AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

105TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 105–358, Part 1

CIVIL ASSET FORFEITURE REFORM ACT

OCTOBER 30, 1997.—Ordered to be printed

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

REPORT

[To accompany H.R. 1965]

[Including cost estimate of the Congressional Budget Office]

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

TABLE OF CONTENTS

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

The amendment is as follows:

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

59–006

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

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

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

Sec. 1. Short title and table of contents.
Sec. 2. Creation of general rules relating to civil forfeiture proceedings.
Sec. 3. Compensation for damage to seized property.
Sec. 4. Prejudgment and postjudgment interest.
Sec. 5. Seizure warrant requirement.
Sec. 6. Access to records in bank secrecy jurisdictions.
Sec. 7. Access to other records.
Sec. 8. Disclosure of grand jury information to Federal prosecutors.
Sec. 9. Use of forfeited funds to pay restitution to crime victims and regulatory agencies.
Sec. 10. Enforcement of foreign forfeiture judgment.
Sec. 11. Admissibility of foreign business records.
Sec. 12. Conforming amendments to title 28, to Rules of Procedure, and to the Controlled Substances Act.
Sec. 13. Inapplicability of the customs laws.
Sec. 14. Applicability.
Sec. 15. Jurisdiction and venue in forfeiture cases.
Sec. 16. Minor and technical amendments relating to 1992 forfeiture amendments.
Sec. 17. Drug paraphernalia technical amendments.
Sec. 18. Certificate of reasonable cause.
Sec. 19. Authorization to share forfeited property with cooperating foreign governments.
Sec. 20. Forfeiture of property used to facilitate foreign drug crimes.
Sec. 21. Forfeiture of proceeds traceable to facilitating property in drug cases.
Sec. 22. Forfeiture of proceeds of certain foreign crimes.
Sec. 23. Civil forfeiture of coins and currency in confiscated gambling devices.
Sec. 24. Clarification of judicial review of forfeiture.
Sec. 25. Technical amendments relating to obliterated motor vehicles identification numbers.
Sec. 26. Statute of limitations for civil forfeiture actions.
Sec. 27. Destruction or removal of property to prevent seizure.
Sec. 28. In personam judgments.
Sec. 29. Uniform procedures for criminal forfeiture.
Sec. 30. Availability of criminal forfeiture.
Sec. 31. Discovery procedure for locating forfeited assets.
Sec. 32. Criminal forfeiture for money laundering conspiracies.
Sec. 33. Correction to criminal forfeiture provision for alien smuggling and other immigration offenses.
Sec. 34. Repatriation of property placed beyond the jurisdiction of the court.
Sec. 35. Right of third parties to contest forfeiture of substitute assets.
Sec. 36. Archeological Resources Protection Act.
Sec. 37. Forfeiture of instrumentalities of terrorism, telemarketing fraud, and other offenses.
Sec. 38. Forfeiture of criminal proceeds transported in interstate commerce.
Sec. 39. Forfeitures of proceeds of Federal Food, Drug, and Cosmetic Act violations.
Sec. 40. Forfeiture of counterfeit paraphernalia.
Sec. 41. Closing of loophole to defeat criminal forfeiture through bankruptcy.
Sec. 42. Collection of criminal forfeiture judgment.
Sec. 43. Criminal forfeiture of property in Government custody.
Sec. 44. Delivery of property to the Marshals Service.
Sec. 45. Forfeiture for odometer tampering offenses.
Sec. 46. Pre-trial restraint of substitute assets.
Sec. 47. Hearings on pre-trial restraining orders; assets needed to pay attorney's fees.

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

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

"§ 983. Civil forfeiture procedures

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

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

"(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1355(b) of title 28 for an extension of time in which to comply with paragraph (1)(A). Such an extension shall be granted based on a showing of good cause.

"(3) A person with an ownership or possessory interest in the seized article who failed to file a claim within the time period prescribed in subsection (b) may, on motion made not later than 2 years after the date of final publication of notice of seizure of the property, move to set aside a declaration of forfeiture entered pursuant

to section 609 of the Tariff Act of 1930 (19 U.S.C. 1609). Such motion shall be granted if—

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

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

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

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

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

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

"(b) FILING A CLAIM.—(1) Any person claiming such seized property may file a claim with the appropriate official after the seizure.

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

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

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

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

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

"(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1355(b) of title 28 for an extension of time in which to comply with paragraph (1). Such an extension shall be granted based on a showing of good cause. If the reason for the extension is that the filing required by paragraph (1) would jeopardize an ongoing criminal investigation or prosecution or court-authorized electronic surveillance, the application may be made ex parte.

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

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

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

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

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

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

"(3) The determination of whether to appoint counsel under this subsection shall be made following a hearing at which the Government shall have an opportunity to present evidence and examine the claimant. The testimony of the claimant at such hearing shall not be admitted in any other proceeding except in accordance

with the rules which govern the admissibility of testimony adduced in a hearing on a motion to suppress evidence. Nothing in this paragraph shall be construed to prohibit the admission of any evidence that may be obtained in the course of civil discovery in the forfeiture proceeding or through any other lawful investigative means.

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

"(f) INNOCENT OWNERS.—(1) An innocent owner's interest in property shall not be forfeited in any civil forfeiture action.

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

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

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

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

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

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

"(ii) in the case of a minor child, as an inheritance upon the death of a parent,

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

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

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

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

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

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

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

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

"(6) As used in this subsection—

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

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

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

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

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

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

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

"(A) severing the property;

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

"(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government, to the extent of the forfeitable interest in the property, that will permit the Government to realize its forfeitable interest if the property is transferred to another person.

To effectuate the purposes of this subsection, a joint tenancy or tenancy by the entireties shall be converted to a tenancy in common by order of the court, irrespective of state law.

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

"(g) MOTION TO SUPPRESS SEIZED EVIDENCE.—At any time after a claim and answer are filed in a judicial forfeiture proceeding, a claimant with standing to contest the seizure of the property may move to suppress the fruits of the seizure in accordance with the normal rules regarding the suppression of illegally seized evidence. If the claimant prevails on such motion, the fruits of the seizure shall not be admitted into evidence as to that claimant at the forfeiture trial. However, a finding that evidence should be suppressed shall not bar the forfeiture of the property based on evidence obtained independently before or after the seizure.

"(h) USE OF HEARSAY AT PRE-TRIAL HEARINGS.—At any pre-trial hearing under this section in which the governing standard is probable cause, the court may accept and consider hearsay otherwise inadmissible under the Federal Rules of Evidence.

"(i) STIPULATIONS.—Notwithstanding the claimant's offer to stipulate to the forfeitability of the property, the Government shall be entitled to present evidence to the finder of fact on that issue before the claimant presents any evidence in support of any affirmative defense.

"(j) PRESERVATION OF PROPERTY SUBJECT TO FORFEITURE.—The court, before or after the filing of a forfeiture complaint and on the application of the Government, may—

"(1) enter any restraining order or injunction in the manner set forth in section 413(e) of the Controlled Substances Act (21 U.S.C. 853(e));

"(2) require the execution of satisfactory performance bonds;

"(3) create receiverships;

"(4) appoint conservators, custodians, appraisers, accountants or trustees; or

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

"(k) EXCESSIVE FINES.—(1) At the conclusion of the trial and following the entry of a verdict of forfeiture, or upon the entry of summary judgment for the Government as to the forfeitability of the property, the claimant may petition the court to determine whether the excessive fines clause of the Eighth Amendment applies, and if so, whether forfeiture is excessive. The claimant shall have the burden of establishing that a forfeiture is excessive by a preponderance of the evidence at a hearing conducted in the manner provided in Rule 43(e), Federal Rules of Civil Procedure, by the Court without a jury. If the court determines that the forfeiture is excessive, it shall adjust the forfeiture to the extent necessary to avoid the Constitutional violation.

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

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

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

"(l) PRE-DISCOVERY STANDARD.—In a judicial proceeding on the forfeiture of property, the Government shall not be required to establish the forfeitability of the

property before the completion of discovery pursuant to the Federal Rules of Civil Procedure, particularly Rule 56(f) as may be ordered by the court or if no discovery is ordered before trial.

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

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

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

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

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

(c) STRIKING SUPERSEDED PROVISIONS.—(1) Section 981(a) of title 18, United States Code, is amended by—

(A) striking paragraph (2); and

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

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

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

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

(d) RELEASE OF PROPERTY.—Chapter 46 of title 18, United States Code, is amended to add the following section after section 984:

"§ 985. Release of property to avoid hardship

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

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

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

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

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

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

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

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

"(3) The district court must act on a motion made pursuant to this subsection within 30 days or as soon thereafter as practicable, and must grant the motion if the claimant establishes that the requirements of subsection (a) have been met. If the court grants the motion, the court must enter any order necessary to ensure

that the value of the property is maintained while the forfeiture action is pending, including permitting the inspection, photographing and inventory of the property, and the court may take action in accordance with Rule E of the Supplemental Rules for Certain Admiralty and Maritime Cases. The Government is authorized to place a lien against the property or to file a lis pendens to ensure that it is not transferred to another person. The Government, in responding to a motion under this subsection, may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter relating to an ongoing criminal investigation or pending trial.

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

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

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

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

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

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

"(d) Once a motion for the release of property under this section is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1355(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28.".

(e) CHAPTER ANALYSIS.—The table of sections for chapter 46 of title 18, United States Code, is amended—

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

"983. Civil forfeiture procedures."; andQ03

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

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

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

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

(2) by striking subparagraph (E).

(g) CRIMINAL FORFEITURE OF PROCEEDS.—Section 982(a)(2) of title 18, United States Code, is amended by—

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

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

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

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

(h) UNIFORM DEFINITION OF PROCEEDS.—(1) Section 981(a) of title 18, United States Code, as amended by subsection (c), is amended—

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

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

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

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

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

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

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

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

SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.

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

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

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

(b) DEPARTMENT OF JUSTICE.—

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

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

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

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

SEC. 4. PREJUDGMENT AND POSTJUDGMENT INTEREST.

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

(1) by inserting "(a) IN GENERAL.—" before "Upon"; and

(2) adding at the end the following:

"(b) INTEREST.—

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

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

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

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

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

"(3) LIMITATION ON OTHER PAYMENTS.—The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.".

SEC. 5. SEIZURE WARRANT REQUIREMENT.

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

"(b)(1) Any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General. In addition, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

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

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

"(B) the seizure is made pursuant to a lawful arrest or search, or if there is probable cause to believe that the property is subject to forfeiture and another exception to the Fourth Amendment warrant requirement would apply; or

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

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

"(4) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under subsection (a) or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district where the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in Rule 43(e) of the Federal Rules of Civil Procedure. The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

"(5) Once a motion for the return of seized property under Rule 41(e) is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1355(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28.".

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

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

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

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

"(d) ACCESS TO RECORDS LOCATED ABROAD.—In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), where—

"(1) financial records located in a foreign country may be material—

"(A) to any claim or to the ability of the Government to respond to such claim; or

"(B) in a civil forfeiture case, to the Government's ability to establish the forfeitability of the property; and

"(2) it is within the capacity of the claimant to waive the claimant's rights under such secrecy laws or to obtain the records, so that the records can be made available,

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

SEC. 7. ACCESS TO OTHER RECORDS.

Section 6103(i)(1) of the Internal Revenue Code of 1986 (26 U.S.C. 6103(i)(1)) is amended—

(1) in subparagraph (A)(i) by inserting "or related civil forfeiture" after "enforcement of a specifically designated Federal criminal statute"; and

(2) in subparagraph (B)(iii) by inserting "or civil forfeiture investigation or proceeding" after "Federal criminal investigation or proceeding".

SEC. 8. DISCLOSURE OF GRAND JURY INFORMATION TO FEDERAL PROSECUTORS.

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

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

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

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

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

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

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

(2) in subsections (e)(3), (4) and (5), by striking "in the case of property referred to in subsection (a)(1)(C)" and inserting "in the case of property forfeited in connection with an offense resulting in a pecuniary loss to a financial institution or regulatory agency"; and

(3) in subsection (e)(7), by striking "In the case of property referred to in subsection (a)(1)(D)" and inserting "In the case of property forfeited in connection with an offense relating to the sale of assets acquired or held by any Federal financial institution or regulatory agency, or person appointed by such agency, as receiver, conservator or liquidating agent for a financial institution".

SEC. 10. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT.

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

"§ 2466. Enforcement of foreign forfeiture judgment

"(a) DEFINITIONS.—As used in this section:

"(1) The term 'foreign nation' shall mean a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter 'the United Nations Convention') or a foreign jurisdiction with which the United States has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance.

"(2) The term 'value-based confiscation judgment' shall mean a final order of a foreign nation compelling a defendant, as a consequence of the defendant's criminal conviction for an offense described in Article 3, Paragraph 1, of the United Nations Convention, to pay a sum of money representing the proceeds of such offense or property the value of which corresponds to such proceeds.

"(b) REVIEW BY ATTORNEY GENERAL.—A foreign nation seeking to have its value-based confiscation judgment registered and enforced by a United States district court under this section must first submit a request to the Attorney General or the Attorney General's designee. Such request shall include—

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

"(2) certified copies of the judgment of conviction and value-based confiscation judgment;

"(3) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable the defendant to defend against the charges that the value-based confiscation judgment rendered is in force and is not subject to appeal;

"(4) an affidavit or sworn declaration that all reasonable efforts have been undertaken to enforce the value-based confiscation judgment against the defendant's property, if any, in the foreign country; and

"(5) such additional information and evidence as may be required by the Attorney General or the Attorney General's designee.

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

"(c) JURISDICTION AND VENUE.—Where the Attorney General or the Attorney General's designee certifies a request under paragraph (b), the foreign nation may file a civil proceeding in United States district court seeking to enforce the foreign value-based confiscation judgment as if the judgment had been entered by a court in the United States. In such a proceeding, the foreign nation shall be the plaintiff and the person against whom the value-based confiscation judgment was entered shall be the defendant. Venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found. The United States district court shall have personal jurisdiction over a defendant residing out-

side of the United States if the defendant is served with process in accordance with Rule 4 of the Federal Rules of Civil Procedure.

"(d) ENTRY AND ENFORCEMENT OF JUDGMENT.—The United States district court shall enter such orders as may be necessary to enforce the value-based confiscation judgment on behalf of the foreign nation where it finds that all of the following requirements have been met:

"(1) The value-based confiscation judgment was rendered under a system which provides impartial tribunals or procedures compatible with the requirements of due process of law.

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

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

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

"(5) The judgment was not obtained by fraud.

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

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

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

(b) CONFORMING AMENDMENT.— The table of sections for chapter 163, title 28, United States Code, is amended by inserting the following at the end:

"2466. Enforcement of foreign forfeiture judgment.".

SEC. 11. ADMISSIBILITY OF FOREIGN BUSINESS RECORDS.

(a) IN GENERAL.—Chapter 163 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 2467. Foreign records

"(a) In a civil proceeding in a court of the United States, including civil forfeiture proceedings and proceedings in the United States Claims Court and the United States Tax Court, a foreign record of regularly conducted activity, or copy of such record, obtained pursuant to an official request shall not be excluded as evidence by the hearsay rule if a foreign certification, also obtained pursuant to the same official request or subsequent official request that adequately identifies such foreign record, attests that—

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

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

"(3) the business activity made such a record as a regular practice; and

"(4) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

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

"(c) As soon as practicable after a responsive pleading has been filed, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

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

"(1) 'foreign record of regularly conducted activity' means a memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

"(2) 'foreign certification' means a written declaration made and signed in a foreign country by the custodian of a record of regularly conducted activity or another qualified person, that if falsely made, would subject the maker to criminal penalty under the law of that country;

"(3) 'business' includes business, institution, association, profession, occupation, and calling of every kind whether or not conducted for profit; and

"(4) 'official request' means a letter rogatory, a request under an agreement, treaty or convention, or any other request for information or evidence made by a court of the United States or an authority of the United States having law enforcement responsibility, to a court or other authority of a foreign country.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 163 of title 28, United States Code, is amended by inserting the following at the end:

"2467. Foreign records.".

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

(a) IN GENERAL.—Section 524(c) of title 28, United States Code, is amended—

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

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

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

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

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

SEC. 13. INAPPLICABILITY OF THE CUSTOMS LAWS.

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

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

(c) LIBEL IN ADMIRALTY.—Section 2461(b) of title 28, United States Code, is amended—

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

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

SEC. 14. APPLICABILITY.

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

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

(c) CIVIL JUDICIAL FORFEITURES.—The amendments in this Act relating to judicial procedures applicable once a civil forfeiture complaint is filed by the Government shall apply to all cases in which the forfeiture complaint is filed on or after the date of the enactment of this Act.

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

SEC. 15. JURISDICTION AND VENUE IN FORFEITURE CASES.

(a) ADMINISTRATIVE FORFEITURES.—Section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) is amended by striking "to the United States Attorney for the district in which seizure was made" and inserting "to the United States attorney for a district in which a forfeiture action could be filed pursuant to title 28, United States Code, section 1355(b)".

(b) JUDICIAL FORFEITURES.—Section 610 of the Tariff Act of 1930 (19 U.S.C. 1610) is amended by striking "to the United States attorney for the district in which the seizure was made" and inserting "to the United States attorney for a district in which a forfeiture action could be filed pursuant to title 28, United States Code, Section 1355(b)".

(c) ADMIRALTY RULES.—The Supplemental Rules for Certain Admiralty and Maritime Claims are amended—

(1) in Rule E(3), by inserting the following at the end of paragraph (a): "This provision shall not apply in forfeiture cases governed by section 1355 of title 28 or any other statute providing for service of process outside of the district."; and

(2) in Rule C(2), by inserting the following after "that it is within the district or will be during the pendency of the action.": "If the property is located outside of the district, the complaint shall state the statutory basis for the court's exercise of jurisdiction over the property.".

SEC. 16. MINOR AND TECHNICAL AMENDMENTS RELATING TO 1992 FORFEITURE AMENDMENTS.

(a) CRIMINAL FORFEITURE.—Section 982 of title 18, United States Code, is amended in subsection (b)(2), by striking "The substitution" and inserting "With respect to a forfeiture under subsection (a)(1), the substitution".

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

(1) striking "section 1956, 1957, or 1960 of this title, section 5322 or 5324 of title 31, United States Code" and inserting "section 981 of this title";

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

(3) striking the last sentence.

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

SEC. 17. DRUG PARAPHERNALIA TECHNICAL AMENDMENTS.

(a) Section 511(a)(10) of the Controlled Substances Act (21 U.S.C. 881(a)(10)) is amended by striking "section 1822 of the Mail Order Drug Paraphernalia Control Act" and inserting "section 422".

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

(1) by deleting subsection (c); and

(2) by redesignating subsections (d), (e), and (f) to be subsections (c), (d), and (e).

SEC. 18. CERTIFICATE OF REASONABLE CAUSE.

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

(1) by striking "property seized" and inserting "property seized or arrested" and

(2) by striking "seizure" each time it appears and inserting "seizure or arrest".

SEC. 19. AUTHORIZATION TO SHARE FORFEITED PROPERTY WITH COOPERATING FOREIGN GOVERNMENTS.

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

(b) CONFORMING AMENDMENT.—Section 511(e)(1) of the Controlled Substances Act (21 U.S.C. 881(e)(1)) is amended by inserting "or" at the end of subparagraph (C), by striking "; or" at the end of subparagraph (D) and inserting a period, and by striking subparagraph (E).

SEC. 20. FORFEITURE OF PROPERTY USED TO FACILITATE FOREIGN DRUG CRIMES.

Section 981(a)(1)(B) of title 18, United States Code, is amended by inserting ", or any property used to facilitate such offense" at the end before the period.

SEC. 21. FORFEITURE OF PROCEEDS TRACEABLE TO FACILITATING PROPERTY IN DRUG CASES.

(a) CONVEYANCES.—Section 511(a)(4) of the Controlled Substances Act (21 U.S.C. 881(a)(4)) is amended by inserting ", and any property traceable to such conveyances" after "property described in paragraph (1), (2), or (9)".

(b) REAL PROPERTY.—Section 511(a)(7) of the Controlled Substances Act (21 U.S.C. 881(a)(7)) is amended by inserting ", and any property traceable to such property" after "one year's imprisonment".

(c) NEGOTIABLE INSTRUMENTS AND SECURITIES.—Section 511(a)(6) of the Controlled Substances Act (21 U.S.C. 881(a)(6)) is amended by inserting ", and any property traceable to such property" after "this title" the second time it appears.

SEC. 22. FORFEITURE OF PROCEEDS OF CERTAIN FOREIGN CRIMES.

Section 981(a)(1)(B) of title 18, United States Code, is amended by—

(1) inserting "(i)" after "against a foreign nation involving"; and

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

SEC. 23. CIVIL FORFEITURE OF COINS AND CURRENCY IN CONFISCATED GAMBLING DEVICES.

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

(1) by inserting "Any coin or currency contained in any gambling device at the time of its seizure pursuant to the preceding sentence shall also be seized and forfeited to the United States." after the first sentence; and

(2) in the last sentence, by inserting ", coins, or currency" after "gambling devices".

