S. HRG. 106–673

OVERSIGHT OF FEDERAL ASSET FORFEITURE: ITS ROLE IN FIGHTING CRIME

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

FEDERAL ASSET FORFEITURE, FOCUSING ON ITS ROLE IN FIGHTING CRIME AND THE NEED FOR REFORM OF THE ASSET FORFEITURE LAWS

JULY 21, 1999

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OVERSIGHT OF FEDERAL ASSET FORFEITURE: ITS ROLE IN FIGHTING CRIME

WEDNESDAY, JULY 21, 1999

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:06 p.m., in room SD–628, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the subcommittee) presiding.

Also present: Senators DeWine, Ashcroft, Sessions, Schumer, Biden, and Leahy.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The subcommittee will come to order. I am pleased to hold this oversight hearing today regarding the use of Federal asset forfeiture and its importance in fighting crime.

The government has had the authority to seize property connected to illegal activity since the founding days of the Republic. Forfeiture may involve seizing contraband, like drugs, or the tools of the trade that facilitate the crime.

Further, forfeiture is critical to taking the profits out of the illegal activity. Profit is the motivation for many crimes like drug trafficking and racketeering, and it is from these enormous profits that the criminal activity thrives and sustains. The use of traditional criminal sanctions of fines and imprisonment are inadequate to fight the enormously profitable trade in illegal drugs, organized crime, and other such activity, because even if one offender is imprisoned, the criminal activity continues.

Criminal and civil forfeiture is essential to ensure that crime does not pay. Criminals must not be allowed to enjoy the fruits of their illegal activity. In fact, some criminals would prefer to spend some time in prison if they can live off the proceeds of their illegally-gotten gains when they are released.

Civil forfeiture is sometimes the only avenue open to law enforcement. For example, sometimes the criminal remains in a foreign base of operation and is untouchable from criminal prosecution. Here, the government's only option may be to take his illegal assets through civil forfeiture.

Asset forfeiture deters crime. It has been a major weapon in the war on drugs since the mid-1980's, when we expanded civil forfeiture to give it a more meaningful role. One of the reforms at the time permitted law enforcement to keep forfeiture proceeds, and it

has become an important source of revenue for law enforcement. This is especially true for State and local law enforcement, which depend on the millions of dollars in shared money for various purposes, such as officer training and to upgrade equipment. Another benefit of forfeiture is that some assets are returned to victim owners, and we need to consider expanding this area even more to allow civil forfeiture to pay restitution to victims.

At the same time, forfeiture is about the government using its powers to take private property, and there must be adequate restrictions to prevent abuse of this power. The Supreme Court has imposed some limits, such as holding that criminal and many civil forfeitures can constitute an excessive fine in violation of the Eighth Amendment if they are grossly disproportionate to the offense. Also, law enforcement agencies should not view forfeiture simply as a way to make money for their agencies, but as a way to fight crime. Prosecutors must use good judgment in case selection and settlement posture, and show a healthy respect for property rights. Forfeiture should never result in the government taking the property of innocent Americans.

Most agree that additional reforms of Federal civil forfeiture laws are needed. For example, the administration believes that the government should have the burden of proving that it is more likely than not that the property was involved in the criminal activity, rather than the owner having to prove that the property was not involved.

There is wide support for developing a more uniform innocent owner defense. Further, some are concerned that under current law, the government is not liable when it negligently damages property in its possession, even when the property is later returned to its innocent owner.

The Civil Asset Forfeiture Act that has passed the House would fundamentally alter Federal civil forfeiture. I respect the sincere efforts of its sponsors to achieve needed reform in this area. However, if passed in its current form, I am concerned that it goes too far. It may undermine the use of forfeiture law in the war against drugs, child pornography, money laundering, telemarketing fraud, terrorism, and a host of other crimes.

For example, we should not make the government's burden of proof in a civil forfeiture higher than it is in a criminal forfeiture. Also, we should not make it so easy for anyone to request a lawyer at government expense that it overwhelms the system with frivolous claims.

There must be balance in any reform of the forfeiture laws. We cannot tie the hands of law enforcement in an effort to stop well-publicized examples of abuse. We must make certain that reform does not give criminals the upper hand.

I wish to thank our distinguished witnesses for appearing today and I look forward to hearing your testimony and discussing the importance of asset forfeiture and the proposals for reform in this complex area.

At this time I would like to place the prepared statement of Senator DeWine into the record.

[The prepared statement of Senator DeWine follows:]

PREPARED STATEMENT OF SENATOR MIKE DEWINE

I would like to make just a few brief remarks, but, before I begin, let me thank our chairman, Senator Thurmond, for holding this hearing today. I commend you, Mr. Chairman, for your willingness to tackle another tough but equally important issue—asset forfeiture reform.

Asset forfeiture has emerged from its early use in admiralty cases as a significant tool in modern law enforcement's war on drugs and other crime. Utilizing criminal and civil forfeiture laws, today's law enforcement officers routinely free our streets and neighborhoods of substantial quantities of illicit drugs, unlawful assault weapons, counterfeit currency, smuggled goods, as well as the instruments of crime. Forfeiture has played an even greater role in proving the old adage, "crime doesn't pay," forcing criminals to forfeit the profits of their unlawful acts and recovering property for their innocent victims. Finally, forfeiture has provided state, local and federal law enforcement with important additional resources with which to fight crime.

But the great benefits of the forfeiture laws in the fight against crime must be balanced with the rights of innocent property owners. Significant questions related to 8th Amendment protections and Due Process concerns must be answered. I hope we can get closer to doing so here today. Several legislative reform proposals have been offered seeking to strike the appropriate balance between individual rights and law enforcement needs. I thank Congressman Hyde for his leadership in the House in this effort, and I appreciate his willingness to share his proposals with us here today. I am pleased that the Administration is also constructively engaged in the debate. Mr. Holder will raise some very important concerns with the House Reform proposal that I too share.

I look forward to a healthy discussion. Thank you Mr. Chairman.

Senator THURMOND. We will be glad to hear from you now, Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Senator Thurmond. I appreciate the opportunity here of you holding this hearing for us and to give an opening statement. I want to congratulate you for holding this hearing because asset forfeiture is a timely and important subject for this subcommittee to be examining.

I want to welcome all of the witnesses today, and particularly the two witnesses at the table now, my former colleague from the House, my friend, the esteemed Chairman of the House Judiciary Committee, whom I always had a close relationship with, and we never let either our agreements or our disagreements stand in the way of that friendship, and Congressman Anthony Weiner, who holds a House seat near and dear to my heart because, among other things, until last November I was the occupant of that House seat.

Federal asset forfeiture and practice is one of a host of law enforcement versus civil liberties issues that have come to a rolling boil recently, after heating up over a number of years. These issues transcend party lines and cut across the usual coalitions, making them one of the most fascinating issues to watch. They excite strong passions and they come down to balancing competing interests, each of which is substantial in its own right.

I think the first step to resolving this issue is to state what this debate is not about. It is not about whether there should be civil asset forfeiture or not, and it is not about one side supporting reform and the other side inalterably opposing reform.

Indeed, I suspect that every witness we hear from today, from libertarian to law enforcement, will tell us that he or she considers

civil asset forfeiture to be a legitimate law enforcement tool and, as well, that he or she is amenable to some degree of reform. And from there, there is even agreement on some of the basic elements of reform, such as assigning the burden of proof to the government and creating a uniform innocent defense. Unfortunately, the consensus ends at the shores of the details.

What should be the government's burden of proof in a civil forfeiture proceeding? There is disagreement there. What should be the scope of an innocent owner defense? Disagreement there. When, if ever, should seized property be returned, pending completion of a forfeiture proceeding? What are the loopholes in current forfeiture law that protect the fruits of illegal activity from forfeiture in circumstances where forfeiture is clearly appropriate? These issues, among others, represent the fault lines of this debate.

I, for one, am concerned that the bill passed by the House, while undoubtedly well-intentioned, may not have struck the proper balance in terms of rewriting Federal forfeiture law. I fear it may inadvertently give sophisticated money launderers and drug lords too great an advantage against law enforcement in their efforts to insulate the fruits of crime from forfeiture.

And I am also concerned about the bill's failure to close some inexplicable loopholes in Federal forfeiture law that prevent forfeiture in cases where it is clearly appropriate. If reform, in fact, worked to render civil asset forfeiture but a paper tiger, the consequences would be dire. Instrumentalities of the drug trade would remain in circulation rather than being put out of commission for good. Clever criminals who knew how to put a good distance between themselves and the proceeds of their illegal acts could very well be able to operate without meaningful consequence. So the right version of reform would restore public confidence in civil asset forfeiture which is needed without entailing such results.

I believe today's hearing will help us strike the proper balance on this most important issue. I know that other members of this panel share at least some of my concerns—I know you do, Mr. Chairman—and I look forward to working with them to ensure that, above all, we act responsibly, preserving civil asset forfeiture as an effective means of ensuring that crime does not pay, while addressing current law's due process shortcomings.

Thank you, Mr. Chairman.

Senator THURMOND. Does anyone over here care to make an opening statement?

[No response.]

Senator THURMOND. Does anyone over here care to make an opening statement?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Mr. Chairman, I know that asset forfeiture is a powerful crime-fighting tool. As you suggested in your statement, it has been a particularly potent weapon in the war on drugs, allowing the government to take the cars and boats and stash houses amassed by drug dealers and put them to honest use. In fact, I think the government was able to seize about $500 million worth

of assets, cutting a big chunk out of the criminals' profits. But it is not failsafe and it can be abused.

In the past year, Americans have had firsthand experience with what can happen when a prosecutor with all the powers of his office throws judgment to the wind and succumbs to zealotry. There is one example of a motel that was being used by drug dealers. There was no allegation that hotel owners participated in any crimes. Indeed, the motel people had called the police dozens of times to report suspected drug-related activity in the motel's rooms by some of its overnight guests. I mean, they were doing what an honest citizen should do; they called and reported it.

But the government said they didn't do all the security measures suggested. What did they suggest? Well, among other things, they said, well, you have got to raise your room rates. And because they didn't, they were giving tacit consent to the drug activity, and so they seized the motel.

Now, I am only a lawyer from a small town in Vermont, but I think maybe the burden should have been on the police. They had the crimes reported to them; the burden should have been on them to go in, not saying, here, raise your prices. A great law enforcement tactic that is, raise the prices. If these people were doing enough drug-dealing that justifies forfeiting and grabbing a motel, do you think they were going to be dissuaded because the room rates went up $10 or $20? Of course not. The government eventually dropped this action, but only after the owners were forced to spend a lot of money that should have been exacted from the drug dealers.

So we are going to hear examples of what happens when prosecutorial zeal skirts the boundaries of due process, leading to the taking of private property, regardless of whether the owner is innocent of, or even cognizant of the property's use in an illegal act.

Our Federal judges are adding their voices to the growing chorus of concern. In 1996, the Eighth Circuit Court of Appeals rebuked the government for capitalizing on the claimant's confusion to forfeit over $70,000 of their currency, and expressed alarm that the war on drugs has brought us to the point where the government may seize a citizen's property without any initial showing of cause.

We put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. And if the citizen proves inept in proving his innocence, in effect, the government may keep the property without ever having to justify or explain its actions. The Seventh Circuit recently ordered the return of over $500,000 in currency that had been improperly seized from a Chicago pizzeria.

Now, it is this notion of guilty property that enables the government to seize property, regardless of the guilt or innocence of the property owner. In fact, in many asset forfeiture cases, the person whose property is taken is never charged with any crime.

I have no problem at all, if a person is convicted, if the courts want to order, as a part of the sentence, the seizure of some of their property. That is fine, if they have been convicted. If the government has proven that the property is somehow either the gains of the defendants' criminal activity or used in their criminal activity, fine, convict them and seize it. That doesn't bother me a bit.

But the guilty property notion kind of explains the topsy-turvy nature of today's civil forfeiture proceedings in which the property owner, not the government, bears the burden of proof. That worries me if we have a case where all the government has to do is make an initial showing of probable cause that the property is guilty and subject to forfeiture. It is then up to the property owner to prove that the property was not involved in any wrongdoing.

I think we have to look at these laws and bring them in line with more modern principles of due process and fair play. H.R. 1658, the Civil Asset Forfeiture Act, would provide safeguards for individuals whose property has been seized by the government. I think that is why this bipartisan legislation passed the House of Representatives last month by an overwhelming majority and deserves our prompt consideration.

The administration says that H.R. 1658 would interfere with its ability to combat drug trafficking, alien smuggling, and so on. Well, we should take those concerns seriously, but I think considering some of the misuse of the forfeiture laws—and I will tell you right now, I know we have distinguished law enforcement people here ready to testify, but in every State in the Union there are police officers who will tell us of misuse of this.

Most police officers would be very careful to do it the right way. Most police officers want to be within the law. But in no department in any State can you go and find that people are going to be able to say never, ever was it used as a pressure tactic; never, ever was the determination of who to go after based on what assets might be seized.

The right to own property doesn't include the right to keep ill-gotten gains. But under our Constitution, deprivation of property and due process have to go hand in hand; you can't have one without the other. So I want to make sure we keep this fair. I want to make sure that we have not taken something that was meant to be a good crime-fighting tool and allowed it to get way out of control.

If you convict somebody and they have got property they gained from that criminal activity, fine, seize it. If you convict them and they have got property they are using to carry on crimes, fine, seize it. But let's not just go seizing property because somebody wants to grab it and then the person who owned it has the burden of proving their innocence, not the other way around.

Thank you, Mr. Chairman.

Senator THURMOND. I understand there is a vote on in the House. Senator Biden, if we could hear from them and then call on you——

Senator BIDEN. Sure, I will forgo.

Senator LEAHY. I am sorry. I didn't realize that.

Mr. HYDE. I don't intend to make the vote, so don't readjust yourself on my account.

Senator THURMOND. Well, how about Mr. Weiner?

Mr. WEINER. Well, Mr. Chairman, would it be more convenient if I just ran and voted—I have my car here—and just run right back?

Senator THURMOND. Yes, go and vote and come back.

Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. I will be brief, Mr. Chairman. Let me ask unanimous consent that my opening statement be placed in the record as if read and just highlight two points.

One, I don't doubt the intention of the House and the distinguished chairman of the committee in trying to correct something. I want to be up front here.

Since you and I were the ones that wrote the forfeiture law years ago, Mr. Chairman, I don't want it to be concluded, although it is easy for that to happen, that my opposition to the House position is based upon it not being invented here. That is not the case.

I think it is really important that we have the hearing, as we all do, because I think it is important to get into some of the details, some of the horror stories that we just heard, for example. If the Senator from Vermont was referring to the Red Carpet Inn case when he was talking about it, the facts aren't accurate. The Federal Government never did seize that motel.

With regard to the Chicago pizza case which we hear all the time, there was a bottom-line problem. The court ruled there was no probable cause. It did not have to do with much else, as they concluded, as they do in many other cases, that there wasn't sufficient probable cause.

There are some abuses of the systems. There are ways to correct that. I have been working very closely with Senator Schumer, as well as our staff with Senator Sessions and others. I think we three probably come at it from a slightly different angle than the House does, and I think and I hope we can work our way through this to make corrections that don't over-correct a problem that doesn't exist.

There are some problems. I acknowledge that, and I am looking forward to the hearing and being able to delve into some of the misconceptions. The number two man in the Justice Department is here. I am going to say something that——

Senator SCHUMER. The number one man, actually.

Senator BIDEN. Well, the number one man, yes, the number two person. Thank you, Senator.

Senator LEAHY. You should be precise, Joe.

Senator BIDEN. That is right. I will be precise.

I think that both the Justice Department and the House have exaggerated their worst case scenarios. I think they both have exaggerated it, and I think this needs some tinkering with. I don't think this needs a major overhaul. And my hope is here that when you finish your hearing or series of hearings, Mr. Chairman, that we will arrive at some consensus here.

I will conclude by ending where Senator Schumer opened. The government acknowledges—we acknowledge that the burden should be upon the government now. That is a reasonable, that is a logical, that is a good change, and it is positive. There are other changes of that nature that I think we ought to be able to work out a compromise on that doesn't meet, I will say, the administration's position fully, but is a far cry from where the House is.

So I am grateful that the chairman would come over here and testify before us. I had the pleasure of doing that in reverse roles

on a number of occasions. It is nice to see him over here in a capacity other than the one we saw him mostly in on this side recently. I bet he is even more overjoyed than we are that he is here for that reason, but I look forward to the testimony.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

I'm glad that we are taking this opportunity to talk about this very important issue. I think it is imperative that we not rush this process, but that we hear from federal and local law enforcement, from concerned groups and from citizens—so that we can make educated judgments about these significant and complex issues.

This issue is particularly important because we must find a way to protect the due process rights of the innocent citizens of this country while at the same time preserving one of the most valuable tools that law enforcement has—asset forfeiture.

I have looked at the major provisions of the bill that recently passed in the House and have reviewed similar provisions in the bill drafted by the Department of Justice. I think neither bill provides the kind of balance necessary to accomplish those, competing goals and that we need to find a more moderate approach.

I believe we need legislation that incorporates some ideas from the House bill and some from the Department of Justice bill. I would like to see a balanced bi-partisan alternative that has a reasonable chance of passage in both Houses and a strong likelihood of making it past the President's desk.

I have been working with Senators Sessions, Schumer and Feinstein on this and have likewise been working with the National Association of Police Officers, the National District Attorney's Association, the Federal Law Enforcement Officers Association, the International Association of Chiefs of Police and the Fraternal Order of Police. I want to continue to meet with law enforcement groups to learn what issues are most important to them and get their help in crafting a workable way to preserve this important law enforcement tool.

Bob Scully, the Executive Director of the National Association of Police Organizations wrote me recently regarding asset forfeiture. In that letter, he urges this Committee to carefully consider the concerns that the National Association for Police Organizations and the law enforcement community have regarding H.R. 1658. He asked that I make this letter a part of the record and I'm happy to do that now.

I will do whatever is reasonable and necessary to give law enforcement the tools that they need to do their job—while providing our citizens with the protection against abuse that they obviously deserve. But, make no mistake—drug dealers and their money launderers will not be able to hide from any piece of legislation that has my support. Drug dealers and their money launderers will never be able to keep their ill-gotten gains—not while I'm sitting in this chair.

I encourage everyone to take a deep breath so that we can make sure that we do the right thing. The right thing that protects law enforcement's valuable tool against drug dealers and money launderers and the right thing to protect innocent citizens' property.

In that vein, I look forward to hearing the suggestions of our distinguished witnesses today.

Representative HYDE. Exultant, Senator. I am exultant being here.

Senator SCHUMER. Stay in your chair. [Laughter.]

Senator LEAHY. In the ecclesiastical sense, Mr. Chairman, or in the legislative sense?

Representative HYDE. Ecclesiastical.

Senator LEAHY. OK.

Senator BIDEN. At any rate, I just hope we all keep an open mind here, and let's not accept at face value some of the broad assertions were are going to hear made. Let's look at the details of this.

I would ask unanimous consent, to further reveal my prejudice here—and I have to admit the angle at which I am coming to this—I have been asked by Robert T. Scully, the Executive Director of NAPO, whether his statement at the appropriate place could be placed in the record.

Again, I look forward to the testimony, but let's not—as your old buddy President Reagan used to say, if it ain't broke, don't fix it. If it is broke, fix it, but let's make sure what part is broke before we go over this wholesale method.

Senator THURMOND. Do you want to put that in the record?

Senator BIDEN. I would like to put Mr. Scully's letter in the record.

Senator THURMOND. Without objection, it will go in the record.

[The letter referred to follows:]

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.,
Washington, DC, July 15, 1999.

Hon. Joseph Biden, Jr.,
U.S. Senate,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR BIDEN., JR.: On June 24, 1999 the House of Representatives passed H.R. 1658, the "Civil Asset Forfeiture Reform Act of 1999." Please be advised of the National Association of Police Organizations' (NAPO) adamant opposition to this legislation. NAPO represents over 4,000 unions and associations and more than 220,000 sworn law enforcement officers throughout the country.

As you know, Chairman Henry Hyde of the, House Judiciary Committee introduced H.R. 1658, on May 4, 1999, to reform Federal civil asset forfeiture procedures. During floor debate on H.R. 1658, Congressman Asa Hutchinson offered a substitute amendment, supported by NAPO and most of the national law enforcement organizations, which unfortunately was not adopted. Ironically, in the 105th Congress, the House Judiciary Committee overwhelmingly supported asset forfeiture legislation similar to the Hutchinson amendment calling for moderate asset forfeiture reform.

This year's legislation would preclude law enforcement from properly performing their duties and at the same time, give an added advantage to alleged criminals and drug dealers. This legislation would limit police powers and inhibit the ability of law enforcement to seize property such as cash, securities, cars, boats and real estate. Over the last decade we have experienced a decline in crime. However, this is no time to undermine the ability of law enforcement to combat drug trafficking, alien smuggling, terrorism, consumer fraud and many other criminal offenses.

Furthermore, police departments across this nation already have severely restricted budgets and by lessening income potential from asset forfeiture through this bill, the federal government would be drastically handicapping law enforcement capabilities in seizing illegal property. The ability of law enforcement to seize property is an important tool in this nation's 'war on drugs'. Asset forfeiture acts as a strong deterrent and deprives drug dealers from profiting from their illegal activities.

NAPO urges members of the Senate Judiciary committee *not* to move forward with H.R. 1658 but instead to enact sensible asset forfeiture legislation. When the Judiciary Committee debates the plight of H.R. 1658, we respectfully request that members consider the potential consequences on law enforcement if this legislation is enacted.

There are a number of provisions in H.R. 1658 that need to be addressed and amended in order for law enforcement to sufficiently carry out their duties, as follows:

(1) Currently in order for law enforcement to seize property they need *'probable cause'* the same standard of proof that is required to arrest a person or secure a warrant to search a person's home. This legislation, however, would require that law enforcement prove by *'clear and convincing evidence'* that the property was used in an illegal manner. The legislation shifts the burden of proof in an extreme manner to the government. NAPO feels a 'clear and convincing' standard sets the bar too high, and NAPO supports *'a preponderance of evidence'* standard of proof as compromise legislation.

(2) This bill would also allow the court to appoint counsel for *'any person claiming an interest in the seized property'*. This language creates the potential to encourage an inordinate amount of frivolous claims and litigation to seized property. Their "free appointed counsel" would come at the expense of taxpayers. NAPO supports language that provides the appointment of counsel for those who cannot afford it. However, NAPO also supports safeguards to prevent frivolous claims in H.R. 1658 that would entitle *'anyone who simply claims an interest'* in the seized property to acquire a government funded lawyer.

(3) Similar to H.R. 1658, NAPO supports language that creates an *'innocent owner'* defense so those who legitimately may not know someone else used their property illegally can take reasonable steps to defend against the governments claim. However, included in the term *'innocent owner'* under H.R. 1658 are those who receive property through probate, which would forever be protected against forfeiture. NAPO does *not* support relatives of a drug lord who was killed in a shoot out with law enforcement authorities, for example, to claim that they are *innocent* owners of illegal property. Therefore, NAPO supports an amendment or legislation that would close this egregious loophole.

(4) H.R. 1658 states (section 2 (k)(1)) that a claimant "is entitled to immediate release of seized property if (c) the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant." However, the only minimal burden the claimant must meet for transfer of assets is that hardship to the claimant outweighs any risk that the property will be destroyed, damaged, lost concealed or transferred. NAPO supports legislation that would ensure the government has the means to inspect that property while the forfeiture proceeding is pending, and would make clear that certain types of property (such as currency, evidence of the crime and contraband) cannot be returned even if hardship is shown.

(5) Finally, under H.R. 1658 an agency seizing property must give written notice no less then 60 days or 'it shall return the property and may not take any further action to effect the forfeiture of such property'. NAPO supports legislation that would make certain that the forfeiture is not foreclosed, merely because of an administrative mistake of not meeting the 60-day deadline.

I urge the Senate Judiciary Committee to carefully consider the concerns that NAPO and the law enforcement community have regarding H.R. 16S8. If I can be of any assistance on this or any other matter, please don't hesitate to call myself or Mike Troubh, NAPO's legislative assistant.

Sincerely,

ROBERT T. SCULLY,
Executive Director.

Senator THURMOND. Now, our first panel consists of the distinguished chairman of the House Judiciary Committee, Chairman Henry Hyde, and another member of the House Judiciary Committee, Congressman Anthony Weiner. Chairman Hyde is the primary sponsor of H.R. 1658, the Civil Asset Forfeiture Reform Act. They are both very knowledgeable on the issue of asset forfeiture. We are very pleased to hear from both of them.

Let us start now with Chairman Hyde.

STATEMENT OF HON. HENRY HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Representative HYDE. Thank you very much, Senator, and I am really delighted—"exultant" is really too strong a word, but I am really pleased to be here. I view every one of you as a friend and a colleague, and I thank you, Senator Thurmond, especially, for holding this hearing.

I would just say to my good friend, Senator Biden, if he would look at our report—and I will leave this with you—it cites chapter and verse on the Red Roof Motel, which was a real happening and an abuse of the forfeiture laws, in my opinion.

There are lots of issues you deal with over a course of years. I have been here 25 years, and I am not a novice in negotiating with this very group of Senators. We negotiated some years ago on the independent counsel law, and I am suppressing the urge to say I told you so.

Senator BIDEN. You were right, you were right. I was wrong, I was wrong. You were right. [Laughter.]

Representative HYDE. Very good. I may get 10 copies of that written up.

But there are some issues that really get to you and this is one. One of the great blessings of this job, being a Congressman, being a Senator, is the opportunity—and I stress opportunity—to right a terrible wrong.

Seven years ago, I read an editorial and I couldn't believe my eyes that in my America, in your America, the police can confiscate your property based on probable cause. You don't have to be convicted, you don't even have to be charged, but on probable cause, the lowest level of accusation, your property can be seized.

Now, if you want to get your property back, you have a magnificent 10 days to file your claim, hire a lawyer, post a bond, 10 percent of the value, go into court and prove a negative, prove that your property was not involved. I thought, what a wonderful judicial system for the Soviet Union that puts the burden of proof on its head and makes you have to prove a negative, and you better do it within 10 days, I guess under certain circumstances 20 days. You better have a lawyer, you better post a bond, and you better be able to prove a negative.

I couldn't believe that was the practice in my country, but I checked into it and I found out, oh, yes, it is, and for 6 years I have been trying to change this to get the burden of proof where it belongs. You shouldn't be punished on probable cause. You should be punished if you are guilty of something, but not probable cause, the lowest level possible. I wrote a book on this. Each of you have a copy of the book.

We put together a bill and, miracle of miracles, supporting it are the American Civil Liberties Union, the National Rifle Association, the Cato Institute, and a ton of very respectable people—the U.S. Chamber of Commerce, the American Bar Association, Americans for Tax Reform, the National Association of Realtors, the American Bankers Association, the National Association of Home Builders, on and on and on, a very distinguished group of people who agree with me that you shouldn't be punished for probable cause.

Now, we finally got the bill up in the House after many years and it passed 375 to 48. And one of my proudest possessions is a picture from the back of the front part of the New York Times with John Conyers, Barney Frank, Bob Barr and me shaking hands.

Senator BIDEN. That is why I am opposed to this. [Laughter.]

