2017)

THIS CAUSE comes before the Court on the United States of America's Motion for Summary Judgment on Second and Third Claims of the Verified Complaint, or in the Alternative, Motion for Leave to Dismiss Action Without Prejudice [ECF No. 110] and the United States' Notice of Filing Proposed Final Order of Dismissal [ECF No. 134]. Being fully advised, the Court makes the following findings:

1. On or about March 31, 2017, the Government requested that the Court grant summary judgment

against Claimants Wilson Colorado, Kurvas Secret by W, and Miladis Salgado, or in the alternative, for leave to voluntarily dismiss the above-captioned action without prejudice so that ownership of the Defendants *In Rem* can be resolved by Eleventh Judicial Circuit in and for Miami-Dade County ("Miami-Dade Circuit Court"). *See* [ECF No. 110 at 3-4, 21-22]. As set forth in the Government's Motion, the Miami-Dade Circuit Court has entered decisions in a parallel state action, *AnnChery Fajas USA Inc. v. Narvaez-Caicedo*, No. 2015-9539 CA 01 (Eleventh Judicial Circuit, Miami-Dade County), which effectively render the outcome of this action moot. [*See* ECF No. 110 at 2].

2. The Court deems the Government's Motion to be a motion to voluntarily dismiss this action under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Pursuant to Rule 41(a)(2), "an action may be dismissed by the plaintiffs request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

3. On July 31, 2017, the Court entered an Endorsed Order which granted, in part, the Government's Motion, and found "good cause to permit the United States to voluntarily dismiss this action without prejudice based on the parallel state action." [ECF No. 133]. The Court further ordered that this action be closed administratively. [*Id.*]

Accordingly, it is **ORDERED AND ADJUDGED** that

Plaintiff United States of America's Motion for Summary Judgment on Second and Third Claims of

the Verified Complaint, or in the alternative, Motion for Leave to Dismiss Action Without Prejudice [ECF No. 110] is **GRANTED** in part. This action is **DISMISSED WITHOUT PREJUDICE**, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

Should the United States re-file this action, the Court will award costs to the Claimants pursuant to Rule 41(d) of the Federal Rules of Civil Procedure.

All other pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2017.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15 V 23616 DPG

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

$70,670 IN U.S. CURRENCY,
$101,629.59 IN U.S. CURRENCY SEIZED FROM
WELLS FARGO BANK CASHIER'S CHECK NO. 6648201039,
AND $30,000 IN U.S. CURRENCY SEIZED FROM
CHASE
BANK CASHIER'S
CHECK NO. 117810368,

Defendants *In Rem*.
/

2333 Brickell Avenue
Suite A-1
Miami, Florida 33129
Tuesday, September 27, 2016
1:20 p.m. – 3:53 p.m.

DEPOSITION

of

JOSE MANTILIA

Taken by the Defendants before ZOILI ALONSO, Court Reporter in and for the State of Florida at Large, pursuant to Notice of Taking Deposition issued herein.

APPEARANCES

UNITED STATES ATTORNEY'S OFFICE
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ASSISTANT UNITED STATES ATTORNEY
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On behalf of Plaintiff.

BERRIO & BERRIO, P.A.
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Miami, Florida 33129
On behalf of Defendants.

* * *

[76] Q Do you have – have you identified any transaction, drug transaction, that generated the $55,000, the $55,000 that were recovered in this case?

A No.

Q How about the two cashier's checks. Have you identified any drug transaction where those – that generated those two cashier's checks?

A No.

Q Have you identified or associated Wilson Colorado with any Mexican cartel?

A No.

Q Have you found any evidence showing that Wilson Colorado moved $450,000 from drug proceeds from Spain to Miami?

A No.

Q Have you located any additional stash houses, in the South Florida area, where Wilson Colorado is said to store bulk cash or cocaine?

A No.

Q Drug money?

A No.

Q Have you identified any stash house location where Wilson Colorado is said to maintain bulk cash or drugs, in the South Florida area?

[77] A No.

Q Have you identified any money laundering transaction where the seized cash was involved in?

A No.

Q How about any money laundering transaction where the two cashier's checks were involved in, or derived from?

A No.

Q No money laundering transaction that you can identify these cashier's checks from?

A I have not.

Q Have you identified any merchandise stolen by Claimant Colorado or Kurvas Secret by W, from Ann Cherry, like any merchandise that he stole from there?

A I'm sorry?

Q Identified or located?

A I haven't.

Q Have you identified any merchandise that Claimant Colorado and Kurvas Secret by W obtained through theft, from Ann Cherry?

A No.

Q Have you identified any merchandise that they obtained through fraud from Ann Cherry?

A I have not identified.

* * *

[90] A Yes.

Q When?

A I don't remember the exact date. But it was at the U.S. Attorney's Office.

Q Was that before or after she gave her deposition?

A That was the deposition.

Q That was at the deposition?

A Yes, sir.

Q So aside from that deposition you haven't conducted any interviews or other meetings with her?

A Correct.

Q Have you conducted any surveillance, during the past year and a half on Wilson Colorado?

A No, sir.

Q Do you have any reason to believe that William Colorado is a narcotics trafficker, who works out of Spain; any evidence that would identify Wilson Colorado as a narcotics trafficker out of Spain?

A No.

Q Any evidence that Wilson Colorado is a money launderer for the Mexican cartel?

A No.

Q Any evidence that Wilson Colorado is a [91] thief that stole merchandise from Ann Cherry?

A If I have any evidence – I don't have any evidence that he stole anything.

Q Do you have any evidence that Wilson Colorado defrauded Ann Cherry, in any way?

A I don't have any evidence.

Q Have you looked at all the documentation provided by Wilson Colorado to show where his monies – where he says his monies originated from, the monies that were seized?

A I have looked at some financial documents. I have looked at spreadsheets.

Q Does it seen that money came from selling girdles and waist cinchers, and things of that nature?

A I'm sorry?

Q Does it look like the cashier's checks derive from selling this product that he says he sells, through Kurvas Secret by W?

A I'm not a financial expert.

Q Do you have any evidence that, that money does not derive from the sale of merchandise through Kurvas Secret by W, evidence that, that money does not come from what he says it comes from, which is the sale of merchandise through Kurvas Secret?

[92] A No.

Q So everything seems to indicate that those monies came from his business, Kurvas Secret by W?

A It's hard to say, at this point.

Q Are you satisfied that the money did not come drug dealing, by Wilson Colorado, the money that was seized from his home and the cashier's checks?

A At this point I don't have any evidence.

Q That it comes from drug dealing or money laundering or theft?

A That it comes from drug dealing.

Q You don't have any evidence that it comes from money laundering?

A No.

Q And you don't have any evidence that it canes from his theft from Ann Cherry?

A We have received evidence that there is theft from Ann Cherry. But like I said, I don't – I don't know specifically what transactions match up with which. I'm still reviewing that.

Q But you don't know if the theft was by Wilson Colorado?

A I don't know who stole the products.

* * *

JUNE 1, 2016

Cashing In? Small business owner out $200K after DEA raid

Craig Stevens | Robin Cross

WSVN – Forty-two years ago, Florida lawmakers passed a law intended to punish drug dealers and crooks by taking away their assets. In a few weeks, that law is being overhauled . . . after many people started to ask who has been policing the police. Craig Stevens takes a look in the special report "Cashing In?"

May 11th, 2015 was a quiet, sunny morning. Wilson Colorado's 14-year-old daughter was at the kitchen table doing homework. He was at the computer filling out customer orders for his thriving business.

There was a knock at the front door.

Wilson Colorado, small business owner: "Once I opened the door, they come inside, they throw me in the floor. One of the guys put his gun to my head."

It was chaotic. Wilson was confused.

Wilson Colorado: "They didn't give me no answer, nothing like that."

The feds raided Wilson's house, looking for cash and drugs after a confidential informant claimed Wilson was crooked.

The DEA confiscated $200,000 in cash and checks, money that belonged to his business.

Wilson Colorado: "Is it possible that they take all your dreams away in a second?"

Wilson was not arrested and has never been charged with a crime. But the feds kept his money, and now he must sue them to get it back.

The Civil Asset Forfeiture law gives police the authority to take someone's cash and assets if they suspect criminal activity.

Justin Pearson, Institute for Justice, Miami: "This is not a rare occurrence. It might even be a majority of the time where people have never been arrested in civil forfeiture, and they lose their money anyway."

Justin Pearson with the Institute for Justice in Miami says a big problem with the law is that it allows police agencies to keep some of the money they seize.

Justin Pearson: "It's this perverse incentive of being allowed to keep the money for themselves that causes the police to chase money instead of chasing criminals."

And, Pearson says, it's not chump change.

Justin Pearson: "Police are taking over $5 billion from Americans every year. That's more than burglars take from Americans every year."

We looked at the numbers. Twenty-five South Florida police agencies collected more than $6.1 million in 2015. The money paid for things like bicycles, an animal rescue facility and a police dog.

Former DEA Agent Robert Crispin has been on thousands of raids and says cops do their best to get it right.

Robert Crispin: "The government agent or the local law enforcement agent is only as good as the information he has. The agent has to be trained enough to show up on a situation, meet with people and find out if what they were told is actually really happening."

After two years of haggling, lawmakers agreed to overhaul the law.

Justin Pearson: "Thankfully, the Florida legislature realized that reforms were needed, and they did these reforms in multiple ways."

Now agencies are required to make an arrest before seizing most property, and cops are required to account for every penny they seize.

Pearson thinks the changes are a step in the right direction.

Justin Pearson: "But they won't take care of all the problems. Frankly, civil forfeiture shouldn't exist."

As for Wilson, a year after his horrifying ordeal, he's not giving up.

Wilson Colorado: "I have been working all my life since I come to this country, and I'm going to fight until the end."

Wilson is suing the DEA to get his money back. He thinks agents were given a false tip by a disgruntled

business associate, who was trying to get revenge on him.

H.R. REP. 106-192, H.R. Rep. No. 192, 106TH Cong., 1ST Sess. 1999, 1999 WL 406892 (Leg.Hist.)
P.L. 106-185, CIVIL ASSET FORFEITURE REFORM ACT

HOUSE REPORT NO. 106–192

June 18, 1999

Mr. Hyde, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1658]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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[2] The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 6, line 7, strike "receive" and insert "acquired".

Page 6, line 8, insert "or inheritance" after "probate".

Page 6, line 9, strike "receipt" and insert "acquisition".

Page 10, beginning on line 17 strike "CONFORMING" and all that follows through "AND" on line 18 and insert "AMENDMENT".

Page 10, strike line 20 and all that follows through page 11, line 13.

Page 11, line 14, strike "(b) Controlled Substances Act.–".

PURPOSE AND SUMMARY

H.R. 1658, as reported by the Committee, would create general rules relating to federal civil forfeiture proceedings designed to increase the due process safeguards for property owners whose property has been seized.

BACKGROUND AND NEED FOR THE LEGISLATION

I. Antecedents of Civil Asset Forfeiture

Civil asset forfeiture is based on the legal fiction that an inanimate object can itself be "guilty" of wrongdoing, regardless of whether the object's owner is blameworthy in any way. This concept descends from a medieval English practice whereby an object responsible for an accidental death was forfeited to the king, who "would provide the [proceeds, the 'deodand'] for masses to be said for the good of the dead man's soul . . . or [would] insure that the deodand was put to charitable uses."[1]

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

---

[1] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.16 (1974).

peculiarities of the maritime law can be made intelligible."[2]

> Justice Holmes used this example:
>
> A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principle. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this [3] means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and the wagon.[3]
>
> Holmes then provided the rationale:
>
> The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving

---

[2] Holmes, Jr., The Common Law 25 (1881).

[3] Id.

the foreign owners to get their indemnity as they may be able.[4]

II. Federal Civil Asset Forfeiture Statutes

Soon after the creation of the United States, ships and cargo violating the customs laws were made subject to federal civil forfeiture.[5] Such forfeiture was vital to the federal treasury for, at that time, customs duties constituted over 80% of federal revenues.[6]

Today, there are scores of federal forfeiture statutes, both civil and criminal.[7] They range from the forfeiture of animals utilized in cock-fights and similar enterprises,[8] to cigarettes seized from smugglers[9] to property obtained from violations of the Racketeer Influenced and Corrupt Organizations Act.[10]

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

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[4] Id. at 26.