SEC. 24. CLARIFICATION OF JUDICIAL REVIEW OF FORFEITURE.

Section 507 of the Controlled Substances Act (21 U.S.C. 877) is amended by adding at the end the following: "This section does not apply to any findings, conclusions, rulings, decisions, or declarations of the Attorney General, or any designee of the Attorney General, relating to the seizure, forfeiture, or disposition of forfeited property brought under this subchapter.".

SEC. 25. TECHNICAL AMENDMENTS RELATING TO OBLITERATED MOTOR VEHICLES IDENTIFICATION NUMBERS.

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

(1) in subsection (b), by inserting "and the provisions of chapter 46 of this title relating to civil judicial forfeitures" before "shall apply"; and

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

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

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

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

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

(1) inserting "OR SEIZURE" after "PHYSICAL INTERFERENCE WITH SEARCH";

(2) inserting ", including seizure for forfeiture," after "after seizure";

(3) striking "searches and seizures" after "authorized to make" and inserting "searches or seizures";

(4) striking "or" after "wares,"; and

(5) inserting ", or other property, real or personal," after "merchandise"

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

(1) inserting "OR SEIZURE" after "NOTICE OF SEARCH";

(2) striking "searches and seizures" after "authorized to make" and inserting "searches or seizures";

(3) inserting ", including seizure for forfeiture" after "likely to make a search or seizure"; and

(4) inserting "real or personal," after "merchandise or other property,".

SEC. 28. IN PERSONAM JUDGMENTS.

Section 1963(l)(1) of title 18, United States Code, and section 413(n)(1) of the Controlled Substances Act (21 U.S.C. 853(n)(1)) are each amended by adding the following sentence at the end: "To the extent that the order of forfeiture includes only an in personam money judgment against the defendant, no proceeding under this subsection shall be necessary.".

SEC. 29. UNIFORM PROCEDURES FOR CRIMINAL FORFEITURE.

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

"(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related administrative or judicial proceeding, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except for subsection 413(d) which shall not apply to forfeitures under this section.".

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

SEC. 30. AVAILABILITY OF CRIMINAL FORFEITURE.

(a) IN GENERAL.—Section 2461 of title 28, United States Code, is amended by adding the following subsection:

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

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

(1) by striking "an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970" and inserting "an offense for which criminal forfeiture is authorized"; and

(2) by inserting "pursuant to the Federal Rules of Criminal Procedure," after "shall order,".

SEC. 31. DISCOVERY PROCEDURE FOR LOCATING FORFEITED ASSETS.

(a) IN GENERAL.—Section 1963(k) of title 18, United States Code, and section 413(m) of the Controlled Substances Act (21 U.S.C. 853(m)) are each amended by—

(1) adding the following at the end before the period: "to the extent that the provisions of the Rule are consistent with the purposes for which discovery is conducted under this subsection"; and

(2) adding the following additional sentence: "Because this subsection applies only to matters occurring after the defendant has been convicted and his property has been declared forfeited, the provisions of Rule 15 requiring the consent of the defendant and the presence of the defendant at the deposition shall not apply."

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

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

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

SEC. 32. CRIMINAL FORFEITURE FOR MONEY LAUNDERING CONSPIRACIES.

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

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

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

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

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

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

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

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

(a) ORDER OF FORFEITURE.—Section 413(p) of the Controlled Substances Act (21 U.S.C. 853(p)) is amended by inserting the following at the end: "In the case of property described in paragraph (3), the court may, in addition, order the defendant to

return the property to the jurisdiction of the court so that it may be seized and forfeited.".

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

"(4) Pursuant to its authority to enter a pre-trial restraining order under this section, including its authority to restrain any property forfeitable as substitute assets, the court may also order the defendant to repatriate any property subject to forfeiture pending trial, and to deposit that property in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account. Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence for the offense giving rise to the forfeiture under the obstruction of justice provision of section 3C1.1 of the United States Sentencing Guidelines.".

SEC. 35. RIGHT OF THIRD PARTIES TO CONTEST FORFEITURE OF SUBSTITUTE ASSETS.

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

(1) inserting the following after the first sentence:
"All right, title and interest in property described in subsection (p) of this section vests in the United States at the time an indictment, information or bill of particulars specifically describing the property as substitute assets is filed."; and

(2) by striking "Any such property that is subsequently transferred to a person other than the defendant" and inserting "Any property that is transferred to a person other than the defendant after the United States' interest in the property has vested pursuant to this subsection".

(b) CONFORMING AMENDMENT.—Section 413(n)(6) of the Controlled Substances Act (21 U.S.C. 853(n)(6)) is amended by adding at the end the following sentence: "In the case of substitute assets, the petitioner must show that his interest in the property existed at the time the property vested in the United States pursuant to subsection (c), or that he subsequently acquired his interest in the property as a bona fide purchaser for value as provided in this subsection.".

SEC. 36. ARCHEOLOGICAL RESOURCES PROTECTION ACT.

Section 8(b) of the Archeological Resources Protection Act of 1979 (16 U.S.C. 470gg(b)) is amended by—

(1) inserting "all proceeds derived directly or indirectly from such violation or any property traceable thereto," before "and all vehicles" in the unnumbered paragraph;

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

(3) inserting the following at the end of the subsection: "If a forfeiture count is included within an indictment in accordance with the Federal Rules of Criminal Procedure, and the defendant is convicted of the offense giving rise to the forfeiture, the forfeiture may be ordered as part of the criminal sentence in accordance with the procedures for criminal forfeitures in chapter 46 of title 18, United States Code. Otherwise, the forfeiture shall be civil in nature in accordance with the procedures for civil forfeiture in said chapter 46 of title 18.".

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

(a) CIVIL FORFEITURE.—Section 981(a)(1) of title 18, United States Code is amended by adding the following subparagraphs:

"(G)(i) Any computer, photostatic reproduction machine, electronic communications device or other material, article, apparatus, device or thing made, possessed, fitted, used or intended to be used on a continuing basis to commit a violation of sections 513, 514, 1028 through 1032, and 1341, 1343, and 1344 of this title, or a conspiracy to commit such offense, and any property traceable to such property.

"(ii) Any conveyance used on two or more occasions to transport the instrumentalities used in the commission of a violation of sections 1028 and 1029 of this title, or a conspiracy to commit such offense, and any property traceable to such conveyance.

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

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

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

"(iii) any other offense enumerated in section 2339A(a) of this title;

or a conspiracy to commit any such offense, and any property traceable to such property.".

(b) CRIMINAL FORFEITURE.—Section 982(a) of title 18, United States Code is amended by adding at the end the following:

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

"(B) The court, in imposing a sentence on a person convicted of a violation of sections 1028 or 1029 of this title, or a conspiracy to commit such offense, shall order the person to forfeit to the United States any conveyance used on two or more occasions to transport the instrumentalities used to commit such offense, and any property traceable to such conveyance.

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

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

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

"(C) any other offense enumerated in section 2339A(a) of this title;

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

SEC. 38. FORFEITURE OF CRIMINAL PROCEEDS TRANSPORTED IN INTERSTATE COMMERCE.

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

"(d)(1) Any proceeds distributed or intended to be distributed in violation of subsection (a)(1) or a conspiracy to commit such violation, or any property traceable to such property, is subject to forfeiture to the United States in accordance with the procedures set forth in chapter 46 of this title.

"(2) The court, in imposing sentence on a person convicted of an offense in violation of subsection (a)(1) or a conspiracy to commit such offense, shall order that the person forfeit to the United States any proceeds distributed or intended to be distributed in the commission of such offense, or any property traceable to such property, in accordance with the procedures set forth in section 982 of this title.".

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

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

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

"SEC. 311. (a) Any property, real or personal, that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from a criminal violation of, or a conspiracy to commit a criminal violation of, a provision of this Act shall be subject to judicial forfeiture to the United States.

"(b) The provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures shall extend to a seizure or forfeiture under this section, insofar as applicable and not inconsistent with the provisions hereof, except that such duties as are imposed upon the Secretary of the Treasury under chapter 46 shall be performed with respect to seizures and forfeitures under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of Health and Human Services.

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

"SEC. 312. (a) Any person convicted of a violation of, or a conspiracy to violate, a provision of this Act shall forfeit to the United States, irrespective of any provision

of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation. The court, in imposing sentence on such person, shall order that the person forfeit to the United States all property described in this subsection.

"(b) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except for subsection 413(d) which shall not apply to forfeitures under this section.".

SEC. 40. FORFEITURE OF COUNTERFEIT PARAPHERNALIA.

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

(1) by striking the third and fourth undesignated paragraphs;

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

(3) by adding the following new subsections:

"(c) For the purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that the duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of the Treasury.

"(d) All seizures and civil judicial forfeitures pursuant to subsection (a) shall be governed by the procedures set forth in chapter 46 of this title pertaining to civil forfeitures. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

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

(4) in subsection (b), as so designated by this section, by striking "fined not more than $100" and inserting "fined under this title".

SEC. 41. CLOSING OF LOOPHOLE TO DEFEAT CRIMINAL FORFEITURE THROUGH BANKRUPTCY.

Section 413(a) of the Controlled Substances Act (21 U.S.C. 853(a)) is amended by inserting ", or of any bankruptcy proceeding instituted after or in contemplation of a prosecution of such violation" after "shall forfeit to the United States, irrespective of any provision of State law".

SEC. 42. COLLECTION OF CRIMINAL FORFEITURE JUDGMENT.

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

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

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

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

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

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

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

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

SEC. 45. FORFEITURE FOR ODOMETER TAMPERING OFFENSES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) by adding at the end the following:

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

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

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

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

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

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

"(iii) the defendant establishes that he or she has no assets, other than the restrained property, available to exercise his or her constitutional right to retain counsel, and there is no probable cause to believe that the restrained property is subject to forfeiture.

"(B) In any hearing under this paragraph where probable cause is at issue, the court shall limit its inquiry to the existence of probable cause for the forfeiture, and shall neither entertain challenges to the validity of the indictment, nor require the Government to produce additional evidence regarding the facts of the case to support the grand jury's finding of probable cause regarding the criminal offense giving rise to the forfeiture. In all cases, the party requesting the modification of the restraining order shall bear the burden of proof.".

PURPOSE AND SUMMARY

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

BACKGROUND AND NEED FOR THE LEGISLATION

I. ANTECEDENTS OF CIVIL ASSET FORFEITURE

Civil asset forfeiture is based on the legal fiction that an inanimate object can itself be "guilty" of wrongdoing, regardless of whether the object's owner is blameworthy in any way. This concept descends from a medieval English practice whereby an object responsible for an accidental death was forfeited to the king, who "would provide the [proceeds, the 'deodand'] for masses to be said for the good of the dead man's soul . . . or [would] insure that the 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 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 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 the foreign owners to get their indemnity as they may be able.[4]

II. FEDERAL CIVIL ASSET FORFEITURE STATUTES

Since early in the nation's history, ships and cargo violating the customs laws were made subject to federal civil forfeiture.[5] Forfeiture was once vital to the federal treasury, with customs duties constituting over 80% of federal revenues.[6]

---

[1] *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 681 n.16 (1974).
[2] Holmes, Jr., *The Common Law* 25 (1881).
[3] *Id.*
[4] *Id.* at 26.
[5] *See* Act of July 31, 1789, §§ 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).

Today, there are scores of federal forfeiture statutes, both civil and criminal.[7] They range from the forfeiture of gamecocks used in cockfighting,[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:

> [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 instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .[12]

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

Before 1984, the monies realized from federal forfeitures were deposited in the general fund of the United States Treasury. Now they primarily go to the Department of Justice's Assets Forfeiture Fund[14] and the Department of the Treasury's Forfeiture Fund.[15]

---

[7] Criminal forfeiture can occur only after a property owner has been convicted of a crime.
[8] *See* 7 U.S.C. § 2156.
[9] *See* 18 U.S.C. § 2344.
[10] *See* 18 U.S.C. § 1963.
[11] 21 U.S.C. § 881(a) .
[12] Section 301(a)(1) of the Psychotropic Substances Act of 1978 (found at 21 U.S.C. § 881(a)(6)).
[13] Section 306(a) of the Comprehensive Crime Control Act of 1984 (found at 21 U.S.C. § 881(a)(7)).
[14] *See* 28 U.S.C. § 524(c)(4)).
[15] *See* 31 U.S.C. § 9703.

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 $338 million in 1996.[17] Of the amount taken in 1996, $250 million was in cash and $74 million was in proceeds of forfeitable property; $163 million of the total was returned to state and local law enforcement agencies that participated in investigations.[18]

Federal forfeiture has been a great monetary success. As former Attorney General Richard Thornburgh said: "[I]t is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation."[19]

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:[20]

> Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations—from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. . . .
>
> Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. . . . [They] allow the government to seize contraband—property that it is simply unlawful to possess, such as illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.
>
> Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into

---

[16] *See* 28 U.S.C. § 524(c)(1)).

[17] *See Civil Asset Forfeiture Reform: Hearing Before the House Committee on the Judiciary*, 105th Cong., 1st Sess. 116 (1997) (statement of Stefan Cassella) (hereinafter cited as "*1997 Hearing*"); U.S. Dept. of Justice, *Asset Forfeiture Fact Sheet* (1993); *Annual Report of the Dept. of Justice Asset Forfeiture Program: 1993,* at 15.

[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 85% of the net proceeds to the state or local agency that initiated the case. Also, state and local law enforcement agencies that have cooperated in federal law enforcement actions often receive a percentage of the net proceeds.

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

[20] *1997 Hearing* at 112.

Southern California, or a printing press used to mint phony $100 bills.

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

Finally, forfeiture undeniably provides both a deterrent against crime and a measure of punishment for the criminal.[21] Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence.

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

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

Mr. HYDE: Would you please state your name and where you live.

---

[21] The Justice Department has in the past argued that civil forfeiture serves "remedial" rather than "punitive" goals. The Department took this position in part to stave off Eighth Amendment challenges to purportedly excessive civil forfeitures. The Eighth Amendment prohibits, among other things, the imposition of excessive fines. The Supreme Court rejected this argument in *Austin* v. *United States,* 509 U.S. 602 (1993), by holding that civil forfeitures are at least partly punitive in nature and thus subject to Eighth Amendment limitations.

[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.

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

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

[26] *1996 Hearing* at 12–14.

Mr. JONES. My name is Willie Jones. I live in Nashville, Tennessee.

Mr. HYDE. Very well, sir. Would you tell us your story involving asset forfeiture.

Mr. JONES. Yes. On February 27, 1991, I went to the Metro Airport to board a plane for Houston, TX, to buy nursery stock. I was stopped in the airport after paying cash for my ticket.

Mr. HYDE. What business are you engaged in or were you engaged in?

Mr. JONES. I am engaged in landscaping.

* * * * *

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

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

Mr. JONES. Yes, sir.

Mr. HYDE. Were you carrying a large amount of cash?

Mr. JONES. Yes, sir. I had $9,000.

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

Mr. JONES. Well, it was going to be if I had found the shrubbery that I liked, by me being—going out of town, and the nursery business is kind of like the cattle business. You can always do better with cash money.

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

Mr. JONES. That is correct.

* * * * *

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

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

Mr. JONES. That is what they said.

Mr. HYDE. That is what they claimed?[27]

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 could not afford to post the required 10% cost bond.[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 ruled that the "frisk" that produced the $9,000 in currency was an unconstitutional search,[31] and that the subsequent seizure of the money was made without probable cause and therefore illegal.[32]

The court's final comments gave rise for pause:

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

---

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

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

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

[31] *Id.* at 718.

[32] *Id.* at 719. Probable cause is "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *Id.* (citation omitted).

> 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.[33]

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

To seize and forfeit property, all the government has to prove is that it had probable cause to believe the property was involved in criminal activity. For property owners to get their property back, they must overcome tremendous procedural hurdles like posting cost bonds and proving that their property is "innocent" (once probable cause has been shown). The abuses can even be worse under certain state forfeiture laws.[34]

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

> For years Billy Munnerlyn and his wife Karon owned and operated a successful air charter service in Las Vegas, Nevada. In October 1989, Mr. Munnerlyn was hired for a routine job—flying Albert Wright, identified as a "businessman," from Little Rock, Arkansas, to Ontario, California. When the plane landed, DEA agents seized Mr. Wright's luggage and the $2.7 million it contained. Both he and Mr. Munnerlyn were arrested. The DEA confiscated the airplane, the $8,500 charter fee for the flight, and all of Munnerlyn's business records. Although drug trafficking charges against Mr. Munnerlyn were quickly dropped for lack of evidence, the government refused to release his airplane (similar charges against Mr. Wright, who unbeknownst to Mr. Munnerlyn was a convicted cocaine dealer, were eventually dropped as well). Mr. Munnerlyn spent over $85,000 in legal fees trying to get his plane back, money raised by selling his three other planes. A Los Angeles jury decided his airplane should be returned because they found Mr. Munnerlyn had no knowledge that Mr. Wright was transporting drug money; however, a U.S. District Court judge reversed the jury's verdict. Mr. Munnerlyn eventually was forced to settle with the government, paying $7,000 to get his plane back. He then discovered that DEA agents had caused about $100,000 of damage to the aircraft. Under federal law the agency could not be held liable for the damage. Unable to raise enough money to restart his air charter business, Mr. Munnerlyn declared bankruptcy. He is now driving a truck for a living.[35]

---

[33] *Id.* at 724.

[34] *See* Hyde, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure*? 38–40 (1995).

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

For Mr. Munnerlyn, there was no happy ending.

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

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

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

1. Burden of Proof

When a property owner goes to federal court to challenge the seizure of his property under federal civil forfeiture laws, the government is required to make an initial showing of probable cause that the property is subject to forfeiture. The property owner must then establish by a preponderance of the evidence that the property is not subject to forfeiture.[36] As mentioned previously, the government can meet its burden without having obtained a criminal conviction. Since the government does not have to prove its case beyond a reasonable doubt—as it would to gain a criminal conviction—even the acquittal of the owner following a criminal trial will not bar the forfeiture his property. Probable cause—what the government needs to show—is the lowest standard of proof in the criminal law. It is the same standard required to obtain a search warrant and can be established by evidence with a low indicia of reliability such as hearsay.[37]

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

> [T]he current allocations of burdens and standards of proof requires that the [owner] prove a negative, that the property was not used in order to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of erroneous, irreversible deprivation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington* v. *Texas,* 441 U.S. 418, 423 . . . (1979). . . . The allocation of burdens and standards of proof implicates similar concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where claimants

[36] *See* 19 U.S.C. § 1615.

[37] *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).

> 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.[38]

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

> The Supreme Court . . . has recently expanded the constitutional protections applicable in forfeiture proceedings to include those of the Eighth Amendment. . . . We therefore agree with the Second Circuit: "Good and Austin reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure—probable cause—suffices to meet the requirements of due process." *United States* v. *One Parcel of Property Located at 194 Quaker Farms Road*, 85 F.3d 985, 990 (2nd Cir.), cert denied . . . 117 S.Ct. 304 . . . (1996).
>
> * * * * *
>
> [W]e observe that allowing the government to forfeit property based on a mere showing of probable cause is a "constitutional anomaly". . . . As the Supreme Court has explained, burdens of proof are intended in part to "indicate the relative importance attached to the ultimate decision." . . . The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause.[39]

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

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

2. Appointment of Counsel

There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened.[40] This is undoubtedly one of the primary reasons why at

---

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

[39] *United States* v. *$49,576*, No. 95–56170, 1997 WL 345961, at *3–4 (9th Cir. June 25, 1997) (citations omitted).

[40] *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).

least 80% of civil forfeiture cases are not challenged: "The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle."[41] This Committee believes that given the punitive, quasi-criminal nature of civil forfeiture proceedings, legal representation should be provided for those who are indigent in appropriate circumstances.

H.R. 1965 provides that a federal court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation. In determining whether to appoint counsel, the court shall take into account (1) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointed counsel, (2) the claimant's standing to contest the forfeiture, and (3) whether the claim appears to be made in good faith or to be frivolous. The first consideration described in the preceding sentence should not be a simple dollar comparison. There will be many instances in which a court should appoint counsel even if the cost of counsel will likely exceed the value of the seized property. Conversely, there will be instances in which a court should not appoint counsel even if the cost of counsel will likely be less than the value of the seized property. The court needs to consider the nature of the property and the hardship that will be caused by its loss. Compensation for appointed counsel will be equivalent to that provided for court-appointed counsel in federal felony cases.[42] An owner would certainly suffer great hardship where the loss of property would prevent the owner from working, leave the owner homeless, or prevent the functioning of a business. These are just illustrative examples of situations where great hardship would result from the forfeiture of property.

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

---

[41] *1996 Hearing* at 289–90 (statement of E.E. (Bo) Edwards III, David Smith, and Richard Troberman, cochairs, National Association of Criminal Defense Lawyers Asset Forfeiture Abuse Task Force).