Senator LEAHY. It is either a good bill or one of you didn't read it. [Laughter.]

Representative HYDE. I thought you were a coalition-builder, Senator. That is eclecticism gone rampant. But nonetheless, there is a balance of people who think it is outrageous that you have to prove you are innocent, prove a negative, to retain your own property.

Then I found out if the government confiscates your property, if they damage it, if they shatter it, if they ruin it, that is your tough luck. They are not accountable, they are not responsible. And so in the bill that we put together with bipartisan support—liberals, conservatives, moderates, quasi-moderates, semi-liberals, the whole panoply across the board, 375 of them—the bill requires that if a property owner challenges a seizure, the Federal Government must prove by clear and convincing evidence the property is subject to

forfeiture. You know, the right of property was recognized in the Ten Commandments: "Thou Shalt Not Steal."

Now, why clear and convincing? Because it is punishment. When they take your house, when they take your farm, when they take your automobile, when they take your business, when they take your cash, they are punishing you. This isn't a civil action merely; it is quasi-criminal. And when they punish you, there ought to be maybe not the criminal standard of proof, beyond a reasonable doubt, but a mere preponderance is for fender bender cases. In this situation, if the government wants to bankrupt you and take your property on probable cause, it seems to me there ought to be clear and convincing evidence.

The bill allows the judge to order the property released pending final disposition if the judge determines it would work a terrible hardship on you. If it is your business and they have taken possession of your business and you are going to be a ward of the State and your family is going to be on welfare, these are things a judge can consider. It is giving a judge flexibility to be humane depending on the situation.

The bill allows judges to appoint counsel for indigents in civil forfeiture proceedings. It isn't much good to say you have the right to get your property back if you can't afford a lawyer. They have impoverished you by confiscating your assets and you have got to go find a lawyer that will take your case. So this allows counsel for indigents in civil forfeiture proceedings.

It also eliminates the requirement that you have to post a 10-percent bond. There is no earthly reason for you posting a bond. Either you have got a case or you don't, and the bond is just another hurdle to keep you from justice.

It provides a uniform innocent owner defense, and that was involved in the case Senator Biden talked about where this motel in a very tough neighborhood, a crime-ridden neighborhood, had drug transactions going on. And the owners repeatedly reported it to the police, withheld permission. You try to evict some drug dealers sometime; I wish you a lot of luck. But the police couldn't do it, and the police took his property, and he finally got it back after the Houston newspapers raised hell and wrote editorials, and I have them here.

So an innocent owner defense is where you do everything you can. You report it to the police, you withhold permission for these illegal transactions, and that gives you a safe harbor. That is missing from the administration's bill, but it is in my bill and it is just and it is fair.

The bill allows a property owner to sue the government for destroying their property. You are in a yacht and you are floating off Miami and the DEA swoops down on you, puts you up against the mast and takes axes and hatchets and chops your boat up looking for cocaine. They don't find any, they wave good-bye, and there you are on a floating wood pile. I mean, that is right, that is a case. It happened, it is in my book. So this says you have to take care of the property once you have confiscated it, and the government can be accountable if they don't. We give 30 days to file the claim rather than 10 days or 20 days, depending on the circumstances.

And if they have taken your cash, then the interest earned on that belongs to you. That is a tenant's right in any building.

You shouldn't be punished on probable cause. I believe in criminal asset forfeiture. I think if you are a drug dealer and you are guilty, not just accused, but you are guilty, you ought to lose your house, your car, and your shoes and socks. I am for that. But when you are not guilty, when you haven't been found guilty, when you haven't been charged, I don't want my country confiscating property just on probable cause, I really don't. When the government gets oppressive, you have no place to turn, except here to Congress. And these people have done that and that is all I want.

I will leave you with one last little famous case down in Memphis, where an African American was a landscaper, but he made the mistake of having $9,000 in cash in his pocket because he was going to Houston to buy shrubs and he could get a better deal if he paid cash. And so he went to this terminal, bought his ticket. The ticket agent saw the money, gave the signal. The police arrested him, confiscated his money, said it was probably drug proceeds, and let him go. He left. They didn't charge him with anything, but they kept his money. It took him a couple of years, with a lawyer, to finally get his $9,000 back. That is an abuse, that is an abuse.

So that is all I want is for you to read the editorials across the country supporting what we are doing, look at the organizations who support it. There must be something right about this bill when the left and the right, when the ACLU and the NRA and the Realtors and the ABA, support it.

So I thank you for listening and I would be happy to answer questions.

Senator THURMOND. Thank you very much.

Congressman Weiner.

STATEMENT OF HON. ANTHONY D. WEINER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Representative WEINER. Thank you, Mr. Chairman, Senator Schumer, members of the subcommittee. Thank you for inviting me this afternoon to discuss our civil asset forfeiture laws.

Let me say at the outset that I am in full agreement with Chairman Hyde that reform is needed. Asset forfeiture is a centuries-old proposition, and in many respects it is showing its age. Laws that were originally designed to fight pirates on the high seas need to be updated to better fight drug dealers in our inner cities, and we need to enact these reforms so that our civil liberties are protected.

Chairman Hyde's bill makes these reforms. He has been pursuing this issue for many years, and he has quite literally written the book on the subject and I applaud his efforts. Where we differed during the House debate concerns the extent to which the scales of justice ought to be tilted toward a potential criminal. In my opinion, and in the opinion of every State, local and Federal law enforcement official who contacted us during the House consideration of this issue, Chairman Hyde's proposal would have the potential to wholly eviscerate our system of civil asset forfeiture.

As you begin to closely examine reform of our civil asset forfeiture laws, I would encourage you to consider the substitute to H.R.

1658 that I offered along with Representatives Hutchinson and Sweeney. While it did not command a majority, it did win bipartisan support from 155 of my colleagues. The support was backed by almost all major law enforcement groups, as well as the administration.

Our substitute does several things. One, it placed the burden of proof squarely on the government to prove by a preponderance of the evidence that property seized was used in illegal activity. Two, it allowed for counsel to be appointed for those people unable to afford their own lawyer during a forfeiture proceeding. We stated that the government ought to be able to explore whether counsel was actually needed. In my view, this is a necessary safeguard against abuse, given that there are over 45,000 forfeiture cases per year.

Three, we protected innocent owners in our bill as well. Four, we provided for a claimant to recover their property pending trial if he or she can show that the forfeiture will cause substantial hardship. And, five, we ensured that notice of a forfeiture action was given by the government to potential claimants within 60 days of seizure.

Mr. Chairman, these are not new proposals. Indeed, the House Judiciary Committee favorably reported out a civil asset forfeiture reform bill last Congress that embodied many of these same ideas. The vote then was 26 to 1. Senator Schumer introduced a bill in 1997 that contained many of these same provisions. The administration has sent draft language to the Hill that is similar in several respects to the substitute offered last month in the House.

I appreciate the opportunity to visit with you this afternoon and to commend you for structuring a hearing that will give air to all sides of this debate. As you begin your consideration of civil asset forfeiture reform, keep the goal of this critical crime-fighting tool in mind to make our cities and towns safer by depriving drug dealers and felons of the instrumentalities and proceeds of their criminal activity, something they have no right to.

Our civil asset forfeiture laws need to be tough, but they also need to be fair. Working with all concerned, it is my hope that this subcommittee can begin to find the common ground necessary so that together we can meet these twin goals.

Thank you very much for the opportunity, Mr. Chairman.

Senator THURMOND. Any questions on this side?

[No response.]

Senator THURMOND. Any questions on this side?

[No response.]

Senator THURMOND. If not, we thank you very much, both of you, and we will now move to the next panel.

Representative WEINER. Thank you, Mr. Chairman.

Representative HYDE. Thank you very much, Senators.

Senator THURMOND. We will now turn to the second panel. Our first witness is Eric Holder, who is Deputy Attorney General of the United States. A graduate of Columbia University Law School, Mr. Holder served as Associate Judge of the Superior Court of the District of Columbia and as U.S. Attorney for the District of Columbia prior to assuming his current position.

Our second witness is James Johnson, Under Secretary of the Treasury for Enforcement. Mr. Johnson holds a bachelors degree

and a law degree from Harvard University. He formerly served as an assistant U.S. Attorney and Deputy Chief of the Criminal Division in the U.S. Attorney's office in New York City.

Our third witness is Richard Fiano, who is currently Chief of Operations for the U.S. Drug Enforcement Administration. Mr. Fiano's experience with the DEA spans more than 25 years. He has served in many positions, including Assistant Country Attache in Pakistan, Section Chief of the Office of International Operations, Special Agent in Charge of the Office of Special Operations, and Chief of Domestic Operations.

Our fourth witness is Bonni Gail Tischler, Assistant Commissioner for Investigations with the U.S. Customs Service. A graduate of the University of Florida, Ms. Tischler has served with Customs since 1971, holding positions including Sky Marshal, Special Agent, and Director of the Smuggling Investigations Division.

I ask that each of you please limit your opening statements to 5 minutes. We will submit any written testimony for the record, without objection. We will start with Mr. Holder and go down the line.

Mr. Holder, we will now hear from you.

PANEL CONSISTING OF ERIC H. HOLDER, JR., DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; JAMES E. JOHNSON, UNDER SECRETARY FOR ENFORCEMENT, U.S. DEPARTMENT OF THE TREASURY, WASHINGTON, DC; BONNI G. TISCHLER, ASSISTANT COMMISSIONER, OFFICE OF INVESTIGATIONS, U.S. CUSTOMS SERVICE, WASHINGTON, DC; AND RICHARD FIANO, CHIEF OF OPERATIONS, DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, ARLINGTON, VA

STATEMENT OF ERIC H. HOLDER, JR.

Mr. HOLDER. Thank you, Mr. Chairman. Mr. Chairman, members of the subcommittee, I would like to thank you, congratulate you, actually, and the Ranking Minority Member, Senator Schumer, and all the members of the subcommittee for helping lead the way toward improving our current asset forfeiture laws.

In addition, I would like to thank Chairman Hyde for his being a leader on this issue. We agree with him that there is a need for reform with regard to asset forfeiture laws. Laws that were designed decades ago, or even centuries ago, need to be updated to apply to the ways in which they can be most constructively used today—that is, to seize houses, cars, businesses and bank accounts which are the instrumentalities and proceeds of criminal activity—in a manner which ensures fairness and due process.

For that reason, the Department of Justice has long supported revisions to the asset forfeiture laws, and we have sent a proposal to Congress which we believe would put those revisions into effect. In addition to reforming the basic civil asset forfeiture law, we also think that the current law needs to be augmented to provide law enforcement with more effective crime-fighting tools. The comprehensive forfeiture bill which we have submitted to Congress, we believe, does both.

While my written testimony comments on the specific provisions of that proposal and the bill recently passed by the House, let me highlight some key areas of our proposal. We believe we have addressed the significant concerns raised about the asset forfeiture laws and have done so in a way that enhances due process protections without unduly hampering necessary law enforcement activities. But I want to stress that we are eager to work with all sides on these issues, and I agree with Senator Biden that we can work together to come up with an acceptable bill here. In fact, it would be a real shame if we did not come to that result.

First, with regard to the burden of proof, the legislation that we have proposed places the burden of proof squarely on the government in civil asset forfeiture cases. This is a significant change. The government's burden would be to prove the connection between the property and the offense by a preponderance of the evidence. This is the same standard that is used in virtually every other kind of civil case, no matter how complex, in the Federal courts.

Two, with regard to innocent owners, we have proposed a uniform innocent owner defense that will provide appropriate protection for persons who legitimately did not know that their property was tainted by criminal activity.

Third, with regard to a property owner's right to a hearing, under our proposal the government must file its forfeiture action within 90 days. And if we fail to do so, the owner may file a motion for the return of the seized property and has the right to a hearing before a judge on that motion.

Four, with regard to a cost bond, our current policy is to waive the requirement that a cost bond be filed where the property owner files his or her claim in forma pauperis. Our proposal writes this policy into the law.

Fifth, with regard to the time for filing of a claim, the time for filing a claim to seized property is extended from 20 to 30 days from publication of the notice of the forfeiture.

Asset forfeiture has become one of the most powerful tools and important tools that we in Federal law enforcement have to employ against criminals who prey on the vulnerable for financial gain. Federal law enforcement agencies use the forfeiture law for a variety of reasons. The modern law allows the government to seize contraband, property that is simply unlawful to possess, like illegal drugs, unregistered machine guns, smuggled goods, and counterfeit money.

Forfeiture is also used 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 rid the community of that crack house.

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. Under the forfeiture laws, we can separate the criminal from his profits and any property traceable to it, thus removing the incentive that 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.

We have included a summary of just a sampling of our recent cases involving both civil and criminal forfeiture, and I would ask that that would be included in the record.

Now, the expansion of forfeiture laws into new areas has been controversial. When laws that were designed to seize, frankly, pirate ships from privateers are applied to the seizure of homes, cars, businesses, and bank accounts, there are a lot of concerns to address and a lot of answers to sort out. How do we protect innocent owners? What procedures afford due process? When does forfeiture go too far?

The executive and judicial branches of government have been very active in this sorting-out process. We at the Department have issued detailed guidelines and have engaged in a substantial amount of training for our people. The courts have been active as well. The Supreme Court has decided 11 forfeiture cases since 1992, and there have been hundreds of other cases dealing with all other aspects of asset forfeiture procedure in the lower courts.

It just seems to us that at a time that we consider needed reforms to civil forfeiture laws, I would urge that Congress expand forfeiture into new areas where it can be used to combat sophisticated, serious domestic and international criminal activity. From telemarketing, to terrorism, to counterfeiting, to violation of the food and drug laws, the remedy of asset forfeiture should be applied.

As I said at the outset, we firmly believe that the time has come to reform our laws. We have said this repeatedly since 1993 and we have said that Congress should enact legislation to ensure that forfeiture laws of the United States will be tough, but fair, which is exactly what the American people have a right to expect. I still very much believe that.

I also believe that, working together, we can craft a balanced set of forfeiture laws that combine fairness with effective law enforcement, and we look forward to working with the subcommittee to do exactly that.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Holder follows:]

PREPARED STATEMENT OF ERIC H. HOLDER, JR.

Mr. Chairman and Members of the Subcommittee, I want to congratulate you, the Ranking Minority Member, Senator Schumer, and all Members of the Subcommittee for helping lead the way toward improving the asset forfeiture laws. The Department of Justice is pleased to be in a position to work cooperatively with you toward important and needed reforms to civil asset forfeiture law.

The time to reform the forfeiture laws has surely come. Laws designed decades, even centuries, ago to deal with the seizure of pirate ships on the high seas need to be updated to apply to the ways we should be most constructively using the forfeiture laws today—to seize houses, cars, businesses and bank accounts which are the instrumentalities and proceeds of criminal activity, in a manner which ensures fairness and due process. For that reason, the Department of Justice has long supported revisions to the asset forfeiture laws, and we have sent a proposal to Congress putting those revisions into effect. In addition to reforming the basic civil asset forfeiture law, we also think that the current laws can be augmented to provide law enforcement with a more effective crime-fighting tool. A comprehensive forfeiture bill can do both.

THE ASSET FORFEITURE PROGRAM

Before commenting on the specific provisions of that proposal and the bill recently passed by the House of Representatives, let me provide the Subcommittee with some background on the asset forfeiture program.

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against criminals—from drug dealers, to terrorists, to white collar criminals—who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal code. We are convinced that the large drop in crime this Nation has witnessed is related to effective use of the asset forfeiture laws, along with other important anti-crime measures.

WHY DO FORFEITURE?

Federal law enforcement agencies use the forfeiture laws for a variety of reasons. Like the statutes the First Congress enacted in 1789, the modern laws allow the government to seize contraband—property that it is simply unlawful to possess, like illegal drugs, unregistered machine guns, smuggled goods and counterfeit money.

Forfeiture is also used 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 rid the community of the crack house. Utilizing the Department's Weed and Seed program we can often ensure that the property goes to a community organization, which will then use it to better the lives of those in the neighborhood. 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 Colombia or Mexico to the United States, or a printing press used to mint phony $100 bills.

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

We have included with this testimony a summary of just a sampling of our recent cases involving both civil and criminal forfeiture.

WHY DO CIVIL FORFEITURE?

There are several reasons why we do forfeitures. There are, however, two kinds of forfeiture: criminal and civil. The former is part of a criminal case against a defendant. The other is an entirely separate civil action. If most of our cases involve an arrest or prosecution—which they do—then why do we need civil forfeiture? Why can't we do most of our forfeitures as part of the criminal prosecution?

Everyone should understand that there is parallel criminal arrest and prosecution in the overwhelming majority of civil forfeiture cases. (In 1996, the rate was 81 percent in DEA cases.) But there are important reasons why the government must have civil forfeiture in addition to criminal.

First, criminal forfeiture is unavailable if the defendant is dead or is a fugitive. There is simply no criminal case in which to pursue forfeiture. Second, a substantial majority of the DEA and FBI's forfeiture cases are uncontested, often because the defendant in jail sees no point in claiming property that most likely connects him to the crime. Civil forfeiture allows us to dispose of these uncontested cases administratively.

Third, criminal forfeiture statutes are not comprehensive. Forfeiture in gambling, counterfeiting, and alien smuggling cases must be done civilly, as must almost all forfeitures of firearms, simply because there is no criminal forfeiture statute.

Fourth, criminal forfeiture in a federal case requires a *federal* conviction. If the defendant was convicted in a state case, the federal forfeiture must be a civil forfeiture.

Fifth, criminal forfeiture is limited to the property *of the defendant.* If the DEA seizes an airplane loaded with drugs and arrests the pilot, it cannot forfeit the airplane in the criminal case against the pilot unless he owns the airplane. But that is rarely the case; the title is almost always in the name of a corporation abroad.

FISCAL IMPACT

The result of this law enforcement activity is that last year the agencies of the Department of Justice took nearly $450 million out of the hands of criminals and deposited it into the Justice Department Assets Forfeiture Fund. That's $450 million that otherwise would have been available to drug dealers, pornographers, loan sharks and terrorists to use to ply their crimes against innocent citizens and their children.

The forfeitures are put to good use. The funds are provided to law enforcement programs, including nearly half that is shared with state and local law enforcement agencies through the equitable sharing program, some of which may be passed on to community-based organizations through that program.[1]

RESPONSE TO CRITICISMS OF THE FORFEITURE LAWS

The proliferation of forfeiture into new areas has been controversial. When laws that were designed to seize pirate ships from privateers are applied to the seizure of homes, cars, businesses and bank accounts, there are a lot of concerns to address and answers to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far in violation of the Excessive Fines Clause of the Eighth Amendment?

The Executive and Judicial Branches of government have been very active in this sorting out this process. First, the Department of Justice has issued detailed policy guidelines governing the use of the administrative, civil judicial, and criminal forfeiture laws by all agencies of the Department. *See* Department of Justice Asset Forfeiture Policy Manual (1996). The Treasury Department has issued similar guidelines. Together, these guidelines help ensure that the forfeiture laws are administered fairly and effectively, with all appropriate consideration given to the rights of property owners. Moreover, we have conducted an intensive series of training sessions for law enforcement agents and federal prosecutors, including detailed instruction on how to incorporate forfeiture into criminal cases instead of relying exclusively on the civil forfeiture laws.

The courts have been extraordinarily active in this area, as well. The Supreme Court has decided eleven forfeiture cases since 1992, and hundreds of cases dealing with all aspects of forfeiture procedure have been decided by the lower courts. These cases have given much needed clarity and definition to the forfeiture laws and the rights of property owners, but they have also left loopholes and ambiguities that only Congress can resolve through legislation.

The cumulative effect of these efforts is evident. New examples of problems in the forfeiture program have been decidedly difficult for our opponents to find. We run a better program because our procedures are better defined, and our guidelines are rigorously enforced. As I said previously, the overwhelming majority of all forfeitures take place in conjunction with a related arrest and prosecution. And as a result of the emphasis on criminal forfeiture since 1994, approximately half of all contested forfeiture actions are now undertaken as part of criminal cases.

GUARANTEEING DUE PROCESS

But we can do more. The asset forfeiture program is a vital law enforcement tool, but we recognize that no system, no program, no tool of law enforcement, however effective at fighting crime, can survive for long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice. It is for that reason that we have supported efforts to make further revisions to the forfeiture laws—not just by policy, not just by case law, but by statute—to ensure fairness and procedural due process.

We said before and we say again that the burden of proof in civil forfeiture cases should be on the government. If the government seeks to forfeit a person's house, the government should have to prove that a crime was committed and that the property was involved in that crime; the burden should not be on property owner (*e.g.,* to prove that he did not know that his property was being used illegally). We said before and we say again that there should be a uniform innocent owner defense available to claimants in all civil forfeiture cases. While the Supreme Court held in *Bennis* v. *Michigan* that an innocent owner defense is not mandated by the Due Process Clause of the Fifth Amendment, that does not mean Congress cannot enact such protection by statute. We think it should.

[1] In the last fiscal year, $177 million was shared with state and local law enforcement from the Justice Assets Forfeiture Fund, of which up to 15 percent was eligible for pass-through to community-based organizations.

We said before, and we say again, that the time limits for filing claims should be extended to ensure that everyone has an adequate opportunity to obtain his day in court; that there should be relief for citizens whose property is damaged while in government custody; and that the government should pay interest on money that it seizes and later has to return.

All of these protections for citizens and property owners are included in the bill that we submitted to Congress. These proposals are derived substantially from the bill that Senator Schumer introduced in the House of Representatives in 1997, H.R. 1745, and we congratulate him for the leadership he has shown on this issue over the past several years.

The following is a short summary of the 13 major reforms to the civil forfeiture laws that are codified in our proposal:

1. *Burden of proof.* The burden is on the government to prove the connection between the property and the offense by a preponderance of the evidence.
2. *Innocent owners.* There is a uniform innocent owner defense.
3. *Return of seized property.* The government must file its forfeiture action within 90 days or give the property owner a hearing on his motion for the return of seized property.
4. *Suppression of evidence.* Property seized without probable cause may not be admitted into evidence in the forfeiture case.
5. *Stay.* Civil forfeiture cases may be stayed, at the property owner's request, while criminal cases are pending to avoid conflicts with the right against self-incrimination.
6. *Proportionality.* The Supreme Court's rule that forfeitures may not be "grossly disproportional to the gravity of the offense" is codified.
7. *Interest.* Successful claimants recover the seized property with interest.
8. *Adoptive forfeitures.* Federal agencies may only adopt state seizures if the state authorities comply with state rules requiring a state judge to authorize the adoption.
9. *Judicial approval of seizures.* Arrest warrants for property subject to forfeiture must be approved by a judge or magistrate.
10. *Time for filing a claim.* The time for filing, a claim is extended from 20 to 30 days from the publication of notice of the forfeiture.
11. *Cost bond.* The present policy of waiving the cost bond in cases where the claim is filed in *forma pauperis* is codified.
12. *Deadlines on government action.* The seizing agency must send notice of the forfeiture action within 60 days of the seizure.
13. *Damage to seized property.* The Federal Tort Claims Act is amended to give property owners the right to recover damages to property that is seized but never forfeited.

We have prepared a detailed section-by-section analysis of our proposal, and ask that it be included in the Record.

PROBLEMS WITH H.R. 1658

Many of these proposals are included in the House bill, H.R. 1658. We are pleased that there is much common ground. But H.R. 1658 crosses the line between providing due process and giving unintended relief to drug dealers, money launderers, and other criminals who victimize the elderly and the vulnerable in our society. Let me give a few examples.

H.R. 1658 IS OVERBROAD

First, H.R. 1658 is seriously overbroad. It applies not just to drug and money laundering cases, but to virtually every one of the more than 200 civil forfeiture statutes in federal law. These are statutes used to protect the environment and endangered species, to recover artifacts stolen from Indian land, to combat terrorism, foil counterfeiters and break up gambling and pornography rings. If there are problems with forfeitures, those must be addressed but without the needless weakening of a tool that has been used for decades in so many different contexts without incident or complaint.

LEAVING PROPERTY TO THE CRIMINAL'S HEIRS

We support the enactment of a uniform innocent owner defense. A person who does not know that his/her property is being used illegally, or who becomes aware of the illegal use but takes all reasonable steps to try to stop it, should not suffer the loss of the property through forfeiture. But H.R. 1658 goes beyond that. It mis-

takenly bars the government from seizing criminal proceeds if the heirs of a criminal have acquired the property through inheritance.

Under the House bill, if a criminal dies, his fortune passes directly to his heirs without fear of forfeiture, even if the money consists entirely of criminal proceeds. A major drug dealer or pornographer could amass a fortune over a lifetime of crime, and pass it on to his heirs without the government's being able to step in and confiscate the money. The same is true if even the criminal proceeds were taken by fraud from innocent victims, thereby granting the fraud artist's heirs priority over the victims of his crimes. The heirs of a drug lord killed in a shoot out with the police or with a rival drug gang should not be free to inherit his drug fortune.

Over the past decade, we have recovered over $70 million from the estate of the notorious drug lord Jose Gonzalo Rodriguez Gacha after he was killed by the Colombian police. Under H.R. 1658, Gacha's heirs would have been entitled to all his drug money.

RETURNING PROPERTY TO CRIMINALS

H.R. 1658 also contains a provision that would require the government to return seized property to criminals pending trial in the forfeiture case in order to avoid a "hardship." We understand that there may be instances where an innocent person's property is seized from a wrongdoer and held pending trial—undoubtedly to the inconvenience of the innocent claimant. But in thousands of cases every year, property—like cars, airplanes, cash and other easily disposable items—is seized from drug dealers, gamblers, pornographers and money launderers. It makes no sense to write into law a provision that allows such people to retain possession of the seized property pending trial. Giving a dufflebag-full of cash back to a drug courier, just because he claims some "hardship" will befall him, defies reason and guarantees the property will simply disappear regardless of what guidelines might be engrafted on the statute.

Seizure of a flashy car from a notorious drug dealer sends a strong message to the community that crime will not pay. If that same car is back on the street a week later because the owner claimed some hardship, sends the opposite message—that law enforcement is a paper tiger, and criminals can flaunt the spoils of their trade without fear of consequences. The same is true if the car, boat, or plane was used as the instrumentality of crime.

The release-of-property provision will cause enormous problems for the Immigration and Naturalization Service, which seized 27,000 automobiles a year, mostly along the Southwest Border, as part of its enforcement program against the transportation and smuggling of illegal aliens. If the cars, trucks, vessels and other conveyances seized by the INS have to be returned to the smugglers to avoid a "hardship," there will be little left of the anti-smuggling program.

Yet, in any case in which INS refused to release the vehicle, H.R. 1658 would permit the claimant to apply immediately to federal court for an order forcing the agency to do so, and the court would have to rule on the request within 30 days. The courts along the Southwest Border are already overburdened with civil and criminal cases related to border interdiction. To add more cases, each of which would have to be resolved within 30 days, to the dockets of those courts could potentially overwhelm the judiciary and threaten to bring justice to a standstill.

Any legislation that contains a provision that requires the government to give a seized airplane back to a drug dealer, or seized photocopy equipment back to a counterfeiter—supposedly to avoid a "hardship" pending trial—crosses the line from a measure designed to ensure fairness to become simply a windfall for criminals.