[5] See Act of July 31, 1789, secs. 12, 36, 1 Stat. 39, 47.

[6] See Piety, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process, 45 U. Miami L. Rev. 911, 940 n.137 (1991).

[7] Criminal forfeiture requires an antecedent criminal conviction of the property owner.

[8] See 7 U.S.C. S 2156.

[9] See 18 U.S.C. S 2344.

[10] See 18 U.S.C. S 1963.

> [a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter . . . [a]ll raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing . . . delivering, importing, or exporting any controlled substance[s] . . . in violation of this subchapter . . . [a]ll property which is used, or intended for use, as a container for [such controlled substances, raw materials, products or equipment] . . . [a]ll conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment [of such controlled substances, raw materials, products or equipment].[11]

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

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable [4] instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .”[12]

---

[11] 21 U.S.C. S 881(a).

[12] Section 301(a)(1) of the Psychotropic Substances Act of 1978 (found at 21 U.S.C. S 881(a)(6)).

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

> [a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment. . . .[13]

III. The Success – and Abuse – of Forfeiture

Prior to 1984, the monies realized from federal forfeitures were deposited in the general fund of the United States Treasury. Now they primarily go to the Department of Justice's Assets Forfeiture Fund[14] and the Department of the Treasury's Forfeiture Fund.[15] The money is used for forfeiture-related expenses and various law enforcement purposes.[16]

In recent years, enormous revenues have been generated by federal forfeitures. The amount deposited in Justice's Assets Forfeiture Fund (from both civil and criminal forfeitures) increased from $27 million in fiscal year 1985 to $556 million in 1993 and then decreased to $449 million in 1998.[17] Of the $338 taken in

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[13] Section 306(a) of the Comprehensive Crime Control Act of 1984 (found at 21 U.S.C. S 881(a)(7)).

[14] See 28 U.S.C. S 524(c)(4)).

[15] See 31 U.S.C. S 9703.

[16] See 28 U.S.C. S 524(c)(1)).

[17] See Office of National Drug Control Policy, National Drug Control Strategy: Budget Summary 1999, at 107 (hereinafter cited as "National Drug Control Strategy"); Civil Asset Forfeiture Reform: Hearing Before the House Comm. on the Judiciary, 105th

1996, $250 million was in cash and $74 million was in proceeds of forfeitable property; $163 million of the total was returned to state and local law enforcement agencies who helped in investigations.[18] As of the end

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Cong., 1st Sess. 116 (1997) (statement of Stefan Cassella) (hereinafter cited as "1997 Hearing"); U.S. Dept. Of Justice, Asset Forfeiture Fact Sheet (1993); Annual Report of the Dept. Of Justice Asset Forfeiture Program: 1993, at 15.

[18] See 1997 Hearing at 116 (statement of Stefan Cassella). Under "adoptive forfeiture", state and local law enforcement officers seize property and then bring it to a federal agency for forfeiture (provided that the property is forfeitable under federal law). The federal government then returns as much as 80% of the net proceeds to the state or local agency that initiated the case. Also, state and local law enforcement agencies that have cooperated in federal law enforcement actions often receive a percentage of the net proceeds.

The Committee is concerned about two aspects of adopted forfeiture. The first is that since property or funds returned to state or local law enforcement agencies through adoptive forfeiture can be kept by these entities, the process can be used to bypass provisions of state laws or state constitutions that dictate that property forfeited (pursuant to state forfeiture provisions) should be used for non-law enforcement purposes such as elementary and primary education. A recent series in the Kansas City Star highlighted this problem in Missouri. See Karen Dillon, Missouri Police Find Ways to Keep Cash Meant for Schools, Kansas City Star, Jan. 2, 6, 11, 20, 21, Feb. 5, 9, 10, 12, 27, Mar. 14, 25, Apr. 23, May 7, 8, 1999. Second, while the property returned through adoptive forfeiture must be used for law enforcement purposes, state and local governing bodies do not exercise their normal oversight role over how the property is used since it is not appropriated through the normal legislative process. Consequently, there have been many disturbing reports of state and local law enforcement using forfeited property, or the proceeds from its sale, for unnecessary or needlessly extravagant expenditures and uses. See, e.g., Hyde, Forfeiting Our Property Rights: Is Your Property Safe from Seizure? 37 (1995) (hereinafter cited as "Forfeiting Our

of 1998, a total of 24,903 seized assets valued at $1 billion were on deposit – 7,799 cash seizures valued at $349 million, [5] 1,181 real properties valued at $205 million, 45 businesses valued at $49 million, and 15,878 other assets valued at $398 million.[19]

So, federal forfeiture has proven to be a great monetary success. And, as former Attorney General Richard Thornburgh said: "[I]t is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation."[20]

The purposes of federal forfeiture were set out by Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, in testimony before this Committee:[21]

> Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of

---

Property Rights"). The Committee plans to continue to closely monitor these two issues. In addition, the Committee urges state and local law enforcement agencies to use forfeited property only for legitimate purposes and urges local communities to engage in oversight over the use by their law enforcement agencies of forfeited property (while not unduly limiting the flexibility of law enforcement).

[19] See National Drug Control Strategy at 108.

[20] Richard Thornburgh, Address Before the Cleveland City Club Forum Luncheon (May 11, 1990).

[21] 1997 Hearing at 112.

criminals and criminal organizations – from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. . . .

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

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

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his

> profits – and any property traceable to it – thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims – like carjacking or fraud – we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.
>
> Finally, forfeiture undeniably provides both a deterrent against crime and a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence.

[6] However, a number of years ago, as forfeiture revenues were approaching their peaks, some disquieting rumblings were heard. The Second Circuit stated that "[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."[22] Newspaper and television exposes appeared alleging that apparently innocent property owners were having their property taken by federal and local law enforcement officers with nothing that could be called due process.[23]

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

[23] See, e.g., Brazil & Berry, Tainted Cash or Easy Money?, Orlando Sentinel, June 14–17, 1992; Schneider & Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs, Pitt. Press, Aug. 11–16, 1991; Poor & Rose, Hooked on the Drug War, St. Louis Post-Dispatch, Apr. 28-May 5, 1991, Oct. 6–11, 20, 1991.

Congress investigated these charges through a series of hearing held by the House Committee on Government Operations' Subcommittee on Legislation and National Security under then-Chairman John Conyers[24] and then by this Committee.[25]

The stories of two of the witnesses at the Judiciary Committee hearings provide a sampling of the types of abuses that have surfaced. Willie Jones (and his attorney E.E. (Bo) Edwards III) testified before the Judiciary Committee on July 22, 1996. Mr. Jones' testified as follows:[26]

> [Chairman] Hyde: Would you please state your name and where you live.
>
> Mr. Jones: My name is Willie Jones. I live in Nashville, Tennessee.
>
> 1Mr. Hyde: Very well, sir. Would you tell us your story involving asset forfeiture.
>
> Mr. Jones: Yes. On February 27, 1991, I went to the Metro Airport to board a plane for

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[24] See Review of Federal Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 103rd Cong., 1st Sess. (1993); Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 102nd Cong., 2nd Sess. (1992).

[25] See 1997 Hearing; Civil Asset Forfeiture Reform Act: Hearing Before the House Comm. on the Judiciary, 104th Cong., 2nd Sess. (1996) (hereinafter cited as "1996 Hearing").

[26] 1996 Hearing at 12–14.

Houston, TX, to buy nursery stock. I was stopped in the airport after paying cash for my ticket.

Mr. Hyde: What business are you engaged in or were you engaged in?

Mr. Jones: I am engaged in landscaping.

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

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

Mr. Jones: Yes, sir.

Mr. Hyde: Were you carrying a large amount of cash?

Mr. Jones: Yes, sir. I had $9,000.

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

Mr. Jones: Well, it was going to be if I had found the shrubbery that I liked, by me being – going out of town, and the nursery business

is kind of like the cattle business. You can always do better with cash money.

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

Mr. Jones: That is correct.

Mr. Jones: So we proceeded to go out of the airport. . . . I was questioned about had I ever been involved in any drug-related activity, and I told them, no, I had not. So they told me I might as well tell the truth because they was going to find out anyway. So they ran it through on the computer after I presented my driver's license to them, which everything was – I had – it was all in my name. And he ran it through the computer, and one officer told the other one, saying, he is clean. But [7] instead, they said that the dogs hit on the money. So they told me at that time they was going to confiscate the money.

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

Mr. Jones: That is what they said.

Mr. Hyde: That is what they claimed?[27]

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[27] A federal court later found that "[t]he presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history. A bill may be contaminated by proximity to a large quantity of cocaine, by its passage through the contaminated sorting machines at the Federal Reserve Banks, or by contact with other contaminated bills in the

Mr. Jones: Yes, sir.

Mr. Hyde: Therefore, they kept the money?

Mr. Jones: They kept the money.

Mr. Hyde: Did they let you go?

Mr. Jones: They let me go.

Mr. Hyde: Were you charged with anything?

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

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

Mr. Jones: No.

Willie Jones did not challenge the forfeiture under the normal mechanism provided by law[28] because he

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wallet or at the bank." Jones v. U.S. Drug Enforcement Administration, 819 F. Supp. 698, 720 (M.D. Tenn. 1993) (citation omitted).

[28] The money was seized pursuant to 21 U.S.C. S 881(a)(6), under which "[a]ll moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance . . . " are subject to civil forfeiture. If Jones challenged the forfeiture, he would have the burden of proving by a preponderance of the evidence that the currency was not subject to forfeiture, provided that the government first showed probable cause that the currency was subject to forfeiture. See 19 U.S.C. S 1615.

could not come up with the 10% cost bond required.[29] He instead filed suit in federal district court alleging that his Fourth Amendment right to be secure against unreasonable searches and seizures had been violated.[30] The court determined that the "frisk" which produced the $9,000 in currency was an unconstitutional search,[31] and that the seizure of the currency was undertaken with no probable cause and therefore an unconstitutional seizure.[32] The court did determine that there was "insufficient proof that the officers' investigation of Mr. Jones [who is African-American] himself was racially motivated[,]" but that other investigations were so motivated.[33]

The court's final comments gave rise for pause:

> The Court also observes that the statutory scheme as well as its administrative implementation provide substantial opportunity for abuse and potentiality for corruption. [Drug Interdiction Unit] personnel encourage airline employees as well as hotel and motel employees to report "suspicious" travelers and reward them with a percentage of the forfeited proceeds. The forfeited monies are divided and distributed by the Department of

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[29] See 1996 Hearing at 15 (statement of E.E. (Bo) Edwards III). See 19 U.S.C. S 1608.

[30] Jones, 819 F. Supp. at 716.

[31] See id. at 718.

[32] See id. at 721. Probable cause is "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." Id. (citation omitted).

[33] See id. at 723.

> Justice among the Metropolitan Nashville Airport and the Metropolitan Nashville Police Department partners in the DIU and itself. As to the local agencies, these monies are "off-budget" in that there is no requirement to account to legislative [8] bodies for its receipt or expenditure. Thus, the law enforcement agency has a direct financial interest in the enforcement of these laws. The previous history in this country of an analogous kind of financial interest on the part of law enforcement officers – i.e., salaries of constables, sheriffs, magistrates, etc., based on fees and fines – is an unsavory and embarrassing scar on the administration of justice. The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested.[34]

Mr. Jones's case typifies the kind that this Committee is gravely concerned about – except that this time there was a happy ending. Individuals very likely innocent of any crime justifying forfeiture meet some sort of "drug courier" profile [here, by buying an airplane ticket with cash] and are subject to a search or investigation. If they have large sums of cash, it is seized. They may not be tried for a crime (Civil forfeiture requires no related criminal conviction or even criminal charge. However, if there is a prosecution, acquittal does not bar a subsequent forfeiture action. The government need only show probable cause for the

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[34] Id. at 724.

seizure to justify a civil forfeiture.). To get their property back, owners have to overcome tremendous procedural hurdles such as posting a cost bond and having to prove their property was "innocent" (once probable cause has been shown). The abuse seems even worse under certain state forfeiture laws.[35]

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

> For years Billy Munnerlyn and his wife Karon owned and operated a successful air charter service out of Las Vegas, Nevada. In October 1989, Mr. Munnerlyn was hired for a routine job – flying Albert Wright, identified as a "businessman," from Little Rock, Arkansas, to Ontario, California. When the plane landed, DEA agents seized Mr. Wright's luggage and the $2.7 million inside. Both he and Mr. Munnerlyn were arrested. The DEA confiscated the airplane, the $8,500 charter fee for the flight, and all of Munnerlyn's business records. Although drug trafficking charges against Mr. Munnerlyn were quickly dropped for lack of evidence, the government refused to release his airplane. (Similar charges against Mr. Wright – who, unbeknownst to Munnerlyn, was a convicted cocaine dealer – were eventually dropped as well.) Mr. Munnerlyn spent over $85,000 in legal fees trying to get his plane back, money raised by selling

[35] See Forfeiting Our Property Rights at 38–40.