[42] *See* 18 U.S.C. § 3006A(d)(2). Currently, maximum compensation would not exceed $3,500 per attorney for representation before a U.S. district court and $2,500 per attorney for representation before an appellate court. These maximums can be waived in cases of "extended or complex" representation where "excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit." 18 U.S.C. § 3006A(d)(3).

3. Innocent Owner Defense

Since 1974, many observers assumed that the Constitution mandated an "innocent owner" defense to a civil forfeiture action.[43] However, last year the Supreme Court in *Bennis* v. *Michigan* ruled that the defense was not mandated by either the due process clause of the Fourteenth Amendment (and presumably that of the Fifth Amendment) or the just compensation clause of the Fifth Amendment.[44] The Court found that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[45]

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.[46]

Justice Thomas stated in his concurrence that: "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[47]

The impact of *Bennis* is limited by the fact that many federal civil forfeiture provisions contain statutory innocent owner defenses. For instance, real property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner."[48] 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."[49] Property involved in certain money laundering transactions shall not be forfeited "by reason of

---

[43] In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), the Supreme Court stated in dicta that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."

[44] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, § 1. "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

[45] *Bennis* v. *Michigan*, No. 94–8729, slip op. at 4 (U.S. March 4, 1996).

[46] *Id.*, slip op. at 2 (Stevens, J., Souter, J., Breyer, J., dissenting).

[47] *Id.*, slip op. at 4 (Thomas, J., concurring).

[48] 21 U.S.C. § 881(a)(7).

[49] 21 U.S.C. § 881(a)(4)(C).

any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."[50] Other federal civil forfeiture statutes contain no innocent owner defenses. For instance, the statute providing for forfeiture of any property, including money, used in an illegal gambling business contains no such defense.[51]

Not only are these statutory innocent owner defenses not uniform, but the protections of the statutes using the "committed or omitted" language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of *and* provided no consent to the prohibited use of the property.[52] Such an interpretation means that diligent owners who try to end the illegal use by others of their property cannot make use of the defense simply because they knew about the illegal use. Many courts require that to qualify as an innocent owner, an owner have done all that reasonably could be expected to prevent the illegal use of the property.[53]

Believing that an innocent owner defense is required by fundamental fairness, the Committee sets out an innocent owner defense in H.R. 1965 designed to provide such a defense for federal civil forfeitures, to make that defense uniform, and to ensure it offers protection in all appropriate cases (including situations where the innocent owner knew of but could not stop the illegal use of property by others).[54]

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

The provision creates a rebuttable presumption that an owner took all the steps that a reasonable person would take if the owner (1) gave timely notice to an appropriate law enforcement agency of information that led the owner to know that the conduct giving rise to forfeiture would occur or has occurred, and (2) in a timely fashion, revoked permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use.[55] The rebuttable presumption signifies the Committee's belief that—absent unusual circumstances—an owner has taken all steps that a reasonable person would take if he has met the terms of the presumption. Moreover, an owner—to be considered a reasonable person—

---

[50] 18 U.S.C. § 981(a)(2).

[51] 18 U.S.C. § 1955(d).

[52] *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).

[53] *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).

[54] H.R. 1965 would exempt traditional U.S. Customs Service seizures and forfeitures from the bill's proposed procedures for reasons explained below.

[55] Of course, an owner may be constrained in revoking permission to use property because of provisions of local, state or federal law (i.e., contract or landlord-tenant law). In instances when an owner cannot simply orally revoke permission for use because of such reasons, the owner shall be considered to have revoked permission for purposes of the rebuttable presumption if the owner has taken those actions pursuant to revocation that are permitted by law.

should not be required to take extraordinary steps that he reasonably believes would likely subject him to physical danger.

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

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

4. Return of Property Upon Showing of Hardship

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

Customs law does allow for the release of property pending final disposition of a case upon payment of a full bond.[56] However, many property owners do not have the resources to make use of this provision. Therefore, in order to alleviate hardship, H.R. 1965 provides that an owner may be entitled to release of his seized property pending trial.

The owner must show that (1) he has a possessory interest in the property sufficient to establish standing to contest forfeiture and

[56] *See* 19 U.S.C. § 1614.

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

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

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

The federal government is exempt from liability under the Federal Tort Claims Act for damage caused by the negligent handling or storage of property detained by law enforcement officers.[57] As the U.S. Comptroller General once stated, seized property awaiting forfeiture can be damaged:

> Seized conveyances devalue from aging, lack of care, inadequate storage, and other factors while waiting forfeiture. They often deteriorate—engines freeze, batteries die, seals shrink and leak oil, boats sink, salt air and water corrode metal surfaces, barnacles accumulate on boat hulls, and windows crack from heat. On occasion, vandals steal or seriously damage conveyances.[58]

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

---

[57] "The provisions of [the Act] shall not apply to . . . [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 26 U.S.C. § 2680(c).

[58] 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).

6. Elimination of the Cost Bond

Under current law, a property owner wanting to contest a seizure of property under a civil forfeiture statute must post a bond of $5,000 or ten percent of the value of the property seized, whichever is less, but in no case less than $250.[59] The bond is unconstitutional in cases involving indigents because it would deprive such claimants of access to the courts simply because of their inability to pay.[60] Even in cases not involving indigents, the bond should not be required. As forfeiture expert David Smith stated, it "is simply an additional financial burden on the claimant and an added deterrent to contesting the forfeiture."[61] H.R. 1965 eliminates the requirement that a property owner must file a cost bond to challenge a civil forfeiture.

7. Adequate Time to Contest Forfeiture

Currently, a property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim in federal court challenging the government's administrative forfeiture of property.[62] To challenge a judicial forfeiture, the property owner has an exceedingly short 10 days after process has been executed:[63]

Even though these time limits sometimes are ignored in the interests of justice, failure to file a timely claim can result in judgment in favor of the government.[64] H.R. 1965 provides a property owner 30 days to file a claim following the final publication of notice (or, if written notice was provided, the date it was received) of an administrative forfeiture proceeding. In a judicial forfeiture proceeding, 20 days is provided after process has been executed.

8. Interest

Under current law, even if a property owner prevails in a forfeiture action, he will receive no interest for the time period in which he lost use of his property.[65] In cases where money or other negotiable instruments were seized, or money awarded a property owner, this is manifestly unfair. H.R. 1965 provides that upon entry of judgment for the owner in a forfeiture proceeding, the United States shall be liable for post-judgment interest on any money awarded (as set forth in section 1961 of title 28). The United States shall be liable for pre-judgment interest in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments. The government must disgorge any funds representing interest actually paid to the United States or an imputed amount that would have been earned had it been invested.

---

[59] *See* 19 U.S.C. § 1608.

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

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

[62] 19 U.S.C. § 1608.

[63] 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).

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

[65] In the absence of an express waiver of sovereign immunity, the government is not liable for interest on seized currency. *See Library of Congress* v. *Shaw,* 478 U.S. 310, 311 (1986).

B. Expansions of Federal Forfeiture Power

1. Extension of Forfeiture to Other Crimes

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

By providing for forfeiture of the proceeds of these offenses, the bill ensures that the government will have a means of depriving criminals of the fruits of their criminal acts without having to resort to the RICO and money laundering statutes—provisions which currently permit forfeiture of criminal proceeds but also carry higher penalties—in cases where it is unnecessary to do so or where the defendant is willing to enter a guilty plea to the offense that generated the forfeitable proceeds but not to the RICO or money laundering offense.

2. Uniform Definition of Proceeds

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

3. Expanded Availability of Criminal Forfeiture

H.R. 1965 would amend section 2461 of title 28 to give the government the option of pursuing criminal forfeiture as an alternative to civil forfeiture if civil forfeiture is otherwise authorized. Under current law (28 U.S.C. § 2461(a)), if a statute provides for forfeiture without prescribing whether the forfeiture is civil or criminal, it is assumed that only civil forfeiture is authorized. In such cases, the government may not pursue forfeiture as part of the criminal prosecution, but must file a parallel civil forfeiture case in order to prosecute an individual and forfeit the proceeds of the offense.[66]

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

[66] *See, e.g.,* 18 U.S.C. § 1955 (gambling), § 545 (smuggling).

thorize criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

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

H.R. 1965 would amend section 2461(b) of title 28 to exempt traditional U.S. Customs Service forfeiture cases from the bill's proposed forfeiture procedures. Traditional Customs Service cases involve the interdiction of imported merchandise and contraband in violation of the customs revenue and criminal laws. As the Supreme Court stated in *United States* v. *Hernandez*,[67] "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."

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

HEARINGS

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

COMMITTEE CONSIDERATION

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

VOTE OF THE COMMITTEE

Vote on final passage: Adopted 26 to 1.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum	X		

[67] 473 U.S. 531, 537 (1985).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Schiff			
Mr. Gallegly			
Mr. Canady			
Mr. Inglis	X		
Mr. Goodlatte	X		
Mr. Buyer	X		
Mr. Bono	X		
Mr. Bryant (TN)	X		
Mr. Chabot	X		
Mr. Barr		X	
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Conyers	X		
Mr. Frank	X		
Mr. Schumer			
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler			
Mr. Rothman			
Mr. Hyde, Chairman	X		
Total	26	1	

Committee Oversight Findings

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

Committee on Government Reform and Oversight Findings

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

New Budget Authority and Tax Expenditures

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

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

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

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 14, 1997.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1965, the Civil Asset Forfeiture Reform Act.

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

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 1965—Civil Asset Forfeiture Reform Act

SUMMARY

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

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

This bill would make numerous changes to federal asset forfeiture laws that would significantly affect the processing of about 40,000 seizures conducted each year by the Department of Justice (DOJ) and the Treasury Department. (The Treasury Department makes an additional 50,000 seizures annually that would not be affected by this bill.) Provisions that would have significant budgetary effects include section 2, which would allow federal courts to appoint counsel for indigent claimants who want to contest civil asset forfeiture proceedings, and section 13, which would eliminate the cost bond requirement, whereby claimants have to post a bond in the amount of 10 percent of the value of the seized property to

preserve the right to contest the forfeiture. Other provisions in the bill, such as shifting the burden of proof to the government, would make proving cases more difficult and time-consuming for the federal government. Enacting H. R. 1965 also would expand the government's forfeiture authority to certain criminal cases.

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

ESTIMATED COST TO THE FEDERAL GOVERNMENT

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

SPENDING SUBJECT TO APPROPRIATION
[By fiscal year, in millions of dollars]

	1997	1998	1999	2000	2001	2002
Spending under current law for defender services and U.S. Attorneys:						
Estimated authorization level [1]	1,308	1,354	1,401	1,448	1,498	1,550
Estimated outlays	1,296	1,331	1,396	1,443	1,492	1,543
Proposed changes, defender services:						
Estimated authorization level	0	4	5	6	6	6
Estimated outlays	0	4	5	6	6	6
U.S. Attorneys:						
Estimated authorization level	0	3	5	5	6	6
Estimated outlays	0	3	5	5	6	6
Total Changes:						
Estimated authorization level	0	7	10	11	12	12
Estimated outlays	0	7	10	11	12	12
Spending under H.R. 1965:						
Estimated authorization level	1,308	1,361	1,411	1,459	1,510	1,562
Estimated outlays	1,296	1,338	1,406	1,454	1,504	1,555

[1] The 1997 level is the amount appropriated for that year. The estimated authorization levels for 1998 through 2002 reflect CBO baseline estimates, assuming adjustment for inflation.

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

BASIS OF ESTIMATE

Spending Subject to Appropriation

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

Because H.R. 1965 would allow for court-appointed counsel and would eliminate the cost bond requirement, CBO anticipates that enacting this bill would make it easier for people whose assets have been seized to challenge the forfeiture of such assets. Based on information from DOJ, we estimate that the number of contested

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

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

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

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

Direct Spending and Revenues

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

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

PAY-AS-YOU-GO CONSIDERATIONS

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

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

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

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

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

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

CONSTITUTIONAL AUTHORITY STATEMENT

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

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title and table of contents

Section 1 contains the Short Title of the bill.

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

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

Subsection 2(a) enacts a new statute, 18 U.S.C. § 983, that will set forth the procedures governing a civil forfeiture case. In some cases, the new statute simply codifies existing procedures that have been developed in the case law; in those cases, the case law would

continue to apply to the new statute. In other instances, however, section 983 is intended to depart from existing practice.

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

First, subsection (a) requires that the government send notice of an administrative forfeiture action to all interested persons,[68] within 60 days of the seizure of the property. As is the case under current law, the government is not required to give actual notice of the forfeiture proceeding, but only to takes steps "reasonably calculated" to apprise interested parties of the pendency of the action.[69]

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

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

In general, administrative forfeitures are generally not subject to judicial review.[70] Thus, if a claimant fails to file a claim opposing an administrative forfeiture action, he may not subsequently ask a court to review the declaration of forfeiture on the merits.[71] The new statute would not change the law in this regard.

Fundamental fairness, however, requires that a claimant have the opportunity to attack an administrative forfeiture on the ground that the he did not file a timely claim because the government failed to provide him with notice of the administrative action. In such cases, it is appropriate for a court to determine if the government complied with the statutory notice provisions and if not,

---

[68] *See* 19 U.S.C. § 1607(a).

[69] *See United States* v. *Clark,* 84 F.3d 378, 380 (10th Cir. 1996) (mailing notice to inmate's place of incarceration is sufficient; personal service not necessary); *Concepcion* v. *United States,* 938 F. Supp. 134, 141 (E.D.N.Y. 1996) (publication and sending notice to last known address and prison where defendant was incarcerated is adequate whether defendant actually receives the notice or not); *Hong* v. *United States*, 920 F. Supp. 311, 316 (E.D.N.Y. 1996) (same); *United States* v. *Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995) (attempts to send notice to defendant's home, attorney and place of confinement were sufficient; failure to receive notice was not government's fault); *United States* v. *Schiavo,* 897 F. Supp. 644, 648–49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not government's fault that notice was not effective).

[70] *See* 19 U.S.C. § 1609(b) ("A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court. . . .")

[71] *Linarez* v. *U.S. Department of Justice,* 2F.3d 208,213 (7th Cir. 1993) ("[A] forfeiture cannot be challenged in district court under any legal theory if the claims *could have* been raised in an administrative proceeding, but *were not*.").

to allow the claimant to file a claim in accordance with section 1608 notwithstanding the expiration of the claims period.[72]

Under current law, however, it is unclear what statute gives the district courts jurisdiction to review due process challenges to administrative forfeiture; indeed, plaintiffs have attempted to base claims on a variety of provisions including the Tucker Act, 28 U.S.C. § 1346(a)(2); the Federal Tort Claims Act, 28 U.S.C. § 1346(b); the Administrative Procedures Act, 5 U.S.C. § 702; Rule 41(e) of the Federal Rules of Criminal Procedure; 28 U.S.C. § 1356; and the Fourth and Fifth Amendments to the Constitution.[73] This has led to widespread confusion as different procedures are applied in different cases, including different statutes of limitations depending on the statute employed.[74]

Paragraphs (3) through (7) of subsection (a) establish a uniform procedure for litigating due process issues in accordance with the leading cases. Under this procedure, which is intended to be the exclusive procedure for challenging administrative forfeiture declarations, a claimant who establishes that the government failed to comply with the statutory notice requirements would be entitled to have the administrative forfeiture set aside.[75]

If the property itself has already been disposed of, the claim would be made against a sum of money of equivalent value.[76] To invoke the jurisdiction of the district court under this provision, an action to set aside a declaration of forfeiture would have to be filed within two years of the last date of publication of notice of the forfeiture of the property.

The claimant could not seek relief under this section if, notwithstanding the defect in the government's compliance with the notice provision, the claimant had actual notice of the seizure from some other source, or was actually present when the property was seized and knew that it would be forfeited.[77]

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

Subsection (b) of section 983 modifies the procedures in the Customs laws governing the filing of the claim that transforms an administrative forfeiture action into a judicial action. In particular, subsection (b) overrides the provision in 19 U.S.C. § 1608 regarding the timing of the filing of a claim. Under the subsection, the claim-

---

[72] *See United States* v. *Woodall,* 12 F.3d 791, 793 (8th Cir. 1993).

[73] *See Wright* v. *United States,* 902 F. Supp. 486, 488–89 (S.D.N.Y. 1995).

[74] *See Williams* v. *U.S. DEA,* 51 F.3d 732, 735 (7th Cir. 1995) (applying Illinois two-year statute of limitations but noting that the contours of the exercise of the court's equitable jurisdiction are "largely undefined"); *Demma* v. *United States,* 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (applying six-year statute of limitations to Tucker Act theory).

[75] *See United States* v. *Volanty,* 79 F.3d 86,88 (8th Cir. 1996) (government could correct due process violation by vacating administrative forfeiture and instituting new judicial forfeiture proceeding); *Barrera-Montenegro* v. *United States*, 74 F.3d 657, 661 (5th Cir. 1996) (remanding for renewed administrative proceeding unless a judicial proceeding is commenced); *United States* v. *Giraldo,* 45 F.3d 509, 512 (1st Cir. 1995) (same); *United States* v. *Woodall*, 12 F.3d 791, 795 (8th Cir. 1993) (same); *but see United States* v. *Boero*, 1997 WL 175099 (2nd Cir. Apr. 14, 1997) (when district court finds that notice of administrative forfeiture was inadequate it should vacate the forfeiture and proceed directly to the merits of the claim).

[76] *See Republic National Bank* v. *United States,* 113 S. Ct. 554 (1992).

[77] *See United States* v. *One 1987 Jeep Wrangler,* 972 F.2d 472, 482 (2nd Cir. 1992) (lack of publication did not amount to violation of due process where claimant had actual knowledge of the seizure); *Lopes* v. *United States*, 862 F. Supp. 1178, 1188 (S.D.N.Y. 1994) (where there is actual notice of an impending forfeiture, there is not violation of due process).

ant would have 30 days from the last date of publication of the notice of forfeiture. In the alternative, a person receiving written notice would have 30 days from the receipt of that notice to file the claim. If the government sends notice but it is never received, for whatever reason, the claimant would have to file the claim within 30 days of the last date of publication. Also, the subsection dispenses with the cost bond requirement in 19 U.S.C. § 1608.

In filing the claim, the claimant will have to describe the nature and extent of the claimant's ownership interest in the property. This minimal requirement is necessary to discourage the filing of spurious or baseless claims; but it is not intended to place on the seizing agency any duty to evaluate the merits of the claim. To the contrary, the seizing agency will simply transfer the claim to the United States Attorney to take whatever action is appropriate under the law.

Subsection (c) of section 983 codifies the existing practice under 28 U.S.C. § 2461(b) which makes the Supplemental Rules for Certain Admiralty and Maritime Cases applicable to civil judicial forfeiture actions. As is the case under current law, the government would have to file a civil judicial forfeiture complaint in accordance with the Admiralty Rules.[78] The new statute modifies current practice, however, by creating a 90-day time limit on the filing of the complaint in cases where the government has seized or restrained the property subject to forfeiture. Under the Customs laws, no fixed time limit applies.

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

Subsection (c) also provides a mechanism whereby the government may request an extension of time from a federal judge or magistrate. In cases where the reason for the delay does not require secrecy, notice of the request for the delay would have to be served on the person filing the claim. But where the reason relates to the government's concern that filing the complaint will jeopardize a criminal investigation or prosecution, the request may be made *ex parte*. In particular, the court should grant an extension of time where the filing of the complaint, which is required to recite the factual basis in some detail,[79] would reveal facts concerning a pending investigation, undercover operation, or court-authorized electronic surveillance, or would jeopardize government witnesses. Also, the court could grant the extension to allow the government to include the forfeiture in a criminal indictment, and thus avoid the necessity of initiating parallel civil and criminal forfeitures. However, an extension should not be granted merely to allow the government additional time to conduct its investigation. In all such cases, when the 90-day time limit expires, the claimant would be entitled to know that the court granted the government an extension of time, but the claimant would not be entitled to know the reasons for the extension.

---

[78] *See e.g.* Supplemental Rules C and E.
[79] *See* Supplemental Rule E(2).

By granting an extension of time, the court would make it unnecessary for the government, as it often must under current law, to file a complaint and then immediately request a stay under Rule 26, Federal Rules of Civil Procedure, or under other statutory authority,[80] to avoid jeopardizing a criminal case.

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

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

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

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

Subsection (g) of section 983 establishes rules regarding motions to suppress seized evidence. It recognizes that a claimant must be afforded a remedy if the government's initial seizure of the property was illegal for lack of probable cause and the claimant has standing to object to the Fourth Amendment violation.[81] The statute codifies the general rule that the remedy in such cases is the suppression of the illegally seized evidence. In such cases, civil forfeiture law is analogous to the criminal law which provides for the suppression of illegally seized evidence while permitting the government to go forward with its case based on other admissible evidence.[82]

Subsection (h) of section 983 authorizes the use of hearsay at pre-trial hearings in which the governing standard is probable cause. This is consistent with the present rule regarding criminal forfeitures.[83] The term "hearing" means either an oral hearing or a determination on written papers, as provided in Rule 43(e), Federal Rules of Civil Procedure. Hearsay will not be admissible at trial except as provided in the Federal Rules of Evidence.