REMEDY FOR FAILURE TO GIVE NOTICE OF ADMINISTRATIVE FORFEITURE

The vast majority of forfeiture cases are uncontested. These are cases in which the government seizes property and sends notice of the forfeiture to the property owner, but no one files a claim. Such administrative forfeitures account for an overwhelming majority of all DEA and FBI forfeitures.

Pursuant to current Justice Department internal guidelines, the seizing agency must send notice of the forfeiture action to potential claimants within 60 days of the seizure, unless the time limit is waived for good cause by a supervising official. Also under current law, if the government fails to make a reasonable effort to give notice of the forfeiture to potential claimants, and a person who did not receive notice later claims an interest in the property, a federal judge may order that the forfeiture action be started over again. *United States* v. *Woodall,* 12 F.3d 791, 793 (8th Cir. 1993). Such claims are almost invariably filed by federal prisoners who assert that they did not receive the forfeiture notice because the seizing agency sent it to the wrong place of incarceration as the prisoner was moved throughout the correc-

tions system. *See e.g. United States* v. *Clark,* 84 F.3d 378 (10th Cir. 1996); *United States* v. *Franklin,* 897 F. Supp. 1301, 1303 (D. Or. 1995); *Hong* v. *United States,* 920 F. Supp. 311 (E.D.N.Y. 1996); *Concepcion* v. *United States,* 938 F. Supp. 134 (E.D.N.Y. 1996); *Scott* v. *United States,* 1996 WL 748428 (D.D.C. 1996).

H.R. 1658 would change this process in two significant ways. First, it would codify the 60-day guideline and require the seizing agency to petition a court for a waiver instead of getting it from a supervising official within the Department or agency—another process certain to burden the judiciary unnecessarily, given the 45,000 seizures per year made by Justice Department agencies. Second, it would change the remedy for the failure to provide notice by allowing the claimant simply to "void the forfeiture," and bar the government ever from re-initiating the forfeiture action.

Again, this issue is one that arises almost always in the context of a federal prisoner who did not receive notice through the prison system. It makes no sense to give prisoners a windfall by allowing them to "void a forfeiture" anytime the Bureau of Prisons is unable to deliver notice of administrative forfeiture of property to the current prison address. If H.R. 1658 were enacted, instead of having judges order that forfeiture proceedings start again by returning to the *status quo ante* in such cases, prisoners serving long terms of incarceration for drug dealing, money laundering and like crimes would receive reimbursement checks for seized proceeds.

APPOINTMENT OF COUNSEL

I now turn to the two most objectionable provisions of H.R. 1658—those dealing with the appointment of counsel and with the standard of proof:

The bill creates incentives for abuse by allowing anyone interested in contesting the forfeiture to file a free claim and to request a free lawyer. Suppose three people are stopped in a car carrying $50,000 in drug money wrapped in rubber bands and hidden under the seat. And suppose they say they got the money from a guy in New York and are delivering it to a friend in Florida. Who gets the free lawyer? The driver? The passengers? The guy in New York? The girlfriend in Florida? Under H.R. 1658, they *all* would be entitled. The potential for abuse in the context of 45,000 cases a year is staggering.

The principle that no person should be denied the means to seek redress in the courts against unreasonable government action is recognized in the Equal Access to Justice Act ("EAJA"). That statute provides that any person who prevails against the government in a case in which the government action was not "substantially justified" is entitled to recover attorney's fees.

The availability of EAJA fees provides the needed protection and there is no need to authorize the court to appoint counsel in civil forfeiture cases. Indeed, with tens of thousands of forfeiture seizures taking place every year, the burden on the courts just to hear the motions for appointment of counsel is likely to be enormous, and to be enormously expensive.

CLEAR AND CONVINCING EVIDENCE

Most troubling, H.R. 1658 would elevate the burden of proof standard to *clear and convincing* evidence—a standard virtually unheard of in civil cases, even when the case is based on a criminal violation. If the government chooses to seek civil sanctions separately, the standard is *preponderance of the evidence.* (Sanctions for knowingly overbilling government programs are generally sought under the False Claims Act, 31 U.S.C. § 3729. The same is true when banks are accused of money laundering, or bankers are accused of bank fraud. *See* 18 U.S.C. § 1956(b) (civil money laundering enforcement); 12 U.S.C. § 1833a (bank fraud).) There is no sound or reasoned basis for imposing the higher standard when we seek to take printing presses from counterfeiters, or profits from drug peddlers.

It is important to understand that there are essentially three issues in a civil forfeiture case.

1. *Forfeitability:* was a crime committed by someone, and was this property derived from, involved in, or used to commit that crime?

2. *Innocent owner:* even if the property is subject to forfeiture, was the owner of the property an innocent owner?

3. *Proportionality:* even if the owner was not innocent, would the forfeiture of this property be "grossly disproportional to the gravity of the offense," and thus be unconstitutional under the Excessive Fines Clause of the Eighth Amendment?

The standard of proof in H.R. 6658 applies only to the first issue: the showing that the property was derived from, or used to commit, a crime. In cases involving a field used for growing marijuana or a crack house where drugs are sold to kids on their way to school, the "nexus" of the property to the crime can be confidently

demonstrated in most cases. The common questions in those cases concern applications of the innocent owner defense and the proportionality of the forfeiture under the Eighth Amendment. Raising the standard of proof is not likely to affect the government's ability to prevail in those civil forfeiture cases.

Elevation of the standard of proof to "clear and convincing evidence" would have a devastating effect on the government's ability to establish the forfeitability of the property in complex money laundering and drug cases. In these offenses the criminal and his money launderers work long and hard to hide the connection between the crime and its proceeds. We are concerned that too high a burden of proof will result in inappropriate losses of cases by the government, leading to a windfall for undeserving criminals.

Managing the cash proceeds is one of the drug dealer's greatest problems. If it is "street money," the drug proceeds weigh 3½ times the equivalent amount of cocaine. But the drug dealer is not a supermarket owner or amusement park operator who can simply deposit his cash proceeds in a bank. To avoid creating a paper trail, he has to move the money via couriers through airports, down highways, and in containers, in his effort to get it back to South America. Or he has to run it through otherwise legitimate businesses, off-shore banks and shell corporations, money remitters, and accounts held by nominees, and ultimately sell it on the Colombian Black Market Peso Exchange, all to conceal or disguise the connection between the criminal proceeds and the underlying crime. That's the very definition of money laundering. *See* 18 U.S.C. § 1956(a)(1)(B)(i). For a sophisticated money launderer—whether he keeps the money as cash, moves it via couriers, smuggles it out of the country, or sells it on the black market—the trail between the crime and the money is very murky indeed.

Significantly, even in the *criminal* forfeiture context, Congress recognized that the nexus between the property and the crime need only be shown by a preponderance of the evidence. In certain drug cases there is even a statutory *presumption* that the money is drug proceeds.

Statutes requiring the government to meet a "clear and convincing" standard are extremely rare. *See e.g.* 18 U.S.C. § 3524(e)(1) (stripping non-custodial parent of visitation rights with child when custodial parent is relocated as a protected witness). In civil cases, such as those filed under the False Claims Act, 31 U.S.C. § 3729, and the bank fraud statutes, 12 U.S.C. § 1833a, to give just two examples, the "preponderance" standard is routinely applied. Our view is that preponderance of the evidence is an appropriate standard.

IMPROVEMENTS TO THE FORFEITURE LAWS

Importantly, we are eager to see civil asset forfeiture reform that includes provisions needed to make the asset forfeiture laws more effective as law enforcement tools.

For example, it is right to put the burden of proof on the government in civil forfeiture cases, but it is wrong to omit provisions that allow the government to gather the evidence needed to meet its evidentiary burden. Congress should enact provisions allowing attorneys for the government to issue subpoenas for evidence in civil forfeiture cases in the same way that they are issued in federal health care cases, anti-trust cases, bank fraud cases and civil RICO cases. Similarly, Congress should permit the government's civil attorneys to have access to the grand jury material already in the possession of its criminal prosecutors.

Also, in the course of revising the civil forfeiture laws, we should address the problem that arises when claims are filed by fugitives. Before 1996, the federal courts employed a rule, known as the fugitive disentitlement doctrine, that barred a fugitive from justice from attempting to hide behind his fugitive status while contesting a civil forfeiture action against his property. *See United States* v. *Eng,* 951 F.2d 461, 464 (2d Cir. 1991) ("a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action").

But in 1996, the Supreme Court held in *Degen* v. *United States,* 116 S. Ct. 1777 (1996), that as a judge-made rule, the sanction of absolute disentitlement goes too far. Instead, it is left to Congress to enact a statute that, as the Court described it, avoids "the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored." *Degen,* 116 S. Ct. at 1778. Codification of the fugitive disentitlement doctrine is an essential part of any civil forfeiture reform.

A serious need is legislation which enhances the *criminal* forfeiture laws. The recent shift to criminal forfeiture in the federal courts has revealed numerous defi-

ciencies in the criminal laws that have hampered the government's ability to make full use of those statutes.

In particular, the law should allow the government to pursue criminal forfeiture any time a statute authorizes civil forfeiture, and it should allow the government to restrain property subject to forfeiture pre-trial, so that the property does not disappear or dissipate while the criminal case is pending. Title V of the Administration's proposal contains these and a comprehensive set of other proposals that would make the criminal forfeiture statutes the equal of their civil counterparts as effective crime-fighting tools.

Finally, once the needed reforms of the civil forfeiture laws are made, I urge Congress to expand forfeiture into new areas where it can be used to combat sophisticated, serious domestic and international criminal activity. From telemarketing to terrorism to counterfeiting to violations of the food and drug laws, the remedy of asset forfeiture should be applied. Title II of our proposal contains numerous provisions designed to achieve this goal.

CONCLUSION

As I said at the outset, we firmly believe that the time has come to reform the forfeiture laws. We have said this repeatedly since 1993, when forfeiture reform legislation was first introduced. We have said that Congress should enact legislation to ensure that "the forfeiture laws of the U.S. will be tough but fair—tough but fair—which is exactly what the American people have a right to expect." I still very much believe that. Working together, we can craft a balanced set of forfeiture laws that combine fairness with effective law enforcement. We look forward to working with the Subcommittee to do exactly that.

HOW DO WE USE THE FORFEITURE LAWS?

The following are examples of recent uses of the civil and criminal forfeiture laws. These examples are from 1997 through 1999 and update a similar collection of examples that was included in the Justice Department's testimony before the House Judiciary Committee in June, 1997.

FORFEITURE USED TO CLOSE "CRACK HOUSE" IN TENNESSEE

(Middle District of Tennessee) Drug dealers in Smyrna, Tennessee, a bedroom community ten miles south of Nashville, used a well-known crack house to menace the town's residents for more than ten years. The crack house was located next to a church near the town square, and was the scene of 40 arrests, including repeated arrests of the children and grandchildren of the owner/resident, Joseph Frank Drennon. When the arrests failed to put a stop to extensive drug dealing from the property, federal prosecutors used the asset forfeiture laws to shut it down.

CIVIL FORFEITURE USED TO RECOVER FUGITIVE'S DRUG PROCEEDS

(District of Minnesota) Seven members of a local suburban drug ring and their two Florida drug suppliers were indicted for conspiracy to distribute and to possess with intent to distribute cocaine. Conservative estimates indicated that during the conspiracy as much as 160 kilos of cocaine were brought to and distributed in Minnesota, and the conspiracy grossed as much as $6 million per year. Six members of the conspiracy were convicted and were ordered to forfeit currency, bank accounts and real property, which has netted approximately $326,000 to date. One member of the conspiracy remains a fugitive, and civil forfeiture proceedings were used to forfeit his cash and real property.

PROCEEDS OF CHARITY SCAM GO TO CHILDREN IN NEED

(Northern District of Texas) FBI investigation of a bogus telephone charity scam led to the civil forfeiture of $61,039.40 in Dallas, Texas. Telephone callers solicited money for an alleged charity to grant the last requests of dying children. In fact, donations were going to the scam organizer's bank accounts. Considering how donors had meant their money to be spent, the U.S. Attorney's Office and the FBI thought it was appropriate to divide the forfeited money between the Make a Wish Foundation and A Wish For Wings. Both organizations work to grant the requests of very ill children.

SEIZURE OF UNLICENSED RADIO STATION ENDS THREAT TO AIRPORT TRAFFIC

(Eastern District of California) An unlicensed radio station near Sacramento Executive Airport interfered with safe air traffic control on four different frequencies, interrupting important radio transmissions. Answering complaints from pilots and air traffic controllers, the FCC ordered the radio station operator to stop transmissions. When the operator of the unlicensed operation refused to stay off the air, federal court action authorized the FCC and U.S. Marshals Service agents to seize the station's equipment under the civil forfeiture laws, ending a threat to the safety of planes and passengers in the area.

FORFEITURE USED TO SHUT DOWN CAR DEALERSHIP LAUNDERING DRUG MONEY

(Western District of North Carolina) A used car dealership known as "Import City" in Charlotte, North Carolina was selling vehicles to known drug dealers. Import City's owner, Majid Ramazanian, was indicted on charges of money laundering and currency reporting violations, to which he later pled guilty. In a parallel civil forfeiture case, 52 of the dealership's cars were forfeited. The case closed down the money laundering operation at Import City and recovered, net of expenses, well in excess of $200,000.

CIVIL FORFEITURE USED TO SHUT DOWN HOUSE USED TO DISTRIBUTE HEROIN IN JACKSONVILLE

(Middle District of Florida) When a federal fugitive was arrested at a Jacksonville, Florida residence, federal officials found cash, narcotics scales, weapons and narcotics paraphernalia, a police scanner and a substantial quantity of heroin. The owner of the residence and half-brother of the fugitive claimed he was unaware that his brother was conducting these activities from the residence, although he admitted that he permitted the fugitive to reside there. When DEA determined that the heroin distribution activities continued from the residence after the arrest of the fugitive, the United States filed a civil forfeiture action against the residence and the cash which led to the uncontested forfeiture of both. The civil forfeiture in this case benefited the Jacksonville community in that it took out a heroin distribution center which was located with 700 feet of a school.

DRUG HOUSE BECOMES HAVEN FOR VICTIMS OF VIOLENCE

(Eastern District of California) Convicted for growing and distributing large amounts of marijuana, the owners of a house in Amador County, California forfeited their indoor growing site. Through the Weed and Seed Program, this structure, formerly used to grow marijuana, was transferred to Operation Care, Inc. The nonprofit organization operates the house as a shelter for women and children who are victims of domestic violence. The facility is the first of its kind in Amador County.

UNITED STATES RETURNS $11 MILLION TO VICTIMS OF LOTTERY SCHEME

(Western District of Washington) A fraud ring headed by James Blair Down, who operated from Canada and Barbados, fraudulently marketed foreign lottery products to elderly U.S. residents through direct mailings and telemarketing. Many of the victims lost their life savings by responding to the high pressure telemarketing and deceptively marketed lottery promotions. More than 900 potential victims, some of whom lost tens of thousands of dollars, were identified. Federal prosecutors in Seattle, Washington used the civil forfeiture laws to seize approximately $12.4 million that Down had hidden in U.S. investment accounts held in the names of Cayman Island corporations. Civil forfeiture statutes were the only means available for immobilizing these assets to preserve their availability for restitution to victims, because a criminal indictment could not be filed until evidence located in foreign countries was obtained through painfully difficult and time consuming requests to foreign governments (Canada, Barbados, Switzerland, Cayman Islands, and Jersey). Down was subsequently indicted and pled guilty. As a result of the combined use of the criminal sentencing and civil forfeiture procedures, the majority of the most severely injured elderly victims will receive 100 percent restitution for their net losses.

FORFEITURE PUTS EMBEZZLED FUNDS BACK IN THE USDA FOOD PROGRAM

(Eastern District of California) A state employee in the Los Angeles area whose job it was to fund feeding centers via the USDA child and adult food program stole over $3 million in federal funds from the program. The employee invested the criminal proceeds in the purchase of 5 pieces of real estate in the Los Angeles/Orange

County area. When the state employee was prosecuted, these properties were seized by the U.S. Attorney's Office. Eighty per cent of the sale proceeds went back to the USDA program to feed the people for whom the money had been intended.

UNION MEMBERS AND PENSIONERS REGAIN MONEY STOLEN BY ORGANIZATION'S PRESIDENT

(Eastern District of Washington) Forfeiture was used to regain $24,000 in substitute assets after a union president was found guilty of embezzling his union and pension plan. He spent the money he stole, making it impossible to forfeit and return to the union. However, he had other accounts which were subject to the substitute asset provision. Even though the president had spent the original funds he stole, the substitute asset provision of the forfeiture law made it possible for union members and pensioners to get some of their money back.

FORFEITURE SAVES ELDERLY WOMAN FROM DESTITUTION

(Northern District of New York) Florence Estes, a 94-year old widow in Loudonville, New York, was stripped of her home and her life savings by Carol Mickens, her home health care aide. Mickens looted Florence's bank accounts and sold her home out from under her while she was living at a nursing home by having an imposter impersonate Florence at the closing. Mickens moved proceeds from the sale of the house into bank accounts in Mickens' name and booked 4 suites on a New Years Eve cruise to the Panama Canal, sending a check for $25,000 drawn on Florence's account with a forged signature. Using the forfeiture laws, federal agents seized Mickens' bank accounts as well as a GMC Yukon, which Mickens bought with $32,000 of Florence's money, and tens of thousands of dollars worth of clothing. Mickens is awaiting trial.

ESPIONAGE PROCEEDS BENEFIT CRIME VICTIMS FUND

(Eastern District of Virginia) The United States Marshal for the Eastern District of Virginia presented checks to the United States District Court for more than $170,000 for deposit to the Crime Victims Fund as a result of, the seizures and forfeitures of the espionage proceeds of convicted spies Harold J. Nicholson and Earl Edwin Pitts. At the time they were caught, Nicholson was an official of the Central Intelligence Agency and Pitts was a Special Agent of the Federal Bureau of Investigation.

LAWYER BILKS IMMIGRANTS, FORFEITS PROCEEDS

(Eastern District of Virginia) For more than a year, Mr. Im, a lawyer in Annandale, Virginia, collected large sums of cash from aliens to obtain false immigration papers. Mr. Im also bribed an undercover Immigration and Naturalization officer in a conspiracy to commit visa fraud. Prosecution of Mr. Im for his visa fraud scheme resulted in the forfeiture of more than $200,000.

PROCEEDS OF VIOLENT DRUG CRIMES FORFEITED

(Eastern District of Virginia) In Alexandria, Virginia, two drug dealers were convicted of 5 murders in connection with their drug enterprise. FBI, DEA, IRS, and HIDTA agents seized from them real estate, art work, jewelry, luxury vehicles and more than $200,000 in cash as proceeds of their crimes.

COCAINE DEALERS CONSPIRE TO MURDER MARYLAND STATE TROOPER

(Eastern District of Virginia) Convicted of engaging in a continuing criminal narcotics enterprise and of conspiring to murder a Maryland State Trooper, Mr. McCorkle and Mr. Barrios were sentenced to life in prison. More than $325,000 in assets traceable to drug proceeds were forfeited.

convicted swiss money launderer forfeits assets

(Eastern District of Virginia) Karl Burkhardt, a Swiss national, ran a lucrative international money laundering business. At one point, he accepted cash from an undercover DEA agent to launder overseas. Mr. Burkhardt was sentenced to six years in prison and forfeited $2,600,000 worth of assets in the United States. These included his Palm Beach mansion, modern art, animal skins and a luxury automobile.

CIVIL FORFEITURE STRIPS MAJOR MARIJUANA SUPPLIER OF HIS CASH IN MINNESOTA

(District of Minnesota) A "mule" was instructed to contact one "Benjamin" by pager when he arrived with a 300 pound load of marijuana at a predetermined loca-

tion in Burnsville, MN. Officers paged Benjamin and, while waiting, executed a search warrant at Benjamin's residence. Officers recovered bags of marijuana and seized a 1994 Lexus ES300, a 1985 BMW 3251 containing $147,700.00 in cash, $944.00 cash, $54,000 cash from a Safe Deposit Box, and several bank accounts. The government filed a civil action against the property. Before answering the government's Complaint, Benjamin was arrested in Oklahoma on a bus with a cache full of marijuana. His counsel declined to file a Claim and Answer, and the government obtained a default judgment for the seized assets.

FORFEITURE REPAYS DEFRAUDED VICTIMS OF REAL ESTATE SCAM

(Middle District of Florida) Homeowners in danger of losing their property to foreclosure because of financial problems were "helped" by loan shark William McCorkle who gave them enormous loans at impossibly high interest rates with the promise the homeowners would eventually own their homes free and clear. In one case, McCorkle preyed upon the fears of a woman who had lived in her house for 20 years, was the single mother of 10 children, and had difficulty making some mortgage payments. McCorkle loaned her five times the amount of money she needed to pay off the loan, placed her property in his name, and when she had finally fully paid off his loan, refused to return the property to her. Through the forfeiture of this and other properties, the U.S. Attorney's Office learned of the plight of the homeowners involved and was able to help them regain legal title to their property and to defeat sham, unconscionable mortgages.

FORFEITURE USED TO REMEDY LOSS FROM HEALTH CARE FRAUD

(Southern District of Ohio) In March 1998, Marvin D. Thomas, a Cincinnati, Ohio, businessman pled guilty to felony mail fraud and false claims violations arising out of a health care fraud scheme. Thomas also pled guilty as President of USA Medical Systems, Inc. to the company's making false claims to Medicare. Thomas and USA Medical admitted to defrauding Medicare of at least $2,000,000 over three years by supplying over 300,000 disposable diapers to elderly patients and misrepresenting to Medicare that they were durable medical equipment. As part of the guilty plea, Thomas and USA Medical agreed to forfeit property worth almost $2,000,000, including: Thomas' residence valued at $500,000; his vacation home valued at $191,000; $125,000 from the sale of a lot; funds in accounts valued at $968,000; and four vehicles worth $133,000. The government filed a parallel civil forfeiture action to arrange a settlement with Thomas' wife regarding her asserted interest in some of the forfeited property.

ATTORNEY FORFEITS DRUG PROCEEDS

(Eastern District of New York) Bronx attorney Pat V. Stiso was sentenced to 87 months in prison following his guilty plea to charges of conspiracy to distribute heroin, obstruction of justice, and conspiracy to obstruct justice in his representation of two major heroin trafficking organizations. Stiso was also ordered to forfeit $600,000 as proceeds of illegal narcotics activity, and was required to cease practicing law. Stiso admitted receiving large sums of money which he knew were illegal drug sale proceeds from a Bronx narcotics trafficking enterprise known as the Maisonet Heroin Organization. Stiso further admitted holding this money to preserve and conceal the organization's profits. Stiso received the money after law enforcement officers seized more than $800,000 from the organization's operative in Florida.

OVER $200,000 RECOVERED IN FOOD STAMP FRAUD IN NORTH CAROLINA

(Western District of North Carolina) Mohammad Salim Pirani and Irfan Salim Pirani (father and son) were indicted for food stamp fraud and money laundering arising out of their operation of several convenience stores in the vicinity of Asheville, North Carolina. In the course of operating the stores, the Piranis frequently purchased food stamps from customers for less than their face value. In plea agreements, they admitted to receiving not less than $750,000 from their crimes and to transferring not less than $484,000 (mostly out of the country) so that it could no longer be recovered or forfeited by the government. Accordingly, the Piranis were required forfeiture of substitute property consisting of currency in the amount of $32,263; 4,450 Pakistani rupees; five bank accounts totaling more than $30,000; one promissory note for $84,000; and real property worth more than $200,000.

UNITED STATES DISTRIBUTES OVER $1 MILLION IN RESTITUTION TO VICTIM BANKS AND LEASING COMPANIES

(Western District of Washington) Frederick Paul Shafer, a computer and technology consultant for Catholic Community Services (CCS), a charitable organization affiliated with the Catholic Archdiocese of Seattle, obtained $4.2 million from banks and leasing companies by fraudulently claiming he was leasing computer equipment on behalf of CSS. Shafer used the proceeds from the fraud scheme to purchase 55 automobiles, vessels, trailers, jewelry, lake front property and home furnishings. He plead guilty to fraud and money laundering charges, and agreed to the forfeiture of his assets. The gross sale proceeds from the sale of the assets, mostly cars, was $1,238,452.59, which will be disbursed on a pro rata basis to the victims.

CIVIL FORFEITURE ENDS MARIJUANA OPERATION AND BENEFITS INNOCENT LIENHOLDER

(Western District of Arkansas) The United States filed a civil forfeiture proceeding against 40 acres of real estate in West Fork, Arkansas used by the owner for an indoor marijuana manufacturing operation. A Michigan woman held the mortgage on the property and relied on the monthly payments for her income. When the forfeiture action was filed, the drug dealer stopped making the payments. But once the Decree of Forfeiture was entered, the property was sold and the escrow contract was paid off in full. The claimant was pleased to be paid the full amount in a lump sum rather than the monthly payments she had been receiving.

$2.3 MILLION RETURNED TO VICTIMS OF WEST VIRGINIA FRAUD SCHEME

(Northern District of West Virginia) George Fredderick Garzarek and approximately ten other individuals were prosecuted in Wheeling, West Virginia, for their involvement in an international securities fraud scheme. Authorities were able to document approximately 15,000 victims in the United States, Canada, and several other countries, who invested over $8 million with Garzarek and his associates. The investment was premised on a "Ponzi-type" scheme whereby investors were told that their monies were needed to fund legal and investigative efforts to release a billion dollar fortune being held by European banks following the death of a British businessman. Garzarek spent a large portion of the monies he received acquiring expensive vehicles, real property, jewelry and taking luxurious vacations throughout the world. He pled guilty to a money laundering conspiracy and securities fraud and was ordered to pay restitution. Garzarek had basically squandered proceeds of his fraud but due to the forfeiture allegation in the indictment, authorities were able to recover, sell and/or liquidate numerous vehicles, parcels of real estate, and businesses linked to the fraudulent proceeds. Approximately $2.3 million will be disbursed to victims who filed claims with the government.

DRUG MONEY USED TO OPEN WATER PARK IN EAST ST. LOUIS

(Southern District of Illinois) On June 16, 1997, the East St. Louis, Illinois Park District cut the ribbon on a new water park, thus permitting hundreds of youths to frolic in colorful sprays, jets, showers, and fountains. The water park replaced a decaying swimming pool which had been closed for the previous ten years due to lack of funds for maintenance and repairs. The new water park provides kids with something to do instead of roaming the streets and is far more appropriate than a pool for the area's children, as 85 percent of them cannot swim. The $350,000 cost of the water park was paid for with federally forfeited money seized from drug dealers.

FORMER TOPLESS BAR TURNED INTO COMMUNITY CENTER

(Southern District of Illinois) In Washington Park, Illinois, a facility that was once a topless bar owned by convicted racketeer Thomas Venezia, is now known as the "Lansdowne/Washington Park Community and Youth Center." The Center houses the Washington Park Library, Americorp, and a police substation, and contains one of several "safe havens" in the greater East St. Louis area. A "safe haven" is a place where children can safely associate off of the streets and provides recreation, tutoring, computer training, conflict resolution, and other developmentally appropriate activities. The Center also serves as a base of operation for community groups and the location of neighborhood leaders training.