> his three other planes. A Los Angeles jury decided his airplane should be returned because they found Munnerlyn had no knowledge Wright was transporting drug money – only to have a U.S. district judge reverse the jury verdict. Munnerlyn eventually was forced to settle with the government, paying $7,000 for the return of his plane. He then discovered DEA agents had caused about $100,000 of damage to the aircraft. Under federal law the agency cannot be held liable for damage. [9] Unable to raise enough money to restart his air charter business, Munnerlyn had to declare personal bankruptcy. He is now driving a truck for a living.[36]
>
> For Mr. Munnerlyn, there was no happy ending.

Neither the state of the law nor its usage have improved in recent years. Since 1974, many observers assumed that the Constitution mandated an "innocent owner" defense to a civil forfeiture. However, in 1996, the Supreme Court in Bennis v. Michigan[37] ruled that the defense was mandated by neither the due process clause of the Fourteenth Amendment (and presumably that of the Fifth Amendment) nor the just compensation clause of the Fifth Amendment. The Court found that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason

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[36] Id. at 12 (based on reporting by Schneider & Flaherty & Miniter, "Property Seizures on Trial," Insight, Feb. 22, 1993, at 10, 33).

[37] 516 U.S. 442 (1996).

of the use to which the property is put even though the owner did not know that it was to be put to such use."[38]

The dissenting justices in Bennis argued that:

> The logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts. Some airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes. The State surely may impose strict obligations on the owners of airlines, hotels, stadiums, and vehicles to exercise a high degree of care to prevent others from making illegal use of their property, but neither logic nor history supports the Court's apparent assumption that their complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction.[39]

And, Justice Thomas stated in his concurrence that, "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who

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[38] Id. at 446.

[39] Id. at 458–59 (Stevens, J., Souter, J., and Breyer, J., dissenting).

associate with criminals, than a component of a system of justice."[40]

The Seventh Circuit recently issued a decision containing a stinging rebuke of the federal government's use of civil forfeiture. United States v. $506,231 in U.S. Currency[41] involved the Congress Pizzeria in Chicago. In 1997, the court ordered the return to Anthony Lombardo, the owner and proprietor of this family-owned business, of over $500,000 in currency improperly seized by police from the restaurant in 1993. The court found the need to remind a U.S. Attorney that "the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister [10] activity."[42] The court also found the need to say that "[w]e are certainly not the first court to be "enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."[43]

Civil asset forfeiture does not just impact civil liberties and property rights. It can work at total cross purposes with the professed public policy goals of the federal government. Few will argue against the

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[40] Id. at 456 (Thomas, J., concurring).

[41] 125 F.3d 442 (7th Cir. 1997).

[42] Id. at 454 (emphasis in original).

[43] Id., quoting U.S. v. All Assets of Statewide Auto Parts, 971 F.2d at 905.

proposition that more private investment needs to be made in our inner cities in order to offer residents hope of a better life. How, then, would anyone explain the actions in 1998 of the U.S. Attorney's Office in Houston in seizing a Red Carpet Motel in a high-crime area of the city?[44] There were no allegations that the hotel owners participated in any crimes. Indeed, motel personnel called the police to the establishment dozens of times to report suspected drug-related activity in the motel's rooms by some of its overnight guests. However, the government claimed the hotel deserved to be seized and forfeited because management had failed to implement all of the "security measures" dictated by law enforcement officials, such as raising room rates. This failure to agree with law enforcement about what security measures were affordable and wise from a legitimate business-operating standpoint was deemed to be "tacit approval" of illegality, subjecting the motel to forfeiture. The U.S. Attorney bragged to the press that he envisioned using current civil asset forfeiture laws in the same fashion against similar types of legitimate commercial enterprises, such as apartment complexes.

A Houston Chronicle editorial pointed to the absurdity and danger of this government forfeiture theory against legitimate business: "Perhaps another

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[44] See Deborah Tedford, Hotel Owners Agree to Beef Up Security, Houston Chron., July 18, 1998; Steve Brewer, Seizure of Hotel Sets Precedent, Houston Chron., March 7, 1998; Deborah Tedford, No Vacancy for Drug Dealers: Feds Seize Hotel, Houston Chron., Feb. 18, 1998.

time, the advice will be to close up shop altogether."[45] The editorial then correctly noted that:

> More than due to shortcomings of the motel owners, this situation appears to be the result of ineffective police work and of . . . prosecutors' inability to build cases against scofflaws operating in an open drug market.
>
> The prosecution's action in this case is contrary not only to the reasonable exercise of government, but it contradicts government-supported enticements to businesses that locate in areas where high crime rates have thwarted development. Good people should not have to fear property seizure because they operate business in high-crime areas. Nor should they forfeit their property because they have failed to do the work of law enforcement.
>
> . . . . This case demonstrates clearly the need for lawmakers to make a close-re-examination of federal drug forfeiture laws.

After much bad publicity, the government dropped its forfeiture proceedings after exacting a written "agreement" with the motel [11] owners as to certain security measures that the owners would undertake. The motel owners had lost their motel to the government's seizure for several months, suffered a significant loss of good business reputation, and were forced to spend substantial amounts of time and money on

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[45] U.S. Attorney Here Overstepped Bounds in Motel Seizure, Houston Chron., Mar. 12, 1998.

hiring an attorney and defending against the government's forfeiture action, which should never have been undertaken in the first place. The resolution does not detract from the fact that business owners who dare to invest in high crime areas are at the complete mercy of our civil asset forfeiture laws and the predilections of prosecutors.

IV. H.R. 1658, the Civil Asset Forfeiture Reform Act

H.R. 1658 is designed to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures. H.R. 1658 amends the rules governing all civil forfeitures under federal law except those contained in the Tariff Act of 1930 or the Internal Revenue Code of 1986.

The Eight Core Reforms of H.R. 1658

1. BURDEN OF PROOF

When a property owner goes to federal court to challenge the seizure of property under a federal civil forfeiture law, the government is required to make an initial showing of probable cause that the property is subject to forfeiture. Under current law, the property owner must then establish by a preponderance of the evidence that the property is not subject to forfeiture.[46] The government can meet its burden without having

[46] See 19 U.S.C. S 1615.

obtained a criminal conviction or even having charged the owner with a crime. Since the government doesn't need the proof beyond a reasonable doubt required for a criminal conviction, even the acquittal of the owner does not bar forfeiture of the property allegedly used in a crime. The probable cause the government needs is the lowest standard of proof in the criminal law. It is the same standard required to obtain a search warrant and can be established by evidence with a low indicia of reliability such as hearsay.[47]

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

> [T]he current allocation of burdens and standards of proof requires that the [owner] prove a negative, that the property was not used in order to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of erroneous, irreversible deprivation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Addington v. Texas, 441 U.S. 418, 423 . . . (1979) . . . The allocation of burdens and standards [12] of proof implicates similar

[47] See United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale, 803 F.2d 625, 629 n.2 (11th Cir. 1986).

> concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.[48]

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

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

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[48] United States v. $12,390, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting).

> [W]e observe that allowing the government to forfeit property based on a mere showing of probable cause is a "constitutional anomaly. . . ." As the Supreme Court has explained, burdens of proof are intended in part to "indicate the relative importance attached to the ultimate decision." . . . The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause.[49]

This Committee finds probable cause too low a standard of proof for the government to meet. Therefore, H.R. 1658 provides that the burden of proof should not shift to a property owner upon a showing of probable cause, but should remain with the government with a standard of clear and convincing evidence that the property is subject to forfeiture.

Why "clear and convincing evidence" and not "a preponderance of the evidence?" The Justice Department used to argue that federal civil forfeiture provisions were not designed to punish anybody. Justice argued that forfeiture served purely remedial functions – such as to remove the instruments of the drug trade and thereby protect the community from the threat of continued drug dealing, and to compensate

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[49] United States v. $49,576, 116 F.3d 425, 429 (9th Cir. 1997) (citations omitted).

the government for the expense of law enforcement activity and for its expenditure on societal problems resulting from the drug trade. The Department made this argument [13] in order to provide a rationale for not applying to civil forfeitures the Eighth Amendment's prohibition against excessive fines. In its 1993 decision in Austin v. United States,[50] the Supreme Court rejected Justice's argument, finding that:

In light of the historical understanding of forfeiture as punishment, the clear focus of [the instant forfeiture provisions] on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that [the provisions serve] solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense. . . ."[51]

One might ask, punishment for what? Clearly, the punishment is for a property owner's alleged involvement in drug trafficking. Civil forfeiture is being used to punish a property owner for alleged criminal activity. The general civil standard of proof – preponderance of the evidence – is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place. As

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[50] 509 U.S. 602 (1993).

[51] Id. at 621-22 (footnote omitted), quoting Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989).

the Supreme Court has said, civil forfeiture actions are in essence "quasi-criminal in character" designed "like a criminal proceeding . . . to penalize for the commission of an offense against the law."[52] Since civil forfeiture doesn't threaten imprisonment, proof beyond a reasonable doubt is not necessary.[53] The intermediate standard – clear and convincing evidence – is more appropriate.

The Florida Supreme Court has ruled that the Florida Constitution mandates a clear and convincing evidence standard in civil forfeiture proceedings commenced under Florida law, stating that:

> In forfeiture proceedings the state impinges on basis constitutional rights of individuals who may never have been formally charged with any civil or criminal wrongdoing. This Court has consistently held that the [Florida] Constitution requires substantial burdens of proof where state action may deprive individuals of basic rights.[54]

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[52] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

[53] Some states do require proof beyond a reasonable doubt. The Supreme Court of Nevada has ruled that because of the "quasi-criminal nature of forfeiture actions," "[p]roof beyond a reasonable doubt is therefore appropriate in order that the innocent not be permanently deprived of their property." A 1983 Volkswagen v. Country of Washoe, 101 Nev. 222, 224, 699 P.2d 108, 109 (Nev. 1985). Others provide only for criminal forfeiture in most situations, which of course leads to the same result. See, e.g., Cal. Health and Safety Code S 11470.

[54] Department of Law Enforcement v. Real Property, 588 So.2d 957, 967 (Fla. 1991). See also Cal. Health and Safety Code

Under H.R. 1658, a property owner would still have the burden of proving affirmative defenses, such as the "innocent owner" defense, by a preponderance of the evidence. Also, property can still be initially seized by the government based on probable cause, and this standard is sufficient to effect forfeiture in cases where a claim to the seized property is not filed.

[14] 2. APPOINTMENT OF COUNSEL

There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened.[55] This is undoubtedly one of the primary reasons why so many civil seizures are not challenged. As the cochairs of the National Association of Criminal Defense Lawyers' Forfeiture Abuse Task Force stated before this Committee in 1996: "The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the

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S 11470 (clear and convincing evidence in cases involving drug proceeds over $25,000); N.Y. Civ. Prac. L. & R. SS 1311(1), 1310(6) (clear and convincing evidence in drug cases); Wisc. Stat. Ann. S 973.076(3) (requiring proof "satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence").

[55] See United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 569 (9th Cir. 1995); United States v. 7108 West Grand Ave., Chicago, Illinois, 15 F.3d 632, 635 (7th Cir. 1994), cert. denied, 114 S. Ct. 2691 (1994).

seizure with which to fight the battle."[56] This Committee believes that civil forfeiture proceedings are so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by a seizure, in appropriate circumstances.