Subsection (i) of section 983, relating to stipulations, ensures that the government will have an opportunity to present the facts underlying the forfeiture action to the jury so that the jury understands the context of the case even if the claimant concedes forfeitability and relies exclusively on an affirmative defense.

---

[80] *See* 18 U.S.C. § 981(g).

[81] *See Rawlings* v. *Kentucky,* 448 U.S. 98 (1980).

[82] *See United States* v. *$7,850.00 in U.S. Currency*, 7 F.3d 1355 (8th Cir. 1993); *United States* v. *$67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992); *United States* v. *A Parcel of Land (92 Buena Vista)*, 937 F.2d 98 (3rd Cir. 1991), *aff'd on separate issue*, 113 S. Ct. 1126 (1993); *United States* v. *Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1268 (2nd Cir. 1989); *United States* v. *$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993); *United States* v. *Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722, 730 (D. Me. 1991); *United States* v. *155 Bemis Road*, 760 F. Supp. 245, 251 (D.N.H. 1991).

[83] *See* 18 U.S.C. § 1963(d)(3) permitting hearsay to be considered in pre-trial hearings in criminal forfeiture cases. *See also McCray* v. *Illinois*, 386 U.S. 300 (1967) (in pre-trial motion to suppress, informer's identity need not be revealed in a pre-trial hearing if the government can establish, through another person's testimony, that the informer is reliable and the information credible).

Subsection (j) of section 983 authorizes the court to take whatever action may be necessary to preserve the availability of property for forfeiture. Although not limited to such instances, it will apply mainly in cases where the government has not seized the subject property in advance of trial.[84]

Subsection (k) of section 983 provides that Eighth Amendment issues are to be resolved by the court alone following return of the verdict of forfeiture. The appropriate procedure for determining Eighth Amendment issues has confused the courts and litigants since the Supreme Court decided *Austin* v. *United States*[85] and *Alexander* v. *United States* (holding that Excessive Fines Clause of the Eighth Amendments may apply to civil and criminal forfeitures respectively).[86]

The subsection provides that the Eighth Amendment determination is to be made after return of the verdict of forfeiture, or the entry of summary judgment for the government. This is consistent with cases holding that the Eighth Amendment's guarantee against Cruel and Unusual Punishment does not apply until after a verdict of guilt is returned.[87] It also makes sense because it is premature to make excessiveness determination before the court determines if, and to what extent, property is forfeitable.[88]

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

The subsection also provides that Eighth Amendment determinations are to be made by the court alone and not by the jury. Again, there has been some confusion in the case law on this issue. The Supreme Court has recognized that the right to a jury trial extends only to factual determinations of guilt or innocence.[89] Eighth Amendment determinations, by contrast, are made by the court alone, generally after the jury has been discharged. This is consistent with the view that constitutional issues generally present questions of law for resolution by the court.

---

[84] *See United States* v. *James Daniel Good Property*, 114 S. Ct. 492 (1993) (government need not seize real property, but may use restraining orders to preserve its availability at trial).

[85] 509 U.S. 602, 113 S. Ct. 2801 (1993).

[86] 509 U.S. 544, 113 S. Ct. 2766 (1993). *See, e.g., United States* v. *Premises Known as RR #1*, 14 F.3d 864, 876 (3d Cir. 1994) (noting that "neither *Austin* nor *Alexander* addresses the question of whether judge or jury decides if a civil forfeiture is excessive" and suggesting that in view of the "present uncertainty of the law," the issue be submitted to the jury by special interrogatory and that the answer be treated as "non-binding" on the court).

[87] *See Hewitt* v. *City of Truth or Consequences*, 758 F.2d 1375, 1377 n.2 (10th Cir. 1985), cert. denied, 474 U.S. 844 (1985) ("The Eighth Amendment does not apply until after an adjudication of guilt"); *see also Ingraham* v. *Wright*, 430 U.S. 651, 671–72 n.40 (1977).

[88] *United States* v. *One Parcel . . . .* 13143 S.W. 15th Lane, 872 F. Supp. 968 (S.D. Fla. 1994); *United States* v. *$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (denying pre-trial motion to dismiss on excessiveness grounds).

[89] *Quick* v. *Jones,* 754 F.2d 1521, 1523 (9th Cir. 1984) (question of what process is due is a question of law); *Burris* v. *Willis Independent School District,* 713 F.2d 1087, 1094 (1983) ("The question of whether specific conduct or speech is protected by the first amendment is ultimately a question of law.").

Finally, the subsection provides that, where an Eighth Amendment violation is found, the court should adjust the forfeiture to meet constitutional standards. Again, this provision is consistent with Eighth Amendment case law.[90]

This subsection is purely procedural in nature. It is not intended to define any standard upon which the excessiveness determination under Austin is to be made nor does it expand the remedies available to the claimant beyond those required by the Eighth Amendment.

Subsection (l) of section 983 provides that the government need not meet its burden of proving forfeitability by a preponderance of the evidence until the completion of discovery, or until trial (if no discovery 15 ordered). Of course, pursuant to the Fourth Amendment, the government must have probable cause at the time it seizes property. In a judicial forfeiture action, a claimant may always move to suppress evidence if he believes that the government has violated the Fourth Amendment. However, with the exception of a motion to suppress, the claimant may not move the court for a preliminary hearing on the status of the government's evidence. Additionally, the claimant may not move to dismiss the case for lack of evidence pre-trail. However, the claimant may move to dismiss alleging that the complaint is facially deficient pursuant to Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims. *See e.g., United States* v. *Two Parcels of Real Property Located in Russell County, Alabama,* 92 F.3d 1123, 1126 (11th Cir. 1996) ("To satisfy this specificity requirement [Rule E(2)(a)], the complaint 'must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture . . .'.") (bracketed material added). Pre-trial dispositive motions are limited to those based on defects in the pleadings, as set forth in Rule 12 of the Federal Rules of Civil Procedure. A claimant may, of course, move for the entry of summary judgment pursuant to Rule 56, Fed. R. Civ. P., once discovery is complete.

Subsection (m) of section 983 provides that this section's forfeiture procedures apply to any civil forfeiture action brought under title 18 U.S.C. § 1 et seq., the Controlled Substances Act, or the Immigration and Naturalization Act.

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

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

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

---

[90] *See United States* v. *Sarbello,* 985 F.2d 716, 718 (3d Cir. 1993) ("We hold that the court may reduce the statutory penalty in order to conform to the eighth amendment."); *see also United States* v. *Chandler*, 36 F.3d 358 (4th Cir. 1994); *United States* v. *Bieri,* 21 F.3d 819 (8th Cir. 1994); *United States* v. *Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987).

Subsection (e) of section 2 of the bill makes two technical amendments to the chapter analysis of chapter 46 of title 18.

Subsection (f) of section 2 of the bill makes the proceeds of any crime constituting "specified unlawful activity" for purposes of the money laundering statute, 18 U.S.C. § 1956(c)(7), subject to civil forfeiture.

Subsection (g) of section 2 of the bill makes a parallel amendment to the criminal forfeiture statute. Neither amendment is intended to override more specific provisions authorizing forfeiture of facilitating property and instrumentalities of crime under existing forfeiture statutes.[91]

By providing for forfeiture of the proceeds of these offenses, the amendment ensures that the government will have a means of depriving criminals of the fruits of their criminal acts without having to resort to the RICO and money laundering statutes—provisions which currently permit forfeiture of criminal proceeds but also carry higher penalties—in cases where it is unnecessary to do so or where the defendant is willing to enter a guilty plea to the offense that generated the forfeitable proceeds but not to the RICO or money laundering offense.

Subsection (h) of section 2 of the bill is intended to replace the conflicting and inconsistent terms used to describe "proceeds" subject to forfeiture with a uniform definition. Sections 981 and 982 of title 18 were amended and expanded in 1988, 1989, 1990, 1992 and 1996 to add new offenses to the list of crimes for which forfeiture is authorized. In each instance, Congress chose a different term to describe the property that could be forfeited, leading to great confusion as to the difference, if any, between "proceeds" and "gross proceeds" and between "gross proceeds" and "gross receipts." The amendment eliminates this problem by using the term "proceeds" throughout the statutes.

Moreover, the amendment defines "proceeds" to mean all of the property derived, directly or indirectly, from an offense or scheme, not just the net profit. This point is important. Lacking a clear definition of "proceeds" some courts have construed "proceeds" to mean "net profits" and have thus allowed criminals to deduct the cost of their criminal activity from the amount subject to forfeiture.[92]

This makes no sense. A person committing a fraud on a financial institution has no right to recover the money he invested in the fraud scheme; nor does a drug dealer have any right to recover his overhead expenses when ordered to forfeit the proceeds of drug trafficking. However, in an overbilling scheme, where the defendant provided some legitimate goods and services but billed for more than the amount actually provided, the court would be required to exempt from the forfeiture the amount of proceeds that the defendant established was traceable to the legitimate goods and services.

---

[91] *See, e.g.,* 18 U.S.C. § 1955(d) (relating to gambling), § 981(a)(1)(A) and § 982(a)(1) (relating to money laundering).

[92] *See United States* v. *McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996) (heroin dealer given credit for cost of heroin sold); *United States* v. *122,942 Shares of Common Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (defendant in fraudulent securities deal permitted to deduct the amount invested in the scheme from the amount subject to forfeiture); *but see, United States* v. *McHan*, 101 F.3d 1027 (4th Cir. 1996) (§ 853(a) authorizes forfeiture of gross proceeds).

Subsection (h) also enacts a new paragraph (3) of section 981(a) to address a different concern regarding the scope of the forfeiture of criminal proceeds. Several provisions of section 981(a)(1) authorize the forfeiture of proceeds or "property traceable thereto." There are two issues regarding the meaning of "traceable" property.

First, the statute codifies the existing case law holding that if forfeitable proceeds are invested or commingled with real or personal property, only the portion of that property derived from the criminal proceeds is considered to be "traceable to" the criminal proceeds for purposes of forfeiture.[93] However, once the government makes a prima facie case that the property was illegally acquired, the burden is on the opposing party to show what part, if any, was legitimately acquired.[94]

Thus, for example, if a person invests $5,000 in a fraud scheme that results in his acquisition of $50,000 in money from his victims, the entire $50,000 is forfeitable as proceeds; as provided in section 981(a)(2), no credit is given for the $5,000 originally invested in the scheme. But if the person then uses the $50,000 to buy a $100,000 car, paying the balance with untainted funds, only half the value of the car would be subject to forfeiture under a "proceeds" theory.

The second issue concerns the attenuation of proceeds invested in a business or other thing of value that has so appreciated since the time of the investment that it may be unfair to consider the present value of the business, in its entirety, to be subject to forfeiture even though it is traceable to the offense. For example, one could start a small business with $10,000 obtained in a fraud scheme. Later, the business could grow to be worth $1 million. Surely, the original "seed money" remains subject to forfeiture, but under subsection 981(a)(3), whether the entire business would be subject to forfeiture would be determined according to the Eighth Amendment, even though the entire business was undeniably traceable to the original investment of fraud proceeds.

Sec. 3. Compensation for damage to seized property

Section 3 provides that property owners who prevail in forfeiture actions can sue the government for any negligent destruction or damage to the property. *See* Background and Need for Legislation for discussion of this section.

Sec. 4. Prejudgment and postjudgment interest

Section 4 provides for the payment of interest to property owners who prevail in forfeiture actions. See Background and Need for Legislation for discussion of this section.

Sec. 5. Seizure warrant requirement

Section 5 simplifies and clarifies the government's authority to seize property for forfeiture. First, 18 U.S.C. § 981(b)(1) is amended

[93] *See United States* v. *One 1980 Rolls Royce*, 905 F.2d 89, 91–92 (5th Cir. 1990) ("[W]e conclude that a court should not . . . permit the complete forfeiture . . . when there is evidence that the properties were purchased at least in part with legitimate funds."); *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636, 639 (1st Cir. 1988) ("We agree that the interest acquired as a result of mortgage payments made with the proceeds of drug transactions should be forfeitable. . . . [but not] that forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment.").

[94] *See United States* v. *One Parcel of Real Property*, 921 F.2d 370, 375 (1st Cir. 1990); *United States* v. *One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990).

to update the authority of the Attorney General, and in appropriate cases the Secretary of the Treasury and the Postal Service, to seize forfeitable property. This section was last amended in 1989 before paragraphs (D), (E) and (F) were added to section 981(a)(1). Absent this amendment, the seizure warrant authority for property forfeitable under those provisions is unclear. Otherwise, the amendment is not meant to alter the investigative authority of the respective agencies.

Subsection (b)(2) preserves the current rule that property may be seized for civil forfeiture either pursuant to the Admiralty Rules once a civil judicial complaint is filed, or pursuant to a seizure warrant. The statute is revised, however, to provide that a seizure warrant is obtained "in the same manner" as provided in the Rules of Criminal Procedure, not "pursuant to" those Rules which, of course, do not apply to civil forfeitures.[95]

Subsection (b)(2) also conforms section 981(b) to the current version of 21 U.S.C. § 881(b) (the parallel seizure statute for drug forfeitures) by authorizing warrantless seizures in cases where an exception to the Fourth Amendment warrant requirement would apply. For example, in section 881 cases, courts have approved warrantless seizures in cases where there is probable cause for the seizure but exigent circumstances preclude obtaining a seizure warrant.[96] The amendment to section 981(b) is necessary because such circumstances occur frequently in money laundering cases involving electronic funds transfers.

Finally, subsection (b)(2) is revised to make clear that federal authorities do not have to obtain a federal warrant to re-seize property already lawfully in the possession of state law enforcement authorities when the State elects, in accordance with state law, to turn the property over to the federal government for forfeiture under federal law. If there is a controversy over whether the State seizure of the property was lawful, of course, federal law would control, once the property is transferred to federal authority.

The remaining subsections are new provisions. The first, to be codified as section 981(b)(3), makes clear that the seizure warrant may be issued by a judge or magistrate judge in any district in which it would be proper to file a civil forfeiture complaint against the property to be seized, even if the property is located, and the seizure is to occur, in another district. Previously, there was no ambiguity in the statute, since *in rem* actions could only be filed in the district in which the property was located. In 1992, however, Congress amended 28 U.S.C. § 1355 to provide for *in rem* jurisdiction in the district in which the criminal acts giving rise to the forfeiture took place, and to provide for nationwide service of process so that the court in which the civil action was filed could bring the subject property within the control of the court.[97] In accord with that statute, the amendment makes clear that it is not necessary for the government to obtain a seizure warrant from a judge or magistrate judge in the district where the property is located, but

[95] *See* Rule 54(b)(5).

[96] *See United States* v. *Daccarett,* 6 F.3d 37 (2nd Cir. 1993). *See also United States* v. *Dixon,* 1 F.3d 1080 (10th Cir. 1993) (warrantless seizure under section 881(b)(4) upheld where plain view exception applies).

[97] *See 28* U.S.C. § 1355(d).

rather that it may obtain such process from the court that will be responsible for the civil case once the property is seized and the complaint is filed. Any motion for the return of seized property filed pursuant to Rule 41(e) will have to be filed in the district where the seizure warrant was issued so that judges and prosecutors in other districts are not required to deal with warrants involving property unrelated to any case or investigation pending in the district. After filing a Rule 41(e) motion, however, the moving party may seek to have the motion considered by a judge in another district by filing a change of venue request pursuant to subsection (b)(6).

The second new provision, set forth as section 981(b)(4), relates to situations where a person has been arrested in a foreign country and there is a danger that property subject to forfeiture in the United States in connection with the foreign offenses will disappear if it is not immediately restrained. In the case of foreign arrests, it is possible for the property of the arrested person to be transferred out of the United States before U.S. law enforcement officials have received from the foreign country the evidence necessary to support a finding a probable cause for the seizure of the property in accordance with federal law. This situation is most likely to arise in the case of drug traffickers and money launderers whose bank accounts in the United States may be emptied within hours of an arrest by foreign authorities in the Latin America or Europe. To ensure that property subject to forfeiture in such cases is preserved, the new provision provides for the issuance of an *ex parte* restraining order upon the application of the Attorney General and a statement that the order is needed to preserve the property while evidence supporting probable cause for seizure is obtained. A party whose property is restrained would have a right to a post-restraint hearing in accordance with Rule 65(b), Fed.R.Civ.P. Subsection (b) makes parallel changes to the Controlled Substances Act (21 U.S.C. § 881(b)).

Sec. 6. Access to records in bank secrecy jurisdictions

Section 6 deals with financial records located in foreign jurisdictions that may be material to a claim filed in either a civil or criminal forfeiture case. Frequently in order for the government to respond to a claim, it must have access to financial records abroad. For example, in a drug proceeds case where a claimant asserts that the forfeited funds were derived from a legitimate business abroad, the government might need access to foreign bank records to demonstrate in rebuttal that the funds actually came from an account controlled by international drug traffickers or money launderers.

Numerous mutual legal assistance treaties and other international agreements now in existence provide a mechanism for the government to obtain such records through requests made to a foreign government. In other cases, the government can request the records only through letters rogatory. This amendment deals with the situation that commonly arises where a foreign government declines to make the requested financial records available because of the application of secrecy laws. In such cases, where the claimant is the person protected by the secrecy laws, the claimant has it within his power to waive the protection of the foreign law to allow

the records to be made available to the United States, or to obtain the records himself and turn them over to the government. It would be unreasonable to allow a claimant to file a claim to property in federal court and yet hide behind foreign secrecy laws to prevent the United States from obtaining documents that may be material to the claim. Therefore, proposed subsection 986(d) provides that the refusal of a claimant to waive secrecy in this situation may result in the dismissal of the claim with prejudice as to the property to which the financial records pertain.

Sec. 7. Access to other records

Section 7 allows disclosure of tax returns and return information to federal law enforcement officials for use in investigations leading to civil forfeiture proceedings in the same circumstances, and pursuant to the same limitations, as currently apply to the use of such information in criminal investigations. Current law, 26 U.S.C. § 6103(I)(4), permits the use of returns and return information in civil forfeiture proceedings, but only in criminal cases does it authorize the disclosure of such information to law enforcement officials at the investigative stage.[98] The amendment revises the statute to treat civil forfeiture investigations and criminal investigations the same.

Sec. 8. Disclosure of grand jury information to federal prosecutors

Section 8 extends a provision in the FIRREA Act of 1989 that authorizes the use of grand jury information by government attorneys in civil forfeiture cases. Under current law, a person in lawful possession of grand jury information concerning a banking law violation may disclose that information to an attorney for the government for use in connection with a civil forfeiture action under 18 U.S.C. § 981(a)(1)(C). This provision makes it possible for the government to use grand jury information to forfeit property involved in a bank fraud violation; it does not permit disclosure to persons outside the government, nor does it permit government attorneys to use the information for any other purpose. Thus, the provision recognizes that civil forfeiture actions under section 981 are part of any law enforcement action arising out of a criminal investigation.

The limitation to forfeiture under section 981(a)(1)(C) for banking law violations, however, is obsolete. Because all civil forfeiture actions are now recognized as law enforcement functions, grand jury information should be available to government attorneys for their use in all civil forfeiture cases. The amendment therefore strikes the references to paragraph (c) and to banking law so that disclosure under 18 U.S.C. § 3322(a) will be permitted in regard to any forfeiture under federal law. The restrictions regarding the persons to whom disclosure may be made and the use that may be made of the disclosed material will remain unchanged.

[98] *See* 26 U.S.C. § 6103(i)(1).

Sec. 9 Use of forfeited funds to pay restitution to crime victims and regulatory agencies

Section 9 amends the civil forfeiture statutes to make it clear that forfeited property may be used to restore property to victims of the offense giving rise to the forfeiture. The statute dealing with restitution to victims, 18 U.S.C. § 981(e), explicitly authorizes the use of forfeited funds to restore property only in cases based on the offenses set forth in sections 981(a)(1)(C) and (D), most of which involve financial institution fraud.[99] In contrast, the criminal statute, section 982, permits forfeited funds to be restored to victims in virtually all instances.[100] Taken together, these statutes imply that the Attorney General may not use forfeited funds to restore property to victims in other civil cases—such as consumer fraud and money laundering.[101] These amendments negate that implication by making it clear that the Attorney General make use the forfeiture laws to restore property to victims in all cases.

First, subsection (e)(6), which presently authorizes the payment of restitution to victims of any crime listed in section 981(a)(1)(C), is expanded to cover all offenses for which forfeiture is authorized under section 981. In the case of money laundering offenses, this includes the offense that constituted the underlying "specified unlawful activity."

Second, subsections (e)(3), (4) and (5), which authorize restitution to financial institutions in cases governed by section 981(a)(1)(C), is revised to take into account the fact that not all financial institution offenses are covered by subsection (a)(1)(C).[102] Thus, the introduction to each subsection, respectively, is amended to refer to "property forfeited in connection with an offense resulting in pecuniary loss to a financial institution or regulatory agency" regardless of what statutory provision is employed to accomplish the forfeiture.

Third, a similar amendment is made to subsection (e)(7) to reflect that not all crimes relating to the sale of assets by receivers of failed financial institutions are covered by subsection (a)(1)(D), and to eliminate the need to revise the cross references in this section in the future each time the various subparagraphs of subsection (a)(1) are amended or redesignated.