FORFEITURE NETS $4.0 MILLION FOR VICTIMS OF A PONZI SCHEME IN TEXAS

(Southern District of Texas) Federal prosecutors in Houston filed a civil forfeiture action against a $4.3 million mansion in Austin, Texas, held in the name of a Brit-

ish Virgin Islands entity controlled by Randall L. Garrett and a $1.1 million bank account controlled by Bryan L. Sims. Garrett and Sims collected more than $25 million in 15 months by touting "prime bank" financial instruments that supposedly returned an annual profit of 240 percent. They failed to invest the funds as promised and used the funds to repay earlier investors and for personal gain. Garrett and Sims were later indicted, and the property originally restrained in the civil case was forfeited. After payment of lienholders and other non-culpable claimants, the net proceeds of sale of forfeited property will provide a pool of approximately $4.0 million from which to compensate the more than 300 victims of the fraudulent scheme.

CRIMINAL FORFEITURE USED TO RECOVER RESTITUTION FOR VICTIM OF SHOOTING

(District of Minnesota) Robert George Jefferson and four other members of the 6–0–Tre Crips gang in Minneapolis were convicted in August 1998 for their involvement in large-scale drug dealing and six murders, including a 1994 arson in St. Paul that killed five children of the Coppage family. Jefferson was also convicted of conspiracy to murder an individual who owed him money for drugs. When Jefferson demanded the money from the individual, who did not comply, a gun battle ensued during which an innocent bystander, Robert Otto, was shot in the head resulting in life-threatening and traumatic brain injuries. Jefferson was sentenced to life in prison and ordered to pay over $6,600 in restitution to Otto. Of course, the money was not forthcoming. However, using the criminal forfeiture process, the government forfeited vehicles belonging to Jefferson and obtained a court order to use the proceeds from the sale of those vehicles to pay the ordered restitution.

Senator THURMOND. Mr. Johnson, you are next.

STATEMENT OF JAMES E. JOHNSON

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Chairman, ranking member, members of the subcommittee, I am pleased to appear before you today to give Treasury's perspective on the Federal asset forfeiture program.

Treasury law enforcement works closely with other Federal as a well as State and local enforcement to address a diverse range of responsibilities. Asset forfeiture is a very powerful tool that helps us accomplish our mission. I am glad to join Deputy Attorney General Holder, Assistant Commissioner Tischler, and DEA Chief of Operations Fiano in support of this valuable law enforcement tool. I assure you that we are working to ensure that it is being used appropriately to attack organized criminal activity.

I have a long statement, Mr. Chairman, that I would request be added to the record, as well as a letter that has been signed by the Treasury enforcement bureau heads, which I also would ask to be added to the record of these proceedings.

Asset forfeiture has played a key role in some of our most prominent recent cases. From narcotics trafficking and money laundering to terrorism and excise tax avoidance, it has proven its value time and time again. Not only does it disrupt the structures that support criminal enterprises, but it uses those instrumentalities and profits from crimes in ways that are consistent with the purpose of forfeiture laws in combatting crime.

Specifically, we use asset forfeiture to reimburse victims of crime, to provide for real properties that revitalize drug-scarred neighborhoods, and bolster law enforcement capacity and bolster cooperation throughout the United States. Everyday, asset forfeiture does what prisons alone cannot do in our struggle against crime.

We know that American citizens will only be comfortable with Federal forfeiture authorities as long as they have faith in the integrity of the program. In our management of the program, we

have worked to secure that faith. Four principles have informed the stewardship of the program, at least these four.

First, we have closely managed the program. Second, we have conducted comprehensive training for our forfeiture personnel, and we are soon going to be making that training part of our basic training for all Treasury enforcement agents.

Third, we have underscored the importance of considered and responsible seizures. And, fourth, we have developed exhaustive policy guidelines to ensure that due process rights of all individuals affected by this program are honored and protected.

We recognize, however, that improvements can be made and we support the reforms in the administration's bill regarding civil asset forfeiture, and actually asset forfeiture as a whole. And the Deputy Attorney General has addressed those issues quite eloquently. We support, again, reform, and we have for some time. Many of the proposed reforms are set forth in my long statement and have already been reviewed in this hearing today. I will highlight just a few.

The administration bill will raise the standard of proof, put the burden of proof on the government, to the level of preponderance of the evidence and shift the burden of proof to the government. The bill will provide for uniform definition of innocent ownership, and will permit the use of forfeited property to pay for victim restitution, not just innocent owner restitution. Such reforms can be made while still maintaining the effectiveness of civil asset forfeiture as a valuable law enforcement tool. It is a balanced approach that we propose that reflects America's sense of fair play.

On the other hand, we believe that H.R. 1658, the alternative to the administration's bill, will have a significant negative impact on our current ability to address the threats posed by criminal organizations. We believe that H.R. 1658 will constrain our ability to seize and forfeit by raising the standard of proof to clear and convincing evidence, even higher than in the criminal context. Providing for counsel at a cost to the government would be an additional burden. We believe that it would enhance the chances for frivolous litigation.

It would impose unrealistic deadlines that will cripple administrative forfeitures and may well result in the return of seized guns to the streets. Finally, we believe that the bill would increase the risk of property being removed from our jurisdiction by allowing criminal organizations to retain it during forfeiture proceedings. In short, H.R. 1658 will cause us to forgo numerous appropriate forfeitures that we now pursue and will undercut our ability to exploit this very valuable tool.

We are making important strides in our efforts against crime, deconstructing its organization in unprecedented ways. Needed change can be effected without undoing a longstanding record of accomplishment.

I thank you for this opportunity to present our views to this committee. Thank you.

[The prepared statement and letter of Mr. Johnson follow:]

PREPARED STATEMENT OF JAMES E. JOHNSON

Mr. Chairman and members of the Subcommittee, good afternoon. I want to thank the Committee for holding this hearing on civil forfeiture reform. I am pleased to appear before you today to give Treasury's perspective on the federal asset forfeiture program—how we use asset forfeiture, how it supports our law enforcement and other organizations, and how we view its prospects for the future.

Day-in and day-out, Treasury law enforcement pursues a wide variety of cases in its many areas of responsibility—including, but not limited to, trade and financial fraud, narcotics smuggling, illegal firearms trafficking, terrorism, counterfeiting and money laundering. In order to effectively address this diverse range of responsibilities, we work closely with other federal agencies and with state and local law enforcement officials.

The Treasury Forfeiture Fund was established by Congress in 1992 to direct a professional application of the forfeiture sanction, and to fairly and systematically strip criminal organizations of both the proceeds and instrumentalities that facilitate their illegal enterprises. Thus far, though the program has enjoyed many successes, the need for prudent reform is acknowledged and solicited and we are here today to discuss our proposal for future direction.

Our management of the program and the use of its funds is very important. We have taken measures in a number of areas to ensure that we fulfill our end of this responsibility. Since the establishment of the Treasury Forfeiture Fund in 1992, we have listened attentively to criticisms. We have heeded valid complaints and have closely managed our program, such as by conducting comprehensive training for all Treasury forfeiture personnel—from our special agents and their supervisors to our seized property managers. We have underscored the importance of considered and responsible seizures and the need for the pre-seizure planning that makes these possible. We have emphasized quality in the management of seized property so that value, whether property is forfeited or returned, is never carelessly diminished. And, recognizing that justice delayed is often justice denied we have directed Treasury law enforcement to stay on top of their forfeiture caseloads, especially with regard to the adjudication of administrative forfeitures.

We will continue to ensure that Treasury's program always affords due process—that it notifies all affected parties of the seizure and intent to forfeit, that it apprises them of their right to contest the forfeiture in court, that it accommodates the indigent and that it offers opportunities to achieve just resolutions short of forfeiture. In short, we are striving not for advantage but for fairness.

We recognize that asset forfeiture is a powerful tool in our arsenal and helps us accomplish our mission. As such, it must be carefully and consistently employed and monitored to protect citizens from abuse and unwarranted burden. As we confront large- scale criminal organizations, we are increasingly struck by the usefulness of asset forfeiture in dismantling their operations.

By allowing us to target the proceeds and instrumentalities of crime, asset forfeiture strikes at the very core of criminal organizations. It enables us to attack their criminal enterprises in ways that the simple incarceration of the criminals could never accomplish. It cuts to the heart of and motivation behind most criminal activity, focusing on criminal profits. It says forcefully to all honest Americans that we will not stand idly by and allow criminals to keep those rewards that fuel their illicit activities. Asset forfeiture is the tool that permits law enforcement to remove such instrumentalities and profits of crime, to ensure that "crime does not pay."

Asset forfeiture's purpose is to attack organized criminal activity and deprive criminals of their illegal profits. As an essential part of our overall law enforcement strategy, asset forfeiture has recently played a key role in a number of prominent cases involving drug trafficking, terrorism and avoiding cigarette excise taxes.

- In Operation Casablanca, one of the most complex money laundering investigations ever conducted by United States law enforcement, Customs agents broke an integral link between narcotics traffickers and their money launderers. Forfeiting cash and monetary instruments, they were able to disrupt an organization that converted drug receipts into operating revenues for the cartels. This year, two Mexican banks pled guilty to money laundering violations and forfeited a total of over $13 million, while a third bank settled its charges and forfeited another $12 million.
- A husband and wife team, who operated a wholesale supply business in Redding, California, was also an important link in a chain that funneled precursor materials to methamphetamine manufacturers in Mexico. IRS agents found that the couple had been laundering the profits of this illegal trade and seized investment accounts, vehicles and a residence, putting out of business one source in a deadly and growing drug trade.

- A naturalized U.S. citizen arrested in Israel confessed that he had served as a financial conduit for the Hamas terrorist organization. A year ago, the Chicago Joint Terrorist Task Force seized his residence, a vehicle, bank accounts, safe deposit boxes, and other property after an investigation revealed that his funds were derived from an international money laundering operation related to Hamas activities. In this instance, the forfeiture sanction was a key tool in negating this financial channel between a terrorist cell operating within our borders and the parent organization.
- The owners of a ranch within the boundaries of the Flathead Indian Reservation in Montana would take deliveries of huge quantities of cigarettes from a licensed wholesaler. They would then load them into transports designed to look like mobile campers and deliver them to smoke shop owners, circumventing the Washington State cigarette allocation program as well as the thirty-four percent per pack tax. These ranchers were moving $13 million worth of cigarettes per year until ATF and the tribal police helped bring about the arrests, convictions and forfeitures of profits that ended the illegal operation.

Asset forfeiture places a high levy on criminal activity, taking apart the structures that support such scourges as terrorism and the international narcotics trade. But its benefits don't stop there. With the authorities of the asset forfeiture funds, we have been able to reimburse certain victims of crime, provide valuable real properties that help resurrect crime plagued neighborhoods, make donations of goods to charities and, very significantly, bolster law enforcement capacity and cooperation throughout the United States.

- In 1996, following a lengthy investigation by the Criminal Investigation Division of the IRS, an individual pled guilty to conspiracy to defraud Medicare and agreed to forfeit $32 million that had been seized from his business, which had falsely claimed reimbursements from a Medicare insurance carrier. That money will be reimbursed to the federal Medicare trust fund and state Medicare insurers victimized by his criminal scheme.
- In Camden, New Jersey, a drug trafficker colluded with a long time family friend and realtor to invest his criminal proceeds in real estate and expensive cars. When IRS criminal investigators and the Camden Police finally helped bring him to justice, four forfeited properties were transferred by the Treasury Department to the City of Camden—two to be used as satellite police stations and two more to community service providers under the Weed and Seed program.

Simply put, we take the property that comes into our asset forfeiture funds and put it to good use. We take the proceeds of crime and re-invest them in law enforcement. First, we pay the often substantial direct expenses of seizure and forfeiture, allowing the tax payers to avoid this burden. Second, we invest in the seizure and forfeiture programs of our law enforcement bureaus, allowing them to keep pace with the increasingly sophisticated criminal challenges that they must confront. Finally, other amounts available from the asset forfeiture fund are used to support Treasury and other federal law enforcement efforts including victim restitution and community programs. We do all this fairly, ever mindful of the due process rights of citizens.

We want to assure the Committee that when we do forfeit assets, we use those assets in responsible ways to further the purpose of the asset forfeiture law and combat crime. The benefits that flow from the Treasury Forfeiture Fund play out every day in many ways, including:

- When tragedy struck earlier this year in high school shootings in Littleton, Colorado, and Conyers, Georgia, explosive detection canine teams from the Bureau of Alcohol, Tobacco and Firearms (ATF) were deployed and assisted in sweeping the schools for destructive devices, firearms and evidence. Asset Forfeiture Fund resources support the ATF canine program.
- The Youth Crime Gun Interdiction Initiative is an ATF program aimed at removing the illegal sources of guns used by American youths. The program is now in 27 vulnerable U.S. communities, in part, thanks to monies from the Forfeiture Fund.
- The southwest border of the United States has been a favored point for the smuggling of currency, drugs and other illegal contraband. The Treasury Forfeiture Fund has helped the Customs Service cover the costs of personnel moves under Operation Hardline to re-direct resources to where they are most acutely needed.
- When a gun is used in a crime, a positive firearms trace is often the crucial piece of evidence needed to make an arrest. ATF's National Tracing Center, the only operation of its kind in the world, traces firearms recovered in crimes for

federal, state, local and international law enforcement. Again, the Treasury Forfeiture Fund is a key resource contributing to the Center's success.

- Forfeiture monies have also enabled us to fund and train computer investigative specialists in all the Treasury law enforcement bureaus. This departmentwide initiative, known as CIS 2000, educates agents in how to match and counter the latest information technologies employed by criminals committing financial crimes through sophisticated uses of today's advanced computers.

Asset forfeiture and the federal forfeiture funds are also major supporters of the unprecedented levels of cooperation that exist today among federal, state and local law enforcement. The forfeiture funds allow us to share equitably among all agencies that have contributed to investigations leading to forfeiture. In fiscal year 1998, the Treasury Fund alone shared $72 million in currency and $3 million in property with state and local law enforcement agencies. These are amounts that are available to supplement the resources of our state and local law enforcement colleagues. In other years, forfeiture funds have:

- built a new forensic laboratory for the New York State Police;
- aided California's Orange County police officers to educate schoolchildren to better resist drugs and gangs; and,
- permitted Florida's Broward County to hire more police officers by matching and extending its share of grants under the Community Oriented Policing Services (COPS) program.

When we view the future of asset forfeiture, we see it continuing to be a valuable tool to do what prisons alone cannot do: give the victimized a chance at restitution; build communities torn apart by drugs and violence; and, strengthen law enforcement's ability to protect and serve.

We recognize, however, that the citizens of the United States will be comfortable with federal forfeiture authorities only as long as they have faith in the integrity of the program. That faith is best secured by Congress' enactment of necessary statutory changes to update asset forfeiture laws as well as by our implementation and continual refinements of policies and guidance that reflect America's sense of fair play.

From our perspective, we also recognize that program improvements can be made which is why we support the Administration's bill regarding civil asset forfeiture. The Administration's Bill would:

- raise the standard of proof to preponderance of evidence and shifts the burden of proof to the government;
- protect innocent owners and bona fide purchasers;
- require seizure warrant for all seizures of forfeitable property unless the 4th Amendment exception applies;
- permit Attorney General to use forfeited property to pay restitution to victims;
- make government liable for pre-judgement interest; and,
- establish a process for return of property pending the outcome of the forfeiture case.

The House Bill, however, would have a significantly negative impact on our current ability to use asset forfeiture against organized criminal activity. Chiefly, it would:

- constrain our ability to seize and forfeit criminal proceeds when the owner is overseas or otherwise beyond the jurisdiction of the United States;
- cause us to forego numerous forfeitures we currently pursue in order to protect our witnesses and investigations because it would eliminate hearsay evidence in meeting the government's initial burden;
- greatly limit the use of administrative forfeitures, now about 70 percent of all our forfeitures, through a combination of eliminating cost bonds and providing counsel in civil actions.
- require the return to the streets of many of the guns we seize everyday because of unrealistically short time frames for initiating the forfeiture proceeding and because they cannot be criminally forfeited; and,
- inordinately increase the risk that property may be removed from the jurisdiction of the United States by allowing criminal organizations to retain their assets during forfeiture proceedings upon a simple petition to the court.

While refinements to the asset forfeiture process would be useful, they should not be allowed to undo asset forfeiture's longstanding record of accomplishment in serving the best interests of American citizens. This is especially true in the area of civil forfeiture, the most historic and tested element of our forfeiture program. If the use of civil forfeiture is curtailed, it will seriously undermine our effectiveness in investigating drug trafficking, money laundering, fraud and other financial crimes.

As I said at the start, we are making important strides in our struggle against most types of organized criminal activity, treating it now for just what it truly is—a subversive business enterprise that needs to be acquired, taken over and deconstructed—lock, stock and barrel.

I hope that I have been able to convey to you the actual intent and application of this most valuable law enforcement tool. If change is to be made, it should be based on a factual analysis of need, not misconception based on anecdotal stories from the early days of the program. I thank you for allowing us to present our views on the asset forfeiture program. We appreciate the support of the Committee in this area and throughout federal law enforcement. I will be pleased to answer any questions you may have at this time.

DEPARTMENT OF THE TREASURY,
Washington, DC, July 21, 1999.

Hon. Strom Thurmond,
U.S. Senate,
Washington, DC.

DEAR SENATOR THURMOND: We write to advise you of our concerns about the provisions of H.R. 1658, the "Civil Asset Forfeiture Reform Act," which passed the House on June 24, 1999. This legislation as currently drafted will severely jeopardize the use of civil asset forfeiture by law enforcement to combat serious crimes, including organized crime, money laundering, and bank fraud. Asset forfeiture strikes at the very core of criminal activity, disrupting the flow of criminal profits and seizing the property used to commit crimes. It dismantles criminal organizations in a way that criminal convictions against individuals cannot. As such, it is an essential part of our overall law enforcement strategy.

We want to stress that we are committed to fair and just civil forfeiture procedures. We fully support asset forfeiture reform where appropriate and needed. Indeed, the Administration is currently proposing a bill that would enact broad reforms in both the civil and criminal asset forfeiture laws. Unfortunately, H.R. 1658 differs from the Administration's bill in a number of important respects. For instance, although the Administration's bill would raise the government's initial burden of proof in civil forfeitures to a "preponderance of the evidence," H.R. 1658 would raise the standard even further, to "clear and convincing evidence." Proof by a preponderance of the evidence is the standard that applies in virtually all civil litigation. We do not think it should be more difficult for the government in civil proceedings to forfeit child pornography equipment or the proceeds of illegal drug trafficking than it is to collect a delinquent student loan.

Additionally, in contrast to the Administration's bill, H.R. 1658 eliminates the 10 percent cost bond requirement, provides for the return of property to claimants pending judgment in certain circumstances, and requires the appointment of counsel for certain types of civil claimants. We are deeply concerned that these and other provisions will severely undermine the government's ability to forfeit criminal assets in appropriate cases. Indeed, the greatest benefits of the bill may redound to criminal organizations and groups, which frequently insulate the assets of their leaders through unknowing underlings who become the claimants in civil forfeiture cases.

The Department of the Treasury strongly supports enactment of meaningful and balanced civil forfeiture reform legislation—legislation that ensures fairness while protecting the due process rights of all claimants. However, any legislation must also support law enforcement's ability to dismantle criminal organizations and compensate crime victims. H.R. 1658 does not embody this balanced approach to forfeiture reform. We look forward to working with you and other Members to craft a bill that does.

Sincerely,

JAMES E. JOHNSON,
Under Secretary (Enforcement).

JOHN W. MAGAW,
Director, Bureau of Alcohol, Tobacco and Firearms.

DAVID PALMER,
Acting Assistant Commissioner, Criminal Investigation Division, Internal Revenue Service.

RAYMOND W. KELLY,
Commissioner, U.S. Customs Service.

BRIAN L. STAFFORD,
Director, U.S. Secret Service.

Senator THURMOND. Ms. Tischler.

STATEMENT OF BONNI G. TISCHLER

Ms. TISCHLER. Mr. Chairman, members of the subcommittee, good afternoon. I am pleased to have this opportunity to testify on the vital importance of asset forfeiture to law enforcement. I believe this hearing will shed important light on one of the chief instruments we use to disrupt international crime, and we thank you for that.

The Customs Service has a proud tradition of employing forfeiture laws effectively and responsibly. Use of forfeiture by Customs dates back to the very founding of our agency over 200 years ago. The first Congress passed forfeiture statutes under the customs laws of 1789. At that time, the statutes were used primarily to confiscate pirate ships, as has been pointed out, preying upon legitimate commerce in U.S. waters.

Today, they are employed in the battle against all aspects of international crimes—drug smugglers, terrorists, child pornographers, counterfeiters, and others who would compromise the security and well-being of our citizens. Indeed, asset forfeiture is one of the most powerful tools employed by all of the Federal Government, not just the U.S. Customs Service.

Not only does it enable us to seize what contraband comes into the country—illegal drugs, child pornography, counterfeit goods—but also what is going out-illicit cash and the weapons that promote the further expansion of criminal activity. Asset forfeiture enables us to take the profit out of crime and target those who would otherwise be out of our reach.

Delivering a blow to a drug kingpin living comfortably abroad beyond our grasp often entails hitting him where it really hurts, his bank accounts, his businesses, and all other means he might use to launder the proceeds of his trade. Crippling these individuals and their illicit networks involves not just the seizure of illegal goods, but also the resources that fuel criminal operations.

To ensure that our seizure operations are done correctly, with the maximum precision and efficiency, Customs created Asset Identification and Removal Groups, or AIRG's. These groups are comprised of special agents, auditors, accountants and contract data analysts, and are especially trained to target the assets of criminal organizations. Personnel assigned to these teams are trained in asset identification, removal, and forfeiture.

The Treasury Executive Office of Asset Forfeiture funds the training program that each group member must complete before conducting cases. AIRG members take part in our investigations right from the beginning and play an important role in all phases of our investigative activities, so much so that these groups are now located in each of our 20 SAIC offices around the country. They have been very successful. Any weakening of the asset forfeiture laws would have a negative effect on their work. Let me mention a few specific examples to highlight this point.

A suspect named Carlos Cardoen was indicted in Miami for supplying cluster bombs to Iraq. He was never caught and he remains a fugitive to this day. However, Customs was able to identify and seize over $10 million that he had generated through the sale of

the bombs. Under H.R. 1658, passed recently by the House, the Customs Service might have had to return the $10 million to Cardoen until a court of law could decide the issue. Under the suspect's continued control, the money could very well have gone toward the procurement of even more weapons. Even if a court order against Cardoen were rendered, it is highly unlikely it would have resulted in the timely surrender of his assets.

Another case in point: Customs works closely with Canadian authorities in telemarketing fraud cases, many of which are ongoing. Our Seattle office recently arrested an individual by the name of James Down, who bilked more than 900 elderly victims out of millions of dollars in a telemarketing scam. Some of the victims lost their life savings, but with the help of civil seizure and asset forfeiture laws, we were able to freeze more than $12 million that Down had hidden in offshore accounts.

Although we pursued criminal charges against Down, much of the evidence needed was located in foreign countries, making the investigation difficult and extremely time-consuming. Thanks to civil asset seizure and forfeiture, we were at least able to ensure that his victims were compensated.

During Operation Casablanca, civil seizure and asset forfeiture laws were used to seize over $67 million from bank accounts used by the drug cartels. To date, more than $30 million has been forfeited to the government. Through negotiations with the banks and private individuals, about $10 million has been returned.

During Operation Casablanca, Customs seized money from Jose Alvarez Tostado, an indicted leader of the Juarez cartel. Tostado is now a fugitive and his money was forfeited. Under H.R. 1658, Tostado, who refuses to appear in court, could fight the forfeiture without ever having to leave his hiding place. The administration's bill that Mr. Holder and Mr. Johnson have spoken about would eliminate this special protection of fugitives.

These cases highlight the potential losses we could incur were H.R. 1658 to become law; in one instance restitution to elderly victims, in others the financial resources of known and indicted criminals. Moreover, the U.S. Government could be put in the ironic position of paying for the legal representation of terrorist organizations, drug cartels, organized crime syndicates, and dangerous fugitives.

As international crime moves beyond our borders, so must Customs. The capacity to seize assets allows us to extend our reach to criminals and networks that might otherwise remain untouchable. We are proud of our successes on this front and we are proud of our responsible, professional and efficient use of seizure methods.

That said, we are fully aware of the sensitivity and caution with which one must utilize seizure and forfeiture techniques. For this reason, Customs is committed to an asset identification and removal program that is responsible, fair and equitable. As I mentioned before, Customs has deployed fully trained asset seizure teams in each of our SAIC offices. Commissioner Kelly has mandated that all investigations involving the potential seizure of real property and/or operating businesses, no matter what the value, are coordinated through these groups. There are no exceptions to this policy.

Additionally, Commissioner Kelly has implemented a policy which calls for a preliminary review of all potential seizures valued over $100,000. Such seizures must first be approved by a chain of command, including the SAIC, the Assistant Director of Asset Forfeiture, and the Director of our Investigative Services Division. All potential seizures of over $1 million must be approved by myself. The only exception to this review process is generated by exigent circumstances such as border search.

Mr. Chairman, committee members, it is certainly proper for the Congress and the American people to seek accountability from their law enforcement community on the sensitive matter of forfeiture practices. It is a serious responsibility, one we must take great pains to manage properly. Customs has been and remains fully committed to asset identification, removal and forfeiture programs that stand up to the strongest test of fairness. The dedication and zeal with which we attack the roots of international crime must be balanced against an unwavering respect for individual rights. Our policies and practices are designed to make sure that that balance is never lost.

Thank you for this opportunity to present our viewpoint today before your subcommittee.

Senator THURMOND. Thank you.

[The prepared statement of Ms. Tischler follows:]

PREPARED STATEMENT OF BONNI G. TISCHLER

Mr. Chairman, members of the subcommittee, good afternoon. I am pleased to have this opportunity to testify on the vital importance of asset forfeiture to law enforcement. I believe this hearing will shed important light on one of the chief instruments we use to debilitate international crime.

The Customs Service has a proud tradition of employing forfeiture laws effectively and responsibly. The use of forfeiture by Customs dates back to the very founding of our agency over two hundred years ago. The First Congress passed forfeiture statutes under the Customs laws in 1789. At that time, the statutes were used primarily to confiscate pirate ships preying upon legitimate commerce in U.S. waters. Today, they are employed in the battle against all faces of international crime: drug smugglers, terrorists, child pornographers, counterfeiters, and others who would compromise the security and well being of our citizens.

Indeed, asset forfeiture is one of the most powerful tools employed by all of Federal law enforcement, not just the Customs Service. Not only does it enable us to seize what contraband comes inbound—the illegal drugs, the child pornography, the counterfeit goods—but also what is going out—the money, and the weapons that promote the further expansion of criminal activity. Asset forfeiture enables us to take the profit out of crime and target those who would otherwise be out of our reach. Delivering a blow to a drug kingpin living comfortably abroad, beyond our grasp, often entails hitting him where it really hurts—his bank accounts, his dummy businesses, and all other means he might use to launder the proceeds of his trade. Crippling these individuals and their illicit networks involves not just the seizure of illegal goods, but also the resources that fuel criminal operations.