H.R. 1658 provides that a federal court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation. In determining whether to appoint counsel, the court shall take into account the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith or to be frivolous. Compensation for appointed counsel will be equivalent to that provided for court-appointed counsel in federal felony cases. Currently, maximum compensation would not exceed $3,500 per attorney for representation before a U.S. district court and $2,500 per attorney for representation before an appellate court. These maximums can be waived in cases of "extended or complex" representation where "excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit."[57]

3. INNOCENT OWNER DEFENSE

The impact of Bennis[58] is limited by the fact that many federal civil forfeiture provisions contain

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[56] 1996 Hearing at 289-90 (statement of E.E. (Bo) Edwards III, David Smith, and Richard Troberman).

[57] 18 U.S.C. S 3006A(d).

[58] 516 U.S. at 442.

statutory innocent owner defenses. For instance, real property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner."[59] Conveyances used in federal drug crimes are not forfeitable "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."[60] Property involved in certain money laundering transactions shall not be forfeited "by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."[61] Other federal civil forfeiture statutes contain no innocent owner defenses. For instance, the statute providing for forfeiture [15] of any property, including money, used in an illegal gambling business contains no such defense.[62] Many courts require that to qualify as an innocent owner, an owner have done all that reasonably could be expected to prevent the illegal use of the property.[63]

Not only are these statutory innocent owner defenses nonuniform, but the protections of the ones

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[59] 21 U.S.C. S 881(a)(7).

[60] 21 U.S.C. S 881(a)(4)(C).

[61] 18 U.S.C. S 981(a)(2).

[62] 18 U.S.C. S 1955(d).

[63] See, e.g., United States v. One Parcel of Property Located at 755 Forest Road, Northford, Connecticut, 985 F.2d 70, 72 (2nd Cir. 1993); United States v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Fla., 963 F.2d 1496, 1506 (11th Cir. 1992).

using the "committed or omitted" language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of and provided no consent to the prohibited use of the property.[64] Such an interpretation means that owners who try to end the illegal use by others of their property cannot make use of the defense simply because they knew about such use.

Believing that a meaningful innocent owner defense is required by fundamental fairness, the Committee sets out an innocent owner defense in H.R. 1658 designed to provide such a defense for all federal civil forfeitures, to make that defense uniform, and to ensure that it offers protection in all appropriate cases.

The innocent owner defense in the bill provides that, with respect to a property interest in existence at the time the illegal conduct giving rise to the forfeiture took place, an innocent owner is an owner who did not know of this conduct or, upon learning of it, did all that reasonably could be expected under the circumstances to terminate such use of the property. One way in which an owner may show that he did all that reasonably could be expected is to demonstrate that he, to the extent permitted by law, (1) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct would occur or has occurred, and (2) in a timely fashion revoked or

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[64] See, e.g., United States v. Lot 111-B, Tax Map Key 4-4-03-71(4), 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam). See, contra, United States v. 141st St. Corp. by Hersh, 911 F.2d 870, 877-78 (2nd Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

attempted to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

Thus, a safe harbor is created for an owner who notifies police and revokes or attempts to revoke (to the extent permitted by law) permission to use the property by those who are using it in the course of criminal activity. The owner's obligations end right there – property owners should not have to assume the responsibilities of police to stop crime. In the Red Carpet Motel incident described earlier, the hotel owner could have taken advantage of the bill's safe harbor by (as he did) notifying police of drug sales taking place at the motel and making a good faith attempt to evict the responsible motel guests from their rooms. In the situation of an apartment building where a tenant is selling illegal drugs, the owner could take advantage of the safe harbor by notifying police and making a good faith attempt to evict the tenants. The term "good faith attempt" is used because in many instances, an owner may be constrained in revoking permission to use property because of provisions of local, state or federal law (i.e., contract or landlord-[16]tenant law). For instance, in many parts of the country it is extremely difficult to evict a tenant because of allegations of illegal drug sales without the tenant having already been convicted of drug trafficking.[65]

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[65] In some areas of the country, it might be generally agreed to be impossible to evict a tenant without a preexisting criminal

Finally, an owner is not required – in order to do "all that can reasonably be expected" – to take steps that he reasonably believes would be likely to subject any person (other than the wrongdoer) to physical danger.

With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, an innocent owner is generally one who, at the time he acquired the interest in the property, was a bona fide purchaser or seller for value and reasonably without cause to believe that the property was subject to forfeiture. This formulation is required because much fraud could result were innocent donees allowed to be considered innocent owners. As Justice Kennedy noted in dissent in United States v. A Parcel of Land (92 Buena Vista Ave.),[66] criminals would then be allowed to shield their property from forfeiture through transfers to relatives.

However, the bill makes exceptions to this formulation in two instances to avoid unjust results. First, a person is considered to be an innocent owner if he acquired an interest in property through probate or inheritance, and was at the time of acquisition reasonably without cause to believe that the property was subject to forfeiture. The risk of a moral hazard here is slight. It is hardly likely that many criminals will

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conviction – in such a case, the bill would not require an owner to go through the futile motion of seeking eviction in order to enjoy the protection of the safe harbor.

[66] 113 S. Ct. 1126, 1146 (1993).

commit suicide for the express purpose of foiling imminent seizures by having their property devolved to their heirs. And this policy has a sound basis. A person may have inherited property from a relative without cause to believe that it had been involved in some criminal activity. Years later, the government might decide to institute forfeiture proceedings against the property. Without the availability of an innocent owner defense, the inheritor would be put in the position of having to rebut the government's case that the property was forfeitable, that it had been involved in criminal activity. To do this, the inheritor would have to know what a dead person had done with the property and what was in the mind of that dead person. It is fundamentally unfair to put someone in this position.[67]

Second, if the property is real property, the owner is the spouse or minor child of the person who committed the offense giving rise to forfeiture, and the owner uses the property as a primary residence, an otherwise valid innocent owner claim shall not be denied because the owner acquired his interest in it not through a purchase but through dissolution of marriage or by operation of law (in the case of a spouse) or as an inheritance upon the death of a parent (in the case of a minor child). However, to be considered an innocent owner,

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[67] The Committee has heard testimony from the executor of an estate who was placed, along with the beneficiaries of a house, in the position of having to fight a seizure based on "an unnamed person in prison [having] told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent . . . on an unspecified date in December 1988." 1997 Hearing at 38 (testimony of Susan Davis).

the spouse or minor child must have been reasonably [17] without cause to believe that the property was subject to forfeiture at the time of the acquisition of his interest in the property.

4. RETURN OF PROPERTY UPON SHOWING OF HARDSHIP

Even should a property owner prevail in a civil forfeiture proceeding, irreparable damage may have been done to the owner's interests. For instance, if property is used as a business, its lack of availability for the time necessary to win a victory in court could have forced its owner into bankruptcy. If the property is a car, the owner might not have been able to commute to work until it was won back. If the property is a house, the owner may have been left temporarily homeless (unless the government let the owner rent the house back). In cases such as this, even when the government's case is extremely weak, the owner must often settle with the government and lose a certain amount of money in order to get the property back as quickly as possible.

The case of Michael and Christine Sandsness is instructive:

> Michael Sandsness and his wife, Christine, owned two gardening supply stores called "Rain & Shine" in Eugene and Portland, Oregon. Among the items sold were metal halide grow lights, used for growing many indoor plants. The grow lights also can be used to

> grow marijuana, but it is not illegal to sell them. Because some area marijuana gardens raided by [the Drug Enforcement Administration] had the lights, the agency began building a case to seize the gardening supply businesses. [T]he DEA sent undercover agents to the stores to try to get employees to give advice on growing marijuana. Unsuccessful in those efforts, the agents then engaged an employee in conversation, asking advice on the amount of heat or noise generated by the lights, making oblique comments suggesting that they wanted to avoid detection and commenting about High Times magazine. They never actually mentioned marijuana. The employee then sold the agents grow lights. DEA raided the two stores, seizing inventory and bank accounts. Agents told the landlord of one of the stores that if he did not evict Sandsness, the government would seize his building. The landlord reluctantly complied. While the forfeiture case was pending, the business was destroyed. Mr. Sandsness was forced to sell the remaining unseized inventory in order to pay off creditors.[68]

Current law does allow for the release of property pending final disposition of a case upon payment of a full bond.[69] However, most property owners do not have the resources to make use of this provision. Therefore, in order to alleviate hardship, H.R. 1658 provides that a property owner is entitled to release of

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[68] Forfeiting Our Property Rights at 13.

[69] See 19 U.S.C. S 1614.

seized property if a court determines that its continued possession by the government pending the final disposition of forfeiture proceedings will likely cause substantial hardship to the owner and that this hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred it if is returned during the pendency [18] of the proceedings. The court may place such conditions on release of the property as it finds are appropriate to preserve the property's availability for forfeiture.

5. COMPENSATION FOR DAMAGE TO PROPERTY WHILE IN THE GOVERNMENT'S POSSESSION

The federal government is exempted from liability under the Federal Tort Claims Act for damage to property while detained by law enforcement officers.[70]

Seized property awaiting forfeiture can be quickly damaged:

> Seized conveyances devalue from aging, lack of care, inadequate storage, and other factors while waiting forfeiture. They often deteriorate – engines freeze, batteries die, seals shrink and leak oil, boats sink, salt air and water corrode metal surfaces, barnacles accumulate on boat hulls, and windows crack from

[70] 26 U.S.C. S 2680(c).

> heat. On occasion, vandals steal or seriously damage conveyances.[71]

It cannot be categorized as victory when a boat owner gets back, for instance, a rusted and stripped hulk of a vessel. The bill amends the Federal Tort Claims Act to allow for tort claims against the United States government based on the destruction, injury, or loss of goods, merchandise, or other property while in the possession of any law enforcement officer if the property had been seized for the purpose of forfeiture. Of course, if seized property is successfully forfeited, no claim would be allowed.

6. ELIMINATION OF COST BOND

Under current law, a property owner wanting to contest a seizure of property under a civil forfeiture statute must give the court a bond of the lessor of $5,000 or ten percent of the value of the property seized (but not less than $250).[72]

The bond is unconstitutional in cases involving indigents, because it would deprive such claimants of hearings simply because of their inability to pay.[73] Even in cases not involving indigents, the bond should not be required. It "is simply an additional financial

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[71] U.S. Comptroller Gen., U.S. Gen. Accounting Office, Better Care and Disposal of Seized Cars, Boats, and Planes Should Save Money and Benefits Law Enforcement, at ii (GAO/PLRD-83-94, 1983).

[72] See 19 U.S.C. S 1608.

[73] See Wiren v. Eide, 542 F.2d 757, 763 (9th Cir. 1976).

burden on the claimant and an added deterrent to contesting the forfeiture."[74] H.R. 1658 eliminates the requirement.

7. ADEQUATE TIME TO CONTEST FORFEITURE

Currently, a property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim with the seizing agency challenging the government's administrative forfeiture of property.[75] To challenge a judicial forfeiture, the property [19] owner has an exceedingly short 10 days (after process has been executed):[76]

> Even assuming that notice is published the next day after process is executed, the reader of the notice will have a mere nine days to file a timely claim. Most local rules require that notice be published for three successive weeks, on the assumption that interested parties will not necessarily see the first published notice. But by the time the second notice is published, more than ten days will have elapsed from the date process is executed. Thus anyone who misses the first published

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[74] Letter from David Smith to Kathleen Clark, Senate Judiciary Committee, at 5 (Aug. 19, 1992).

[75] 19 U.S.C. S 1608.

[76] Fed. R. Civ. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims) (This is the date when a U.S. court takes possession of the property through "arrest" by a federal marshal. It is not the date when it is initially seized by a law enforcement officer).

> notice will be unable to comply with the exceedingly short time limitation for filing a claim. . . .[77]

Even though these time limits sometimes are ignored in the interests of justice, failure to file a timely claim often results in judgment in favor of the government.[78]

The bill provides a property owner 30 days to file a claim following both administrative and judicial forfeiture actions.

8. INTEREST

Under current law, even if a property owner prevails in a forfeiture action, he may receive no interest for the time period in which he lost use of his property.[79] In cases where money or other negotiable instruments were seized, or money is awarded a property owner, this is manifestly unfair.

H.R. 1658 provides that upon entry of judgment for the owner in a forfeiture proceeding, the United

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[77] David Smith, Prosecution and Defense of Forfeiture Cases, S 9.03[1], at 9-45 (1998).

[78] See, e.g., United States v. Beechcraft Queen Airplane, 789 F.2d 627, 630 (8th Cir. 1986).