Sec. 10. Enforcement of foreign forfeiture judgment

Section 10 puts the United States in compliance with Vienna Convention regarding the enforcement of foreign forfeiture orders. The United States was the eighth country to ratify the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), and has been under an obligation to meet the Convention's requirements since the treaty went into effect on November 11, 1990.

---

[99] The restitution provisions were enacted as part of the Financial Institutions Reform and Recovery Act (FIRREA) of 1989, which explains their limitation to these particular offenses.

[100] *See* 21 U.S.C. § 853(i) incorporated by reference in section 982(b).

[101] Section 981(d) incorporates the Customs laws, which in turn contain remission and mitigation authority. *See* 19 U.S.C. § 1618. But that authority has been interpreted only to permit remission to the owner of the seized property, a category that does not include most victims.

[102] *See* subsection (a)(1)(A) relating to money laundering offenses in which the underlying unlawful activity may be a financial institution offense.

Article V of the Vienna Convention requires the member nations (the Parties) to enact legislation providing for the forfeiture of proceeds and instrumentalities of drug trafficking and drug-related money laundering offenses. Specifically, paragraph 1(a) of Article V says that each Party shall adopt measures authorizing the forfeiture of "proceeds derived from offenses established in accordance with article 3, paragraph 1, [which defines the predicate drug and drug-related money laundering offenses], or property the value of which corresponds to that of such proceeds."

The United States is in full compliance with these requirements insofar as they relate to domestic forfeitures. The drug and money laundering forfeiture statutes enacted by Congress since 1978 authorize the forfeiture of both drug proceeds and property involved in money laundering offenses where the underlying crime is committed in the United States. The substitute assets provisions of these statutes permit the forfeiture of property of "equivalent value" when the property traceable to the criminal offense is unavailable.[103] Indeed, these statutes frequently serve as models for other Parties seeking to comply with the Vienna Convention's requirements. Additional legislation, however, will support our compliance with the Convention's international forfeiture obligations.

Under Article V, a Party must provide for the forfeiture of drug proceeds derived from an offense occurring in another country by providing forfeiture assistance to a Party in whose jurisdiction the underlying drug or money laundering offense occurred. This obligation applies both to the drug proceeds themselves and to property of equivalent value. Under 18 U.S.C. § 981(a)(1)(B), the United States can initiate a civil action against foreign drug proceeds that would result in the seizure and confiscation of such property. But because that statute is a civil in rem statute, it does not authorize the forfeiture of substitute assets of equivalent value.

The proposed statute is intended to reinforce our compliance with the Vienna Convention in this regard by giving our treaty partners access to our courts for enforcement of their forfeiture judgments. Under the proposal, once a defendant is convicted of a drug trafficking or money laundering offense in a foreign country and an order of forfeiture is entered against him, the foreign country, as the Party requesting assistance under the Vienna Convention, would file a civil action as a plaintiff in federal court seeking enforcement of the judgment against assets that may be found in the United States. The Requesting Party, however, would not be allowed to file for enforcement without approval from the United States Department of Justice, thereby permitting the United States to screen out requests that are factually deficient or based on unacceptable foreign proceedings.

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

> Where the Minister [of Justice] approves a request of a foreign state to enforce the payment of a fine imposed in respect of an offense by a court of criminal jurisdiction of

[103] *See* 21 U.S.C. § 853(p).

> the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a court in Canada.

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

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

Sec. 11. Admissibility of foreign business records

Section 11 adds a new provision to Title 28 to allow foreign-based records of a regularly conducted activity, obtained pursuant to an official request, to be authenticated and admitted into evidence in a civil proceeding, including civil forfeiture proceedings, notwithstanding the requirements of F.R.Evid. Rules 803(6) and 901(a)(1), by means of a certificate executed by a foreign custodian (or other person familiar with the record keeping activities of the institution maintaining the records). This new provision would be the civil analog to 18 U.S.C. § 3505.

To make foreign records of a regularly conducted activity admissible in a civil proceeding under current law, F.R.Evid. Rules 803(6) and 901(a)(1) currently require that a foreign custodian or other qualified witness give testimony, either by appearing at a proceeding, or in a deposition taken abroad and introduced at the proceeding, establishing a record-keeping exception to the hearsay rule (under Rule 803(6)) and authentication (under 901(a)(1)).

There is, however, no means by which the U.S. government can compel the attendance of a foreign custodian or other qualified foreign witness at a U.S. proceeding to testify. Thus, to adduce the requisite testimony the government must (1) rely on the prospective witness' willingness to voluntarily appear (which is very rare and subject to vicissitudes) or (2) attempt to obtain a foreign deposition of the witness. The latter process is unduly cumbersome (when measured in terms of the objective, i.e., to make records admissible) and may not be available in many situations, especially under administrative agreements, such as a tax treaty.

By enacting a civil analog to 18 U.S.C. § 3505, which provides for the admissibility of foreign business records in criminal cases, this provision would provide for a streamlined process for making foreign records of a regularly conducted activity admissible without

the U.S. government having to either (1) rely on having a foreign witness voluntary travel to the U.S. and appear at a civil proceeding or (2) get involved in the unduly cumbersome process of deposing the witness abroad.

Sec. 12. Conforming amendments to title 28, to rules of procedure, and to the Controlled Substances Act

Section 12 makes minor and technical amendments to 28 U.S.C. § 524(c), the statute governing the Justice Assets Forfeiture Fund. In addition, Section 12 amends the Admiralty Rules to give the claimant 20 days, instead of only 10 days, to file a claim in a civil judicial forfeiture case. Finally, Section 12 repeals 21 U.S.C. § 888. That statute, which contains a filing deadline in forfeiture cases involving automobiles used to facilitate drug trafficking offenses, is rendered unnecessary by the general purpose filing deadlines included in 18 U.S.C. § 983.

Sec. 13. Inapplicability of the Customs laws

Section 13 is intended to make clear that the incorporation of the Customs forfeiture laws for forfeiture cases under 18 U.S.C. § 983 does not include the cost bond requirement in 19 U.S.C. § 1608 or the burden of proof provision in 19 U.S.C. § 1615. The latter provision, of course, is plainly inconsistent with the burden of proof provision in section 983(e).

Also, Section 13 amends 28 U.S.C. § 2461(b) to make clear that in any civil forfeiture case, the procedures set forth in chapter 46 of title 18 apply, except that those procedures do not apply in cases handled by the U.S. Customs Service under statutes other than those in title 18 or title 21.

Sec. 14. Applicability

This section provides that the amendments made in this Act are intended to apply prospectively. In the case of the amendments to the Customs laws, Admiralty Rules, and other statutes affecting administrative forfeitures and the procedure for filing a claim to initiate a judicial civil forfeiture, the new provisions would apply to seizures occurring 60 days after the effective date of the Act. The new trial procedures governing judicial civil forfeitures would apply to cases in which the complaint was filed by the government after the effective date of the Act. Finally, changes to the substantive forfeiture statutes, such as those that expand forfeiture to apply to offenses for which forfeiture has not previously been available as a remedy, would apply to offenses occurring on or after the effective date.

Sec. 15. Jurisdiction and venue in forfeiture cases

Section 15 amends the statutes relating to jurisdiction and venue. Historically, courts had *in rem* jurisdiction only over property located within the judicial district. Since 1986, however, Congress has enacted a number of jurisdictional and venue statutes

permitting the courts to exercise authority over property located in other districts under certain circumstances.[104]

Many older statutes and rules, however, still contain language reflecting the old within-the- district requirements. These technical amendments bring those provisions up to date in accordance with the new venue and jurisdictional statutes. Indeed, several courts have already held that nationwide service of process provisions necessarily override Rule E(3)(a).[105] The amendment is therefore intended merely to remove any ambiguity resulting from Congress's previous omission in conforming Rule E and the other amended provisions to section 1355(d) as they apply to forfeiture cases.

Sec. 16. Minor and technical amendments relating to 1992 forfeiture amendments

Section 16(a) amends section 982(b)(2) to clarify, in light of additions made to section 982(a) in 1990 and 1992, that the substitute asset limitation in that section applies only to money laundering cases. Section 16(b) makes stylistic changes to section 986, making it applicable to all section 981 forfeitures including the provisions added in 1992, and eliminating the erroneous reference to section 1960. The amendment also makes it possible to issue a subpoena before a civil complaint is filed, and strikes a meaningless cross-reference to a non-existent statute, 18 U.S.C. § 985. Section 16(c) is a purely technical amendment.

Sec. 17. Drug paraphernalia technical amendments

Section 17 makes technical changes to the drug paraphernalia statute. Section 511(a)(10) of the Controlled Substances Act (21 U.S.C. § 881(a)(10)) provides for the civil forfeiture of "[a]ny drug paraphernalia (as defined in section 857 of this title)." Section 2401 of the Crime Control Act of 1990, Pub.L. 101–647, 104 Stat. 4858, November 29, 1990, transferred 21 U.S.C. § 857 (drug paraphernalia violations) to a new 21 U.S.C. 863 and made it part of the Controlled Substances Act. "Drug paraphernalia" is defined at section 863(d). Paragraph (a) above amends 21 U.S.C. § 881(a)(10) to correct the misreference to the repealed section 857.

Prior to enactment of 21 U.S.C. § 863, references in 21 U.S.C. §§ 881 and 853 to violations of "this subchapter" as bases for forfeiture did not include drug paraphernalia violations because 21 U.S.C. § 857 was part of the Anti-Drug Abuse Act of 1986. The references to "this subchapter" in 21 U.S.C. §§ 853 and 881 are actually references to the original legislation (Title II of Pub.L. 91–513, October 27, 1970, 84 Stat. 1242) popularly known as the "Controlled Substances Act".[106] Consequently, the reference to "this title" in 21 U.S.C. § 881(a)(10) should be corrected to "this subchapter" when the proposed amendment is codified.

---

[104] *See* 28 U.S.C. § 1355(b) (authorizing forfeiture over property in districts where act giving rise to the forfeiture occurred); 18 U.S.C. § 981(h) (creating expanded venue and jurisdiction over property located elsewhere that is related to a criminal prosecution pending in the district); 28 U.S.C. § 1355(d) (authorizing nationwide service of process in forfeiture cases).

[105] *See United States* v. *Parcel I, Beginning at a Stake*, 731 F. Supp. 1348, 1352 (S.D. Ill. 1990); *United States* v. *Premises Known as Lots 50 & 51*, 681 F. Supp. 309, 313 (E.D.N.C. 1988).

[106] *See* editorial note entitled "References in Text" after 21 U.S.C. § 801 in West's *Federal Criminal Code and Rules* (1991 Revised Edition) at 962.

Section 863 penalizes sale, use of any facility of interstate commerce to transport, and import or export of drug paraphernalia with imprisonment for up to three years. Additionally, 21 U.S.C. § 863(c) provides for criminal forfeiture of drug paraphernalia involved in a violation of 21 U.S.C. § 863 "upon the conviction of a person for such violation" and directs forfeited drug paraphernalia to be delivered to the Administrator of General Services, who may order its destruction or authorize its use by federal, state, or local authorities for law enforcement or educational purposes. Paragraph (b) above deletes section 863(c) as unnecessary because 21 U.S.C. § 853(a)(2) provides for criminal forfeiture of any property used to commit "a violation of this subchapter" that is punishable by imprisonment for more than one year. Section 863 is such a violation. Deletion of section 863(c) also removes section 863(c)'s contradiction of section 853(h)'s provision for disposition of criminally forfeited drug paraphernalia by the Attorney General. Disposition of drug paraphernalia forfeited civilly under section 881 is also by the Attorney General pursuant to 21 U.S.C. § 881(e).

Sec. 18. Certificate of reasonable cause

Section 18 makes a technical amendment to 28 U.S.C. § 2465 to provide that a certificate of reasonable cause shall be issued in appropriate circumstances whether the property in question was seized or merely arrested pursuant to an arrest warrant *in rem.* The amendment is necessary because of the Supreme Court's decision in *United States* v. *James Daniel Good Property*,[107] which explained that the government need not seize real property for forfeiture but may instead post the property with an arrest warrant issued pursuant to the Admiralty Rules and file a *lis pendens.*

Sec. 19. Authorization to share forfeited property with cooperating foreign governments

Section 19 provides authorization to share forfeited property with cooperating foreign governments. Section 981(i) of title 18 authorizes the sharing of forfeited property with foreign governments in certain circumstances. It currently applies to all civil and criminal forfeitures under 18 U.S.C. §§ 981–82, which are the forfeiture statutes for most federal offenses in title 18. Older parallel provisions applicable only to drug cases and Customs cases appear in 21 U.S.C. § 881(e)(1)(E) and 19 U.S.C. § 1616a(c)(2), respectively.

The amendment simply extends the existing sharing authority to all other criminal and civil forfeitures, including those undertaken pursuant to RICO, the Immigration and Naturalization Act, the anti-pornography and gambling laws, and other statutes throughout the United States Code. Because the amendment makes the parallel provisions in the drug and customs statutes unnecessary, section 881(e) is amended to remove the redundancy.

Sec. 20. Forfeiture of property used to facilitate foreign drug crimes

Section 20 is another provision relating to Vienna Convention, which the United States ratified on November 11, 1990. Under the Convention, the United States is obligated to enact procedures for

[107] 114 S. Ct. 492 (1993).

the forfeiture of both the proceeds and the instrumentalities of foreign crimes involving drug trafficking. 18 U.S.C. § 981(a)(1)(B) already provides for the forfeiture of foreign drug proceeds, but it does not provide for the forfeiture of facilitating property. The amendment rectifies this omission.

Sec. 21. Forfeiture of proceeds traceable to facilitating property in drug cases

Section 21 provides for the forfeiture of proceeds traceable to facilitating property in drug cases. Currently 21 U.S.C. § 881(a)(4) permits the forfeiture of conveyances used to facilitate a controlled substance violation. Similarly, section 881(a)(7) permits the forfeiture of real property used to facilitate such a violation. Neither statute, however, explicitly extends forfeiture to the proceeds traceable to the sale of such conveyances or real property. Not infrequently, for investigative reasons, facilitating property is not immediately seized. Thus, the owners are able to sell the property, and the proceeds of that sale are outside the purview of the statute. Similarly, if property is destroyed before it is seized, the government is unable to forfeit the insurance proceeds.

The amendment revises sections 881(a)(4) and (7) to permit forfeiture of proceeds traceable to forfeitable property, including proceeds of a sale or exchange as well as insurance proceeds in the event the property is destroyed. The amendment also insures that the "innocent owner" exceptions apply to the forfeiture of traceable property in all cases where the facilitating property itself would not be forfeitable. (This latter provision is necessary, of course, only if the uniform innocent owner provisions of 18 U.S.C. § 983 are not enacted. If section 983 is enacted, these innocent owner provisions will be stricken by conforming amendments.) The portion of this amendment relating to section 881(a)(4) passed the Senate in 1990 as section 1907 of S. 1970.

Sec. 22. Forfeiture of proceeds of certain foreign crimes

Section 22 authorizes the forfeiture of the proceeds of any foreign crime designated as "specified unlawful activity" for purposes of the money laundering statute. Such crimes currently include drug trafficking, terrorism and other crimes of violence and bank fraud. By authorizing the forfeiture of the proceeds of such crimes when found in the United States, the provision makes it more difficult for international criminals to use the United States as a haven for the profits from their crimes, and it permits the United States to assist foreign governments in recovering the proceeds of crimes committed abroad.

The forfeiture provision will only apply where the foreign offense was punishable by at least one year in prison in the foreign country, and would be recognized as a felony under federal law if committed within the jurisdiction of the United States.

Sec. 23. Civil forfeiture of coins and currency in confiscated gambling devices

Section 23 makes a change in the civil forfeiture provisions in the Gambling Devices Act, 15 U.S.C. § 1171, *et seq*. The Gambling Devices Act, set out as chapter 24 of title 15, is a scheme for regu-

lating devices like slot machines and other machines used for gambling. In general, the chapter makes it illegal to ship such devices into states where they are illegal and to use or possess them in areas of special federal responsibility such as in the special maritime and territorial jurisdiction and in Indian country. 15 U.S.C. § 1175 provides for the seizure and civil forfeiture of gambling machines involved in a violation of the chapter. Occasionally a slot machine or video game involved in a violation will contain money. This section clarifies that money in such a machine at the time it is seized is also subject to seizure and forfeiture. Such a forfeiture is justified and the section eliminates any need for a complicated procedure under which such a machine would have to be opened and the money counted and removed before it can be seized.

Sec. 24. Clarification of judicial review of forfeiture

Section 24 clarifies 21 U.S.C. § 877. That statute provides that "(a)ll final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final . . . except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or the circuit in which his principal place of business is located upon petition filed with the court. . . ." One court has found that the "express and unambiguous terms" of section 877 provided the court of appeals with jurisdiction to review on direct appeal a denial of a petition for remission or mitigation of the forfeiture of property by an agency.[108]

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

Sec. 25. Technical amendments relating to obliterated motor vehicle numbers

Section 25 contains technical amendments relating to obliterated motor vehicle identification numbers. 18 U.S.C. § 512 is the civil forfeiture statute governing motor vehicles and parts with obliterated serial numbers. The amendments cross-reference the new procedural statutes in sections 981–86, including the innocent owner defense in section 983.

Sec. 26. Statute of limitations for civil forfeiture actions

Presently, forfeiture actions must be filed within five years of the discovery of the *offense* giving rise to the forfeiture. In customs cases, in which the property is the offender, this presents no problem. In such cases, the discovery of the offense and the discovery

[108] *Scarabin* v. *DEA,* 925 F.2d 100, 100–01 (5th Cir. 1991). This decision was later upheld in *Clubb* v. *FBI*, No. 93–4912 (5th Cir. Feb. 28, 1994) (unpublished).

of the involvement of the property in the offense occur simultaneously.

This provision of the customs laws, however, is incorporated into other forfeiture statutes. In those cases, the government may be aware of an offense long before it learns that particular property is the proceeds of that offense. For example, the government may know that a defendant robbed a bank in 1990 but not discover that the proceeds of the robbery were used to buy a motorboat until 1996. Under current law the forfeiture of the motorboat would be barred by the statute of limitations. The amendment rectifies this situation by allowing the government to file the forfeiture action within five years of the discovery of the *offense* giving rise to the forfeiture, as under current law, or within two years from the discovery of the involvement of the property in the offense, whichever is longer.

Sec. 27. Destruction or removal of property to prevent seizure

Section 27 is intended to remove any possible ambiguity about whether 18 U.S.C. § 2232 (Destruction or removal of property to prevent seizure) applies to seizures for forfeiture. In particular, it is intended to alleviate any concern that section 2232 is limited to investigative "searches and seizures" only and thus excludes forfeiture seizures executed by law enforcement agencies pursuant to seizure warrants issued against forfeitable property (see, e.g., 21 U.S.C. § 881(b)) and forfeiture seizures executed by the U.S. Marshals Service pursuant to warrants of arrest in rem or orders of criminal forfeiture. The amendment also adds language to clarify that interference with seizures of real property is included within the statute's prohibitions.

Sec. 28. In personam judgments

Section 28 makes it clear that ancillary proceedings are not necessary where the order of forfeiture contains only an *in personam* money judgment against the defendant. It is well-established that in a criminal forfeiture case, the court, in lieu of ordering the forfeiture of specific assets, can enter a personal money judgment against the defendant for an amount of money equal to the amount otherwise subject to forfeiture.[109] In such cases, obviously, no interests of any third parties can be implicated. Therefore, there is no need for any ancillary hearing.

Sec. 29. Uniform procedures for criminal forfeiture

Section 29 corrects omissions that occurred when Congress enacted new criminal forfeiture provisions for cases involving fraud against government regulatory agencies (18 U.S.C. § 982(a)(3)) and car-jacking (18 U.S.C. § 982(a)(5)) but neglected to enact any criminal forfeiture procedures. To solve that problem, and to make it unnecessary to amend the procedural statute again each time new forfeiture statutes are enacted, section 981(b)(1) is amended to incorporate the procedures in 21 U.S.C. § 853 for all criminal forfeit-

[109] *United States* v. *Voight*, 89 F.3d 1050 (3rd Cir. 1996) (government is entitled to a personal money judgment equal to money involved in the money laundering offense); *United States* v. *Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985) (en banc), *cert. denied,* 475 U.S. 1011 (1986); *United States* v. *Conner*, 752 F.2d 566, 576 (11th Cir. 1985), *cert. denied*, 474 U.S. 821 (1985).

ures under section 981(a). The section dealing with rebuttable presumptions in drug cases, 21 U.S.C. § 853(d), is the only provision omitted because it has no application outside the context of narcotics violations.