To ensure that our seizure operations are done right, with the maximum precision and efficiency, Customs created Asset Identification and Removal Groups, or AIRG's. These groups, which are comprised of Special Agents, Auditors, Accountants, and contract data analysts, are specially trained to target the assets of criminal organizations. Personnel assigned to these teams are trained in asset identification, removal and forfeiture. The Treasury Executive Office of Asset Forfeiture funds the training program that each group member must complete before conducting cases. AIRG members take part in our investigations right from the beginning, and play an important role in all phases of our investigative activities—so much so that AIRG's are now located in each of our 20 SAC offices around the country.

Let me mention a few specific examples to highlight this point. A suspect named Carlos Cardoen was indicted in Miami for supplying cluster bombs to Iraq. He was never caught and he remains a fugitive to this day. However, Customs was able to

identify and seize over $10 million dollars that he had generated through the sale of the bombs. Under H.R. 1658, passed recently by the House, the Customs Service might have had to return the $10 million to Cardoen until a court of law could decide the issue. Under the suspect's continued control, the money could very well have gone towards the procurement of more weapons. Even if a court order against Cardoen were rendered, it is highly unlikely it would have resulted in the timely surrender of his assets.

Another case in point: Customs works closely with Canadian authorities in telemarketing fraud cases, many of which are ongoing. Our Seattle office recently arrested an individual by the name of James Down who bilked more than 900 elderly victims out of millions of dollars in a telemarketing scam. Some of the victims lost their life savings. But with the help of civil seizure and asset forfeiture laws we were able to freeze more than $12 million that Down had hidden in off shore accounts. Although we pursued criminal charges against Down, much of the evidence needed was located in foreign countries, making the investigation difficult and time consuming. But thanks to civil asset seizure and forfeiture, we were at least able to ensure that his victims were compensated.

During Operation Casablanca, civil seizure and asset forfeiture laws were used to seize over $67 million dollars from bank accounts used by the drug cartels. To date, more than $30 million dollars has been forfeited to the government. Through negotiations with the banks and private individuals, about $10 million has been returned. During Operation Casablanca, Customs seized money from Jose Alvarez Tostado, an indicted leader of the Juarez Cartel. Tostado is now a fugitive and his money was forfeited. Under H.R. 1658, Tostado, who refuses to appear in court could fight the forfeiture without ever having to leave his hiding place. The Administration's bill that Mr. Holder and Mr. Johnson have spoken about would eliminate this special protection to fugitives.

These cases highlight the potential losses we could incur were H.R. 1658 to become law: in one instance, restitution to elderly victims, in others the financial resources of known and indicted criminals. Moreover, the U.S. Government could be put in the ironic position of paying for the legal representation of terrorist organizations, drug cartels, organized crime syndicates, and dangerous fugitives.

As international crime moves beyond borders, so must Customs. The capacity to seize assets allows us to extend our reach to criminals and networks that might otherwise remain untouchable. We're proud of our successes on this front, and were proud of our responsible, professional, and efficient use of seizure methods. That said, we are fully aware of the sensitivity and caution with which one must utilize seizure and forfeiture techniques. For this reason, Customs is committed to an asset identification and removal program that is responsible, fair, and equitable.

As I mentioned before, Customs has deployed fully trained asset seizure teams in each of our SAC offices. Commissioner Kelly has mandated that all investigations involving the potential seizure of real property and/or operating businesses, no matter the value, are coordinated through these groups. There are no exceptions to this policy.

Additionally, Commissioner Kelly has implemented a policy which calls for a preliminary review of all potential seizures valued at over $100,000. Such seizures must first be approved by a chain of command, including, the Special Agent in Charge, the Assistant Director of our Asset Forfeiture Section, and the Director of our Investigative Services Division at Headquarters. All potential seizures of over $1 million must be approved by the Assistant Commissioner for the Office of Investigations. The only exception to this review process is generated by exigent circumstances, such as a border search.

Mr. Chairman, it is certainly proper for the Congress and the American people to seek accountability from their law enforcement community on the sensitive matter of forfeiture practices. It is a serious responsibility, one we must take great pains to manage properly. Customs has been, and remains, fully committed to asset identification, removal and forfeiture programs that stand up to the strongest tests of fairness. The dedication and zeal with which we attack the roots of international crime must be balanced against an unwavering respect for individual rights. Our polices and practices are designed to make sure that this balance is never lost.

Senator THURMOND. Mr. Fiano.

STATEMENT OF RICHARD FIANO

Mr. FIANO. Chairman Thurmond, members of the committee, thank you for the opportunity to testify today on the subject of asset forfeiture.

There is legislation pending before the Congress which will quite simply undercut the ability of law enforcement to forfeit illegally-gained property or property used to facilitate a crime from drug dealers. Asset forfeiture is one of law enforcement's most effective weapons against drug trafficking because it takes the profit out of crime. Moreover, property is not seized unless the government meets the standard of probable cause. This is the same standard of proof required to arrest a person or obtain a search warrant from a Federal judge.

Powerful international drug syndicates operate around the world, supplying drugs to American communities. They smuggle tons of cocaine and heroin into the United States and distribute it and sell it in communities across the country. These organizations generate millions, possibly billions of dollars of U.S. currency as profit. They drain this currency from the American economy and divert it to the personal consumption of a few individuals living outside of the country.

Because of currency transaction reporting requirements, to a large degree illicit profits are no longer laundered through banks, but are smuggled in vast amounts out of the United States and into foreign hands. Many of DEA's cases involve seizing bulk cash smuggled out of the United States by couriers who are well paid for their services. In many of these cases, nobody claims ownership of this ill-gotten cash. To do so would be to run the risk of criminal prosecution, so the monies are administratively forfeited.

There are several circumstances where civil asset forfeiture, pursuant to 21 U.S.C. 881, is the most effective method of removing the instrumentalities and profits from narcotics trafficking. In instances where law enforcement intercepts an illegal money courier with bulk amounts of cash, civil asset forfeiture law enables the DEA to seize and forfeit these illegally obtained assets. In many cases, the courier denies any knowledge of illegal activity, disavows any ownership, and is free to leave throughout the encounter. Therefore, criminal forfeiture is not an option. However, DEA would be able to forfeit that currency after proving by a preponderance of the evidence that the currency either represents the proceeds of the narcotics trafficking or was intended as a payment for narcotics.

Allow me to turn to some examples of how DEA has used asset forfeiture. In most drug law enforcement cases, it is more than clear that the individuals involved are engaged in criminal activity and their assets are probably subject to forfeiture.

Code 31: On November 25, 1998, an investigator for the special narcotics prosecutor's office in New York City acting in an undercover capacity was to meet a currency counterfeiter at a prearranged location. While the undercover officer was waiting, an unknown male driving a Toyota stopped, motioned for the officer to approach his car, asking if he was Code 31. Then he asked the officer if he was there to pick up the 2 percent at 11:30.

The officer agreed, knowing that the term "2 percent" referred to the money launderer's commission and that the male was advising him that the 2-percent commission was with the money to be laundered. The driver then opened the rear storage area of the Toyota from inside the vehicle and told the officer that the money

was inside the compartment. The undercover officer then removed the black bag from the storage compartment. The driver of the Toyota then drove away.

The black bag was found to contain in excess of $200,000 in U.S. currency. There was no way to ascertain the owner of this cash and no one ever came forward to claim it. The money was therefore administratively forfeited. Interestingly enough, this officer was there working an unrelated counterfeiting case.

When assets are forfeited, they are put into an asset forfeiture fund which is used to help the victims of crime. One example can be found in a recent case in Philadelphia. Two federally forfeited properties were transferred to community action groups for use in anti-drug and educational activities. The properties were formerly used as stash houses by drug organizations operating in neighborhoods or purchased by the drug dealer using drug proceeds.

Sister Carol Kreck, who accepted the title to one of the properties on behalf of the United Neighbors Against Drugs, stated that the property will serve as a community center for drug abuse prevention, job skills training programs, and safe haven educational programs for neighborhood children.

Additionally, DEA carries out many of its activities in partnership with State and local police. The highway interdiction program is led by State and local agencies and is supported by DEA's El Paso Intelligence Center. As an example, on October 30, 1996, two troopers from the Texas Department of Public Safety performed a traffic violation stop on a van with New York plates on Interstate 30. They became suspicious when they learned that one man was from New York, while the other was from El Paso, and they were not well-acquainted. Neither man owned the van and their stories conflicted regarding where they were going and where they had been.

The driver and passenger consented to a search and the troopers found 99 bundles of money hidden in the vehicle's walls. It took 3 hours to count the $1.3 million concealed in the van. As the officers continued their search, they discovered another $700,000, bringing the total to $2 million. Follow-up investigation connected this interdiction and other seizures of money to a cocaine warehouse in Tucson and to ongoing investigations in Texas, Arizona, Illinois, Michigan and New York. These investigations would not be as successful if we did not have asset forfeiture authority.

I have some pictures of some of the other seizures, including a $5.6 million seizure made in El Paso which was money that was going back into Mexico, that I would like to add into the record.

Asset forfeiture plays a key role in our most complex investigations, some of which could not take place successfully without this vital tool. Twenty-two separate DEA, FBI and U.S. Customs investigations under the name of Operation Rio Blanco led to the identification of the top leaders of the trafficking group operating in the United States, 90 arrests, and the seizure of 3,500 kilos of cocaine and $15 million in U.S. currency.

Public notice of the seizure of the assets would certainly have resulted in the early culmination of the wire intercept investigation prior to the acquisition of sufficient evidence to prosecute the leaders of the organization. Legislation now pending before the Con-

gress would require that notice of such seizures be given within 60 days of the seizure, no exceptions without an order of the court. If this provision becomes law, operations like Rio Blanco will be severely hindered or compromised upon notification of the seized assets.

Aside from criminal investigation, asset forfeiture plays a key——

Senator THURMOND. Your time is up. If you can wind up, go ahead for another minute.

Mr. FIANO. Aside from criminal investigation, asset forfeiture plays a key role in money laundering investigations. The traffickers will attempt to obscure the drug profits, making it appear that the money is legitimately-gained wealth. DEA strategy is to direct law enforcement actions not only at the violators, but also toward the seizure of their illegally-obtained and laundered assets.

DEA is working with the Department of Justice and other Federal agencies to craft legislation which can strike a balance between the needs of law enforcement and the rights of innocent individuals.

That concludes my statement. Thank you.

[The prepared statement of Mr. Fiano and information referred to follow:]

PREPARED STATEMENT OF RICHARD FIANO

Chairman Thurmond and members of the Committee, thank you for the opportunity to testify today on the subject of asset forfeiture. Asset forfeiture is one of the most important tools in DEA's fight against drug traffickers. There is legislation pending before the Congress which will, quite simply, undercut the ability of law enforcement to forfeit illegally gained property, or property used to facilitate a crime, from drug dealers, terrorists, alien smugglers, and other criminals. While other witnesses on the panel can speak on the details of the pending legislation, my testimony will focus on the central role asset forfeiture plays in drug law enforcement. Asset seizures and forfeitures under Title 21, U.S. Code, the vast majority of which are generated from drug cases, give DEA the largest share of asset forfeitures among all the Federal law enforcement agencies.

Most Americans agree that criminals, including drug dealers, should not be allowed to benefit financially from their illegal acts. Federal law provides that the profits and proceeds of designated crimes, as well as property used to facilitate certain crimes, are subject to forfeiture to the government. Asset forfeiture is one of law enforcements most effective weapons against drug trafficking—because it takes the profit out of crime. Not only are the profits of crime taken away from the criminals, but the money is put into the Asset Forfeiture Fund, which is used to help the victims and to fund law enforcement programs to further combat crime.

Asset forfeiture has been a part of the American legal system jurisprudence since the founding of the nation. Current Federal law contains numerous protections against possible abuse. Property is not seized unless the government meets the standard of "probable cause." This is the same standard of proof required to arrest a person or to obtain a search warrant from a federal judge. If a claim to the property is made it is not forfeited unless the government meets the standard of preponderance of evidence. There are protections against the seizure of innocent property. The process provides for the protection of innocent parties whose property may have been seized, including banks and financial institutions that may have an interest in the seized property. Such parties may elect to have the courts consider their interests, or they may seek administrative relief without the need to go to court.

I. DRUG ASSET FORFEITURE AND INTERNATIONAL ORGANIZED CRIME

Powerful international drug syndicates operate around the world, supplying drugs to American communities, employing thousands of individuals to transport and distribute drugs to American youth. They smuggle tons of cocaine and heroin into the United States and distribute and sell it in communities across the country. As a result of selling their poison, these organizations generate millions—possibly billions

of dollars of U.S. currency as profit. They need to return this profit somehow to Colombia and Mexico. The drug traffickers take money from American citizens who become hooked on drugs. They drain this currency from the American economy and divert it to the personal consumption of a few individuals living outside of the country. United States that forfeiture can be employed as an effective weapon against drug trafficking.

Where, in the past, seizures of currency involved in drug cases might have been in the thousands or tens of thousands of dollars, now, seizures of bulk amounts of U.S. currency are in the millions and tens of millions of dollars. In the nature of the international drug trade, because of currency transaction reporting requirements, to a large degree illicit profits are no longer laundered through banks, but are smuggled in vast amounts out of the U.S. and into foreign hands. Many of DEA's cases involve seizing these shipments of bulk cash being smuggled outside of the United States. The international traffickers isolate themselves from the monies, and have the money transported separately from the drugs, oftentimes by couriers who are well paid for their services. In many of these cases, nobody claims ownership of this ill-gotten cash—to do so would be to run the risk of criminal prosecution—so the monies are administratively forfeited.

There are large dollar amounts connected with drug asset forfeiture, because of the nature of the drug trade. One example from just one case will illustrate this point. During 1998, in numerous investigations within the United States, DEA worked with other Federal, state and local law enforcement partners to arrest members of an international drug trafficking syndicate who were operating on U.S. soil. Resulting from a series of cooperative investigations which linked trafficking organizations in Mexico, Colombia and the Dominican Republic to their operatives in New York, Los Angeles, Atlanta, and a variety of other U.S. locations, over 1,200 individuals were arrested; almost 13 tons of cocaine, two and a half tons of methamphetamine, 127 pounds of heroin, and almost $60 million in U.S. currency were seized and subject to criminal forfeiture.

Asset forfeiture, both civil and criminal, is one of DEA's most powerful weapons against narcotics traffickers. There are several circumstances where civil asset forfeiture, pursuant to 21 U.S. C. § 881, is the most effective method of removing the instrumentalities and profits from narcotics trafficking. Since criminal forfeiture requires the conviction of the violator, it is not available in cases where the drug trafficker is a fugitive, deceased or resides outside the reach of U.S. extradition laws.

In instances where law enforcement intercepts an illegal money courier with bulk amounts of cash, civil asset forfeiture law enables the DEA to seize and forfeit these illegally obtained assets. In such cases, criminal charges are rarely brought against the couriers. The couriers, who either know little about the underlying illegal activity or are told not to ask questions, are paid generously for their services. Couriers are frequently chosen because they lack a criminal drug history and are purposefully isolated from the underlying illegal activity through an intricate system of cells which make up the structure of the drug trafficking organization. In many cases, the courier denies any knowledge of illegal activity, disavows any ownership interest in the currency, may not be arrested, and is free to leave throughout the encounter. Therefore, criminal forfeiture is not an option. However, as a result of the investigation, DEA would be able to forfeit that currency after proving, by a preponderance of the evidence, that the currency either represents the proceeds of the narcotics trafficking or was intended as a payment for narcotics.

Today's international organized criminal groups are strong, sophisticated, and destructive organizations operating on a global scale. They are shadowy figures who send thousands of workers into the United States who answer to them via daily faxes, cellular phones, or pagers. These syndicate bosses have at their disposal airplanes, vessels, vehicles, radar, communications equipment, and weapons in quantities which rival the capabilities of some legitimate governments. Whereas previous organized crime leaders were millionaires, the Cali drug traffickers and their counterparts from Mexico are billionaires. These enormously wealthy criminals should not be allowed to enjoy the profits of their crimes. Drug trafficking is a crime of greed and is profit motivated. Asset forfeiture is a vital tool in striking blows at the drug trade at one of its most vulnerable spots, the money. Law enforcement must be able to take the profit out of drug trafficking.

One way in which these international drug traffickers use their vast wealth is to purchase the very best, state-of-the-art telecommunications equipment. They use this sophisticated technology to carry out command and control their operations. Money is no object. They have been purchasing and using some of the best available encryption technology in an effort to secure their communications from law enforcement. The drug lords now routinely turn on encryption devices in the middle of their conversations with surrogates in the United States. The content of these conversa-

tions could contain details of shipments, storage of loads, the return of millions of dollars in profits, the bribing of government or law enforcement officials, or the murder of associates, rivals, or political or police officials who stand in their way. Using court ordered wiretaps, law enforcement intercepts these communications in order to build cases leading to the criminals' arrests and to the seizure and forfeiting of their property.

II. ASSET FORFEITURE: DEA INVESTIGATIONS AND OPERATIONS

Allow me to turn to some examples of how DEA has used asset forfeiture in our money laundering investigations and enforcement operations. Financial and asset forfeiture investigative activity is an integral part of DEA investigations today. The Asset Forfeiture Section oversees the asset forfeiture program within DEA. No property is forfeited unless it is determined to be a tool for, or the proceeds of, illegal activities such as drug trafficking, organized crime, and money laundering.

In most drug law enforcement cases, it is more than clear that the individuals involved are engaged in criminal activity, and their assets are properly subject to forfeiture. On November 25, 1998, an investigator for the Special Narcotics Prosecutor's Office in New York City, acting in an undercover capacity, was to meet a currency counterfeiter at a prearranged location. While the undercover officer was waiting, an unknown male driving a Toyota stopped and motioned for the officer to approach his car, asking if he was "code 31", then asked the officer if he was there to pick up the two percent at 11:30. The officer agreed, knowing that the term "two percent" referred to the money launderer's commission, and that the male was advising him that the two percent commission was with the money to be laundered.

The driver then opened the rear storage area of the Toyota from inside the vehicle and told the officer that the money was inside the compartment. The undercover officer then removed a black bag from the storage compartment. The driver of the Toyota then drove away. The black bag was found to contain in excess of $200,000 in United States currency. There was no way to ascertain the "owner" of this cash, and no one ever came forward to claim it. The money was, therefore, administratively forfeited.

The DEA has asset forfeiture investigative groups in nearly all of its field divisions, and provides asset forfeiture training to thousands of drug law enforcement officers, both domestic and international. DEA's asset forfeiture program was responsible in fiscal year 1997, in over 7,500 cases, for seizure of over $382 million. In fiscal year 1998, there were more than 7,700 DEA cases, in which over $337 million was seized. As part of over 6,000 cases so far in fiscal year 1999, more than $451 million has been seized.

When assets are forfeited, they are put into an Asset Forfeiture Fund, which is used to help the victims of crime. One example of how these activities play a key role in the war on drugs, and often result in substantial benefit to the community can be found in a recent case in Philadelphia. Two federally forfeited properties were transferred to community action groups for use in anti-drug and educational activities. The properties were formerly used as "stash" houses by drug organizations operating in the neighborhoods or purchased by the drug dealer using drug proceeds. The two properties were seized pursuant to two federal narcotics investigations involving two organizations responsible for the distribution of significant quantities of cocaine and heroin in local Philadelphia neighborhoods. Thirteen defendants were arrested and convicted as a result of these investigations and received sentences of up to fifteen years.

The groups to which the properties were transferred, United Neighbors Against Drugs and Community United Neighbors Against Drugs are using the properties, which were rehabilitated by government employees and citizen volunteers, to expand programs which provide a safe haven for neighborhood children. Sister Carol Kreck, who accepted the title to one of the properties on behalf of the United Neighbors Against Drugs, stated that the property will serve as a community center for drug abuse prevention, job skills training programs and "safe haven" educational programs for neighborhood children.

DEA carries out many of its activities in partnership with State and Local police. One example is the nation's most effective drug interdiction programs which has been carried out on its highways for over a decade, and has been responsible for seizures that match or exceed those of other, more costly programs. The Highway Interdiction program is led by State and Local agencies, and is supported by DEA's El Paso Intelligence Center [EPIC]. Through EPIC, state and local agencies can share real-time information on arrests and seizures with other agencies, obtain immediate results to record check requests, and receive detailed analysis of drug seizures to support investigations.

The interdiction program is active along the highways and interstates most often used by drug organizations to move illicit drugs money. Since the initiation of this program in 1986, the following seizures were made on the Nation's highways: $510,000,000 in U.S. currency; 872,777 kilograms of marijuana; 116,188 kilograms of cocaine; 748 kilograms of crack cocaine; 369 kilograms of heroin, and 3,274 kilograms of methamphetamine. In the last calender year alone, from January 1998 through December 1998, Pipeline Seizures totaled: $86,189,860 in U.S. currency; 121,587 kilograms of marijuana; 14,860 kilograms of cocaine; 80 kilograms of crack cocaine; 75 kilograms of heroin; and 979 kilograms of methamphetamine. These results dramatically show the high value of this interdiction program and the importance of seizing and forfeiting drug related assets.

DEA Agents across the country, together with State and Local partners, carry out controlled deliveries of the drug shipments they seize. Our operations do not stop with intercepting the drugs or cash, they are used to develop information on the trafficking organizations. We follow the cash because it forms a trail to the criminals who transport the drugs. By identifying and arresting members of the transportation cells of drug trafficking organizations, along with the U. S. customers, law enforcement authorities are better positioned to target the command, control, and communication of a criminal organization, and arrest its leadership.

Many of our investigations and enforcement operations point to the connection between domestic law enforcement in the United States and the problems posed by international drug trafficking organizations in Mexico. These operations show, as do most of our investigations, that arresting the leaders of international organized crime rings often ultimately begins with a seemingly routine event in the United States. For example, on October 30, 1996, two troopers from the Texas Department of Public Safety performed a traffic violation stop (failure to drive in a single, marked lane) on a van with New York plates on Interstate 30. They became suspicious when they learned that one man was from New York while the other was from El Paso, and they were not well acquainted. Neither man owned the van and their stories conflicted regarding where they were going and where they had been. The driver and passenger consented to a search, and the troopers found 99 bundles of money hidden in the vehicle's walls. It took three hours to count the $1.3 million concealed in the van. As the officers continued their search, they discovered another $700,000, bringing the total to $2 million.

On December 3, 1996, after receiving an anonymous call, the Tucson Police Department and drug task force officers raided a warehouse containing 5.3 tons of cocaine. On December 13, 1996, the same Texas troopers stopped a northbound tractor trailer and seized 2,700 pounds of marijuana. Follow-up investigation connected this interdiction to their previous seizure of money, to the cocaine warehouse in Tucson, and to ongoing investigations in Texas, Arizona, Illinois, Michigan, and New York.

These investigations would not be as successful as they were, if we did not have asset forfeiture authority. All of these investigations provided our Special Agents and federal prosecutors with the key to uncover the operations of the Amado Carrillo-Fuentes organization. This powerful Mexican syndicate was apparently using U.S. trucks and employees to transport huge amounts of cocaine to various U.S. destinations. The resulting investigation, Operation RECIPROCITY, resulted in the seizure of more than 7.4 metric tons of cocaine, 2,800 pounds of marijuana, $11.2 million in cash, and 53 arrests. RECIPROCITY showed that just one Juarez-based organized crime cell shipped over 30 tons of cocaine into American communities and returned over $100 million in profits to Mexico in less than two years. Distribution of multi-ton quantities of cocaine, once dominated by the Cali-based drug traffickers, was now controlled from Mexico in cities such as Chicago, Dallas, Denver, Houston, Los Angeles, Phoenix, San Diego, San Francisco, and Seattle. The Carrillo-Fuentes organization was also beginning to make inroads into the distribution of cocaine in the East Coast, particularly New York City, the traditional stronghold of the Cali drug cartel.

A parallel investigation, Operation LIMELIGHT, secured 48 arrests, the seizure of $7.3 million in cash, 4,102 kilograms of cocaine and 10,846 pounds of marijuana—keeping this poison off the streets of America.

Asset forfeiture plays a key role in our most complex investigations, some of which could not take place successfully without this vital tool. The 22 separate DEA, FBI, and U.S. Customs investigations in 8 different judicial districts from August 1997 to July 1998 came under the name of OPERATION RIO BLANCO. These investigations led to the identification of the top leaders of the trafficking group operating in the United States, 90 arrests, and the seizure of 3,500 kilograms of cocaine and $15 million in U.S. currency. Working within current legal restrictions, operations such as RIO BLANCO can inflict significant damage on drug trafficking organizations.

During OPERATION RIO BLANCO, drug assets were seized as a result of information obtained through wire intercepts of command and control communication devices. Some 30 court ordered wiretaps produced 5,000 intercepted phone calls—361 of which were encrypted. The seizure of the drugs and drug-related profits allowed law enforcement to identify members of the organization, trafficking routes and smuggling methods. Public notice of the seizure of the assets would certainly have resulted in the early culmination of the wire intercept investigation prior to the acquisition of sufficient evidence to prosecute the leaders of the organization. Details of ongoing investigations are routinely included in seizure reports which will be given to defense attorneys and their clients as part of the discovery process at the conclusion of the case.

Legislation now pending before the Congress would require that notice of such seizures be given within 60 days of the seizure—no exceptions without an order of the court. If this provision becomes law, operations like RIO BLANCO will be severely hindered. We want to see a compromise, allowing DEA to approve a delay in the 60 day notification requirement in situations involving long term undercover or wire intercept investigations. Without these exceptions, many investigations would be severely hindered or compromised upon notification of the seizure of the assets.

Aside from criminal investigations, asset forfeiture plays a key role in money laundering investigations. Money laundering takes place because the drug lords need to insulate themselves from the drug smuggling, in an attempt to avoid criminal prosecution. The traffickers will attempt to obscure the drug profits, making it appear that the money is legitimately gained wealth. DEA's strategy in money laundering investigations is to direct law enforcement actions not only at the arrest of the violators and the seizure of their contraband, but also towards the seizure of their illegally obtained and laundered assets. Asset forfeiture takes the profit out of drug trafficking by seizing laundered money that can be tied to trafficking. There are several examples of successful DEA investigations and operations that have resulted in such seizures.

Operation DINERO was a long term DEA and IRS money laundering undercover program initiated by the Atlanta Field Division in 1994. During the first phase of DINERO, cash transactions and money pickups, were used to connect drug trafficking and drug cell money groups in the United States. These pickups were necessary in order for undercover agents to gain greater credibility with the drug trafficking organizations' hierarchy and to establish the traffickers trust in them to handle large financial transactions.

The establishment of a Class B bank was designed to serve as the vehicle for providing what appeared to be a legitimate channel for the laundering of drug proceeds. The pick-ups were also necessary in order that, in subsequent pick-ups of cash, the services of the undercover bank could be offered. This was the first time that DEA established and operated a fictitious bank. The bank was incorporated in the British West Indies on the island of Anguilla with the cooperation of the British government.

Phase two of this operation targeted major drug trafficker accounts and assets. Undercover "shell" corporations and bank accounts were established in several key cities throughout the United States. These corporations were multi-purpose "front" businesses established for the purpose of supplying "money laundering" services. These front businesses not only gave undercover agents access to information on the financial dealing of the trafficking organization, but also assisted them in identifying distribution cells, which could be dismantled without affecting the undercover operation.