[79] The courts are divided on whether the government must pay interest to a successful claimant. Compare United States v. $515,060.42 in U.S. Currency, 152 F.3d 491, 504-06 (6th Cir. 1998) (awarding interest) with United States v. $7,990 in U.S. Currency, 170 F.3d 843 (8th Cir. 1999) (sovereign immunity bars awarding of interest).

States shall be liable for post-judgment interest on any money judgement. The United States shall generally not be liable for pre-judgment interest. However, in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments, the government must disgorge any funds representing interest actually paid to the United States that resulted from the investment of the property or an imputed amount that would have been earned had it been invested.

HEARINGS

While no hearings were held in the 106th Congress, the Committee held one day of hearings on civil asset forfeiture reform legislation on June 11, 1997. Testimony was received from Billy Munnerlyn, E.E. (Bo) Edwards III, F. Lee Bailey, Susan Davis, Gerald B. Lefcourt, Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Department of the Treasury, Bobby Moody, Chief of Police, Marietta, Georgia, and 1st Vice President, International Association of Chiefs of Police, and David Smith. Additional material [20] was submitted by Nadine Strossen, President, American Civil Liberties Organization, and Roger Pilon, Director, Center for Constitutional Studies, CATO Institute.

COMMITTEE CONSIDERATION

On June 15, 1999, the Committee met in open session and ordered reported favorably the bill H.R. 1658 without amendment by a recorded vote of 27-3, a quorum being present.

VOTE OF THE COMMITTEE

Vote on final passage: Adopted 27 to 3.

AYES	**NAYS**
Mr. Sensenbrenner	Mr. Bryant
Mr. Gekas	Mr. Hutchinson
Mr. Coble	Mr. Weiner
Mr. Smith (TX)	
Mr. Gallegly	
Mr. Canady	
Mr. Goodlatte	
Mr. Chabot	
Mr. Barr	
Mr. Jenkins	
Mr. Cannon	
Mr. Rogan	
Mr. Graham	
Mr. Scarborough	
Mr. Conyers	
Mr. Frank	

Mr. Berman

Mr. Nadler

Mr. Scott

Mr. Watt

Ms. Lofgren

Ms. Jackson Lee

Mr. Delahunt

Mr. Wexler

Mr. Rothman

Ms. Baldwin

Mr. Hyde

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

[21] COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of Rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will have no cost for the current fiscal year, and that the cost incurred in carrying out H.R.1658 would be $52 million for the next five fiscal years.

The Congressional Budget Office did not have an independent cost estimate prepared by the time of filing of this report. However, CBO did prepare a cost estimate in 1997 of H.R. 1965, another bill reforming federal forfeiture laws. While the two bills have significant differences, H.R. 1965 did contain versions of the eight fundamental reforms of civil forfeiture laws contained in H.R. 1658. The CBO estimated that over the period 1998-2002, implementation of H.R. 1965 would cost $52 million and that any changes to direct spending and governmental receipts would be less than $500,000 a year.[80]

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[80] H.R. Rep. No. 105-358, pt. 1, at 38-41 (1997).

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short title.

Section 1 contains the Short Title of the bill.

Section 2. Creation of general rules relating to civil forfeiture proceedings.

Section 2 creates new subsections (j) and (k) of section 981 of title 18 of the United States Code (and redesignates subsection (j) as subsection (l)) that contain revised procedures which are to govern all administrative and judicial civil forfeiture actions brought pursuant to federal law (except as specified in subsection (j)(8)). To the extent these procedures are inconsistent with any preexisting federal law, these procedures apply and supercede preexisting law.

Subparagraph (A) of paragraph (1) of subsection (j) provides that in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must give written notice to interested parties, such notice [22] shall be given as soon as practicable and in no case more than 60 days after the later of the date of

the seizure or the date the identity of the interested party is first known or discovered by the agency, except that the court may extend the period for filing a notice for good cause shown.

Subparagraph (B) of paragraph (1) provides that a person entitled to written notice in such proceeding to whom written notice is not given may on motion void the forfeiture with respect to that person's interest in the property, unless the agency show either good cause for the failure to give notice to that person or that the person otherwise had actual notice of the seizure.

Subparagraph (C) of paragraph (1) provides that if the government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property and may not take any further action to effect the forfeiture of such property. If the government has made a mistake or administrative error in providing notice, a court may consider good cause to have been shown pursuant to subparagraph (A). In such case, the government may take further action to effect the forfeiture.

Subparagraph (A) of paragraph (2) provides that any person claiming property seized in a nonjudicial forfeiture proceeding may file a claim with the appropriate official after the seizure.

Subparagraph (B) of paragraph (2) provides that a claim under subparagraph (A) may not be filed later than 30 days after either the date of final publication of notice of seizure or, in the case of a person entitled to written notice, the date that notice was received.

Subparagraph (C) of paragraph (2) provides that the claim shall state the claimant's interest in the property.

Subparagraph (D) of paragraph (2) provides that not later than 90 days after a claim has been filed, the Attorney General shall file a complaint for forfeiture in the appropriate court or return the property, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

Subparagraph (E) of paragraph (2) provides that if the government does not file a complaint for forfeiture of property in accordance with subparagraph (D), it shall return the property and may not take any further action to effect the forfeiture of such property.

Subparagraph (F) of paragraph (2) provides that any person may bring a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

Subparagraph (A) of paragraph (3) provides that in any case where the government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property within 30 days of service of the government's complaint or, where applicable, within 30 days of alternative publication notice.

Subparagraph (B) of paragraph (3) provides that a person asserting an interest in seized property in

accordance with subparagraph (A) shall file an answer to the government's complaint for forfeiture within 20 days of the filing of the claim.

[23] Subparagraph (A) of paragraph (4) provides that if the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim.

Subparagraph (B) of paragraph (4) provides that in determining whether to appoint counsel to represent the person filing the claim, the court shall take into account such factors as the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith or to be frivolous.

Subparagraph (C) of paragraph (4) provides that the court shall set the compensation for that representation, which shall be equivalent to that provided for court-appointed representation under section 3006A of title 18 of the United States Code (for federal criminal defendants), and to pay such cost there are authorized to be appropriated such sums as are necessary as an addition to the funds otherwise appropriated for the appointment of counsel under that section.

Paragraph (5) provides that in all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the United States government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

Subparagraph (A) of paragraph (6) provides that an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.

Subparagraph (B) of paragraph (6) provides that with respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who either did not know of the conduct giving rise to the forfeiture or, upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property. To meet the requirements of the last clause of the preceding sentence, the property owner is not required to take every conceivable action which could be considered reasonable, but only to take actions which are in total a reasonable response to the conduct giving rise to the forfeiture. In determining what is a reasonable response, the economic situation of the property owner (and his business, if applicable) should be taken into account.

Subparagraph (C) of paragraph (6) provides that with respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property, was reasonably without cause to believe that the property was subject to forfeiture and was either a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value) or a person who acquired an interest in property through probate or inheritance.

A property owner is considered to have acquired an interest in property through probate or inheritance at the time of the death of the previous property owner, not at the time of final, permanent, distribution of the property.

The use of the term inheritance recognizes that property interests often pass at the death of previous owners outside of formal [24] probate proceedings. For instance, property interests are routinely inherited in community property states (such as California and Texas) without a testamentary device. Likewise, standard property law in many states recognizes transfers of interests through mechanisms such as remainder interests, and "tenancy-in-entireties" (which cause property interests in the whole res to pass virtually automatically upon the death of one "tenant"/owner to the surviving "tenant"/owner). This is often true of partnership property, including family business partnerships. In short, the use of the term recognizes that non-probate assets might be acquired by truly innocent owners through all manner of standard, legitimate state and commercial law mechanisms, for fundamental tax and estate planning reasons. For example, assets commonly inherited but not subject to probate administration in many states include the following: joint bank accounts with right of survivorship, property held in joint tenancy, property subject to a community property agreement (in community property states), property held in an inter vivos (living) trust, life insurance (unless all beneficiaries are dead or proceeds are payable to the estate), and assets

governed by dispositive provisions in an insurance policy, employment contract, bond, mortgage, promissory note, deposit agreement, pension plan, conveyance, or other non-testamentary written instrument effective as a contract, gift, conveyance or trust.

Subparagraph (D) of paragraph (6) provides that where the property subject to forfeiture is real property, and the claimant uses the property as the claimant's primary residence (i.e., homestead) and is the spouse or minor child of the person who committed the offense giving rise to the forfeiture, an otherwise valid innocent owner claim shall not be denied on the ground that the claimant acquired the interest in the property not through a purchase but through dissolution of marriage or by operation of law (in the case of a spouse) or as an inheritance upon the death of a parent (in the case of a minor child[81]). The claimant must establish that at the time of the acquisition of the property interest, the claimant was reasonably without cause to believe that the property was subject to forfeiture.

This provision recognizes that one spouse might acquire an innocent, legitimate ownership interest in a residence through formal "dissolution" of marriage (divorce) – without any reasonable cause to believe that the property is tainted by the other spouse's conduct. Some states recognize separate property interests between spouses after a certain period of separation, even without formal marriage "dissolution"

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[81] The time of acquisition of a minor child's interest is at the time of the parent's death.

proceedings. An annulment, too, may not be regarded as a "dissolution" of marriage, per se, but rather, an official pronouncement that no legitimate marriage ever existed between the "spouses." A community property agreement between spouses, in community property states like California and Texas, is another common example of how one spouse could innocently acquire an interest in his or her primary residence by operation of (state) law, other than dissolution of marriage. Such standard agreements exist during the life of a marriage, after marriage, and indeed, serve as a non-probate asset after death of a spouse. The [25] provision for acquisition by an innocent spouse "by operation of law", as well as "dissolution of marriage", is intended to cover all of the similarly innocent situations regarding spousal acquisition of a primary residence under various, legitimate operations of state and commercial laws.

Paragraph (7) provides that (for purposes of paragraph (6)) one way in which a person may show that he did all that reasonably could be expected would be to demonstrate that he, to the extent permitted by law, gave timely notice to an appropriate law enforcement agency of information that led him to know the conduct giving rise to a forfeiture would occur or has occurred while in a timely fashion revoking or attempting to revoke permission for those engaging in such conduct to use the property or taking reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property. To meet the requirements of the last clause of the preceding

sentence, the person is not required to take every conceivable action which could be considered reasonable, but only to take actions which are in total a reasonable response to the conduct giving rise to the forfeiture. In determining what is a reasonable response, the economic situation of the property owner (and his business, if applicable) should be taken into account. Paragraph (7) also provides that in order to do all that could reasonably be expected (for purposes of paragraph (6)), a person is not required to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

Paragraph (8) provides definitions of terms for purposes of subsection (j). The term "civil forfeiture statute" means any provision of federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense. The term "owner" means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security device, or valid assignment of an ownership interest; it does not include a person with only a general unsecured interest in (or claim against) the property or estate of another, a bailee (unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized), or a nominee who exercises no dominion or control over the property.

Paragraph (1) of subsection (k) provides that a claimant under subsection (j) is entitled to immediate

release of seized property if the court determines that (1) the claimant has a possessory interest in the property, (2) the continued possession by the United States government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant (such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless), and (3) the claimant's likely hardship from the continued possession by the United States government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding.

Paragraph (2) provides that a claimant seeking release of property under subsection (k) must request possession of the property [26] from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

Paragraph (3) provides that if within 10 days after the date of the request the property has not been released, the claimant may file a motion or complaint in any district court that would have jurisdiction of forfeiture proceedings relating to the property setting forth the basis on which the requirements of paragraph (1) are met and the steps the claimant has taken to secure release of the property from the appropriate official.

Paragraph (4) provides that if a motion or complaint is filed under paragraph (3), the district court

shall order that the property be returned to the claimant, pending completion of proceedings by the United States government to obtain forfeiture of the property, if the claimant shows that the requirements of paragraph (1) have been met. The court may place such conditions on release of the property as it finds are appropriate to preserve the availability of the property or its equivalent for forfeiture.

Paragraph (5) provides that the district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the date of the filing, unless such 30 day limitation is extended by consent of the parties or by the court for good cause shown.

Section 3. Conforming amendment to the Controlled Substances Act.