Sec. 30. Availability of criminal forfeiture

Section 30 is intended to give the U.S. Attorneys the option of pursing criminal forfeiture as an alternative to civil forfeiture if civil forfeiture is otherwise authorized. Under current law, 28 U.S.C. § 2461(a), if a statute provides for forfeiture without prescribing whether the forfeiture is civil or criminal, it is assumed that only civil forfeiture is authorized. In such cases, the government may not pursue forfeiture as part of the criminal prosecution, but must file a parallel civil forfeiture case in order to prosecute an individual and forfeit the proceeds of the offense.[110]

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

Sec. 31. Discovery procedure for locating forfeited assets

Section 31(a) amends 21 U.S.C. 853(m) to give the court the discretion to exclude a convicted defendant from a post-trial deposition conducted for the purpose of locating the defendant's forfeited assets if the defendant's presence could frustrate the purpose of the inquiry. The provision is necessary because otherwise, under Rule 15 of the Federal Rules of Criminal Procedure, the defendant would have the right to be present at a deposition conducted for the purpose of locating assets that have been declared forfeited.[111] If, for example, the assets include funds in bank accounts that the defendant had hoped to conceal from the government and the court, the defendant's presence at the deposition could frustrate its purpose because upon learning that the government had discovered the location of his secret accounts, the defendant could quickly take steps to remove the assets before government agents could recover them. Subsection (b) contains a technical amendment that makes clear that the authority to subpoena bank records in 18 U.S.C. § 986 applies in criminal forfeiture cases.

Sec. 32. Criminal forfeiture for money laundering conspiracies

Section 32 clarifies the scope of criminal forfeiture for money laundering conspiracies. Current law provides for the forfeiture of property involved in the substantive money laundering offenses set forth in titles 18 and 31. It also provides for the forfeiture of property involved in conspiracies to commit violations of 18 U.S.C. §§ 1956 and 1957 because such conspiracies are charged as violations of section 1956(h). There is no provision, however, for the forfeiture of property involved in conspiracies to violate the title 31

[110] *See, e.g.,* 18 U.S.C. § 1955 (gambling), § 545 (smuggling).
[111] *United States* v. *Saccoccia*, 913 F. Supp. 129 (D.R.I. 1996).

money laundering offenses because such conspiracies are charged as violations of 18 U.S.C. § 371, a statute for which forfeiture is not presently authorized. The amendment plugs this loophole by providing for forfeiture of the property involved in a conspiracy to commit any of the offenses listed in section 982(a)(1) following a criminal conviction on the conspiracy count.

Sec. 33. Correction to criminal provision for alien smuggling and other immigration offenses

Section 33 corrects technical errors in the drafting of Section 217 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that nullify the intended effect of the criminal forfeiture provisions. It is evident from the text of the provision that Congress intended to authorize criminal forfeiture for violations of 8 U.S.C. §§ 1324(a), 1324A(a)(1) and 1324A(a)(2). References to those statutes, however, appear only in one subparagraph of the provision, and not in the introductory paragraph that lists the offenses for which forfeiture may be imposed as a penalty. The statutes must be referenced in the introductory language to give the provision its intended effect. Subsequent surplus references are deleted. In addition, the statute is re-designated as paragraph (7) of 18 U.S.C. § 982(a) because another paragraph (6) was previously enacted.

Sec. 34. Repatriation of property placed beyond the jurisdiction of the court

Section 34 allows a court to order the repatriation of property placed beyond the jurisdiction of the court. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of "substitute assets" when the defendant has placed the property otherwise subject to forfeiture "beyond the jurisdiction of the court." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. Often, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

Other countries, such as the United Kingdom, address this problem by authorizing the court to order the defendant to repatriate the property that he has sent abroad. Because the sentencing court has in personam jurisdiction over the defendant, it can use this authority to reach assets that are otherwise beyond the jurisdiction of the court, as long as the defendant retains control of the property. This section amends 21 U.S.C. § 853 to authorize the sentencing court to issue a repatriation order either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. § 853(e) to restrain property, including substitute assets, so that they will be available for forfeiture.[112] Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both. The government has the authority to grant use

[112] *See United States* v. *Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (pre-trial repatriation order).

immunity to a defendant for the act of repatriating property to the United States pre-trial or while an appeal was pending if such an act would tend to implicate the defendant in a criminal act in violation of the Fifth Amendment.[113]

Sec. 35. Right of third parties to contest forfeiture of substitute assets

Section 35 deals with the right of third parties to contest the forfeiture of substitute assets. Current law is unclear with respect to when the government's interest in substitute assets vests. Some have argued that because the relation-back provisions of section 853(c) do not expressly apply to substitute assets, the government's interest in substitute assets does not vest until the jury returns a special verdict of forfeiture or the court enters a preliminary order of forfeiture. Others have argued that because the substitute asset is forfeited in place of property in which the government's interest vested at the time of the act giving rise to forfeiture, the government's interest in the substitute asset vests on the date on which the crimes were committed. Still another interpretation is that the government's interest in substitute assets vests at the time the grand jury returns an indictment including a substitute assets provision, because at that time the defendant and any potential claimants (including potential bona fide purchasers) are placed on notice that the defendant's estate is subject to forfeiture up to the amount of the proceeds of his criminal activity.

The amendment ends this uncertainty by adopting the third interpretation as a reasonable compromise between the other two more extreme positions. Under this provision, a defendant would be free to transfer his untainted property to a third person at any time prior the filing of an indictment, information or bill of particulars identifying the property as subject to forfeiture (unless, of course, the property was subject to a pre-indictment restraining order). After that time, however, the defendant and potential transferees would be on notice that the government was seeking to forfeit the property as substitute assets in a criminal case, and that the property would belong to the government upon the conviction of the defendant and the entry of an order of forfeiture. Accordingly, any transfer by the defendant to a third party after the property was identified in an indictment, information or bill of particulars would be void, unless the transferee establishes, pursuant to section 853(n)(6)(B), that he or she was a bona fide purchaser for value of the property who was reasonably without cause to believe that the property was subject to forfeiture.

Sec. 36. Archeological Resources Protection Act

Section 36 expands the forfeiture provisions of the Archeological Resources Protection Act of 1979 (16 U.S.C. § 470gg(b)) to include proceeds of a violation of the Act and to provide that the procedures governing criminal and civil forfeiture in title 18 apply to such forfeitures.

---

[113] *Id.* (no Fifth Amendment violation if government does not use evidence of the repatriation in its case in chief).

Sec. 37. Forfeiture of instrumentalities of terrorism, telemarketing fraud, and other offenses

Section 37 adds new civil and criminal forfeiture provisions to sections 981 and 982, respectively, to cover the instrumentalities used to commit certain fraud offenses and violations of the Explosives Control Act. These provisions are necessary because in many such cases forfeiture of the proceeds of the offense alone is an inadequate sanction. For example, in a computer crime case in which the defendant has penetrated the security of a computer network, there may not be any proceeds of the offense to forfeit, but the perpetrator should be made to forfeit the computer or other access device used to commit the offense. The description of the articles subject to forfeiture in such cases is derived from 18 U.S.C. § 492, the forfeiture provision for instrumentalities used to commit counterfeiting crimes. The reference to specific items such as computers in the statutory language is not intended to limit the generic description of the articles subject to forfeiture to those particular items.

The provision relating to fraud offenses states that only property used on a "continuing basis" is subject to forfeiture. This is intended to make clear, as many courts have already held, that there must be a substantial temporal connection between the forfeited property and the act giving rise to forfeiture. Under the statute, property otherwise used for lawful purposes will be subject to forfeiture if it is used to commit two or more offenses, or if it used to commit a single offense that involved the use of the property on a number of occasions. On the other hand, property otherwise used for lawful purposes would not be subject to forfeiture if used only in an isolated instance to commit or facilitate the commission of an offense.

Sec. 38. Forfeiture of criminal proceeds transported in interstate commerce

Section 38 provides for the forfeiture of criminal proceeds transported in interstate commerce in violation of 18 U.S.C. § 1952. Section 1952(a)(1) makes it a crime to distribute the proceeds of an "unlawful activity" in interstate commerce. "Unlawful activity" includes gambling, drug trafficking, prostitution, extortion, bribery and arson.[114] There is, however, no statute authorizing forfeiture of the criminal proceeds distributed in violation of section 1952(a)(1). Prosecutors have attempted to work around this problem by charging interstate transportation of drug proceeds as a money laundering offense under 18 U.S.C. § 1956(a)(1)(B)(i), an offense for which forfeiture of all property involved is authorized.[115] The courts, however, have not endorsed this theory either on the ground that mere transportation of drug money is not a "financial transaction,"[116] or because transporting cash does not, by itself, evince an intent to "conceal or disguise" drug proceeds.[117]

---

[114] *See* 18 U.S.C. § 1952(b).

[115] *See* 18 U.S.C. § 981(a)(1)(A) and 982(a)(1).

[116] *See United States* v. *Puig-Infante*, 19 F.3d 929 (5th Cir. 1994) (transporting drug proceeds from Fla. to Tex. not a "transaction" absent evidence of disposition once cash arrived at destination).

[117] *See United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994) (covert nature of transportation of funds from one state to another not sufficient to imply intent to conceal or disguise); *United*

Continued

The amendment to section 1952 cures this problem by authorizing civil and criminal forfeiture of the proceeds of unlawful activity distributed in violation of subsection (a)(1). In each instance, the applicable procedures would be the same as those applicable to money laundering forfeitures.

Sec. 39. Forfeitures of proceeds of Federal Food, Drug, and Cosmetic Act violations

Section 39 creates civil and criminal forfeiture provisions for proceeds traceable to Federal Food, Drug, and Cosmetic Act (FFDCA) violations codified in chapter 9 of title 21 (21 U.S.C. § 301 et seq.). The new forfeiture provisions would be additions to chapter 9 (new 21 U.S.C. § 311 (civil forfeiture) and § 312 (criminal forfeiture)). FFDCA violations are investigated by the Food and Drug Administration's Office of Criminal Investigations (FDAOCI). The FFDCA presently provides for forfeiture of only the specific articles of food, drugs, or cosmetics that are in violation of the FFDCA.[118] In order to achieve forfeitures of the proceeds of FFDCA violations, FDAOCI has to expand FFDCA cases to include additional offenses (e.g., mail or wire fraud and the laundering of fraud proceeds) which serve as predicate offenses for adoptive forfeitures undertaken by other federal law enforcement agencies under statutes outside the FFDCA (e.g., 18 U.S.C. §§ 981 and 982). FDAOCI forfeiture cases under the FFDCA forfeiture statutes will simplify the process by which FDAOCI investigations lead to proceeds forfeitures.

FDAOCI does not seek forfeiture of facilitating property; nor does FDAOCI seek administrative forfeiture authority. FDAOCI does not want to establish organizational infrastructures for managing property seized for facilitating FFDCA violations (e.g., factories and warehouses) or for executing administrative forfeitures. All forfeitures of articles that are in violation of the FFDCA under the existing FFDCA forfeiture statute (21 U.S.C. § 334) are judicial.

Sec. 40. Forfeiture of counterfeit paraphernalia

18 U.S.C. § 492 has provided for the civil forfeiture of counterfeiting paraphernalia since 1909. It was last amended in 1938. The amendments are intended to bring the statute up to date and in conformance with modern civil forfeiture statutes by cross-referencing procedures pertaining to administrative forfeitures in customs law, 19 U.S.C. § 1602 *et seq*., and the civil forfeiture procedures in 18 U.S.C. §§ 981–87. The amendments also add a criminal forfeiture provision that cross-references the procedure in section 982.

Sec. 41. Closing of loophole to defeat criminal forfeiture through bankruptcy

Section 41 closes a loophole that has been used to defeat criminal forfeiture through bankruptcy. These provisions would prevent the circumvention of criminal forfeiture through the use of forfeitable property to satisfy debts owed to unsecured general creditors. The

---

States v. *Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994) (simple wire transfer of proceeds to Colombia evidences no intent to conceal or disguise).

[118] *See* 21 U.S.C. § 334 (seizure, judicial condemnation, and court-ordered destruction or sale of adulterated or misbranded foods, drugs, or cosmetics, with net proceeds of any sale going to the Treasury of the United States).

limitation to those bankruptcy proceedings commenced after or in contemplation of criminal proceedings safeguards against interference with legitimate bankruptcy filings.

Sec. 42. Collection of criminal forfeiture judgment

Section 42 makes the provisions for enforcing a criminal fine available for the enforcement of a criminal forfeiture judgment. The language of the provision is taken virtually verbatim from 18 U.S.C. § 3663(h), the provision for enforcing a restitution order in a criminal case, which likewise incorporates the procedure for enforcing a criminal fine. The amendment is intended to give the government a means of enforcing an in personam money judgment entered against a convicted defendant when there are no substitute assets available to be seized.

Sec. 43. Criminal forfeiture of property in government custody

Section 43 is intended to resolve any ambiguity that may exist as to whether a federal agency that has obtained lawful custody of property pursuant to a civil seizure warrant or otherwise may retain custody of the property without obtaining another warrant or restraining order when the property is made the subject of a forfeiture count in a criminal case.[119] The amendment makes clear that if the property is already in the custody of the government, obtaining a new seizure warrant or restraining order is unnecessary.

Sec. 44. Delivery of property to the Marshals Service

Section 44 is intended to incorporate procedures from the Admiralty Rules regarding the delivery of property to the Marshals Service. 21 U.S.C. § 853(j) incorporates the civil forfeiture procedures set forth in 21 U.S.C. § 881(d) for purposes of criminal forfeiture. The cross reference to section 881(d), however, fails to include a useful provision of the Admiralty Rules that is used in civil forfeiture. Under Rule C(5) of the Admiralty Rules, the court has the authority to order any person who has custody of a portion of property subject to forfeiture to show cause why that property should not be turned over to the Marshals Service. For example, the government may seize and ultimately forfeit an airplane. To sell the plane for its true value, the Marshals would need to obtain the log books showing the number of hours the plane has flown and its maintenance history. Rule C(5) may be used to order the person holding the log books to show cause why they shouldn't be turned over to the Marshals. The amendment makes this useful procedural tool applicable to criminal forfeitures by incorporating a cross-reference to Rule C(5) in section 853(j).

Sec. 45. Forfeiture for odometer tampering offenses

Sections 981 and 982 of title 18 were amended in 1992 to include civil and criminal forfeiture provisions, respectively, for certain offenses relating to carjacking and transporting stolen automobiles.

---

[119] *See United States* v. *Schmitz,* 156 F.R.D. 136 (E.D. Wis. 1994) (once government files criminal forfeiture action, it no longer has authority to retain property seized for civil forfeiture under section 881 unless it obtains a restraining order under section 853(e) or a seizure warrant under section 853(f)).

This amendment expands the forfeiture statutes to include odometer tampering offenses under 49 U.S.C. § 32703. Because the forfeiture of the proceeds of the odometer tampering offense would not, by itself, be sufficient to deter the commission of this crime, the amendment makes the vehicles and other property used to commit the offense subject to forfeiture as well.

Sec. 46. Pre-trial restraint of substitute assets

It is necessary to resolve a split in the circuits regarding the proper interpretation of the pre-trial restraining order provisions of the criminal forfeiture statutes. Under 21 U.S.C. § 853(e)(1), a court may enter a pre-trial restraining order to preserve the availability of forfeitable property pending trial. At first, the courts were unanimous in their view that the restraining order provisions applied both to property directly traceable to the offense and to property forfeitable as substitute assets.[120] Subsequently, however, other courts held that because Congress did not specifically reference the substitute assets provisions in the restraining order statutes, pre-trial restraint of substitute assets is not permitted.[121]

At least one of the recent cases was based on an erroneous reading of the legislative history. *In re Assets of Martin* relies on a footnote in a 1982 Senate Report that states that the restraining order provision in section 1963 would not apply to substitute assets.[122] The appellate court was apparently unaware that before the restraining order provision was finally enacted in 1984, the footnote in question was dropped from the Senate Report, thus negating any suggestion that Congress did not intend for the new statute to apply to substitute assets.[123]

The amendment cures this problem of statutory interpretation by including specific cross-references to the substitute assets provision, 21 U.S.C. § 853(p), at the appropriate place in the section dealing with pre-trial restraining orders. The government, in cases involving the pre-trial restraint of substitute assets, must exempt from the restraining order any property needed to pay attorneys fees in the criminal case and for ordinary living expenses.

Sec. 47. Hearing on pre-trial restraining orders; assets needed to pay attorney's fees

Section 47 concerns the scope of a post-restraint, pre-trial hearing following the issuance of a restraining order in a criminal case. The criminal forfeiture statutes provide that in order to preserve assets for forfeiture at trial, the government may seek, and the court may issue, an *ex parte* pre-trial restraining order.[124] This procedure supplements, and does not preclude, seizure of the property pursuant to a seizure warrant.

---

[120] *See Assets of Tom J. Billman*, 915 F.2d 916 (4th Cir. 1990); *United States* v. *Regan*, 858 F.2d 115 (2nd Cir. 1988); *United States* v. *Schmitz*, 156 F.R.D. 136 (E.D. Wis. 1994); *United States* v. *O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993); *United States* v. *Swank Corp.*, 797 F. Supp. 497 (E.D. Va. 1992).

[121] *See United States* v. *Field*, 62 F.3d 246 (8th Cir. 1995); *United States* v. *Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States* v. *Floyd*, 992 F.2d 498 (5th Cir. 1993).

[122] 1 F.3d at 1360, *citing* S. Rep. 97–520, 97th Cong., 2d Sess. (1982) at 10 n.18.

[123] *See* S. Rep. 98–225, 98th Cong., 1st Sess. (1983) at 201–05.

[124] *See* 21 U.S.C. § 853(e).

If a restraining order is to be issued before any indictment is returned, "persons appearing to have an interest in the property" are entitled to an immediate hearing.[125] The statute, however, makes no provision for any hearing—either pre- or post-restraint—where the property is not restrained until after an indictment is filed. The legislative history of these provisions makes clear that Congress considered a hearing unnecessary in the post-indictment context because the grand jury's finding of probable cause to believe that the restrained property was subject to forfeiture was sufficient to satisfy the due process rights guaranteed by the Fifth Amendment:

> [T]he probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order.[126]

The Senate Report went on to explain that the statute was not intended to preclude the court from holding a post-restraint hearing in appropriate circumstances to determine if a restraining order should be continued, but it stressed that in that context as well, the court was not to reexamine the validity of the indictment or the grand jury's finding of probable cause for the forfeiture:

> This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment. However, *it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment.* For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.[127]

Congress' principal concern in precluding any re-examination by the court of the validity of the indictment was that such an examination might force the government to make a "damaging premature disclosure of the government's case and trial strategy."[128]

Since the restraining order provisions were enacted in 1984, several appellate courts have had occasion to determine whether the statutory structure comports with due process under the 5th Amendment. The courts unanimously hold that due process does not require a pre-restraint adversary hearing where the restraining

---

[125] 21 U.S.C. §§ 853(e)(1)(B) & (2). Restraining orders apply to both the criminal defendant and to any third party who might otherwise have access to the subject property. *United States* v. *Jenkins,* 974 F.2d 32 (5th Cir. 1992); *In re Assets of Tom J. Billman,* 915 F.2d 916 (4th Cir. 1990); *United States* v. *Regan,* 858 F.2d 115 (2nd Cir. 1988).

[126] S. Rep. 255, 98th Cong., 1st Sess. (1983) at 202–03.

[127] *Id.* at 203 (emphasis supplied).

[128] *Id.* at 196.

order is not issued until after the return of an indictment.[129] In such circumstances, the property owner's right to a hearing is outweighed by the government's need for "some means of promptly heading off any attempted disposal of assets that might be made in anticipation of a criminal forfeiture." [130]

The courts differ, however, as to whether a post-indictment restraining order may be continued up to and through trial without granting the defendant an opportunity for a post-restraint hearing. Those courts that would require such a hearing also differ among themselves as to whether the scope the hearing should include a re-examination by the court of the validity of the indictment and the grand jury's finding of probable cause for forfeiture.

On the one extreme, the Eleventh Circuit has held that there is no constitutional right to a post-restraint hearing on the validity of a restraining order because the Speedy Trial Act ensures that a defendant will have a prompt opportunity to challenge the validity of the order at trial.[131] The Eleventh Circuit holds this view even where the defendant alleges that the restraining order infringes upon his Sixth Amendment right to hire counsel of his choice.[132] The Tenth Circuit is in accord, at least where the right-to-counsel issue is not implicated.[133]

On the other extreme, the Second Circuit, in a 7–6 *en banc* opinion, held not only that a post-restraint, pre-trial hearing is required whenever Sixth Amendment right to counsel issues are raised, but that at such hearing the court is required "to reexamine the probable cause determinations" embodied in the grand jury indictment.[134] In so holding, the Second Circuit expressly declined to follow Congress' admonition that the courts should not "entertain challenges to the validity of the indictment." [135]

In between these two extremes, several courts have held that a defendant's Sixth Amendment right to counsel is an interest of such importance that due process requires that the defendant be granted a hearing pre-trial to determine the validity of an order that restrains the assets the defendant would use to retain counsel of his choice. [136] As the Seventh Circuit noted in *United States* v. *Moya-Gomez*, cases implicating the Sixth Amendment are unique because a "defendant needs the attorney [pre-trial] if the attorney is to do him any good." [137] Thus, where the defendant asserts that the assets he would use to hire counsel have been improperly restrained, forcing the defendant to wait until the time of trial to contest the restraining order would constitute an unconstitutional "permanent deprivation" of property without a hearing.[138]

---

[129] *See e.g. United States* v. *Monsanto,* 924 F.2d 1186, 1192 (2nd Cir. 1991); *United States* v. *Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989).