Operation DINERO was concluded with worldwide impact with the following results. Eighty-eight individuals were arrested, nine tons of cocaine was seized, and $82 million dollars in cash and property was seized. These results occurred in the United States, Canada, Spain, and Italy. The operation clearly showed that these assets were, in fact, profits of drug trafficking. Not only was a significant portion of the international drug trafficking organization crippled by the arrests, but a small fortune was denied for those members of the organization who remained at large.

In a series of investigations in New York called Operation BOOKENDS, we used selective money pick-ups from cell organizations and offered money laundering service on a very limited and select basis to the trafficking organization. One of these investigations had an unique aspect, in that, one of the defendants in the 1982 case sold a DEA undercover agent 28.5 grams of cocaine, was convicted, and sentenced to 2 years probation to be served concurrently with another conviction. In November 1997, he negotiated with an undercover agent to launder narcotic proceeds, and in December 1997, he was arrested for money laundering and $9,000 was seized. The story does not end there.

In December 1997, DEA negotiated with the president of a company associated with money laundering. During a nine-day period DEA was hand delivered approximately $972,000 by the president of the company and the previously mentioned convicted felon. There is no doubt these individuals were in possession of money gotten from illegal activities. The two were arrested for money laundering charges in violation of 18 U.S.C. 1956. At the time of their arrests additional currency was seized, which totaled in excess of $700,000.

Another example is Operation SKYLINE, a money laundering operation directed towards the identification and arrest of members of the Cali Mafia. In 1995, negotiations for money laundering services had been established, and three cash pick-ups totaling approximately $250,000 were made. Two of the negotiators stated that they were to organize the laundering of $1.2 million dollars of cocaine proceeds. These negotiators were arrested and $540,000 in cash was seized at the time of arrest. A subsequent search of a hotel room resulted in the additional seizure of another $60,000 in cash.

In a separate investigation under Operation SKYLINE, a DEA undercover agent in Houston, Texas had been in extensive telephonic negotiations with a suspect to provide money-laundering services. The currency was in a parked vehicle and the undercover agent was provided with a description of the vehicle and the license of the vehicle. During these negotiations, the surveillance agents were able to locate the suspect and the "stash" vehicle. The undercover agent ultimately refused to take receipt of the money. Uniformed officers stopped the vehicle on a pretext, and recovered approximately $600,000 of U.S. Currency that was wrapped in Christmas paper in the trunk of the vehicle. Both suspects denied knowledge or ownership of the money. Upon the culmination of Operation Skyline over $2,700,000 was seized administratively along with 85 kilograms of cocaine, and twenty-one people were arrested.

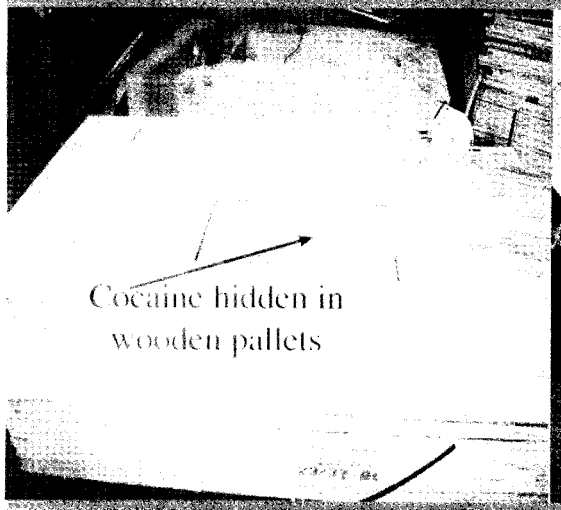
These examples show how we use asset forfeiture to take the profit out of drug trafficking. We are sure that most Americans agree that criminals, including drug dealers, should not be allowed to benefit financially from their illegal acts. We can work within current Federal law. Current law provides that the profits and proceeds of designated crimes, as well as property used to facilitate certain crimes, are subject to forfeiture to the government. Asset forfeiture, operating within the strict requirement of the law, is one of law enforcement's most effective weapons against drug trafficking. If asset forfeiture law is unduly weakened, it would severely cripple law enforcement's ability to strike the kind of blows against drug trafficking illustrated in these examples.

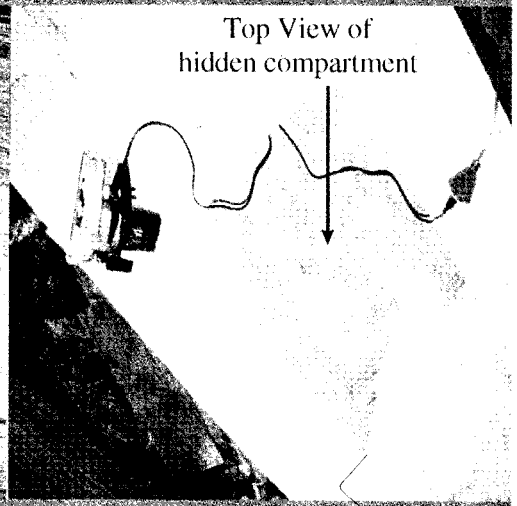
III. CONCLUSION

In conclusion, let me again emphasize that DEA's asset forfeiture actions all take place within a legal framework with built-in protections for the innocent. As the illustrations in my testimony show, we conduct asset seizures against real criminals, and these actions are a vital part of DEA's efforts to combat drug crime.

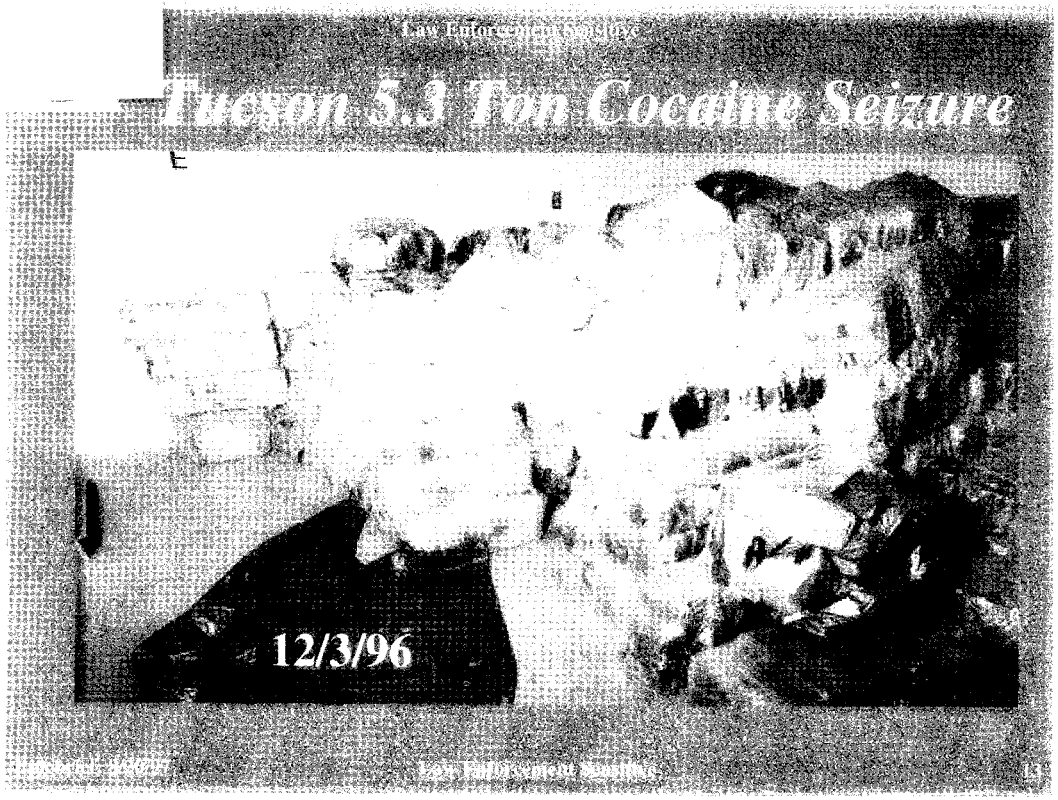
Still, we are deeply concerned with the efforts now underway to weaken current law, making it much more difficult for law enforcement to forfeit drug related and other criminally derived seized property. We believe that weakening asset forfeiture laws will directly benefit drug dealers and their criminal associates. On the other hand, we support reforming asset forfeiture law. The DEA is working with the Department of Justice and other Federal agencies to craft legislation which can strike a balance between the needs of law enforcement and the rights of innocent individuals. We hope you will give the most careful consideration to the department's legislation, and will not support legislation which may have potentially crippling effects on drug law enforcement.

New York
614 Kilogram Cocaine Seizure
June 11, 1997





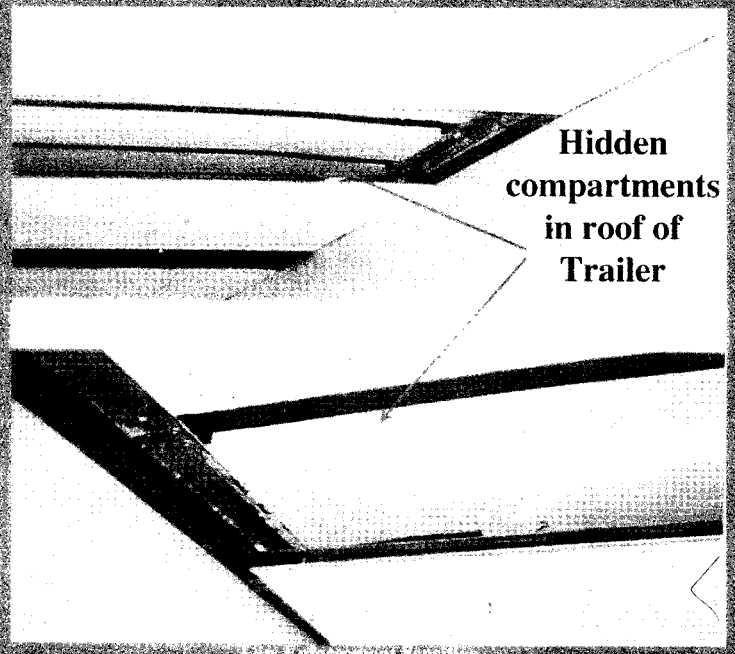
New York
614 Kilogram Cocaine Seizure
June 11, 1997


Law Enforcement Sensitive
Tucson 5.3 Ton Cocaine Seizure
12/3/96
Law Enforcement Sensitive
13

Robert Helfer's Tractors in El Paso

Law Enforcement Sensitive

Helfer's Trapped Trailer



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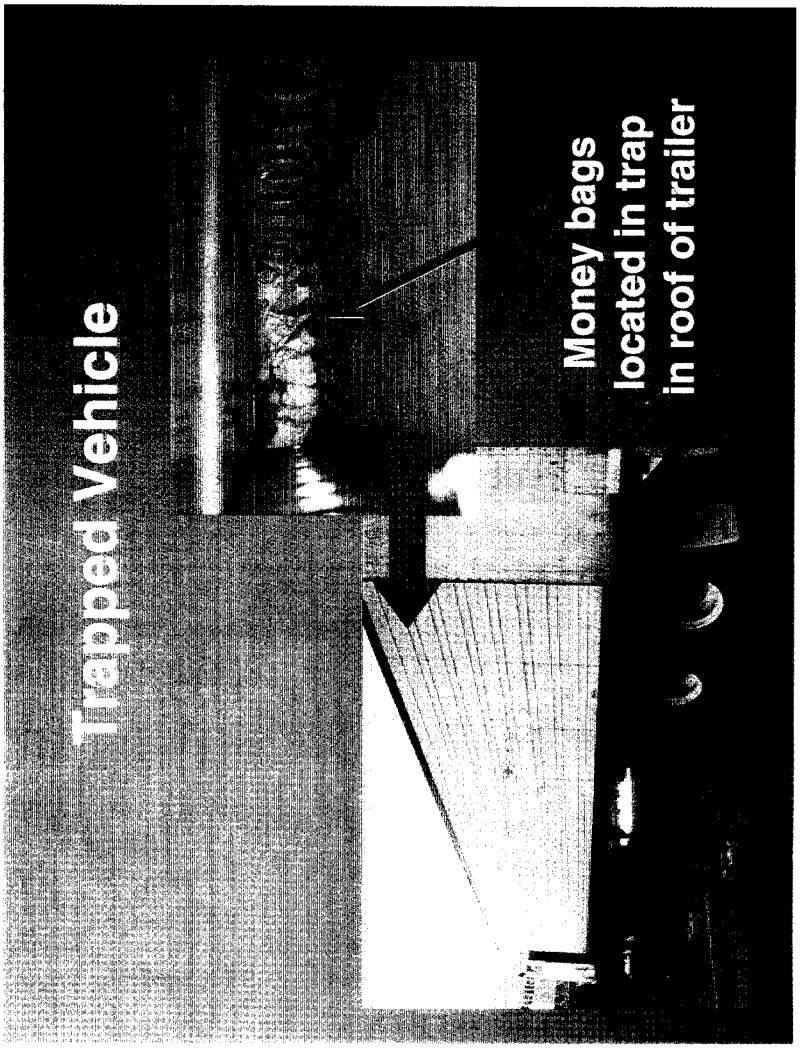
Law Enforcement Sensitive

El Paso, Texas
$5.6 Million Seizure on April 9, 1997


Trapped Vehicle
Money bags
located in trap
in roof of trailer

Senator THURMOND. Mr. Holder, criticism of Federal forfeiture law has focused on civil forfeiture rather than criminal forfeiture. It appears that court filings by the Justice Department for civil forfeitures have decreased considerably in recent years, from over 5,900 in 1990 to less than 2,400 in 1997.

The question is has the Justice Department attempted to focus more on criminal forfeiture in recent years, and why?

Mr. HOLDER. I am not sure I would say that we have tried to focus on criminal forfeiture more than civil forfeiture. Depending on the circumstances, you would use one or the other. I mean, there are instances in which you cannot use criminal forfeiture, for instance, if the defendant is dead or is a fugitive. Criminal forfeiture statutes are not as comprehensive as they are on the civil side.

So it is not a question of us abandoning one or the other, but really trying to determine where we can most appropriately use one or the other. Our real concern, though, today is with regard to the civil forfeiture provisions and the need to maintain them or keep them in such a form that we can continue to use them in the effective way that we think we have in the past few years.

Senator THURMOND. Mr. Holder, if anyone who is searched and interested in seized property could ask a court to provide them free legal counsel, what impact would this have on the number of frivolous claims?

Mr. HOLDER. I think there is a real potential for an increase in the number of claims, and I think a substantial number of them could be frivolous if a person simply walks in and under H.R. 1658 had the ability to get a lawyer appointed for them, did not have to post a bond. There is really nothing to be lost by getting a lawyer, filing a claim, and then if the government does not respond within the allotted time having the property returned to you. Given that fact situation, it seems to me that the potential for the filing of frivolous claims really raises pretty dramatically.

Senator THURMOND. Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman. Years ago, when my son who is a prosecutor now was young, there used to be an expression, "get real." I think it is time for us to get real here.

I am with you guys; I am on your side, but you haven't made a very good case so far. The idea that a leader of a drug cartel is going to seek counsel, paid for by the government, is bizarre, absolutely bizarre, crazy, makes no sense.

Second, the DEA. I challenge you to find somebody in the U.S. Senate or Congress who has been a stronger supporter of DEA than me, but two of the three cases you gave us wouldn't be affected by Hyde at all. The $1.7 or $2 million found inside that van no one is trying to claim anyway. They are bad guys, they left it behind. It is not in any way affected by Hyde, any change.

Nobody is trying to do away with, including Chairman Hyde, civil forfeiture. So making the case why civil forfeiture has been such a valuable tool seems to me to make us who oppose the Hyde proposal look like we are avoiding the real serious questions about what is involved in the Hyde amendment.

I want to take you through piece by piece, to the extent my time allows in the first round, what Hyde does. We have agreed, Gen-

eral Holder, that you are not opposed to—the Justice Department is not opposed to the burden of proof shifting, correct?

Mr. HOLDER. That is correct.

Senator BIDEN. Is there any opposition on anybody's part to damaged property? If you go in and screw up the property of the person and they are able to prove in court you had no right to take it in the first place and it is returned, shouldn't we compensate the person for that?

Mr. HOLDER. Yes.

Senator BIDEN. Any problem with that piece?

Mr. HOLDER. No.

Senator BIDEN. OK, we have got two reforms done. Now, the third one—I am not being facetious now by this; I am being real serious.

The third one, does anybody have a problem—if you confiscate that $2 million, assuming someone comes back and claims it, assuming the court concludes you had no reason to keep it and assuming it gained $100,000 in interest, any reason why they shouldn't get the interest? Any opposition to that?

Mr. HOLDER. No.

Senator BIDEN. I don't think so, so we have got three reforms done. Now, this notion of counsel. Does anybody have any objection to the—and I want to thank you, by the way, Mr. Holder. Your staff has been made available to me trying to figure out whether or not we could work out some kind of reasonable compromise, because I want to get some additional powers in this process.

We may be able to work a deal here. If we acknowledge the part and figure out the part that we don't think is going to do any damage to our ability to enforce the laws property, we may very well be able to work out something here, speaking only for myself, where the additional changes in forfeiture that we would like to see that give more power because of the changed circumstances of the way crime is committed—we may be able to work something out here.

The appointment of counsel. Now, with regard to the appointment of counsel, is there a—and I am not sure there is room for compromise here, but how about the case where there is, in fact, proof of the person being an absolute indigent? I mean, as I understand it, of the 45,000 civil forfeitures, about 10 percent of those people were indigent. So we are talking about the potential, based on last year's statistics, of 4,500 people getting counsel.

I am not asking you to sign onto this or not, but I think we should think about whether or not there is some way we ought to be able to deal with what are the, I think, rare but real cases where there is a mistake made by us where there is the inability of someone to hire counsel, to be able to get counsel. There may be a way we can work that out. I don't have an answer.

Mr. HOLDER. Senator, if a person actually is indigent and can proceed in forma pauperis in Federal court, we would not have an objection to that. And if a person then ran up legal fees and could show under the Equal Access to Justice Act that he had met all the requirements of that, he could get those legal fees paid for him. And it seems to us that there are in place already things that would handle that person.

Senator BIDEN. Now, I hope someone from Chairman Hyde's office is here because what we are talking about is you are willing to consider making a change that you would not only get the lawyer's fees paid, but the cost for you to pursue getting your property back if you fit into that category.

Mr. HOLDER. Yes. I mean I am talking about——

Senator BIDEN. Existing law.

Mr. HOLDER. I am talking about existing law, right.

Senator BIDEN. Existing law, or are you talking about extending existing law, increasing existing—how can I say it—extending existing law to allow for the actual cost of the attorneys?

Mr. HOLDER. That I would have to get back to you on, Senator. I am not exactly sure about that.

Senator BIDEN. Well, my time is up and my chairman is going to bang the gavel. Let me just close and I will come back if we have time in the second round. I am beginning to question—and since it has been so pilloried, this law, I probably shouldn't acknowledge I am the guy that wrote it with the guy sitting there chairing this hearing.

When Senator Thurmond and I back in the 1970's started this pursuit to change the law, the focus of civil forfeiture was in the case that the DEA indicated where someone was dead or on the lam and we weren't able to get to them. We have gone kind of beyond that in certain ways. So as we refocus a little bit, I am beginning to question whether or not there should be the requirement of a bond being filed for 10 percent to be able to come back in and claim it is yours.

The real bad guys ain't going to come back and claim it, and the folks who maybe have a legitimate claim to getting it back—I should stop. He has powers that exceed even what I am aware of. [Laughter.]

Senator THURMOND. Go ahead and finish.

Senator BIDEN. So my question to you is should we consider some compromise relative to the requirement of the bond being filed for 10 percent or up to $5,000, whichever is less, of the forfeited property. I don't have a clear answer to this, but I am wondering if you have a view on it.

Mr. HOLDER. Well, I like the law in its present form, but as I indicated in kind of echoing what you said earlier, we are really open to discussions about virtually all of these things in an attempt to work out something that will inspire confidence in this law. The law is not going to be as effective as it might be if people perceive it as something where the government is constantly overreaching. And if there are things that we can do to tweak the law, to modify it, to update it, we are willing to discuss those things.

Senator BIDEN. Well, I appreciate that because we haven't been overreaching as a law enforcement community, in my view. There are examples where it has occurred. And I can say for the record I think it is fair to say I importuned the chairman in the hallway and indicated to him that I personally was willing to see whether the law enforcement agencies, local and Federal, might find some way we could reach some compromise, whether he was genuinely willing to make some changes, significant changes, and he said he was.

So maybe we have the beginning—and I want to ask a second round if we get a chance here—the beginning of the possibility of doing something that has the effect of what you have in mind and I do. I want the public to have confidence that we, the Federal Government and the State governments and law enforcement, are doing the right thing. We are, in my view; we are, in my view. But these individual cases that are aberrations are coming to be viewed as the norm rather than an aberration, and that worries me about the confidence in the system.

I thank you for the extra time, Mr. Chairman. I apologize to my colleagues.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman, for having this hearing and for the leadership you and Senator Biden and others have provided over the years to allow law enforcement, many of whom are going to testify in this next panel, to seize the ill-gotten gains of criminal activity and apply them to good and noble purposes.

It is one thing to arrest a person and put them in jail, but that person ought not to have $1 million in the bank and be able to keep and use it. What happens if his gang members and his organization are able to use those assets?

I just noticed, Ms. Tischler, in Mobile, AL—I know, Joe Bettner and his crew at the Customs Service there. There is a great group of investigators in the Customs Service. On July 9, in a national news release—they seized 1,100 pounds of cocaine and froze 65 bank accounts containing $5 million.

Mr. Fiano, you mentioned the storage, but before I get to that, I want to make another point. Senator Biden, you might think about this I would like to raise the question of the van with the $1.7 million. If you went to a clear and convincing standard, what that would mean is that before those agents—correct me if I am wrong—could seize that money, they would have to have clear and convincing evidence that it was connected to drugs.

It may be that they were on a drug route or that they used drug language or that there was some drug paper or document in there that would indicate drugs, but it might not rise to clear and convincing. If you couldn't seize it, couldn't they drive away with that money on the spot perhaps?

Mr. FIANO. I think that the police officers would not allow them to drive away. [Laughter.]

Senator SESSIONS. I was U.S. attorney for 12 years and I have advised a lot of police officers, but I don't think so. I think you have got to meet the legal standard for seizing of the assets, isn't that right?

Mr. FIANO. That is right.

Senator SESSIONS. And if you have got that standard too high, it may keep you from making the quick follow-up investigation that could confirm that that was drug-connected and they may be gone scott-free.

Mr. FIANO. That is right.

Senator SESSIONS. Or these 65 bank accounts that you seized, if you weren't able to seize them promptly before all your investiga-

tion was complete, that money will be disappearing out of those accounts immediately, to be utilized by the drug cartel.

So this concession, as I see it—and we are willing to talk about changing from probable cause to maybe a preponderance of the evidence standard—is a major concession that probably is the core of the danger of forfeiture. Maybe probable cause is still low, but it is still a serious burden. You can indict people for probable cause. You can arrest people and put them in jail on probable cause, but we can't seize $1.7 million in their van on probable cause.

We need to get real and really think about what is happening. I am concerned about it. And I think what I hear you saying is day after day, case after case by police officers and Federal agents having to make those decisions to seize or not to seize—if we raise that burden too high, then they are not able to seize and the money is gone and there is nothing you can do about it.

Does anybody want to comment on that, or am I off base?

Mr. FIANO. No. That is accurate. And from that seizure, that seizure was tied into a multi-jurisdictional case which resulted in about $11.1 million actually being seized.

Senator SESSIONS. That is the money in the truck you are talking about?

Mr. FIANO. That is right, that van. Those two troopers seized that money and the information from those two individuals that were in the truck. From information we gained from that stop and that seizure, we tied that into a number of other seizures, including 5.3 metric tons of cocaine that was seized a couple of weeks later in Tucson.

Senator BIDEN. Would the Senator yield for 10 seconds?

Senator SESSIONS. Yes.

Senator BIDEN. I want to make it clear what I meant. If you have $2 million inside the walls of a van, two guys coming across the border, different nationalities who don't know each other, you have got "clear and convincing." That is well beyond "probable." But my point is not that we should move away from "probable" to "clear and convincing." I am not making that point. I just meant that single example. That is all.

Senator SESSIONS. I think I understood you. I guess I was just trying to suggest that as a practical matter, sometimes these standards can cause us more trouble and we need to be careful about how we word it so that we don't change what doesn't need to be changed.

Mr. Holder, there is one thing in the Hyde bill that troubled me and it has to do with notice—and those of us who practiced law for a long time know that getting notice to the right person at the right time can be a problem. It seems to me that there are some dangers in demanding that actual notice be received by the potential criminal and that that could really cause some unfortunate results. For example, if you mistakenly send the notice to the wrong prison (e.g. they move prisoners around periodically) could that allow the whole forfeiture to be voided?

Mr. HOLDER. Yes. The way the proposal is made is if the notice is sent to the wrong person, we are not given an opportunity to correct that mistake. I mean, if the government in using all the information it had in good faith sent a notice to somebody at a wrong

address—perhaps the person has moved—and the time limit then expired, the forfeiture effort at that point would have to cease. And it seems to me that that is not justice, if there is a ministerial error, and I think that is one of the concerns we have with regard to the Hyde proposal.

Senator SESSIONS. Additionally, I was concerned as I read the bill—that it would apply retroactively and allow the reopening, perhaps, of many cases that have already been closed under these standards? Are you familiar with that?

Mr. HOLDER. My understanding was that, at a minimum, it would apply to cases that are already in progress.

Senator SESSIONS. In progress, but it would apply if the standards were changed during the pendency of a case? (Some of them do last for several years, I would think.)

Mr. HOLDER. That is correct.

Senator SESSIONS. Well, I would just say this. My time has about passed and we do have some law enforcement officers that will testify. I do take private property rights very seriously. That is a protected constitutional right. I have supported a private property bill in Congress because I believe we have gotten too cavalier about taking property rights.

Frankly, I am less concerned about taking property from criminal drug dealers than I am from legitimate farmers who have a red cock-headed woodpecker land on their timber land and they can't cut 40 acres of timber for the rest of their lives. If the taxpayers want to protect the woodpecker, they ought to pay for it, not the individual. I think that could amount to a taking of property. So I am not insensitive to private property rights.

The way this system is working, I believe that it is not working that badly. One reason I think your numbers show a decline, Mr. Holder—is because you have established some very intensive internal review policies that are declining to undertake certain cases that were undertaken in the past.

Mr. HOLDER. We have tried to institute within the Department a serious review of cases in which we are trying to make use of asset forfeiture. We have done a lot of training. We have tried to do the right thing in using these statutes, using these laws so that we are seen as being fair and only using them in appropriate cases. And that might have something to do with the fact that those numbers have declined. It doesn't mean we are any less committed to it, but it means that we are trying to use it only in appropriate cases.

Senator SESSIONS. I hear from local law enforcement that they think that is too much. They wish the Department of Justice would continue to handle more cases that are jointly investigated. But I think it does go against the argument that you are going off on a wild goose chase, seizing assets willy-nilly. I think there has been a decline in the number of cases that are filed.

So, Mr. Chairman, I really respect Chairman Hyde. I think we need to listen carefully to what he says. And like Senator Biden, I think we can answer most of those questions. I look forward to working with you, Senators Biden and Schumer, and Chairman Hyde in fixing some of the potential areas for abuse, but I don't want to throw the baby out with the bath water.