Section 3 repeals section 518 of the Controlled Substances Act (21 U.S.C. S 888). Section 518 provides for expedited forfeiture procedures in the cases of seized conveyances.

Section 4. Compensation for damage to seized property.

Subsection (a) of section 4 amends the Federal Tort Claims Act, which currently does not allow a claim for damages to be brought against the United States in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any

other law enforcement officer (see 28 U.S.C. S 2680(c)). The subsection provides that claims can be brought that are based on the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited.

Subsection (b) of section 4 provides that with respect to a claim that cannot be settled under the Tort Claims Act, the Attorney General may settle, for not more than $50,000 in any case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer who is employed by the Department of Justice and acting within the scope of his or her employment. However, the Attorney General may not pay a claim that is presented more than 1 year after it occurs or is presented by an officer or employee of the United States government and arose within the scope of employment.

Section 5. Prejudgment and postjudgment interest.

Section 5 amends section 2465 of title 28 of the United States Code to provide that upon entry of judgment for the claimant in [27] any proceeding to condemn or forfeit property seized or arrested under any Act of Congress, the United States shall be liable for post-judgment interest as set forth in section 1961 of title 28 of the United States Code. The United States shall not be liable for prejudgment interest, except that

in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, the United States shall disgorge to the claimant any funds representing interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument, and for any period during which no interest is actually paid, an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961. The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

Section 6. Applicability.

Section 6 provides that unless otherwise specified in this Act, the amendments made by this Act apply with respect to claims, suits, and action filed on or after the date of the enactment of this Act. However, the standard for the required burden of proof shall apply in cases pending on the date of the enactment of this Act and the amendment made by section 5 shall apply to any judgment entered after the date of enactment of this Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in

existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 981 OF TITLE 18,
UNITED STATES CODE

S 981. Civil forfeiture

(a) * * *

* * * * * * *

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

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

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

[28] (ii) that the person otherwise had actual notice of the seizure.

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

(2)(A) Any person claiming property seized in a nonjudicial forfeiture proceeding may file a claim with the appropriate official after the seizure.

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

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

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

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

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

(E) If the government does not file a complaint for forfeiture of property in accordance with subparagraph (D), it shall return the property and may not

take any further action to effect the forfeiture of such property.

(F) Any person may bring a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)(A) In any case where the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property within 30 days of service of the Government's complaint or, where applicable, within 30 days of alternative publication notice.

(B) A person asserting an interest in seized property in accordance with subparagraph (A) shall file an answer to the Government's complaint for forfeiture within 20 days of the filing of the claim.

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

(B) In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account such factors as –

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

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

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

(5) In all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on [29] the United States Government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

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

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

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

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

(C) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who,

at the time that person acquired the interest in the property, was –

(i)(I) a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); or

(II) a person who acquired an interest in property through probate or inheritance; and

(ii) at the time of the purchase or acquisition reasonably without cause to believe that the property was subject to forfeiture.

(D) Where the property subject to forfeiture is real property, and the claimant uses the property as the claimant's primary residence and is the spouse or minor child of the person who committed the offense giving rise to the forfeiture, an otherwise valid innocent owner claim shall not be denied on the ground that the claimant acquired the interest in the property –

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

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

(7) For the purposes of paragraph (6) –

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

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

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

(B) in order to do all that can reasonably be expected, a person is not required to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

[30] (8) As used in this subsection:

(1) The term "civil forfeiture statute" means any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.

(2) The term "owner" means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage,

recorded security device, or valid assignment of an ownership interest. Such term does not include –

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

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

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

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

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

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

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

(2) A claimant seeking release of property under this subsection must request possession of the property

from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

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

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

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

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

(5) The district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the [31] date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

[(j)] (l) For purposes of this section –

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

SECTION 518 OF THE CONTROLLED SUBSTANCES ACT

[EXPEDITED PROCEDURES FOR SEIZED CONVEYANCES

[Sec. 518. (a)(1) The owner of a conveyance may petition the Attorney General for an expedited decision with respect to the conveyance, if the conveyance is seized for a drug-related offense and the owner has filed the requisite claim and cost bond in the manner provided in section 608 of the Tariff Act of 1930. The Attorney General shall make a determination on a petition under this section expeditiously, including a determination of any rights or defenses available to the petitioner. If the Attorney General does not grant or deny a petition under this section within 20 days after the date on which the petition is filed, the conveyance shall be returned to the owner pending further forfeiture proceedings.

[(2) With respect to a petition under this section, the Attorney General may –

[(A) deny the petition and retain possession of the conveyance;

[(B) grant the petition, move to dismiss the forfeiture action, if filed, and promptly release the conveyance to the owner; or

[(C) advise the petitioner that there is not adequate information available to determine the petition and promptly release the conveyance to the owner.

[(3) Release of a conveyance under subsection (a)(1) or (a)(2)(C) does not affect any forfeiture action with respect to the conveyance.

[(4) The Attorney General shall prescribe regulations to carry out this section.

[(b) At the time of seizure, the officer making the seizure shall furnish to any person in possession of the conveyance a written notice specifying the procedures under this section. At the earliest practicable opportunity after determining ownership of the seized conveyance, the head of the department or agency that seizes the conveyance shall furnish a written notice to the owner and other interested parties (including lienholders) of the legal and factual basis of the seizure.

[(c) Not later than 60 days after a claim and cost bond have been filed under section 608 of the Tariff Act of 1930 regarding a conveyance seized for a drug-related offense, the Attorney General shall file a complaint for forfeiture in the appropriate district court, except that the court may extend the period for filing for good cause shown or on agreement of the parties. If the Attorney General does not file a complaint as

specified in the preceding sentence, the court shall order the return of the conveyance to the owner and the forfeiture may not take place.

[32] [(d) Any owner of a conveyance seized for a drug-related offense may obtain release of the conveyance by providing security in the form of a bond to the Attorney General in an amount equal to the value of the conveyance unless the Attorney General determines the conveyance should be retained (1) as contraband, (2) as evidence of a violation of law, or (3) because, by reason of design or other characteristic, the conveyance is particularly suited for use in illegal activities.]

TITLE 28, UNITED STATES CODE

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PART VI – PARTICULAR PROCEEDINGS

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CHAPTER 163 – FINES, PENALTIES AND FORFEITURES

* * * * * * *

S 2465. Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure

(a) Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the

seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

(b) Interest. –

(1) Post-judgment. – Upon entry of judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any Act of Congress, the United States shall be liable for post-judgment interest as set forth in section 1961 of this title.

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

(A) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

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

(3) Limitation on other payments. – The United States shall not be required to disgorge the value of any intangible [33] benefits nor make any other

payments to the claimant not specifically authorized by this subsection.

* * * * * * *

CHAPTER 171 – TORT CLAIMS PROCEDURE

* * * * * * *

S 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) * * *

* * * * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other [law-enforcement] law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title do apply to any claim based on the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited.

* * * * * * *

[34] DISSENTING VIEWS

While we support the general concept of reforming our asset forfeiture laws and believe it is important to ensure that innocent citizens do not have their

property taken away by an over-zealous government, we oppose this particular legislation as it tilts the balance too far in favor of the alleged criminal.

During the 105th Congress, this Committee overwhelmingly approved compromise legislation accomplishing the desired end of reforming our asset forfeiture laws so that individuals are not deprived of their rights, but doing so in a way that ensures that drug dealers, money launderers and organized crime syndicates are not able to exploit loopholes in the system. Unfortunately, the House did not have the opportunity to debate that bill and we find ourselves here today in a situation where that balanced approach has been discarded.

While our specific concerns regarding H.R. 1658 vary, we agree that in six fundamental ways, the bill denies law enforcement the tools they need to make sure that criminals are not able to enjoy the proceeds of their illegal activity.

BURDEN OF PROOF

Current law requires that the government only have probable cause to seize property, but requires citizens to prove by a preponderance of the evidence that the property or proceeds were not used in illegal activity. H.R. 1658 shifts the burden of proof to the government and requires that the government prove by clear and convincing evidence that the property was used in an illegal manner. While we support shifting the burden of proof to the government, the clear and

convincing standard is too high. The standard of proof in these cases should be the same as in all civil cases – that of preponderance of the evidence.

APPOINTMENT OF COUNSEL

H.R. 1658 allows the court to appoint counsel for "any person claiming an interest in the seized property" who is "financially unable to obtain representation." The only factors that the court must consider in determining this are (1) the claimant's standing to contest the forfeiture and (2) whether the claim appears to be made in good faith.

The Department of Justice undertakes 30,000 seizures a year, most of them in drug and alien smuggling cases. H.R. 1658 authorizes the appointment of free counsel in all of those cases for anyone who asserts an interest in the seized property. The potential for abuse is great and there are no safeguards in the bill to prevent it. It is also important to note that those who successfully challenge civil forfeiture decisions already are able to recover attorneys fees under the Equal Access to Justice Act.

[35] INNOCENT OWNER DEFENSE

H.R. 1658 provides that certain individuals are de facto innocent owners, including those who receive property through probate. In these cases, the property would forever be protected against forfeiture.

We fully support the notion of protecting innocent owners who legitimately may not be aware that someone else has used the property illegally. But we do not think that the wives, family members and friends of criminals should be able to claim that they are "innocent" owners of the proceeds of crimes. In particular, the "probate" provision of H.R. 1658 allows a drug dealer to amass a large fortune in drug proceeds and pass it on to his girlfriend, wife or children should he be killed in a shoot-out with police or rival narcotraffickers.

RETURN OF PROPERTY FOR HARDSHIP

H.R. 1658 allows a claimant to recover his property pending trial if he can show that the forfeiture will cause substantial hardship, such as preventing the functioning of a business, preventing an individual from working or leaving an individual homeless. The only burden that must be met to allow the transfer is a determination that the hardship outweighs any risk that the property will be destroyed, damaged, lost, concealed or transferred. The bill does not even ask judges to consider the likelihood of whether the property will be maintained and used in the continued commission of crime. No provisions are included to ensure that the government can recover the property once a judicial determination is made that the property is subject to forfeiture. Certain instruments of alleged illegal activity are not appropriate to be returned while the forfeiture is pending, but the bill makes no distinction between legitimate business assets and contraband,

currency and other property that is likely to be used to commit additional crime if returned.

NOTIFICATION TO CLAIMANT

H.R. 1658 requires that actual notice be given to a potential claimant within 60 days or the forfeiture action is nullified and may never be activated against that property again. The bill includes no exceptions for administrative errors, such as a misaddressed letter to a jail or prison.

So, under the bill, if the government arrests a drug dealer, puts him in jail, and sends him notice of the forfeiture of his drug proceeds, but misdirects the notice to the wrong jail, the Attorney General would have to return the money to the prisoner. Morever, based on case law, prisoners would have eleven years in which to raise such claims. The proper remedy for such administrative errors is to give the prisoner proper notice and allow him the normal period of time in which to file a claim contesting the forfeiture.

EFFECTIVE DATE

H.R. 1658 applies its new standard of proof (that of clear and convincing evidence) to cases pending at the time of the bill's enactment. This provision has the potential for reeking havoc on on-[36]going cases and cases on appeal. We believe that any change in the standard of proof should apply prospectively.

For these and other reasons, we opposed H.R. 1658 when it was considered by the Committee. We urge the Committee and Members of the full House to consider these issues as the bill moves through the legislative process.

Asa Hutchinson.

Ed Bryant.

Anthony Weiver.

H.R. REP. 106-192, H.R. Rep. No. 192, 106TH Cong., 1ST Sess. 1999, 1999 WL 406892 (Leg.Hist.)

Fed. R. Civ. P. Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) ***By the Plaintiff***

(A) *Without a Court Order* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiffs request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 – operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action., and

(2) may stay the proceedings until the plaintiff has complied.

PL 106–185, April 25, 2000, 114 Stat 202

UNITED STATES PUBLIC LAWS

106th Congress - Second Session

Convening January 24, 2000

Additions and Deletions are
not identified in this database.

Vetoed provisions within tabular
material are not displayed

PL 106-185 (HR 1658)

April 25, 2000

CIVIL ASSET FORFEITURE REFORM ACT OF 2000

An Act To provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 18 USCA § 981 NOTE >>

(a) SHORT TITLE.—This Act may be cited as the "Civil Asset Forfeiture Reform Act of 2000".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

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

Sec. 3. Compensation for damage to seized property.