[130] *Monsanto*, 924 F.2d at 1192.

[131] *Bissell*, 866 F.2d at 1354. *See In Re Protective Order*, 790 F. Supp. 1140 (S.D. Fla. 1992).

[132] *Bissell, supra.*

[133] *See United States* v. *Musson*, 802 F.2d 384, 387 (10th Cir. 1986) (no hearing required); *but see United States* v. *Nichols*, 841 F.2d 1485, 1491 n.4 (10th Cir. 1988) (leaving open question whether hearing is required if Sixth Amendment issue is raised).

[134] *Monsanto*, 924 F.2d at 1195–97.

[135] 924 F.2d at 1197, *quoting* S. Rep. 225, *supra,* at 196. *See also United States* v. *Crozier*, 777 F.2d 1376, 1383–84 (9th Cir. 1985).

[136] *See e.g. United States* v. *Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988); *United States* v. *Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986).

[137] 860 F.2d at 726

[138] *Id.*

These courts, however, have declined to go as far as the Second Circuit in *United States* v. *Monsanto* in sanctioning a full-blown reexamination of the validity of the indictment. For example, in *United States* v. *Thier*, the Fifth Circuit noted Congress' "clear intent to specifically forbid a court to 'entertain challenges to the validity of the indictment' at a hearing on a motion to modify or vacate a restraining order,"[139] and held that the grand jury's finding of probable cause that the defendant's property was subject to forfeiture should be regarded as a strong, though not irrebuttable, showing in support of the restraining order.[140] The court continued:

> The court is not free to question whether the grand jury should have acted as it did, but it is free, and indeed required, to exercise its discretion as to whether and to what extent to enjoin based on all matters developed at the hearing.[141]

Similarly, the Seventh Circuit in *Moya-Gomez* held that where Sixth Amendment issues are implicated, the defendant is entitled to a hearing at which the government is "required to prove the likelihood that the restrained assets are subject to forfeiture."[142] But at the same time the court held that the "careful and deliberate judgment of Congress" was entitled to "respect,"[143] and that therefore "[w]hatever may be the precise limits on the authority of the district judge at a [post-restraint] hearing . . ., *it is clear that the court may not inquire as to the validity of the indictment and must accept that 'the probable cause established in the indictment or information is . . . determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based*.'"[144]

The Seventh Circuit continued as follows:

> It is therefore not open to the defendant to attempt to persuade the court that the government's claim to the property is any less strong than suggested by the government in the indictment. . . .[145]

The proposed legislation attempts to end the uncertainty and ambiguity in the law by codifying the majority view, consistent with the original intent of Congress, on the issues raised. Proposed paragraph (5) codifies the rule that permits the district court, in its discretion, to grant a request for a hearing for modification of the restraining order. Paragraph (5) also sets forth two grounds, other than the Sixth Amendment grounds, upon which a court may be asked to modify a restraining order. As the Second Circuit held in *Monsanto*, an order may be modified upon a showing that even if all of the facts set forth in the indictment are established at trial,

---

[139] 801 F.2d at 1469–70.
[140] *Id.* at 1470.
[141] *Id.*
[142] 860 F.2d at 731.
[143] *Id.* at 729.
[144] 860 F.2d at 728 (emphasis added), *quoting* S. Rep. 225, *supra*.
[145] *Id. See Monsanto*, 924 F.2d at 1206 (Cardamone, J. dissenting) ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the government's case during the post-restraint, pre-trial period."); *United States* v. *O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993) (following *Moya-Gomez*).

the restrained property would not be subject to forfeiture.[146] The court would also have the discretion to revise an order, in light of evidence produced at a hearing, to employ less restrictive means of restraint if such means are available to protect the government's interests without infringing on the defendant's property rights unnecessarily.[147] Under the statute, the court would have the discretion to grant a hearing for such purposes at any time before trial.

With respect to the use of restrained property to retain criminal defense counsel, the restraining order would be modified if the defendant establishes that he or she has no other assets available with which to retain counsel, and demonstrates that there is no probable cause to believe that the restrained property is likely to be forfeited if the defendant is convicted. The issue before the court, however, would be solely the likelihood of forfeiture assuming a conviction. As Congress stated in the 1984 legislative history, and as the majority of courts have held since that time, the indictment itself conclusively establishes probable cause regarding the criminal offense upon which the forfeiture would be based. Thus, in a money laundering case, for example, the court would require the government to establish probable cause to believe that the restrained assets were "involved in" the money laundering offense(s) set forth in the indictment,[148] but it would not look behind the indictment to determine independently whether there was probable cause to believe that the money laundering offense itself had been committed.

This provision explicitly codifies the 1984 legislative history and recent case law regarding challenges to the sufficiency of the indictment. It would prohibit the defendant from challenging the validity of the indictment itself, and would bar the court from reexamining the factual basis for the grand jury's finding of probable cause. In this way, the statute would protect the defendant from the unlawful restraint of his property when there is no legal basis for the restraint, but it would preclude the use of the pretrial hearing as pretext for forcing the government to tip its hand prematurely as to its evidence and trial strategy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

[146] 924 F.2d at 1199, *quoting* S. Rep. 225 at 203.
[147] *Id.* at 1207 (Cardamone, J. dissenting).
[148] *See* 18 U.S.C. § 982(a)(1).

PART I—CRIMES

* * * * * * *

CHAPTER 25—COUNTERFEITING AND FORGERY

* * * * * * *

§ 492. Forfeiture of counterfeit paraphernalia

(a) All counterfeits of any coins or obligations or other securities of the United States or of any foreign government, or any articles, devices, and other things made, possessed, or used in violation of this chapter or of sections 331–333, 335, 336, 642 or 1720, of this title, or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority from the Secretary of the Treasury or other proper officer, shall be forfeited to the United States.

(b) Whoever, having the custody or control of any such counterfeits, material, apparatus, articles, devices, or other things, fails or refuses to surrender possession thereof upon request by any authorized agent of the Treasury Department, or other proper officer, shall be [fined not more than $100] *fined under this title* or imprisoned not more than one year, or both.

[Whenever, except as hereinafter in this section provided, any person interested in any article, device, or other thing, or material or apparatus seized under this section files with the Secretary of the Treasury, before the disposition thereof, a petition for the remission or mitigation of such forfeiture, the Secretary of the Treasury, if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of such forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just.

[If the seizure involves offenses other than offenses against the coinage, currency, obligations or securities of the United States or any foreign government, the petition for the remission or mitigation of forfeiture shall be referred to the Attorney General, who may remit or mitigate the forfeiture upon such terms as he deems reasonable and just.]

(c) For the purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that the duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of the Treasury.

(d) All seizures and civil judicial forfeitures pursuant to subsection (a) shall be governed by the procedures set forth in chapter 46 of this title pertaining to civil forfeitures. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

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

* * * * * * *

§ 512. Forfeiture of certain motor vehicles and motor vehicle parts

(a) If an identification number for a motor vehicle or motor vehicle part is removed, obliterated, tampered with, or altered, such vehicle or part shall be subject to seizure and forfeiture to the United States unless—

(1) in the case of a motor vehicle part, such part is attached to a motor vehicle and the owner of such motor vehicle [does not know that the identification number has been removed, obliterated, tampered with, or altered] *is an innocent owner as defined in section 983 of this title*;

* * * * * * *

(b) All provisions of law relating to—

(1) the seizure and condemnation of vessels, vehicles, merchandise, and baggage for violation of customs laws, and procedures for summary and judicial forfeiture applicable to such violations;

(2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such disposition;

(3) the remission or mitigation of such forfeiture; and

(4) the compromise of claims and the award of compensation to informers with respect to such forfeiture;

and the provisions of chapter 46 of this title relating to civil judicial forfeitures shall apply to seizures and forfeitures under this section, to the extent that such provisions are not inconsistent with this section. The duties of the collector of customs or any other person with respect to seizure and forfeiture under such provisions shall be performed under this section by such persons as may be designated by the Attorney General.

* * * * * * *

CHAPTER 46—FORFEITURE

Sec.
981. Civil forfeiture.
982. Criminal forfeiture.
983. Civil forfeiture procedures.
984. Civil forfeiture of fungible property.
985. Release of property to avoid hardship.
986. Subpoenas for bank records.

§ 981. Civil forfeiture

(a)(1) [Except as provided in paragraph (2), the] *The* following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving *(i)* the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act) *or (ii) any other conduct described in section 1956(c)(7)(B)*, within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States*, or any property used to facilitate such offense*.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or a violation of section 1341 or 1343 of such title affecting a financial institution *or any offense constituting "specified unlawful activity" as defined in section 1956(c)(7) of this title or a conspiracy to commit such offense*.

(D) Any property, real or personal, which represents or is traceable to the [gross receipts] *proceeds* obtained, directly or indirectly, from a violation of—

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or

the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

[(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.**]**

(F) Any property, real or personal, which represents or is traceable to the **[**gross**]** proceeds obtained, directly or indirectly, from a violation of—

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); **[**or**]**

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce)**[**.**]***; or*

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

In the case of a violation described in clause (vi), any vehicles or other property involved in the commission of the offense shall also be subject to forfeiture.

(G)(i) Any computer, photostatic reproduction machine, electronic communications device or other material, article, apparatus, device or thing made, possessed, fitted, used or intended to be used on a continuing basis to commit a violation of sections 513, 514, 1028 through 1032, and 1341, 1343, and 1344 of this title, or a conspiracy to commit such offense, and any property traceable to such property.

(ii) Any conveyance used on two or more occasions to transport the instrumentalities used in the commission of a violation of sections 1028 and 1029 of this title, or a conspiracy to commit such offense, and any property traceable to such conveyance.

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

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

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

(iii) any other offense enumerated in section 2339A(a) of this title;

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

[(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder 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.]

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

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

[(b)(1) Any property—

[(A) subject to forfeiture to the United States under subparagraph (A) or (B) of subsection (a)(1) of this section—

[(i) may be seized by the Attorney General; or

[(ii) in the case of property involved in a violation of section 5313(a) or 5324 of title 31, United States Code, or section 1956 or 1957 of this title investigated by the Secretary of the Treasury or the United States Postal Service, may be seized by the Secretary of the Treasury or the Postal Service; and

[(B) subject to forfeiture to the United States under subparagraph (C) of subsection (a)(1) of this section may be seized by the Attorney General, the Secretary of the Treasury, or the Postal Service.

[(2) Property shall be seized under paragraph (1) of this subsection upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

[(A) the seizure is pursuant to a lawful arrest or search; or

[(B) the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, has obtained a warrant for such seizure pursuant to the Federal Rules of Criminal Procedure, in which event proceedings under subsection (d) of this section shall be instituted promptly.]

(b)(1) Any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General. In addition, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

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

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

(B) the seizure is made pursuant to a lawful arrest or search, or if there is probable cause to believe that the property is subject to forfeiture and another exception to the Fourth Amendment warrant requirement would apply; or

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

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

(4) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under subsection (a) or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district where the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in Rule 43(e) of the Federal Rules of Civil Procedure. The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

(5) Once a motion for the return of seized property under Rule 41(e) is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1355(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28.

* * * * * * *

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, con-

demnation of property for violation of the customs laws, the disposition of such property or the proceeds from the [sale of this section] *sale of such property*, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. *However, the cost bond provision of section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) and the burden of proof provision of section 615 of the Tariff Act of 1930 (19 U.S.C. 1615) shall not apply to any forfeiture governed by the procedures set forth in this chapter.* The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine—

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) [in the case of property referred to in subsection (a)(1)(C)] *in the case of property forfeited in connection with an offense resulting in a pecuniary loss to a financial institution or regulatory agency*, to any Federal financial institution regulatory agency—

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) [in the case of property referred to in subsection (a)(1)(C)] *in the case of property forfeited in connection with an offense resulting in a pecuniary loss to a financial institution or regulatory agency*, upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) [in the case of property referred to in subsection (a)(1)(C)] *in the case of property forfeited in connection with an offense resulting in a pecuniary loss to a financial institution or regulatory agency*, to any Federal financial institution regu-

latory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

[(6) in the case of property referred to in subsection (a)(1)(C), restore forfeited property to any victim of an offense described in subsection (a)(1)(C); or]

(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

(7) [In the case of property referred to in subsection (a)(1)(D)] *In the case of property forfeited in connection with an offense relating to the sale of assets acquired or held by any Federal financial institution or regulatory agency, or person appointed by such agency, as receiver, conservator or liquidating agent for a financial institution*, to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

* * * * * * *

(i)(1) Whenever property is civilly or criminally forfeited under [this chapter] *any provision of Federal law*, the Attorney General

or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 490 of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

* * * * * * *

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title*, or a conspiracy to commit any such offense*, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, **[**or**]**

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title, *or*

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

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under—

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

(D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the [gross receipts] *proceeds* obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the [gross receipts] *proceeds* of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate—

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); [or]

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce); *or*

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

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the [gross] proceeds obtained, directly or indirectly, as a result of such violation. *If the conviction was for a violation described in subparagraph (F), the court shall also order the forfeiture of any vehicles or other property involved in the commission of the offense.*

(6) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from [gross] proceeds traceable to the commission of the offense.

[(6)(A)] *(7)* The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, *sections 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1324(a), 1324A(a)(1), and 1324A(a)(2)),* section 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order

that the person forfeit to the United States, regardless of any provision of State law—

[(i)] *(A)* any conveyance, including any vessel, vehicle, or aircraft used in the commission of [a violation of, or a conspiracy to violate, subsection (a)] *the offense of which the person is convicted*; and

[(ii)] *(B)* any property real or personal—

[(I)] *(i)* that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of [a violation of, or a conspiracy to violate, subsection (a), section 274A(a)(1) or 274A(a)(2) of the Immigration and Nationality Act, or section 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title] *the offense of which the person is convicted*; or

[(II)] *(ii)* that is used to facilitate, or is intended to be used to facilitate, the commission of a violation of, or a conspiracy to violate, subsection (a), section 274A(a)(1) or 274A(a)(2) of the Immigration and Nationality Act, or section 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title.

The court, in imposing sentence on such person, shall order that the person forfeit to the United States all property described in this [subparagraph] *subsection*.

[(B) The criminal forfeiture of property under subparagraph (A), including any seizure and disposition of the property and any related administrative or judicial proceeding, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), other than subsections (a) and (d) of such section 413.]

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

(B) The court, in imposing a sentence on a person convicted of a violation of sections 1028 or 1029 of this title, or a conspiracy to commit such offense, shall order the person to forfeit to the United States any conveyance used on two or more occasions to transport the instrumentalities used to commit such offense, and any property traceable to such conveyance.

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

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

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

(C) any other offense enumerated in section 2339A(a) of this title;

or a conspiracy to commit any such offense, shall order the person to forfeit to the United States any conveyance, chemicals, laboratory

equipment, or other material, article, apparatus, device or thing made, possessed, fitted, used or intended to be used to commit such offense, and any property traceable to such property.

[(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

[(A) in the case of a forfeiture under subsection (a)(1) or (a)(6) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

[(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.]

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related administrative or judicial proceeding, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C 853), except for subsection 413(d) which shall not apply to forfeitures under this section.

(2) [The substitution] *With respect to a forfeiture under subsection (a)(1), the substitution* of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

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

§ 983. Civil forfeiture procedures

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

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

(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1355(b) of title 28 for an extension of time in which to comply with

paragraph (1)(A). Such an extension shall be granted based on a showing of good cause.

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1355(b) of title 28 for an extension of time in which to comply with paragraph (1). Such an extension shall be granted based on a showing of good cause. If the reason for the extension is that the filing required by paragraph (1) would jeopardize an ongoing criminal investigation or prosecution or court-authorized electronic surveillance, the application may be made ex parte.

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

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

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

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

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

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

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

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

(f) INNOCENT OWNERS.—(1) An innocent owner's interest in property shall not be forfeited in any civil forfeiture action.

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

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

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

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

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

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

(ii) in the case of a minor child, as an inheritance upon the death of a parent,

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

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

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

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

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

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

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

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

(6) As used in this subsection—

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

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

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

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

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

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

(7) If the court determines, in accordance with this subsection, that an innocent owner had a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court shall enter an appropriate order—

(A) severing the property;

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

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government, to the extent of the forfeitable interest in the property, that will permit the Government to realize its forfeitable interest if the property is transferred to another person.

To effectuate the purposes of this subsection, a joint tenancy or tenancy by the entireties shall be converted to a tenancy in common by order of the court, irrespective of state law.

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

(g) MOTION TO SUPPRESS SEIZED EVIDENCE.—At any time after a claim and answer are filed in a judicial forfeiture proceeding, a claimant with standing to contest the seizure of the property may move to suppress the fruits of the seizure in accordance with the normal rules regarding the suppression of illegally seized evidence. If the claimant prevails on such motion, the fruits of the seizure shall not be admitted into evidence as to that claimant at the forfeiture trial. However, a finding that evidence should be suppressed shall not bar the forfeiture of the property based on evidence obtained independently before or after the seizure.

(h) USE OF HEARSAY AT PRE-TRIAL HEARINGS.—At any pre-trial hearing under this section in which the governing standard is probable cause, the court may accept and consider hearsay otherwise inadmissible under the Federal Rules of Evidence.

(i) STIPULATIONS.—Notwithstanding the claimant's offer to stipulate to the forfeitability of the property, the Government shall be entitled to present evidence to the finder of fact on that issue before the claimant presents any evidence in support of any affirmative defense.

(j) PRESERVATION OF PROPERTY SUBJECT TO FORFEITURE.—The court, before or after the filing of a forfeiture complaint and on the application of the Government, may—

(1) enter any restraining order or injunction in the manner set forth in section 413(e) of the Controlled Substances Act (21 U.S.C. 853(e));

(2) require the execution of satisfactory performance bonds;

(3) create receiverships;

(4) appoint conservators, custodians, appraisers, accountants or trustees; or

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

(k) EXCESSIVE FINES.—(1) At the conclusion of the trial and following the entry of a verdict of forfeiture, or upon the entry of summary judgment for the Government as to the forfeitability of the property, the claimant may petition the court to determine whether the excessive fines clause of the Eighth Amendment applies, and if so, whether forfeiture is excessive. The claimant shall have the burden of establishing that a forfeiture is excessive by a preponderance of the evidence at a hearing conducted in the manner provided in Rule 43(e), Federal Rules of Civil Procedure, by the Court without a jury. If the court determines that the forfeiture is excessive, it shall adjust the forfeiture to the extent necessary to avoid the Constitutional violation.

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

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

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

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

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

* * * * * * *

§ 985. Release of property to avoid hardship

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Once a motion for the release of property under this section is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1355(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28.

§ 986. Subpoenas for bank records

(a) At any time *before or* after the commencement of any action for forfeiture [in rem] brought by the United States under [section 1956, 1957, or 1960 of this title, section 5322 or 5324 of title 31, United States Code] *section 981 of this title*, or the Controlled Substances Act, any party may request the Clerk of the Court in the district in which the proceeding is pending to issue a subpoena duces tecum to any financial institution, as defined in section 5312(a) of title 31, United States Code, to produce books, records and any other documents at any place designated by the requesting party. All parties to the proceeding shall be notified of the issuance of any such subpoena. [The procedures and limitations set forth in section 985 of this title shall apply to subpoenas issued under this section.]

* * * * * * *

(c) Nothing in this section shall preclude any party from pursuing any form of discovery pursuant to the Federal Rules of Civil *or Criminal* Procedure.

(d) ACCESS TO RECORDS LOCATED ABROAD.—In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), where—

(1) financial records located in a foreign country may be material—

(A) to any claim or to the ability of the Government to respond to such claim; or

(B) in a civil forfeiture case, to the Government's ability to establish the forfeitability of the property; and

(2) it is within the capacity of the claimant to waive the claimant's rights under such secrecy laws or to obtain the records, so that the records can be made available,

the refusal of the claimant to provide the records in response to a discovery request or take the action necessary otherwise to make the

records available shall result in the dismissal of the claim with prejudice. This subsection shall not affect the claimant's rights to refuse production on the basis of any privilege guaranteed by the Constitution or Federal laws of the United States.

* * * * * * *

CHAPTER 95—RACKETEERING

* * * * * * *

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) * * *

* * * * * * *

(d)(1) Any proceeds distributed or intended to be distributed in violation of subsection (a)(1) or a conspiracy to commit such violation, or any property traceable to such property, is subject to forfeiture to the United States in accordance with the procedures set forth in chapter 46 of this title.

(2) The court, in imposing sentence on a person convicted of an offense in violation of subsection (a)(1) or a conspiracy to commit such offense, shall order that the person forfeit to the United States any proceeds distributed or intended to be distributed in the commission of such offense, or any property traceable to such property, in accordance with the procedures set forth in section 982 of this title.