Thank you, sir.

Senator THURMOND. You will work with Senator Biden, will you, on this?

Senator SESSIONS. I sure will, and I look forward to that. Our staffs are already discussing this matter.

Senator BIDEN. We are working on it now.

Senator THURMOND. Senator DeWine.

Senator DEWINE. Thank you, Mr. Chairman.

Mr. Holder, Mr. Johnson, and anybody else who wants to answer this question, I am trying to determine some of the bottom line here. If the Hyde bill is adopted, what changes will it make in the real world? And I wonder if you have done an analysis, or sampling and analysis of the forfeitures that you have had, say, over the last year or 2 years and if you could tell me what percentage of those cases would come out differently. In other words, if you went to Mr. Hyde's standard of clear and convincing evidence, what difference would it make?

Mr. JOHNSON. Senator, we can't present at this stage a statistical analysis of all of the cases, but I can give you an example of the type of case that probably Ms. Tischler can amplify on that——

Senator DEWINE. Excuse me just a minute. I am very interested in examples. That is fine, but for you to come in here today and testify about this, it seems to me either today or at some point in the future you need to be able to give us, because you are the experts, you are the ones who are prosecuting these cases, you are the ones that are handling the forfeitures—you need to be able to tell us there will be a third of these cases, Senator DeWine, Senator Biden, and the rest of the panel, that we just wouldn't make that we are making today, and here is what they are. I mean, you don't have to have it today.

Mr. HOLDER. We will send it over. We will endeavor to——

Senator DEWINE. And I would love to hear your example and I didn't mean to interrupt you.

Mr. JOHNSON. I think I would adopt the Deputy Attorney General's point that we will endeavor to get those answers to you as best we can. It will involve a fair amount of analysis. But with respect to my example, very often at the border there are seizures of large quantities of currency, and the courier may say when asked at the border crossing either by a Customs inspector or by an INS inspector—actually, out-bound it would more likely be a Customs inspector—what is the source or the origin of the funds—it may be a case even where a Customs dog is alerted on the car.

Under the Hyde bill, we believe that—and the answers may come back inconsistent. There may be several clearly incredible explanations for the quantity of money that is in the car. Under a preponderance of the evidence standard, which is what we would propose, we could make the case for permanent seizure of those funds. Under the Hyde bill, at the clear and convincing evidence standard, it would be much more difficult to make that case. And there are a fair number of cases that occur like that at the border.

There are other aspects of the case that might also come into play. If there are one, two, three or four other people in the car, at a later date perhaps all of them might file a claim under the Hyde bill for return of those funds. And we would see that as a dif-

ficulty in a case where, under the preponderance of the evidence standard, we believe we would be able to make out a case for the permanent forfeiture of those funds.

Senator DEWINE. Well, I thank you for the example. We would appreciate other examples, and I certainly would like to see some general analysis of what percentage of these cases—obviously, this is an inexact science; this is an art. We just ask you to use your best judgment on that, and your best expertise.

You have raised the issue that drug dealers could pass on their fortunes through probate. I just wonder how often that happens, if you could give us some idea about that. You have also raised the concern that this would create a windfall for prisoners because the forfeiture notice might be sent to the wrong jail and the prisoner would get his property back. I wonder how often that happens.

Mr. HOLDER. Well, again, we would try to get you some statistical information with regard to both of those questions. But I can tell you, though, with regard to Jose Gonzalez Rodriguez Gacha, a Colombian drug lord, we have recovered over $70 million from him from bank accounts he has left all over the world. And in every instance, we have had to fight with his heirs who are claiming access or claiming the right to this money.

If, in fact, we had a provision that was a part of the law that allowed an innocent owner, perhaps a son or a daughter, to get access to that money because the person legitimately perhaps did not know—an infant did not know where the money was coming from, I would question whether or not that is an appropriate disposition of those kinds of funds. To give to the heir of somebody who has gotten this money through the sale of drugs—to give it to that person's heir, it seems to me that that is just not where we want to have our law.

Senator DEWINE. Thank you, Mr. Chairman.

Senator BIDEN. May I follow up?

Senator THURMOND. Senator Biden.

Senator BIDEN. With regard to the innocent owner or the heir, I think it is important that we point out that we are not saying the heir can't recover the property if they can prove that, in fact, it is not from gains made by—this is about whether or not while the trial of this question is pending, and before it is resolved, the heir can get under a hardship the money back, can say, by the way, now I know you all have got this and I know this is going to be litigated later down the road, but I need the money now to pay for my education at Harvard University or something, and I need it now.

It seems to me that in this balancing piece here—and this is a comment, but I would like you to respond to it—in this balancing act, which all of this ends up being, one of the things we should be looking at is the suffering that will be undergone by the innocent owner relative to the potential loss that the government will undertake if, in fact, they are not an innocent owner.

And in the area of cash, when you are talking about the seizure of cash, it is not likely that much of it will be around for the ultimate litigation. To distinguish that from a house, if there is a piece of real estate there, it may gall law enforcement that a person who is claiming to be an innocent owner, when the law enforcement

folks believe they are really guilty, is allowed to lounge in the 50-foot pool behind the house.

Well, in that case, in the balance, I think law enforcement has to swallow their pride. If, in fact, they can make the case before a judge that they are an innocent owner, then go with it because they are not going to hook a big winch to the house and haul the house away.

So I just think that part of what we are talking about here is balancing the equities here. And I am wondering whether or not in terms of this whole question of innocent owner the Justice Department thinks that there is—right now, we only protect innocent owners and bona fide purchasers. We don't protect those who receive other forfeitable property through probate. That is the way the law is now, right? Am I correct?

Mr. HOLDER. Correct.

Senator BIDEN. And you are not supporting, are you, any change in the probate piece of that?

Mr. HOLDER. No, we are not.

Senator BIDEN. OK, because again I can see where it is possible that an heir is truly denied something that they should have because it was not from ill-gotten gains from their father or mother or whoever the heck the person leaving the money was. But I just think it is a relatively rare circumstance the other way as well, because ultimately you get a disposition from the court if someone is going to come back in. The heirs are contesting this of the deceased cartel member. The courts are eventually going to decide that, right, one way or another?

Mr. HOLDER. Yes. I mean, the concern we have—I mean, we have talked about, I guess, a couple of concepts here, and that is the release of property pending the resolution of the matter. And the concern, as you indicated, is with things like cash, property that is mobile. Again, we want to work with you all so that we can figure out a way in which we can make sure that assets that ultimately come into our possession are undepleted, are not in any way negatively affected so that their value is lowered.

But there are certain things, it seems to me, cash being chief among them, that it would seem hard to see how you could give that back to somebody on merely a showing of hardship, with the expectation that you are going to be able to recover those assets at the conclusion of the proceeding.

Senator BIDEN. Theoretically, you could give back something that requires a transfer of title, with a prohibition on not being able to transfer title. That would not, in fact, put you in as much jeopardy; that is, you, the government, in as much jeopardy. And if the case could be made there is genuine hardship—there are 17 kids, no place to live, you are out in the street, you know, the horror story things we hear—you are not taking nearly the chance there as you are if there is a Picasso hanging on the wall in that same place and they say, by the way, I need the Picasso back, I have got a hardship problem here, or I need the $400,000 in cash back. That stuff goes quickly.

But if you have something that requires title, I could even theoretically think you may be able to deal with the possibility of auto-

mobiles or boats. But there they will just come back and say, well, it was stolen, and it is in a chop shop somewhere.

I think that the public listening to this, General—everyone in here is probably very informed or they are not likely to be in here. It is not like a topic that draws the average person in the front door here. But people watching—well, there are no cameras, but if people were watching this on C–SPAN, they don't make a distinction between criminal forfeiture and civil forfeiture. They don't understand the differences and they don't understand the pieces that go into you having to make the case to be able to seize civilly in the first place.

I think the Senator from Alabama made a very good point. We can lock someone up on probable cause. We can put them in jail. If they can't make bail, they stay in jail. You know, I mean that is probable cause. The idea that somehow on probable cause we can't confiscate your property when there is an end date here, there is an ultimate resolution—it is not like it is being held in perpetuity, confiscated and kept or sold and disposed of by the Federal Government. I mean, there has to be an ultimate court disposition as to whether or not you can take this forfeited property and distribute it to the local Boys Club or buy new automobiles for the local police department, all of which are good things to do.

I think as we go through this debate—and if the Senator from Alabama and I have anything to do with it, there is going to be a little bit of debate here. This is not going to go quietly into the night in terms of the Hyde law passing. I just hope we are able to do a little bit of educating here.

To the extent, Mr. Johnson—and I realize this sounds like a tall order, but you have got a lot of Senators here—and I will conclude my comment with this before the next panel—you have got a lot of Senators who are very strongly pro-law enforcement who have been smitten by this notion that there is this unreasonable overreaching on the part of local and Federal law enforcement. And they cite cases that really happen, and now you have people who don't—and Senator DeWine does fully understand this, but you have Senators who don't fully understand this any more than I understand a certain section of the HCFA regulations at the Department of Health and Human Services.

They hear the one side, they see the story, and we don't make a very—I will speak for myself—a very convincing case and simplify for them what the counter-argument is without exaggerating it. What won't work—and this is my plea—what doesn't work like it used to work in 1981 is to say this will make law enforcement harder. That used to be an automatic. All I had to do is march up to my buddies in the police organizations and say this will make law enforcement harder, and Senators would stand there and go, I don't want to be on the other side of making law enforcement harder.

But now we have had everything from Ruby Ridge, to black helicopter folks, to the old-line liberals, and they are kind of coming around the meeting here and so it is not so automatic anymore. And all I am asking you to do is sort of get out of the mode and get into—and it is going to take resources, I acknowledge, but I really think that the suggestion that Senator DeWine made, and he

has a slightly different perspective on this than I do, to try to go back and just pick a random sample—I mean, prove to us it is a random sample of 50 cases that you picked out of the 4,000-some filed and apply the Hyde standard to it and give us some sense of whether it really would have altered it.

I think it will; I think it will alter it, but I think we are going to have to make that case in order for us to, very bluntly, prevail short of us being Horatio at the bridge, which we are prepared to be. Do you understand what I am saying?

Mr. JOHNSON. Yes, Senator. We have got our assignment and I think the approach you outline of sampling is something that we will try to work our way through and come back with something that will be more helpful.

Senator BIDEN. It would be useful. Understate it, don't overstate it. Understate it.

Thank you, Mr. Chairman.

Senator THURMOND. Anymore questions by anybody?

Senator SESSIONS. Mr. Chairman, I would like to ask one of Mr. Holder with regard to homes. It is the policy of the Department of Justice that if a home is subject to forfeiture that a notice is tacked on the door and the occupants aren't thrown out onto the street until the court has heard the case. Isn't that correct?

Mr. HOLDER. That is correct.

Senator SESSIONS. Maybe some States may do it differently, but on the Federal law you monitor that closely, do you not?

Mr. HOLDER. Yes. In fact, there have been at least a couple of cases in which—and these are not matters that generally will rise to the level of the Deputy Attorney General, but there have been at least a couple of cases where ultimately we wanted to do something with regard to homes and it got me involved in those particular situations. We are very careful when it comes to——

Senator SESSIONS. And if Customs or DEA or the FBI or the Secret Service wants to seize some property, real estate like that, they still have to get the approval of the U.S. attorney and the Department of Justice before they can do so. Isn't that correct?

Mr. HOLDER. That is correct.

Senator SESSIONS. So it goes beyond the agents all the way to Washington most of the time to get a final approval. There is really an intensive review process that sometimes turns out to be more bureaucratic and a headache for those out in the field than it needs to be.

And I see Stef Casella back there behind you, and he is a professional and he reviews those things. He was reviewing them when I was U.S. attorney and I have disagreed with him at times, but they maintain that that is not a phantom control. That is a real control the Department of Justice maintains.

Thank you, Mr. Chairman.

Mr. HOLDER. I don't want to leave the misimpression that all those matters come back to Washington with regard to the seizure of residences or moving against residences, but there is a U.S. attorney involved certainly in those matters.

Senator THURMOND. I wish to thank the members of this panel for their presence and their testimony, and you are now excused and the third panel will come up.

Senator SESSIONS. Mr. Chairman, while they are taking their seats, I just want to say I am sorry I am going to have to leave. I have got to preside at the Senate here in a few minutes, and I want to thank these members of the law enforcement community that have come here. They deal with this issue on a daily basis.

Just as you can find people who have been wrongly charged with crimes, you can find people's properties that may have been wrongly seized. But we also don't want to eliminate our laws against robbery and murder and those kinds of events, and we don't need to be too much damaging and undermining this very effective forfeiture law. I used it a long time.

Senator THURMOND. I understand that you and Senator Biden are going to get together and maybe come up with an amendment.

Senator SESSIONS. We will certainly try.

Senator THURMOND. Thank you very much.

I will now introduce the third and final panel. Our first witness on this panel is Gilbert Gallegos, National President of the Fraternal Order of Police. He has a degree in criminology from the University of Albuquerque and is a graduate of the FBI National Academy. Prior to becoming FOP National President, he served for 25 years in the Albuquerque Police Department, retiring with the rank of deputy chief of police.

I am especially pleased to welcome our next witness, Sheriff Johnny Mack Brown. He has served as Sheriff of Greenville County, SC, since 1977.

Isn't that right?

Mr. BROWN. Yes, sir.

Senator THURMOND. He has also been elected as President of the South Carolina Sheriff's Association and the National Sheriff's Association. Sheriff Brown has been a leader in community-oriented law enforcement and in combatting youth-oriented crime and gang activity. He is representing the National Sheriff's Association.

Our third witness is Johnny Hughes, Director of the National Information Unit of High–Intensity Drug Trafficking Areas. Mr. Hughes served with the Maryland State Police for 29 years, retiring with the rank of major. He also served in the U.S. Army 2nd Airborne Division. He is currently Director of Government Relations for the National Troopers Coalition.

Our fourth witness is Samuel Buffone, a litigation partner in the Washington, DC, office of Ropes and Gray, who specialize in white-collar criminal defense and complex civil cases. A graduate of the University of Pittsburgh and Georgetown University Law School, Mr. Buffone is representing the National Association of Criminal Defense Lawyers.

Our fifth witness is Roger Pilon, Vice President for Legal Affairs and Director of the Center for Constitutional Studies at the Cato Institute. Dr. Pilon holds a bachelor's degree from Columbia University, a master's degree and Ph.D. degree from the University of Chicago, and a law degree from George Washington University. Dr. Pilon formerly served in a variety of positions in the Reagan administration in the Office of Personnel Management, the State Department, and the Department of Justice.

I ask that each of you please limit your opening remarks to no more than 5 minutes, and all of your written statements will be

placed in the record, without objection. We will start with Mr. Gallegos and go down the line.

PANEL CONSISTING OF GILBERT G. GALLEGOS, NATIONAL PRESIDENT, FRATERNAL ORDER OF POLICE, WASHINGTON, DC; JOHNNY MACK BROWN, PAST PRESIDENT, NATIONAL SHERIFF'S ASSOCIATION, ALEXANDRIA, VA; JOHNNY L. HUGHES, DIRECTOR, GOVERNMENT RELATIONS, NATIONAL TROOPERS COALITION, ANNAPOLIS, MD; SAMUEL J. BUFFONE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, DC; AND ROGER PILON, DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE, WASHINGTON, DC

STATEMENT OF GILBERT G. GALLEGOS

Mr. GALLEGOS. Thank you, Mr. Chairman. Good afternoon, Mr. Chairman, Senator Biden. I am Gilbert Gallegos. I am the National President of the Fraternal Order of Police, which is the largest law enforcement organization in the Nation. I am here to testify on the civil forfeiture question and attempts to reform the existing law, an issue obviously which is very important to law enforcement at every level of government in this country. While reform of current forfeiture law is appropriate, it is of equal importance that any such reform not hamper the ability of law enforcement to separate the proceeds of illegal activity from criminals and drug traffickers.

Obviously, the impetus of this hearing has been the passage of H.R. 1658 in the House. During floor debate of this measure, the FOP, the Department of Justice, and a lot of other law enforcement organizations stood together to oppose the kind of reform that was being proposed in that legislation.

Proponents of the bill that attack law enforcement's use of civil forfeiture made several veiled references to police officers serving as the government's bounty hunters. Mr. Chairman, I can assure you we are not bounty hunters, but servants of the American people, who want criminals in jail and their illegal assets seized and forfeited. That is our job.

And it is true, Mr. Chairman, that law enforcement believes in the effectiveness of civil asset forfeiture. It provides State and local agencies with much needed resources which are used to provide equipment for officer safety and to supplement the funds available to fight crime. But perhaps more importantly, it comprises the second of a two-pronged approach to winning the war on drugs.

Not only can we put criminals and drug dealers behind bars, but we need to ensure that neither they nor their families will be allowed to live a life of luxury from illegal profits. That is why we worked with members of both parties to enact legislation that would increase the protections available to innocent property owners, while preserving law enforcement's ability to ensure that criminals and drug dealers do not profit from their illegal activity.

Putting someone in jail may or may not be enough to deter them from a life of crime, but when you take away the assets that they have, you take away their cars and their fancy jewelry, it makes an impact on their thinking, and it makes an impact on the other people around that understand that they may lose their property.

The problems with the House-passed version of the bill have been addressed. But more importantly, I want to address the need to pass reform that will be effective; that is, in the area of the burden of proof, and we support the idea that, yes, it should be the government's job to have preponderance of evidence to forfeit the property. But on the other hand, it should be in the hands of law enforcement to determine what the probable cause is to seize that property before forfeiture.

Also of critical concern is the innocent owner defense which allows many criminals and drug dealers to pass on otherwise forfeitable property to their heirs under sham transactions. This practice may prolong the cycle of criminality in some families. And believe me, in over 30 years of law enforcement, I have seen where the father has been the drug dealer and the kids have been drug dealers and the grandkids become drug dealers. And they all have a method of being able to use the funds that they gathered through a joint effort to pass the money on from one family member to the other. But we believe that there has to be some remedy in that area.

Obviously, the first one that we need to address is the burden of proof. A showing of probable cause does not merit the forfeiting of a person's property to the government, but likewise a standard of clear and convincing evidence is not appropriate for use in civil forfeiture cases. To my knowledge, such a standard of evidence is only used in the most serious civil actions brought by the government, such as involuntary separation of a child from its parents.

The second important provision that we must address is the innocent owner defense so that property owners who take reasonable steps can defend against the government's claims, while protecting innocent people from seizure and forfeiture of their property.

We need to take the profit out of crime. We think that civil forfeiture does, in fact, do that. This is a very important piece of legislation for this country. I urge you to seek a balance. Senator Biden has spoken about a balance between all the issues, and I think it is important that we have that balance.

The decisions that you will soon be making will begin today as we determine the future of law enforcement's use of civil asset forfeiture. Do we continue to stand up and fight those who peddle drugs to our kids and our grandkids, or will we decide to surrender an important crime-fighting tool to the critics of the Civil Forfeiture Act?

Thank you, Mr. Chairman. I think this is my time, and I will stand for any questions.

[The prepared statement of Mr. Gallegos follows:]

PREPARED STATEMENT OF GILBERT G. GALLEGOS

Good afternoon Mr. Chairman and distinguished Members of the Criminal Justice Oversight Subcommittee, it is an honor to appear before you once again. My name is Gilbert Gallegos and I am the National President of the Grand Lodge, Fraternal Order of Police. With over 283,000 members, the F.O.P. is the largest organization of rank-and-file law enforcement officers in the nation. I am here today to testify on the future of civil asset forfeiture and attempts to reform existing law, an issue of the utmost concern to law enforcement officers at every level of government. While reform of current forfeiture law is appropriate, it is of equal importance that any such reform does not hamper the ability of law enforcement to separate the proceeds of illegal activity from criminals and drug traffickers.

The impetus for this hearing is no doubt the recent attempts to reform forfeiture procedures through enactment of H.R. 1658, which passed the House of Representatives last month. During floor debate on this important measure, the Fraternal Order of Police, the Department of Justice, and various other law enforcement groups stood together to oppose the intent and perhaps unintended consequences of that legislation. Proponents of the bill attacked law enforcement's use of civil forfeiture and made several veiled references to police officers serving as the government's bounty hunters. Several lawmakers came to the floor to describe the "horror stories" of law enforcement's supposedly unjust attempts to take property away from innocent citizens. We were described as opposed to "constructive" reform of any type and our position was described as the defenders of the status quo. Nothing could be further from the truth.

We worked with Members of both parties not out of a desire to thwart any type of civil forfeiture reform, but rather out of a dedication to a common-sense reform effort that would increase the protections available to innocent property owners while preserving law enforcement's ability to ensure that criminals and drug dealers do not profit from their illegal activity.

A part of the reason that I am appearing before you today, Mr. Chairman, is to debunk these salacious assertions and give you the perspective of the "cop on the beat." It is true that law enforcement believes in the effectiveness of civil asset forfeiture. It provides State and local police agencies with much needed resources that can be used to provide officer safety equipment or to supplement the funds available to fight crime. But perhaps most importantly, it comprises the second of a two pronged approach to winning the war on drugs. As former U.S. Attorney General Richard Thornburgh once said, "it 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." Not only can we put criminals and drug dealers behind bars, but civil asset forfeiture allows us to ensure that neither they, nor their families, will be allowed to live a life of luxury off of a criminal's ill-gotten gains.

There are several problems with the House-passed version of the bill that I believe must be addressed. First, in the event of an administrative error, H.R. 1658 would give prisoners and criminals a windfall by forcing the government to return forfeited property to the prisoner with no opportunity to file a new forfeiture action against it. For example, if the government sends notice to an incarcerated felon that his property will be forfeited to the wrong prison, the government has no alternative but to return that property.

Second, while H.R. 1658 appropriately places the burden of proof on the government, it does so at the unacceptably high level of "clear and convincing" evidence. This means that drug dealers would have more protection from civil sanctions than are currently available to doctors, bankers, and defense contractors.

Third, the legislation gives judges the authority to appoint counsel to any and all persons who *believe* that they have standing to contest a forfeiture. No safeguards are in place to prevent the abuse of this provision by individuals filing frivolous claims and it will no doubt cause an enormously unnecessary drain on government funds.

Fourth, this legislation establishes an "innocent owner" defense that allows criminals and drug dealers to pass on their fortunes through sham transactions. Under the provisions of this bill, criminals will be allowed to amass sizable illegal fortunes and then pass it on legitimately to their children, spouses, and associates through probate.

Finally, there is the issue of the return of seized property pending completion of the forfeiture proceedings if the person can successfully claim that continued government possession of their property would impose a "substantial hardship." H.R. 1658 would force law enforcement to return seized property despite the fact that there may be overwhelming evidence that it was used to commit a crime. If property that is currency, contraband, evidence, or an item likely to be used to commit additional criminal acts is returned, it is highly likely that it will be disposed of and will not be available for forfeiture.

These are just some of the problems that law enforcement has with the current provisions of H.R. 1658. Having said that, I want to make it clear that I am not here today to argue that some reform is not necessary to maintain the public's confidence in the use of civil asset forfeiture as an effective crime-fighting tool. Since 1993, the Supreme Court has decided no fewer than eleven cases dealing with the procedural safeguards that must be provided to individuals who have their property seized and forfeited. For example, forfeitures are now subject to the Eighth Amendment's prohibition against excessive fines; and if it would be "grossly disproportional to the gravity of the offense," it is unconstitutional. In addition, the Supreme Court

has said that residences and other real property cannot be seized without prior notice and a hearing. In response, Federal law enforcement agencies who conduct forfeitures have been revising and refining their procedures to be in compliance with the Supreme Court's decisions. Therefore, the fact that proponents of H.R. 1658 in its existing form can only cite "horror stories" which occurred before the Court's rulings indicate that the administrative reforms have been effective.

We can, however, take these efforts one step further. It is possible to codify into law the efforts of the Department of Justice, the Treasury Department, and the Supreme Court to reform civil forfeiture procedures, protect the interest of innocent property owners, and preserve law enforcement's ability to use civil forfeiture to win the war on drugs. Despite conventional wisdom, these three goals are not at odds with one another.

To that end, I believe that there are two important provisions that must be incorporated into any reform legislation not included in H.R. 1658 as engrossed by the House. The first is shifting the burden of proof in civil asset forfeiture cases from the property owner to the government to show by a "preponderance of the evidence" that the property is subject to forfeiture. It is not fair for a property owner who believes that his or her property has been incorrectly seized to have to prove that their property was not used in the commission of a crime in order to avoid forfeiture. We believe that a "preponderance of the evidence," the standard used in most civil cases, is the appropriate level of proof in civil forfeiture cases. A showing of "probable cause" does not merit the forfeiting of a person's property to the government. Likewise, a standard of "clear and convincing" evidence is not appropriate for use in civil forfeiture cases. To my knowledge, such a standard of evidence is used only for the most serious civil actions brought by the government, such as the involuntary separation of a child from its parent.

The second important provision that must be included in any final civil asset forfeiture reform legislation is the construction of an "innocent owner defense" so that property owners who take certain reasonable steps can defend against the government's claims. While protecting innocent property owners, however, we must be careful not to create a loophole whereby criminals can pass on the profits of their crimes through sham transactions. First, property owners must have the opportunity to defeat a forfeiture action if, at the time of the criminal offense, they had no knowledge of the illegal use of their property or upon learning of the illegal use, took all reasonable steps to revoke permission for the use of their property.

Second, with respect to property acquired after the illegal offense giving rise to the forfeiture, a person would be an "innocent owner" if they were a bona fide purchaser for value and was, at the time of purchase, reasonably without cause to believe that the property had been used for criminal purposes. If the property is jointly owned, there should also be a recourse for one party to receive either the property or a portion of the proceeds from the sale of such property. This would enable the spouse of a criminal, who was unaware of the illegal use of their jointly owned property to not have to forfeit their right to it simply because of the actions of another. Here again there is a balance that can be struck between protecting property rights and taking property used to commit crimes out of commission.

Law enforcement officials at every level of government believe that forfeiture is extremely effective in taking the profit out of crime and reducing the incentive that others would have to commit similar illegal offenses. And if it is a crime that has victims, law enforcement can use civil asset forfeiture to recover and restore the property to its rightful owners or at the very least, ensure a just measure of compensation to the victim. In addition, forfeiture provides much needed resources to state and local governments that supplement the funds available to keep our streets safe. As I have said before, civil asset forfeiture is one of the most effective tools we have to rid our communities of the scourge of crime and drugs. For when law enforcement can use a criminal's money or property to rid our communities of this problem once and for all, then we as a nation, and as a society, can claim a final victory in the war on drugs.

As the Senate begins its consideration of the future of civil asset forfeiture, I would urge that you seek out that balance which I have spoken of between defending the rights of law abiding property owners and defending law enforcement's use of this effective crime fighting tool. As you have heard, and will continue to hear, this is something that we in the law enforcement community believe is sorely lacking from H.R. 1658.

Thank you Mr. Chairman. At this time, I would be pleased to answer any questions you may have.

Senator THURMOND. Sheriff Brown.

STATEMENT OF JOHNNY MACK BROWN

Mr. BROWN. Thank you, Senator Thurmond and Senator Biden. Thank you for letting me be here this afternoon to testify about this critical issue of asset forfeiture.