Sec. 4. Attorney fees, costs, and interest.

Sec. 5. Seizure warrant requirement.

Sec. 6. Use of forfeited funds to pay restitution to crime victims.

Sec. 7. Civil forfeiture of real property.

Sec. 8. Stay of civil forfeiture case.

Sec. 9. Civil restraining orders.

Sec. 10. Cooperation among Federal prosecutors.

Sec. 11. Statute of limitations for civil forfeiture actions.

Sec. 12. Destruction or removal of property to prevent seizure.

Sec. 13. Fungible property in bank accounts.

Sec. 14. Fugitive disentitlement.

Sec. 15. Enforcement of foreign forfeiture judgment.

Sec. 16. Encouraging use of criminal forfeiture as an alternative to civil forfeiture.

Sec. 17. Access to records in bank secrecy jurisdictions.

Sec. 18. Application to alien smuggling offenses.

Sec. 19. Enhanced visibility of the asset forfeiture program.

Sec. 20. Proceeds.

Sec. 21. Effective date.

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

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

<< 18 USCA § 983 >>

"§ 983. General rules for civil forfeiture proceedings

"(a) NOTICE; CLAIM; COMPLAINT.—

"(1)(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

"(ii) No notice is required if, before the 60–day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

"(iii) If, before the 60–day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either—

"(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

"(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

"(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

"(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

"(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

"(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which

period may be further extended by the court for 60–day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

"(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including—

"(i) endangering the life or physical safety of an individual;

"(ii) flight from prosecution;

"(iii) destruction of or tampering with evidence;

"(iv) intimidation of potential witnesses; or

"(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

"(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

"(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without

prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

"(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

"(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

"(C) A claim shall—

"(i) identify the specific property being claimed;

"(ii) state the claimant's interest in such property (and provide customary documentary evidence of such interest if available) and state that the claim is not frivolous; and

"(iii) be made under oath, subject to penalty of perjury.

"(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms

generally available on request, which forms shall be written in easily understandable language.

"(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

"(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

"(B) If the Government does not—

"(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

"(ii) before the time for filing a complaint has expired—

"(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

"(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney

General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

"(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

"(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

"(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Governments complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

"(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

"(b) REPRESENTATION.—

"(1)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

"(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as—

"(i) the person's standing to contest the forfeiture; and

"(ii) whether the claim appears to be made in good faith.

"(2)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

"(B)(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

"(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

"(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

"(c) BURDEN OF PROOF.—In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—

"(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

"(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

"(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

"(d) INNOCENT OWNER DEFENSE.—

"(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of

proving that the claimant is an innocent owner by a preponderance of the evidence.

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

> "(i) did not know of the conduct giving rise to forfeiture; or
>
> "(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

> "(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and
>
> "(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

"(ii) A person is not required by this subparagraph to take steps that the person reasonably

believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

"(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner" means a person who, at the time that person acquired the interest in the property—

> "(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and
>
> "(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

"(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—

> "(i) the property is the primary residence of the claimant;
>
> "(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
>
> "(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and
>
> "(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was

the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

"(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

"(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order—

"(A) severing the property;

"(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

"(C) permitting the innocent owner to retain the property subject to a lien in favor of

the Government to the extent of the forfeitable interest in the property.

"(6) In this subsection, the term 'owner'—

"(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

"(B) does not include—

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

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

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

"(e) MOTION TO SET ASIDE FORFEITURE.—

"(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if—

"(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

"(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

"(2)(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

"(B) Any proceeding described in subparagraph (A) shall be commenced—

"(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

"(ii) if judicial, within 6 months of the entry of the order granting the motion.

"(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

"(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

"(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

"(f) RELEASE OF SEIZED PROPERTY.—

"(1) A claimant under subsection (a) is entitled to immediate release of seized property if—

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

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

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

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

"(E) none of the conditions set forth in paragraph (8) applies.

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

"(3)(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

"(B) The petition described in subparagraph (A) shall set forth—

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

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

"(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

"(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown

"(6) If—

"(A) a petition is filed under paragraph (3); and

"(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

"(7) If the court grants a petition under paragraph (3)—

"(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including—

"(i) permitting the inspection, photographing, and inventory of the property;

"(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

"(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

"(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

"(8) This subsection shall not apply if the seized property—

"(A) is contraband, currency, or other monetary instrument, or electronic funds

unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

"(B) is to be used as evidence of a violation of the law;

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

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

"(g) PROPORTIONALITY.—

"(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

"(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

"(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

"(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

"(h) CIVIL FINE.—

"(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than $250 or greater than $5,000.

"(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

"(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

"(i) CIVIL FORFEITURE STATUTE DEFINED.—

In this section, the term 'civil forfeiture statute'—

"(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

"(2) does not include—

"(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

"(B) the Internal Revenue Code of 1986;

"(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

"(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.); or

"(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).".

<< 18 USCA prec.§ 981 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 982 the following:

"983. General rules for civil forfeiture proceedings.".

(c) STRIKING SUPERSEDED PROVISIONS.—

<< 18 USCA § 981 >>

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

(A) in paragraph (1), by striking "Except as provided in paragraph (2), the" and inserting "The"; and

(B) by striking paragraph (2).

<< 21 USCA § 881 >>

(2) DRUG FORFEITURES.—Paragraphs (4), (6), and (7) of section 511(a) of the Controlled Substances Act (21 U.S.C. 881(a)(4), (6), and (7)) are each amended by striking ", except that" and all that follows before the period at the end.

<< 21 USCA § 888 >>

(3) AUTOMOBILES.—Section 518 of the Controlled Substances Act (21 U.S.C. 888) is repealed.

<< 18 USCA § 2254 >>

(4) FORFEITURES IN CONNECTION WITH SEXUAL EXPLOITATION OF CHILDREN.—Paragraphs (2) and (3) of section 2254(a) of title 18, United States Code, are each amended by striking ", except that" and all that follows before the period at the end.

<< 42 USCA § 2996f >>

(d) LEGAL SERVICES CORPORATION REPRESENTATION.—Section 1007(a) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)) is amended—

(1) in paragraph (9), by striking "and" after the semicolon;

(2) in paragraph (10), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(11) ensure that an indigent individual whose primary residence is subject to civil forfeiture is represented by an attorney for the Corporation in such civil action.".

SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY

<< 28 USCA § 2680 >>

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

(1) by striking "any goods or merchandise" and inserting "any goods, merchandise, or other property";

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

(3) by inserting before the period at the end the following: ", except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

"(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

"(2) the interest of the claimant was not forfeited;

"(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

"(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.".

<<31 USCA § 3724 NOTE >>

(b) DEPARTMENT OF JUSTICE.—

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

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

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

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

SEC. 4. ATTORNEY FEES, COSTS, AND INTEREST.

<< 28 USCA § 2465 >>

(a) IN GENERAL.—Section 2465 of title 28, United States Code, is amended to read as follows:

"§ 2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

"(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law—

"(1) such property shall be returned forthwith to the claimant or his agent; and

"(2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

"(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—

"(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

"(B) post-judgment interest, as set forth in section 1961 of this title; and

"(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale—

"(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

"(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

"(2)(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

"(B) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

"(C) If there are multiple claims to the same property, the United States shall not be liable for costs

and attorneys fees associated with any such claim if the United States—

"(i) promptly recognizes such claim;

"(ii) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;

"(iii) does not cause the claimant to incur additional, reasonable costs or fees; and

"(iv) prevails in obtaining forfeiture with respect to one or more of the other claims.

"(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.".

<< 28 USCA prec. § 2461 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 163 of title 28, United States Code, is amended by striking the item relating to section 2465 and inserting the following:

"2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest.".

SEC. 5. SEIZURE WARRANT REQUIREMENT.

<< 18 USCA § 981 >>

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

"(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

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

> "(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;
>
> "(B) there is probable cause to believe that the property is subject to forfeiture and—
>
> "(i) the seizure is made pursuant to a lawful arrest or search; or
>
> "(ii) another exception to the Fourth Amendment warrant requirement would apply; or

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

"(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

"(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

"(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person

arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.".

<< 21 USCA § 881 >>

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

"(b) SEIZURE PROCEDURES.—Any property subject to forfeiture to the United States under this section may be seized by the Attorney General in the manner set forth in section 981(b) of title 18, United States Code.".

<< 18 USCA § 981 >>

SEC. 6. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS.

Section 981(e) of title 18, United States Code, is amended by striking paragraph (6) and inserting the following:

"(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or".

SEC. 7. CIVIL FORFEITURE OF REAL PROPERTY

<< 18 USCA § 985 >>

(a) IN GENERAL.—Chapter 46 of title 18, United States Code, is amended by inserting after section 984 the following:

"§ 985. Civil forfeiture of real property

"(a) Notwithstanding any other provision of law, all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures.

"(b)(1) Except as provided in this section—

"(A) real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture; and

"(B) the owners or occupants of the real property shall not be evicted from, or otherwise deprived of the use and enjoyment of, real property that is the subject of a pending forfeiture action.

"(2) The filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection.

"(c)(1) The Government shall initiate a civil forfeiture action against real property by—

"(A) filing a complaint for forfeiture;

"(B) posting a notice of the complaint on the property; and

"(C) serving notice on the property owner, along with a copy of the complaint.

"(2) If the property owner cannot be served with the notice under paragraph (1) because the owner—

"(A) is a fugitive;

"(B) resides outside the United States and efforts at service pursuant to rule 4 of the Federal Rules of Civil Procedure are unavailing; or

"(C) cannot be located despite the exercise of due diligence, constructive service may be made in accordance with the laws of the State in which the property is located.

"(3) If real property has been posted in accordance with this subsection, it shall not be necessary for the court to issue an arrest warrant in rem, or to take any other action to establish in rem jurisdiction over the property.

"(d)(1) Real property may be seized prior to the entry of an order of forfeiture if—

"(A) the Government notifies the court that it intends to seize the property before trial; and

"(B) the court—

"(i) issues a notice of application for warrant, causes the notice to be served on the property owner and posted on the property, and conducts a hearing in which the property owner has a meaningful opportunity to be heard; or

"(ii) makes an ex parte determination that there is probable cause for the forfeiture and that there are exigent circumstances that

permit the Government to seize the property without prior notice and an opportunity for the property owner to be heard. "(2) For purposes of paragraph (1)(B)(ii), to establish exigent circumstances, the Government shall show that less restrictive measures such as a lis pendens, restraining order, or bond would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

"(e) If the court authorizes a seizure of real property under subsection (d)(1)(B)(ii), it shall conduct a prompt post-seizure hearing during which the property owner shall have an opportunity to contest the basis for the seizure.

"(f) This section—

"(1) applies only to civil forfeitures of real property and interests in real property;

"(2) does not apply to forfeitures of the proceeds of the sale of such property or interests, or of money or other assets intended to be used to acquire such property or interests; and

"(3) shall not affect the authority of the court to enter a restraining order relating to real property.".

<< 18 USCA prec. § 981 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 984 the following:

"985. Civil forfeiture of real property.".

SEC. 8. STAY OF CIVIL FORFEITURE CASE.

<< 18 USCA § 981 >>

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

"(g)(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

"(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that—

"(A) the claimant is the subject of a related criminal investigation or case;

"(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

"(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

"(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

"(4) In this subsection, the terms 'related criminal case" and 'related criminal investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is 'related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

"(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

"(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other

persons with an interest in the property while the stay is in effect.

"(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.".

<< 21 USCA § 881 >>

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

"(i) The provisions of section 981(g) of title 18, United States Code, regarding the stay of a civil forfeiture proceeding shall apply to forfeitures under this section.".

<< 18 USCA § 983 >>

SEC. 9. CIVIL RESTRAINING ORDERS.

Section 983 of title 18, United States Code, as added by this Act, is amended by adding at the end the following:

"(j) RESTRAINING ORDERS; PROTECTIVE ORDERS.—

"(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory

performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture—

"(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

"(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

"(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

"(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

"(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

"(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity

for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

"(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.".

<< 18 USCA § 3322 >>

SEC. 10. COOPERATION AMONG FEDERAL PROSECUTORS.

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

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

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

<< 19 USCA § 1621 >>

SEC. 11. STATUTE OF LIMITATIONS FOR CIVIL FORFEITURE ACTIONS.