* * * * * * *

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

* * * * * * *

§ 1963. Criminal penalties

(a) * * *

* * * * * * *

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure *to the extent that the provisions of the Rule are consistent with the purposes for which discovery is conducted under this subsection. Because this subsection applies only to matters occurring after the defendant has been convicted and his property has been declared forfeited, the provisions of Rule 15 requiring the consent of the defendant and the presence of the defendant at the deposition shall not apply.*

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified. *To the extent that the order of forfeiture includes only an in personam money judgment against the defendant, no proceeding under this subsection shall be necessary.*

* * * * * * *

CHAPTER 109—SEARCHES AND SEIZURES

* * * * * * *

§ 2232. Destruction or removal of property to prevent seizure

(a) PHYSICAL INTERFERENCE WITH SEARCH *OR SEIZURE*.—Whoever, before, during, or after seizure*, including seizure for forfeiture,* of any property by any person authorized to make [searches and seizures] *searches or seizures*, in order to prevent the seizure or securing of any goods, wares, [or] merchandise*, or other property, real or personal,* by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined under this title or imprisoned not more than five years, or both.

(b) NOTICE OF SEARCH *OR SEIZURE*.—Whoever, having knowledge that any person authorized to make [searches and seizures] *searches or seizures* has been authorized or is otherwise likely to make a search or seizure*, including seizure for forfeiture*, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, *real or personal,* gives notice or attempts to give notice of the possible search or seizure to any person shall be fined under this title or imprisoned not more than five years, or both.

* * * * * * *

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

* * * * * * *

§ 2254. Civil forfeiture

(a) PROPERTY SUBJECT TO CIVIL FORFEITURE.—The following property shall be subject to forfeiture by the United States:

(1) Any visual depiction described in section 2251, 2251A, or 2252 of this chapter, or any book, magazine, periodical, film, videotape or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped, or received in violation of this chapter.

(2) Any property, real or personal, used or intended to be used to commit or to promote the commission of an offense under this chapter involving a visual depiction described in section 2251, 2251A, or 2252 of this chapter[, except that no

property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.**]**.

(3) Any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from a violation of this chapter involving a visual depiction described in section 2251, 2251A, or 2252 of this chapter**[**, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.**]**.

* * * * * * *

PART II—CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 215—GRAND JURY

* * * * * * *

§ 3322. Disclosure of certain matters occurring before grand jury

(a) A person who is privy to grand jury information **[**concerning a banking law violation**]**—

(1) received in the course of duty as an attorney for the government; or

(2) disclosed under rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure;

may disclose that information to an attorney for the government for use in enforcing section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 or for use in connection with **[**civil forfeiture under section 981 of title 18, United States Code, of property described in section 981(a)(1)(C) of such title**]** *any civil forfeiture provision of Federal law*.

CHAPTER 227—SENTENCES

* * * * * * *

SUBCHAPTER A—GENERAL PROVISIONS

* * * * * * *

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of **[**an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970**]** *an offense for which criminal forfeiture is authorized* shall order, *pursuant to the Federal Rules of Criminal Procedure,* in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section

1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

* * * * * * *

SECTION 274 OF THE IMMIGRATION AND NATIONALITY ACT

SEC. 274. (a) * * *

(b)(1) Any conveyance, including any vessel, vehicle, or aircraft, which has been or is being used in the commission of a violation of subsection (a) shall be seized and subject to forfeiture[, except that—

[(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to the illegal act; and

[(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.].

* * * * * * *

(5) In all suits or actions brought for the forfeiture of any conveyance seized under this section, where the conveyance is claimed by any person, [the burden of proof shall lie upon such claimant, except that probable cause shall be first shown for the institution of such suit or action. In determining whether probable cause exists,] 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) * * *

* * * * * * *

(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.

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

* * * * * * *

CONTROLLED SUBSTANCES ACT

* * * * * * *

TITLE II—CONTROL AND ENFORCEMENT

* * * * * * *

PART E—ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

Sec. 501. Procedures.

* * * * * * *

[518. Expedited procedures for seized conveyances.]

* * * * * * *

TITLE II—CONTROL AND ENFORCEMENT

* * * * * * *

PART D—OFFENSES AND PENALTIES

* * * * * * *

CRIMINAL FORFEITURES

PROPERTY SUBJECT TO CRIMINAL FORFEITURE

SEC. 413. (a) Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law*, or of any bankruptcy proceeding instituted after or in contemplation of a prosecution of such violation—*

(1) * * *

* * * * * * *

THIRD PARTY TRANSFERS

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. *All right, title and interest in property described in subsection (p) of this section vests in the United States at the time an indictment, information or bill of particulars specifically describing the property as substitute assets is filed.* [Any such property that is subsequently transferred to a person other than the defendant] *Any property that is transferred to a person other than the defendant after the United States' interest in the property has vested pursuant to this subsection* may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

* * * * * * *

PROTECTIVE ORDERS

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) *or (p)* for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, 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:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed. *To the extent that property forfeitable only pursuant to subsection (p) is restrained under this paragraph, the court shall afford the defendant a prompt post-restraint hearing and shall exempt from such restraint such property as may reasonably be needed by the defendant to pay attorney's fees, other necessary cost-of-living expenses, and expenses of maintaining restrained assets pending the entry of judgment in the criminal case.*

* * * * * * *

(4) Pursuant to its authority to enter a pre-trial restraining order under this section, including its authority to restrain any property forfeitable as substitute assets, the court may also order the defendant to repatriate any property subject to forfeiture pending trial, and to deposit that property in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account. Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence for the offense giving rise to the forfeiture under the obstruction of justice provision of section 3C1.1 of the United States Sentencing Guidelines.

(5)(A) When property is restrained pre-trial subject to paragraph (1)(A), the court may, at the request of the defendant, hold a pre-trial hearing to determine whether the restraining order

should be vacated or modified with respect to some or all of the restrained property because—

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

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

(iii) the defendant establishes that he or she has no assets, other than the restrained property, available to exercise his or her constitutional right to retain counsel, and there is no probable cause to believe that the restrained property is subject to forfeiture.

(B) In any hearing under this paragraph where probable cause is at issue, the court shall limit its inquiry to the existence of probable cause for the forfeiture, and shall neither entertain challenges to the validity of the indictment, nor require the Government to produce additional evidence regarding the facts of the case to support the grand jury's finding of probable cause regarding the criminal offense giving rise to the forfeiture. In all cases, the party requesting the modification of the restraining order shall bear the burden of proof.

WARRANT OF SEIZURE

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property. *If property subject to criminal forfeiture under this section is already in the custody of the United States or any agency thereof, it shall not be necessary to seize or restrain the property for the purpose of criminal forfeiture.*

* * * * * * *

APPLICABILITY OF CIVIL FORFEITURE PROVISIONS

(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. 881(d))*, and Rule C(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims,* shall apply to a criminal forfeiture under this section.

* * * * * * *

DEPOSITIONS

(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of

any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time any place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure *to the extent that the provisions of the Rule are consistent with the purposes for which discovery is conducted under this subsection. Because this subsection applies only to matters occurring after the defendant has been convicted and his property has been declared forfeited, the provisions of Rule 15 requiring the consent of the defendant and the presence of the defendant at the deposition shall not apply.*

THIRD PARTY INTERESTS

(n)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified. *To the extent that the order of forfeiture includes only an in personam money judgment against the defendant, no proceeding under this subsection shall be necessary.*

* * * * * * *

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under the section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination. *In the case of substitute assets, the petitioner must show that his interest in the property existed at the time the property vested in the United States pursuant to subsection (c), or that he subsequently acquired his interest in the property as a bona fide purchaser for value as provided in this subsection.*

* * * * * * *

(p) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) * * *

* * * * * * *

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5). *In the case of property described in paragraph (3), the*

court may, in addition, order the defendant to return the property to the jurisdiction of the court so that it may be seized and forfeited.

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

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

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

[(q)**]** *(r)* The court, when sentencing a defendant convicted of an offense under this title or title III involving the manufacture of methamphetamine, may—

(1) order restitution as provided in sections 3612 and 3664 of title 18, United States Code;

(2) order the defendant to reimburse the United States for the costs incurred by the United States for the cleanup associated with the manufacture of methamphetamine by the defendant; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663 of title 18, United States Code.

* * * * * * *

DRUG PARAPHERNALIA

SEC. 422. (a) * * *

* * * * * * *

[(c) Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.**]**

[(d)**]** *(c)* The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91–513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as—

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;
(8) carburetor pipes;
(9) electric pipes;
(10) air-driven pipes;
(11) chillums;
(12) bongs;
(13) ice pipes or chillers;
(14) wired cigarette papers; or
(15) cocaine freebase kits.

[(e)**]** *(d)* In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the radio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

[(f)**]** *(e)* This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

* * * * * * *

PART E—ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

* * * * * * *

JUDICIAL REVIEW

SEC. 507. All final determinations, findings, and conclusions of the Attorney General under this title shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive. *This section does not apply to any findings, conclusions, rulings, decisions, or declarations of the Attorney General, or any designee of the Attorney General, relating to*

the seizure, forfeiture, or disposition of forfeited property brought under this subchapter.

* * * * * * *

FORFEITURES

SEC. 511. (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) * * *

* * * * * * *

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9)**[**, except that—

[(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

[(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

[(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.**]***, and any property traceable to such conveyances.*

* * * * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title**[**, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.**]***, and any property traceable to such property.*

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, 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 title punishable by more than one year's imprisonment**[**, except that no property shall be forfeited under this paragraph, to the

extent of an interest of an owner, by reason of any act or ommission established by that owner to have been committed or omitted without the knowledge or consent of that owner.**]**, *and any property traceable to such property.*

* * * * * * *

(10) Any drug paraphernalia (as defined in **[**section 1822 of the Mail Order Drug Paraphernalia Control Act**]** *section 422*).

* * * * * * *

[(b) Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

[(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

[(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;

[(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

[(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.**]**

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

* * * * * * *

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer. *However, the cost bond provision of section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) and*

the burden of proof provision of section 615 of the Tariff Act of 1930 (19 U.S.C. 1615) shall not apply to any forfeiture governed by the procedures set forth in chapter 46 of title 18, United States Code.

(e)(1) Whenever property is civily or criminally forfeited under this title the Attorney General may—

(A) * * *

* * * * * * *

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law; *or*

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General)**[**; or**]**.

[(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

[(i) has been agreed to by the Secretary of State;

[(ii) is authorized in an international agreement between the United States and the foreign country; and

[(iii) is made to a country which, if applicable, has been certified under section 490(b) of the Foreign Assistance Act of 1961.**]**

* * * * * * *

[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.

[(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

* * * * * * *

PART II—DEPARTMENT OF JUSTICE

* * * * * * *

CHAPTER 31—THE ATTORNEY GENERAL

* * * * * * *

§ 524. Availability of appropriations

(a) * * *

* * * * * * *

(c)(1) There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund (hereafter in this subsection referred to as the "Fund") which shall be available to the Attorney General without fiscal year limitation for the following [law enforcement purposes—] *purposes—*

(A) * * *

* * * * * * *

(I) payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law en-

forcement officers that are incurred in a joint law enforcement operation with a Federal law enforcement agency participating in the Fund;

[(I) after all reimbursements and program-related expenses have been met at the end of fiscal year 1989, the Attorney General may transfer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions.]

After all reimbursements and program related expenses have been met at the end of fiscal year 1989, the Attorney General may transfer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions. Amounts for paying the expenses authorized by subparagraphs (A)(iv), (B), (C), (F), (G), and [(H)] *(I)* shall be specified in appropriations Acts and may be used under authorities available to the organization receiving the funds. Amounts for other authorized expenditures and payments from the Fund, including equitable sharing payments, are not required to be specified in appropriations acts. The Attorney General may exempt the procurement of contract services under subparagraph (A) under the fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

* * * * * * *

(8)(A) There are authorized to be appropriated such sums as necessary for the purposes described in subparagraphs (A)(iv), (B), (C), (F), (G), and [(H)] *(I)* of paragraph (1).

* * * * * * *

PART VI—PARTICULAR PROCEEDINGS

* * * * * * *

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

Sec.
2461. Mode of recovery.

* * * * * * *

2466. Enforcement of foreign forfeiture judgment.
2467. Foreign records.

§ 2461. Mode of recovery

(a) * * *

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture [may be enforced by libel in admiralty] *may be enforced under the procedures set forth in chapter 46 of title 18 and libel in admiralty if not in conflict with such procedures, except that only the libel in admiralty procedures shall apply to forfeitures under the customs laws* but in cases of seizures

on land the forfeiture [may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty] *may be enforced under the procedures set forth in chapter 46 of title 18 and by a proceeding by libel, if not in conflict with such procedures, which shall conform as near as may be to proceedings in admiralty, except that only such proceeding by libel shall apply to forfeitures under the customs laws.*

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

* * * * * * *

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

(a) IN GENERAL.—Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit [property seized] *property seized or arrested* 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] *seizure or arrest*, 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] *seizure or arrest*, 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, proceeds of an interlocutory sale, or other negotiable instruments, the United States shall disgorge to the claimant any funds representing—

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

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

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

(3) LIMITATION ON OTHER PAYMENTS.—The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

§ 2466. Enforcement of foreign forfeiture judgment

(a) DEFINITIONS.—As used in this section:

(1) The term "foreign nation" shall mean a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter "the United Nations Convention") or a foreign jurisdiction with which the United States has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance.

(2) The term "value-based confiscation judgment" shall mean a final order of a foreign nation compelling a defendant, as a consequence of the defendant's criminal conviction for an offense described in Article 3, Paragraph 1, of the United Nations Convention, to pay a sum of money representing the proceeds of such offense or property the value of which corresponds to such proceeds.

(b) REVIEW BY ATTORNEY GENERAL.—A foreign nation seeking to have its value-based confiscation judgment registered and enforced by a United States district court under this section must first submit a request to the Attorney General or the Attorney General's designee. Such request shall include—

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

(2) certified copies of the judgment of conviction and value-based confiscation judgment;

(3) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable the defendant to defend against the charges that the value-based confiscation judgment rendered is in force and is not subject to appeal;

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

(5) such additional information and evidence as may be required by the Attorney General or the Attorney General's designee.

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

(c) JURISDICTION AND VENUE.—Where the Attorney General or the Attorney General's designee certifies a request under paragraph (b), the foreign nation may file a civil proceeding in United States district court seeking to enforce the foreign value-based confiscation judgment as if the judgment had been entered by a court in the United States. In such a proceeding, the foreign nation shall be the

plaintiff and the person against whom the value-based confiscation judgment was entered shall be the defendant. Venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found. The United States district court shall have personal jurisdiction over a defendant residing outside of the United States if the defendant is served with process in accordance with Rule 4 of the Federal Rules of Civil Procedure.

(d) ENTRY AND ENFORCEMENT OF JUDGMENT.—The United States district court shall enter such orders as may be necessary to enforce the value-based confiscation judgment on behalf of the foreign nation where it finds that all of the following requirements have been met:

(1) The value-based confiscation judgment was rendered under a system which provides impartial tribunals or procedures compatible with the requirements of due process of law.

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

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

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

(5) The judgment was not obtained by fraud.

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

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

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

§ 2467. Foreign records

(a) In a civil proceeding in a court of the United States, including civil forfeiture proceedings and proceedings in the United States Claims Court and the United States Tax Court, a foreign record of regularly conducted activity, or copy of such record, obtained pursuant to an official request shall not be excluded as evidence by the hearsay rule if a foreign certification, also obtained pursuant to the same official request or subsequent official request that adequately identifies such foreign record, attests that—

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

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

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

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

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

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

(c) As soon as practicable after a responsive pleading has been filed, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

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

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a record of regularly conducted activity or another qualified person, that if falsely made, would subject the maker to criminal penalty under the law of that country;

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind whether or not conducted for profit; and

(4) "official request" means a letter rogatory, a request under an agreement, treaty or convention, or any other request for information or evidence made by a court of the United States or an authority of the United States having law enforcement responsibility, to a court or other authority of a foreign country.

* * * * * * *

CHAPTER 171—TORT CLAIMS PROCEDURE

* * * * * * *

§ 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 negligent destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement*

officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited.

* * * * * * *

SECTION 6103 OF THE INTERNAL REVENUE CODE OF 1986

SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) * * *

* * * * * * *

(i) DISCLOSURE TO FEDERAL OFFICERS OR EMPLOYEES FOR ADMINISTRATION OF FEDERAL LAWS NOT RELATING TO TAX ADMINISTRATION.—

(1) DISCLOSURE OF RETURNS AND RETURN INFORMATION FOR USE IN CRIMINAL INVESTIGATIONS.—

(A) IN GENERAL.—Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in—

(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute *or related civil forfeiture* (not involving tax administration) to which the United States or such agency is or may be a party,

* * * * * * *

(B) APPLICATION FOR ORDER.—The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, may authorize an application to a Federal district court judge or magistrate for the order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that—

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed,

(ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and

(iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding *or civil forfeiture investigation or proceeding* concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

* * * * * * *

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME

* * * * * * *

Rule C. Action in Rem: Special Provisions

* * * * * * *

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. *If the property is located outside of the district, the complaint shall state the statutory basis for the court's exercise of jurisdiction over the property.* In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the actions is brought.

* * * * * * *

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within [10] *20* days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

* * * * * * *

Rule E. Actions in Rem and Quasi in Rem: General Provisions

* * * * * * *

(3) Process.

(a) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district. *This provision shall not apply in for-*

feiture cases governed by section 1355 of title 28 or any other statute providing for service of process outside of the district.

* * * * * * *

TARIFF ACT OF 1930

* * * * * * *

SEC. 608. SEIZURE; CLAIMS; JUDICIAL CONDEMNATION.

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, **[**to the United States attorney for the district in which seizure was made**]** *to the United States attorney for a district in which a forfeiture action could be filed pursuant to title 28, United States Code, section 1355(b)*, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

* * * * * * *

SEC. 610. SEIZURE; JUDICIAL FORFEITURE PROCEEDINGS.

If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to section 607, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, **[**to the United States attorney for the district in which the seizure was made**]** *to the United States attorney for a district in which a forfeiture action could be filed pursuant to title 28, United States Code, Section 1355(b)* for the institution of the proper proceedings for the condemnation of such property.

* * * * * * *

SEC. 621. LIMITATION OF ACTIONS.

No suit or action to recover any duty under section 593A(d), or any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered*, 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*; except that—

(1) in the case of an alleged violation of section 592 or 593A, no suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud, and

(2) the time of the absence from the United States of the person subject to the penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within the 5-year period of limitation.

* * * * * * *

SECTION 7 OF THE ACT OF JANUARY 2, 1951

AN ACT To prohibit transportation of gambling devices in interstate and foreign commerce.

SEC. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. *Any coin or currency contained in any gambling device at the time of its seizure pursuant to the preceding sentence shall also be seized and forfeited to the United States.* All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided,* That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices*, coins, or currency* under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

* * * * * * *

SECTION 8 OF THE ARCHEOLOGICAL RESOURCES PROTECTION ACT OF 1979

REWARDS; FORFEITURE

SEC. 8. (a) * * *

(b) All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of section 6 occurred and which are in the possession of any person, *all proceeds derived directly or indirectly from such violation or any property traceable thereto,* and all vehicles and equipment of any person which were used in connection with such violation, may be (in the discretion of the court or administrative law judge, as the case may be) subject to forfeiture to the United States upon—

(1) such person's conviction of such violation under section 6,

(2) assessment of a civil penalty against such person under section 7 with respect to such violation, or

(3) a determination by any court that such archaeological resources, *proceeds,* vehicles, or equipment were involved in such violation.

If a forfeiture count is included within an indictment in accordance with the Federal Rules of Criminal Procedure, and the defendant is convicted of the offense giving rise to the forfeiture, the forfeiture may be ordered as part of the criminal sentence in accordance with the procedures for criminal forfeitures in chapter 46 of title 18, United States Code. Otherwise, the forfeiture shall be civil in nature in accordance with the procedures for civil forfeiture in said chapter 46 of title 18.

* * * * * * *

FEDERAL FOOD, DRUG, AND COSMETIC ACT

* * * * * * *

CHAPTER III—PROHIBITED ACTS AND PENALTIES

* * * * * * *

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

SEC. 311. (a) Any property, real or personal, that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from a criminal violation of, or a conspiracy to commit a criminal violation of, a provision of this Act shall be subject to judicial forfeiture to the United States.

(b) The provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures shall extend to a seizure or forfeiture under this section, insofar as applicable and not inconsistent with the provisions hereof, except that such duties as are imposed upon the Secretary of the Treasury under chapter 46 shall be performed with respect to seizures and forfeitures under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of Health and Human Services.

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

SEC. 312. (a) Any person convicted of a violation of, or a conspiracy to violate, a provision of this Act shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation. The court, in imposing sentence on such person, shall order that the person forfeit to the United States all property described in this subsection.

(b) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act

of 1970 (21 U.S.C. 853), except for subsection 413(d) which shall not apply to forfeitures under this section.

○