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

<< 18 USCA § 2232 >>

SEC. 12. DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.

Section 2232 of title 18, United States Code, is amended—

(1) by striking subsections (a) and (b);

(2) by inserting "(e) FOREIGN INTELLIGENCE SURVEILLANCE.—" before "Whoever, having knowledge that a Federal officer";

(3) by redesignating subsection (c) as subsection (d); and

(4) by inserting before subsection (d), as redesignated, the following:

"(a) DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.—Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure,

knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Governments lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) IMPAIRMENT OF IN REM JURISDICTION.—Whoever, knowing that property is subject to the in rem jurisdiction of a United States court for purposes of civil forfeiture under Federal law, knowingly and without authority from that court, destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of impairing or defeating the court's continuing in rem jurisdiction over the property, shall be fined under this title or imprisoned not more than 5 years, or both.

"(c) NOTICE OF SEARCH OR EXECUTION OF SEIZURE WARRANT OR WARRANT OF ARREST IN REM.—Whoever, having knowledge that any person authorized to make searches and seizures, or to execute a seizure warrant or warrant of arrest in rem, in order to prevent the authorized seizing or securing of any person or property, gives notice or attempts to give notice in advance of the search, seizure, or execution of a seizure warrant or warrant of arrest in rem, to any

person shall be fined under this title or imprisoned not more than 5 years, or both".

<< 18 USCA § 984 >>

SEC. 13. FUNGIBLE PROPERTY IN BANK ACCOUNTS.

(a) IN GENERAL.—Section 984 of title 18, United States Code, is amended—

(1) by striking subsection (a) and redesignating subsections (b), (c), and (d) as subsections (a), (b), and (c), respectively;

(2) in subsection (a), as redesignated—

(A) by striking "or other fungible property" and inserting "or precious metals"; and

(B) in paragraph (2), by striking "subsection (c)" and inserting "subsection (b)";

(3) in subsection (c), as redesignated—

(A) by striking paragraph (1) and inserting the following: "(1) Subsection (a) does not apply to an action against funds held by a financial institution in an interbank account unless the account holder knowingly engaged in the offense that is the basis for the forfeiture."; and

(B) in paragraph (2), by striking "(2) As used in this section, the term" and inserting the following:

"(2) In this subsection—

"(A) the term "financial institution" includes a foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(b)(7))); and

"(B) the term"; and

(4) by adding at the end the following:

"(d) Nothing in this section may be construed to limit the ability of the Government to forfeit property under any provision of law if the property involved in the offense giving rise to the forfeiture or property traceable thereto is available for forfeiture.".

SEC. 14. FUGITIVE DISENTITLEMENT.

<< 28 USCA § 2466 >>

(a) IN GENERAL.—Chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"§ 2466. Fugitive disentitlement

A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person—

"(1) after notice or knowledge of the fact that a warrant or process has been issued for his

apprehension, in order to avoid criminal prosecution—

"(A) purposely leaves the jurisdiction of the United States;

"(B) declines to enter or reenter the United States to submit to its jurisdiction; or

"(C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and

"(2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.".

<< 28 USCA prec. § 2461 >>

(b) CONFORMING AMENDMENT.—The analysis for chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"2466. Fugitive disentitlement.".

<< 28 USCA § 2466 NOTE >>

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to any case pending on or after the date of the enactment of this Act.

SEC. 15. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT.

<< 28 USCA § 2467 >>

(a) IN GENERAL.—Chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"§ 2467. Enforcement of foreign judgment

"(a) DEFINITIONS.—In this section—

"(1) the term 'foreign nation' means a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (referred to in this section as the 'United Nations Convention') or a foreign jurisdiction with which the United States has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance; and

"(2) the term 'forfeiture or confiscation judgment' means a final order of a foreign nation compelling a person or entity—

"(A) to pay a sum of money representing the proceeds of an offense described in Article 3, Paragraph 1, of the United Nations Convention, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or

"(B) to forfeit property involved in or traceable to the commission of such offense.

"(b) REVIEW BY ATTORNEY GENERAL.—

"(1) IN GENERAL.—A foreign nation seeking to have a forfeiture or confiscation judgment registered and enforced by a district court of the United States under this section shall first submit a request to the Attorney General or the designee of the Attorney General, which request shall include—

"(A) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation judgment;

"(B) certified copy of the forfeiture or confiscation judgment;

"(C) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable the defendant to defend against the charges and that the judgment rendered is in force and is not subject to appeal; and

"(D) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.

"(2) CERTIFICATION OF REQUEST.—The Attorney General or the designee of the Attorney General shall determine whether, in the interest of justice, to certify the request, and such decision shall be final and not subject to either judicial review or review under subchapter II of chapter 5, or chapter 7, of title 5 (commonly known as the 'Administrative Procedure Act').

"(c) JURISDICTION AND VENUE.—

"(1) IN GENERAL.—If the Attorney General or the designee of the Attorney General certifies a request under subsection (b), the United States may file an application on behalf of a foreign nation in district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States.

"(2) PROCEEDINGS.—In a proceeding filed under paragraph (1)—

"(A) the United States shall be the applicant and the defendant or another person or entity affected by the forfeiture or confiscation judgment shall be the respondent;

"(B) venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found; and

"(C) the district court shall have personal jurisdiction over a defendant residing outside of the United States if the defendant is served with process in accordance with rule 4 of the Federal Rules of Civil Procedure.

"(d) ENTRY AND ENFORCEMENT OF JUDGMENT.—

"(1) IN GENERAL.—The district court shall enter such orders as may be necessary to enforce the

judgment on behalf of the foreign nation unless the court finds that—

"(A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;

"(B) the foreign court lacked personal jurisdiction over the defendant;

"(C) the foreign court lacked jurisdiction over the subject matter;

"(D) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend; or

"(E) the judgment was obtained by fraud.

"(2) PROCESS.—Process to enforce a judgment under this section shall be in accordance with rule 69(a) of the Federal Rules of Civil Procedure.

"(e) FINALITY OF FOREIGN FINDINGS.—In entering orders to enforce the judgment, the court shall be bound by the findings of fact to the extent that they are stated in the foreign forfeiture or confiscation judgment.

"(f) CURRENCY CONVERSION.—The rate of exchange in effect at the time the suit to enforce is filed by the foreign nation shall be used in calculating the amount stated in any forfeiture or confiscation judgment requiring the payment of a sum of money submitted for registration.".

<< 28 USCA prec. § 2461 >>

(b) CONFORMING AMENDMENT.—The analysis for chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"2467. Enforcement of foreign judgment".

<< 28 USCA § 2461 >>

SEC. 16. ENCOURAGING USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL FORFEITURE.

Section 2461 of title 28, United States Code, is amended by adding at the end the following:

"(c) If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.".

<< 18 USCA § 986 >>

SEC. 17. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.

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

"(d) ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.—

"(1) IN GENERAL.—In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), in which—

"(A) financial records located in a foreign country may be material—

"(i) to any claim or to the ability of the Government to respond to such claim; or

"(ii) in a civil forfeiture case, to the ability of the Government to establish the forfeitability of the property; and

"(B) it is within the capacity of the claimant to waive the claimant's rights under applicable financial secrecy laws, or to obtain the records so that such records can be made available notwithstanding such secrecy laws,

the refusal of the claimant to provide the records in response to a discovery request or to take the action necessary otherwise to make the records available shall be grounds for

judicial sanctions, up to and including dismissal of the claim with prejudice.

"(2) PRIVILEGE.—This subsection shall not affect the right of the claimant to refuse production on the basis of any privilege guaranteed by the Constitution of the United States or any other provision of Federal law.".

SEC. 18. APPLICATION TO ALIEN SMUGGLING OFFENSES.

<< 8 USCA § 1324 >>

(a) AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT.—Section 274(b) of the Immigration and Nationality Act (8 U.S.C. 1324(b)) is amended to read as follows:

"(b) SEIZURE AND FORFEITURE.—

"(1) IN GENERAL.—Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

"(2) APPLICABLE PROCEDURES.—Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in

that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

"(3) PRIMA FACIE EVIDENCE IN DETERMINATIONS OF VIOLATIONS.—In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

"(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

"(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

"(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.".

<< 18 USCA § 982 >>

(b) TECHNICAL CORRECTIONS TO EXISTING CRIMINAL FORFEITURE AUTHORITY.—Section 982(a)(6) of title 18, United States Code, is amended—

(1) in subparagraph (A)—

(A) by inserting "section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or" before "section 1425" the first place it appears;

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

(C) in subclauses (I) and (II) of clause (ii), by striking "a violation of, or a conspiracy to violate, subsection (a)" and all that follows through "of this title" each place it appears and inserting "the offense of which the person is convicted";

(2) by striking subparagraph (B); and

(3) in the second sentence—

(A) by striking "The court, in imposing sentence on such person" and inserting the following:

"(B) The court, in imposing sentence on a person described in subparagraph (A)"; and

(B) by striking "this subparagraph" and inserting "that subparagraph".

<< 28 USCA § 524 >>

SEC. 19. ENHANCED VISIBILITY OF THE ASSET FORFEITURE PROGRAM.

Section 524(c)(6) of title 28, United States Code, is amended to read as follows:

"(6)(A) The Attorney General shall transmit to Congress and make available to the public, not later than 4 months after the end of each fiscal year, detailed reports for the prior fiscal year as follows:

"(i) A report on total deposits to the Fund by State of deposit.

"(ii) A report on total expenses paid from the Fund, by category of expense and recipient agency, including equitable sharing payments.

"(iii) A report describing the number, value, and types of properties placed into official use by Federal agencies, by recipient agency.

"(iv) A report describing the number, value, and types of properties transferred to State and local law enforcement agencies, by recipient agency.

"(v) A report, by type of disposition, describing the number, value, and types of forfeited property disposed of during the year.

"(vi) A report on the year-end inventory of property under seizure, but not yet forfeited, that reflects the type of property, its estimated value, and the estimated value of liens and mortgages outstanding on the property.

"(vii) A report listing each property in the year-end inventory, not yet forfeited, with an outstanding equity of not less than $1,000,000.

"(B) The Attorney General shall transmit to Congress and make available to the public, not later than 2 months after final issuance, the audited financial statements for each fiscal year for the Fund.

"(C) Reports under subparagraph (A) shall include information with respect to all forfeitures under any law enforced or administered by the Department of Justice.

"(D) The transmittal and publication requirements in subparagraphs (A) and (B) may be satisfied by—

"(i) posting the reports on an Internet website maintained by the Department of Justice for a period of not less than 2 years; and

"(ii) notifying the Committees on the Judiciary of the House of Representatives and the Senate when the reports are available electronically.".

SEC. 20. PROCEEDS.

<< 18 USCA § 981 >>

(a) FORFEITURE OF PROCEEDS.—Section 981(a)(1)(C) of title 18, United States Code, is amended by striking "or a violation of section 1341" and all that follows and inserting "or any offense constituting "specified unlawful activity" (as defined in section

1956(c)(7) of this title), or a conspiracy to commit such offense.".

<< 18 USCA § 981 >>

(b) DEFINITION OF PROCEEDS.—Section 981(a) of title 18, United States Code, is amended by adding at the end the following:

"(2) For purposes of paragraph (1), the term 'proceeds" is defined as follows:

> "(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term 'proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.
>
> "(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term 'proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.
>
> "(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court

shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.".

<< 8 USCA § 1324 NOTE >>

SEC. 21. EFFECTIVE DATE.

Except as provided in section 14(c), this Act and the amendments made by this Act shall apply to any forfeiture proceeding commenced on or after the date that is 120 days after the date of the enactment of this Act.

Approved April 25, 2000.

PL 106-185, 2000 HR 1658

28 U.S.C. § 2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

Currentness

(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law—

> **(1)** such property shall be returned forthwith to the claimant or his agent; and
>
> **(2)** if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—

> **(A)** reasonable attorney fees and other litigation costs reasonably incurred by the claimant;
>
> **(B)** post-judgment interest, as set forth in section 1961 of this title; and
>
> **(C)** in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale—

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

(2)(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

(B) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(C) If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the United States—

(i) promptly recognizes such claim;

(ii) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;

(iii) does not cause the claimant to incur additional, reasonable costs or fees; and

(iv) prevails in obtaining forfeiture with respect to one or more of the other claims.

(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.