Before I begin, let me say I concur that it is a fundamental right for all Americans to feel secure from unlawful searches and seizures. I have spent most of my adult life defending these rights. Americans need to feel secure that government will not unjustly seize their property. However, these same Americans not only expect, but demand action to be taken against illegal proceeds and property of criminal enterprises. The public expects, and we will make certain, that criminals do not profit from crimes. But without strong asset forfeiture laws, crime does pay, and it pays well.

The primary aim of asset forfeiture is to cripple criminal organizations by removing their ill-gotten assets which are utilized in their continuing criminal enterprise. A secondary benefit of asset forfeiture is the assets seized by law enforcement can be used to continue our efforts to fight the war on crime, while lessening the financial burden on law-abiding citizens. Let me give you an example, Senator Thurmond and Senator Biden, of how Federal laws have assisted us in Greenville, SC.

In 1989, we identified an individual named Dawain Israel Faust, Jr., as operating a large cocaine and heroin enterprise in our area. After months of investigation, we were able to arrest Faust and several associates. We were able to identify a significant amount of real property and personal property which was used in the furtherance of this enterprise.

Using the Federal forfeiture statute and working in conjunction with the FBI, we seized these assets. After conviction on narcotics charges in the Federal system, Faust' property was forfeited. As a result of this forfeiture and equitable sharing, the Greenville County Sheriff's Office received approximately 60 acres of land and a 2,000-square-foot home, which was transformed into a state-of-the-art law enforcement training facility.

Our Center for Advanced Training provides advanced training for sheriff's office personnel, along with local, State and Federal agencies. This is just one example of how Federal forfeiture statutes serve as a valuable weapon in the war against drugs, while having a positive effect on law enforcement. Without strong asset forfeiture laws, we will not be effective in dealing with such complex, multi-State criminal enterprises as the one headed by Faust.

Mr. Chairman, the changes being proposed to the Federal asset forfeiture law will handcuff our efforts to eliminate these complex organizations. While we may be able to cut off the head of the organization by criminal enforcement, the current asset forfeiture laws help us make certain that the organization is thoroughly disbanded and handicapped in their ability for further criminal activity.

While the NSA tried to work with the managers of the legislation in the House, they were uninterested in negotiating to make this bill acceptable to law enforcement. We applaud your diligence and appreciate the opportunity to work with this committee to craft an acceptable bill.

As you know, the House-passed bill will force law enforcement and prosecutors to prove their case by clear and convincing evidence. At first glance, Mr. Chairman and Senator Biden, this may seem reasonable. But at closer examination, it is an unreasonably higher standard. The clear and convincing standard is a higher standard than probable cause, needed to effect an arrest of an individual.

The House-passed bill makes the government's burden of proof in forfeiture actions against drug dealers higher than required to take the freedom in arrest situations. Does it really make sense that the burden of proof to take property is higher than required to take freedom?

Instead of this overly restrictive standard, the National Sheriff's Association would support the reasonable burden of proof which calls for a preponderance of evidence. As most of you know, the preponderance of evidence is the accepted standard in civil property forfeiture cases.

Second, the House bill creates an entitlement program for lawyers. Under the House bill, anyone can challenge a forfeiture action, and they are entitled to a free lawyer to do so. This places an unwarranted burden on the government, in that we would have to address any claim regardless of merit. But we will also have to fund all claims regardless of the ability to retain counsel. Why should our law-abiding citizens be forced to pay for legal services for wealthy drug dealers and criminal syndicates to defend their criminal activity? These criminals can afford their own attorney and it would be obscene to require them to have an appointed attorney.

The House bill further makes a mockery of law enforcement efforts to interdict drug trafficking by forcing the courts to release this property back to criminal defendants pending trial if they can claim a hardship. It is even difficult for me to believe that a seized boat, airplane or luxury car should be returned to a drug dealer because the dealer claims a hardship. The only hardship encountered by the trafficker would be more difficulty in continuing his or her illegal activity without that piece of property.

It is my job to make the lives of these traffickers as difficult as possible, and I ask you to provide us with the tools to ensure that they continue to suffer this type of hardship. Finally, the House bill creates a huge loophole through innocent owner defense. The loophole allows drug dealers to transfer their assets and their property to so-called innocent people.

Mr. Chairman and members of this committee, the National Sheriff's Association strongly opposes House bill 1658. We feel that this legislation changes the intent of asset forfeiture and turns the tide in favor of drug traffickers. We encourage you to support your Nation's law enforcement and ask that you strongly oppose H.R. 1658.

Thank you for allowing me to be here this afternoon.

Senator THURMOND. Thank you very much. We appreciate your fine service. You have been outstanding in that office.

Mr. BROWN. Thank you, sir.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF JOHNNY MACK BROWN

Good Afternoon Mr. Chairman, Members of the Committee.

Thank you for inviting me to testify before you this afternoon on this crucial issue, Asset Forfeiture. My name is Johnny Mack Brown and I am the Sheriff of Greenville County, South Carolina. I was first elected in 1976 and am a Past President of the National Sheriffs Association (NSA). I remain active in the NSA and currently serve as the Association's Treasurer.

Before I go on, let me say I concur it is a fundamental right for all Americans to feel secure from unlawful searches and seizure, I have spent most of my adult life defending these rights, Americans need to feel secure that their government will not unjustly seize their property. However, these same Americans not only expect but demand action be taken against the illegal proceeds and property of criminal enterprises. The public expects we will make certain that criminals do not profit from their crimes, but without strong asset forfeiture laws crime does pay, and it pays very well.

The primary aim of asset forfeiture is to cripple criminal organizations by removing their ill-gotten assets which are utilized in their continuing criminal enterprise. A secondary benefit of asset forfeiture is the assets seized by law enforcement can then be used to continue our efforts to fight the war on crime while lessening the financial burden on our law-abiding citizens. Let me give you an example of how federal forfeiture laws have assisted the citizens of Greenville County. In 1989, we identified an individual, Dawain Israel Faust, Jr., as operating a large scale cocaine and heroin enterprise in our area. After months of investigation we were able to make arrests of Faust and several associates. We were also able to identify a significant amount of real estate and other personal property which was used in the furtherance of this enterprise. Using the Federal Forfeiture Statute we, working in conjunction with the FBI, were able to seize these assets. After conviction on the narcotics charges in the Federal system Faust's property was forfeited. As the result of this forfeiture and equitable sharing the Greenville County Sheriff's Office received approximately sixty (60) acres of land with a two thousand square foot home, which was transformed into a state-of-the-art law enforcement training facility. Our Center for Advanced Training provides advanced training for Sheriffs Office personnel along with other local, state and federal law enforcement agencies. This is just one example of how the Federal Forfeiture Statute serves as a valuable weapon in the war against drugs, while having a positive effect on law enforcement. Without strong asset forfeiture laws we would not have been as effective in dealing such a complex multi-state criminal enterprise as the one headed by Faust.

Mr. Chairman, the changes being proposed to the Federal Asset Forfeiture law will handcuff our efforts to eliminate these complex criminal organizations. While we may be able to cut off the head of the organization by criminal enforcement, the current asset forfeiture laws help us make certain the organization is thoroughly disabled and handicapped in its ability to engage in future criminal activity. While we tried to work with the House, the managers of this legislation were uninterested in negotiating to make this bill acceptable to law enforcement. We applaud your diligence and appreciate the opportunity to work with the Committee to craft an acceptable bill.

As you know, the House passed bill will force law enforcement and prosecutors to prove their case by "clear and convincing evidence." At first glance this may seem reasonable, but on closer examination it is an unreasonably high standard. The clear and convincing standard is a higher standard than the probable cause needed to effect an arrest of an individual. The House passed, bill makes the government's burden of proof in forfeiture actions against drug dealers higher than required to take their freedom in arrest situations. Does it really make sense that the burden of proof to take property is higher than that required to take freedom?

Instead of this overly restrictive standard, the NSA would support the more reasonable burden of proof which calls for a "preponderance of the evidence." As most of you know, the preponderance of the evidence is the accepted standard in civil property actions.

Secondly, the House bill creates an entitlement program for lawyers. Under the House bill anyone can challenge a forfeiture action and they are entitled to a free lawyer to do so. This places an unwarranted burden on the government in that we will have to address any claim regardless of merit, but we will also have to fund all claims regardless of the ability to retain counsel. Why should our law-abiding citizens be forced to pay for legal services for wealthy drug dealers and criminal syndicates to defend their criminal activities? These criminals can afford their own counsel and it would be obscene for them to receive an appointed attorney.

The House bill further makes a mockery of law enforcement efforts to interdict drug trafficking by forcing the courts to release seized property back to the criminal pending trial if the individual claims a "hardship," even in cases where overwhelming evidence indicates the property was used in furtherance of the crime. It is difficult for me to believe a seized boat, airplane, or luxury car should be returned to a drug dealer because the dealer claims a hardship. The only hardship encountered by the trafficker would be more difficulty in continuing his illegal activity without that property. It is my job to make the lives of these traffickers as difficult as possible, and I ask you to provide us with the tools to ensure they continue to suffer this type of hardship.

Finally, the House bill creates a huge loophole through its innocent owner defense. This loophole allows drug traffickers to transfer their property to their friends and associates who become so-called innocent owners. These innocent owners hold the property for the dealers until they get out of jail or in most cases continue to support and grow the business accumulating more property. It is not difficult to imagine a drug trafficker claiming it is his mothers' new Jaguar and he is just using it, while his mother has little or no legitimate source of income. The NSA would like to see this loophole slammed shut in the face of these drug traffickers, so only truly innocent owners would be allowed to recover property.

Mr. Chairman, Members of the Committee, the NSA strongly opposes H.R. 1658, the Civil Asset Forfeiture Reform Act. We feel this legislation changes the intent of asset forfeiture, and turns the tide in favor of drug traffickers and trial lawyers at the expense of the men and women in law enforcement. That is not only wrong, it is reprehensible. This Nation's Sheriffs use asset forfeiture to disrupt criminal activity and the NSA is concerned if H.R. 1658 is enacted, law enforcement at all levels will be adversely affected.

We encourage you to support your nation's law enforcement and ask that you strongly oppose H.R. 1658. Asset forfeiture has allowed law enforcement to disrupt illegal activity by seizing real property and assets from criminals. It has made a difference in the fight against crime and we should not erode this valuable law enforcement tool.

Thank you, Mr. Chairman. I would be happy to answer any questions you may have.

Senator THURMOND. Mr. Johnny Hughes.

STATEMENT OF JOHNNY L. HUGHES

Mr. HUGHES. Thank you, Senator Thurmond. Chairman Thurmond, Senator Biden, fellow committee members, I am here today representing our Chairman, Trooper Scott Reinacher of the Michigan State Police, and the National Troopers Coalition which represent approximately 45,000 troopers. Our troopers range from the patrol trooper and criminal investigator up through the ranks of administrative commissioned officers and State police and highway patrol department heads.

State and local law enforcement efforts account for over 90 percent of criminal arrests, and troopers do the bulk of drug interdictions. Our troopers are on the front lines daily, and some of them are seriously injured and killed in the performance of their duties.

Our troopers work on a daily basis with the following Federal law enforcement agencies: Secret Service, FBI, ATF, Border Patrol, Immigration, Marshals, and DEA. Many of our State police and highway patrol agencies work in a joint cooperative effort through combined local, State and Federal law enforcement task forces. As a rule, the task forces work quite well together, participating, sharing resources, equipment, personnel and information. Through these joint cooperative efforts, relationships of Federal, State and local law enforcement are enhanced.

Asset forfeiture laws allow State and local governments to seize the assets of convicted drug dealers. Law enforcement officers frequently use the asset forfeiture laws in the fight against drugs. The

forfeiture laws deprive traffickers of the fruits of their crime and return illegal profits of the drug trade to Federal, State and local agencies for use in future drug enforcement activities.

Law enforcement agencies across the country use the proceeds from these investigations to finance a variety of special investigations and other police functions. At a time when drugs pose such a tremendous threat to our society, asset forfeiture has been an invaluable tool for law enforcement to implement productive drug interdiction programs and purchase equipment for anti-drug programs.

As you know, the asset forfeiture and equitable sharing program is the lifeblood of our drug interdiction initiatives. The taking away of the drug kingpins' and drug couriers' profits and property has proven to be very effective in combatting crime. Our State police and highway patrol organizations cannot afford to have their highly successful programs watered down to a mere perfunctory level.

Unfortunately, law enforcement's ability to utilize asset forfeiture will be seriously impaired if H.R. 1658, the Hyde bill, is signed into law. There are five provisions in H.R. 1658 that we are concerned about that are going to hurt law enforcement.

Number one, the burden of proof is too high. H.R. 1658 would force the government to prove its case by clear and convincing evidence. The usual standard for civil enforcement actions involving property is preponderance of evidence. Thus, H.R. 1658 would make the government's burden in drug cases higher than cases involving bank fraud, health care fraud, procurement fraud, and give drug dealers more protection than bankers, doctors, and defense contractors.

H.R. 1658 would encourage the filing of thousands of frivolous claims by criminals, their family members, friends and associates by, in effect, requiring Federal agencies to publish ads stating that anyone interested in contesting the forfeiture may do so free of charge, and by entitling each claimant to request a free lawyer. So, a lot of work for the lawyers.

H.R. 1658 will let criminals abscond with cash, vehicles and airplanes. It makes a mockery of law enforcement efforts to stop drug smuggling by forcing courts to release seized property back to the criminal pending trial if he claims he is suffering a hardship, even where there is overwhelming evidence that it was used to commit a crime. If the drug smuggler gets his airplane or his hoard of cash released pending trial, it will disappear.

H.R. 1658 allows drug dealers to pass drug profits to their heirs. By classifying as innocent owners anyone who receives otherwise forfeitable property through probate, H.R. 1658 creates a legal loophole allowing drug kingpins and other criminals to pass their illegal fortunes to their heirs, wives, children, friends, mistresses and business associates.

H.R. 1658 would give criminals a windfall. Under the bill, if the government sends notice to a prisoner that his property will be forfeited but sends the notice to the wrong jail, the remedy is to give the property back to the prisoner and bar the government from ever reinstating a forfeiture. It also gives prisoners 11 years to reopen old cases. I don't know what they were thinking about there. The proper remedy would be to give prisoners 2 years to reopen

forfeiture cases if notice is sent to the wrong address and then to reopen the proceedings so that the prisoner can file his claim.

The National Troopers Coalition is a member of Attorney General Reno's State and Local Working Group on Asset Forfeiture Reform and has fervently worked on this issue for the last 6 years. I have personally worked with Mr. Cary Copeland, past Director; Laurie Sartorio, past Deputy Director of the Asset Forfeiture Office; and the current Chief, Jerry McDowell; and the current Assistant Chief, Alice Dery, of the Asset Forfeiture Office and Money Laundering Section.

I have found these individuals to be hard-working, honorable people, and through their talent and ability, additional national and ethical standards have been developed and implemented for the asset forfeiture and equitable sharing program.

It is long past time to pass meaningful asset forfeiture reform that would not seriously curtail law enforcement efforts. And just to give you an example of this, I have two sons that are troopers. One was shot in the line of duty back in August 1996. They were actually after my one son, David; they inadvertently shot Mike, 11 shots in a car, in an assassination attempt. He is disabled and had to retire from the State police.

They arrested 22 individuals—the perpetrator, Gregory McCorkle, and his gang, several people. He got life plus 45 years, as well as some of the other ones. But this individual—they confiscated over $13 million, and he had homes in five States. He had been running heroin and cocaine from New York to Florida, with DC as his base of operation.

Quickly, I would like to thank Senator Thurmond. I can't thank you and Senator Biden enough. I thank Senator Thurmond for your half century, and Joe Biden for your probably quarter century, for helping law enforcement and troopers. The Delaware troopers send their regards. And, Senator Thurmond, the South Carolina troopers send their regards.

Thank you.

[The prepared statement of Mr. Hughes follows:]

PREPARED STATEMENT OF JOHNNY L. HUGHES

Good morning Mr. Chairman and fellow Committee members. I am here today representing our Chairman, Mr. Scott Reinacher and the National Troopers Coalition which represents approximately 45,000 troopers throughout this great nation. Our troopers range from the patrol trooper and criminal investigator up through the ranks including administrative commissioned officers and State Police and Highway Patrol department heads.

State and local law enforcement efforts account for over 90 percent of criminal arrests and Troopers do the bulk of highway drug interdictions. Our troopers are on the front lines daily and some of them are seriously injured and killed in the performance of their duties.

Our troopers work on a daily basis with the following federal law enforcement agencies; United States Secret Service, Federal Bureau of Investigation, Alcohol, Tobacco & Firearms, United States Border Patrol, Immigration and Naturalization, United States Marshals Service, and the Drug Enforcement Administration. Many of our State Police and Highway Patrol agencies work in a joint cooperative effort through combined local, state and federal law enforcement task forces. As a rule, these task forces work quite well together with all participating agencies sharing resources; i.e., equipment, personnel and information. Through these joint cooperative efforts, relationships of federal, state and local law enforcement are enhanced.

Asset forfeiture laws allow state and local governments to seize the assets of convicted drug dealers. Law enforcement officers frequently use asset forfeiture laws

in the fight against drugs. These forfeiture laws deprive traffickers of the fruits of their crime and return illegal profits of the drug trade to federal, state and local agencies for use in future drug enforcement activities.

Law enforcement agencies across the country have used the proceeds from drug investigations to finance a variety of special investigation and other police functions. At a time when drugs pose such a tremendous threat to our society, asset forfeiture has been an invaluable tool for law enforcement to implement productive drug interdiction programs and purchase equipment for anti-drug programs.

As you know, the asset forfeiture and equitable sharing program is the life-blood of our drug interdiction initiatives. The taking away of the drug kingpins and drug couriers' profits and property has proven to be very effective in combating crime. Our State Police and Highway Patrol organizations cannot afford to have their highly successful programs watered down to a mere perfunctory level. Unfortunately, law enforcement's ability to utilize asset forfeiture will be seriously impaired if H.R. 1658 is signed into law.

There are five provisions in H.R. 1658 that will hurt law enforcement:

- *The burden of proof is too high.* H.R. 1658 would force the government to prove its case by "clear and convincing evidence." The usual standard for civil enforcement actions involving property is "preponderance of the evidence." Thus, H.R. 1658 would make the government's burden in drug cases higher than it is in cases involving bank fraud, health care fraud or procurement fraud, and give drug dealers more protection than bankers, doctors and defense contractors.
- *H.R. 1658 will encourage the filing of thousands of frivolous claims.* By criminals, their family members, friends and associates, by, in effect, requiring federal agencies to publish ads stating that anyone interested in contesting the forfeiture may do so free of charge, and by entitling each claimant to request a free lawyer.
- *H.R. 1658 would let criminals abscond with cash, vehicles and airplanes.* This makes a mockery of law enforcement efforts to stop drug smuggling by forcing courts to release seized property back to the criminal pending trial if he claims he is suffering a "hardship", even where there is overwhelming evidence that it was used to commit a crime. If the drug smuggler gets his airplane or his hoard of cash released pending trial, it will disappear.
- *H.R. 1658 allows drug dealers to pass drug profits on to their heirs.* By classifying as "innocent owners" anyone who receives otherwise forfeitable property through probate, H.R. 1658 creates a legal loophole allowing drug kingpins and other criminals to pass their illegal fortunes to their heirs, including wives and children, friends, mistresses and business associates.
- *H.R. 1658 would give criminals a windfall.* Under the bill, if the government sends notice to a prisoner that his property will be forfeited, but sends the notice to the wrong jail, the remedy is to *give the property back to the prisoner* and to bar the government from ever re-instituting the forfeiture action. It also gives prisoners *eleven years* to re-open old cases. The proper remedy would be to give prisoners two years to re-open forfeiture cases if notice is sent to the wrong address, and then to re-open the proceedings so that the prisoner can file his claim.

The National Troopers Coalition is a member of Attorney General Reno's state and local working group on asset forfeiture reform and has fervently worked on this issue for the last six years. I have personally worked with Mr. Cary Copeland, Past Director, and Ms. Laurie Sartorio, Past Deputy Director, of the Asset Forfeiture Office and the current Chief, Gerald McDowell, and current Assistant Chief, Alice Dery, of the Asset Forfeiture and Money Laundering Section. I have found these individuals to be hardworking, honorable people and through their talent and ability, additional national and ethical standards have been developed and implemented for the Asset Forfeiture and Equitable Sharing Programs.

It is long past the time to pass meaningful asset forfeiture reform that would not seriously curtail law enforcement efforts.

We look forward to working with you and your staff on this most important issue. Thank you for all your past support of this nation's law enforcement officers.

Senator THURMOND. Mr. Buffone.

STATEMENT OF SAMUEL J. BUFFONE

Mr. BUFFONE. Thank you. Chairman Thurmond, members of the subcommittee, I appear today on behalf of the 10,000 members of the National Association of Criminal Defense Lawyers. Present

with me today in the hearing room are two of my co-chairs, Bo Edwards and David Smith.

As Senator Biden and Senator Leahy acknowledged at the beginning of this hearing, there is no serious debate about the effectiveness of forfeiture laws and civil asset forfeiture as a weapon against crime, and as an effective weapon against crime. The appropriate debate for this committee should be, rather, upon whether or not those weapons are used in a fashion that deprives individuals of their property rights, their individual rights, and their constitutional protections.

Throughout the entire debate over asset forfeiture—and I have been involved in it since the 1970's—there has never been serious disagreement about the underlying issues. What there has been is an inability to come together in a meaningful way to discuss what the real abuses are, to quantify them, and to come up with a way to eliminate them. That was until the proceedings in the House of Representatives that resulted in the passage of the Hyde legislation. The NACDL strongly supports the Hyde bill and believes that it should be passed by the Senate as reported from the House.

As I mentioned when I began my remarks, I speak for the organized defense bar, and on a daily basis the members of the NACDL experience, witness, and attempt to do something about abuse of asset forfeiture laws. These abuses are not aberrant, these abuses are not isolated, these abuses are not frivolous. They occur.

There is a reason why there is a public perception that something has gone amiss with asset forfeiture, and that reason is not because the public is attuned to the complexity of this debate. It is because they know friends, they know neighbors who have experienced firsthand the power of a prosecutor, not the kinds of prosecutors and law enforcement people who we have had here today and who have been addressed in this testimony, but those who would abuse their power in ways that infringe the rights of citizens.

I am going to come back to some examples of that, but an individual who walked into this hearing room might believe that forfeiture abuse was about things that happened to narcoterrorists and international drug smugglers. Forfeiture abuse is about the individual who stands on the street corner and is improperly stopped and arrested and has the $100 in pocket money seized and doesn't have the ability to retain an attorney or fight through the complex system to obtain the return of that money.

It is about the individual who makes his business by driving a delivery van and happens to find out that somehow, through misidentification, he is stopped and the van is seized, and before he can get it back, he losses his business. That might make it sound like this is a small matter limited to small people, but it affects big business just as much.

The Red Carpet Motel case which we have heard from two Senators—and there has been some confusion about the facts. I spoke yesterday with the defense attorney who was responsible for bringing that case to justice. The records in the case are being shipped to me and I am happy to make them a part of this record so that the committee can study them.

There was a seizure of the Red Carpet Motel. This was a civil forfeiture case and without a seizure of the property, the in rem proceedings could not have gone forward. Whether or not that meant that the motel was shut down—and it was not, it is my belief—did not affect the rights of the hotel owner. Because a U.S. attorney decided that he wanted to change the way the business was run so that it would be more prophylactic in its ability to combat drug trafficking, he placed upon that motel the mark that it was involved in drug trafficking.

Imagine the effort of the owner of that hotel to obtain financing, to market his hotel to a better clientele, having been branded on the basis of a civil forfeiture action as a location, a guilty property that furthered narcotics activities.

One of the examples that we cited in our testimony was the case of Bob's Space Racers. Bob's Space Racers is a large and legitimate organization that makes amusement rides for carnivals and circuses, and services them and installs them. Bob's Space Racers, as it was often the practice, took some of their employees, gave them traveling and spending money and sent them to Canada for legitimate jobs. They were stopped at the border. Their currency was seized, under the theory that they must have been drug traffickers or why else would all of them be traveling with this money.

There is a risk, and this risk becomes reality, that because we are concerned as a society about the narcotrafficker who will cross the border with large amounts of currency that we would disregard the rights of a small businessman who is doing nothing more than engaging in legitimate activity.

We have heard much about the supposed windfall for attorneys.

Senator Thurmond, I see my time is up. If I could just complete that one thought, if you will look carefully at the provision of the Hyde bill on appointment of counsel, it provides that counsel is only available for those financially unable to obtain counsel. There is discretion in judges to determine whether or not attorneys should be appointed. And the courts are to consider, among other things, whether or not the claim is frivolous. These are not unbridled rights. They are reasoned provisions that should be adopted into law in order to eliminate real abuses.

Thank you.

[The prepared statement of Mr. Buffone follows:]

PREPARED STATEMENT OF SAMUEL J. BUFFONE

Distinguished members of the Committee. I appear today on behalf of the National Association of Criminal Defense Lawyers (NACDL). On behalf of the NACDL I thank you for inviting us to participate in this hearing. I currently serve as co-chair of the NACDL's Forfeiture Abuse Task Force.

NACDL is the preeminent organization in the United States advancing the mission of the Nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members—and 80 state and local affiliate organizations with another 28,000 members—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The committee has captioned today's hearing as "Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime." The issue before this Committee should not be the importance of asset forfeiture as an effective weapon to combat crime. All parties to the debate agree on this point. Rather, the issue before this Committee should be whether current forfeiture law and practice adequately protects the rights

of all Americans. Since the rebirth of forfeiture law in the 1970's, and its subsequent dramatic growth, I have been involved as an author, litigator and spokesperson on behalf of organized bar associations on forfeiture issues. Throughout this entire debate there has never been a serious contention that both civil asset forfeiture and criminal forfeiture are indeed effective law enforcement tools and play a valuable role in fighting crime. It is appropriate for this committee to consider how this important weapon in the arsenal of law enforcement can be most effectively employed consistent with our constitutional system of government and historic concern as a nation for the personal and property rights of our citizens.

During hearings before the Committee on the Judiciary of the House of Representatives on civil asset forfeiture reform Stefan D. Cassella, Assistant Chief, Asset Forfeiture, Money Laundering Section, Criminal Division, United States Department of Justice, testified regarding the Department of Justice's position on asset forfeiture reform. Mr. Casella stated:

> I said last year that no matter how effective asset forfeiture may be as a law enforcement tool—and this is a very effective law enforcement tool—that no program, no tool of law enforcement, however effective at fighting crime, can survive long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice.[1]

The NACDL agrees with Mr. Casella's premise that respect for the rule of law is ultimately based on the respect for understanding of the basis for societal regulation and the overall fairness of how that regulation is administered. When law becomes an abstraction, as it has in the forfeiture area, the government risks losing societal consensus on the very need for these law enforcement tools. Such archaic notions as the "personification fiction," under which inanimate property can be found guilty of a crime despite the innocence of its owner, is a level of abstraction that evades all but the most attentive scholars to the nuances of forfeiture law. The average citizen finds it difficult to comprehend the fairness of a system under which property may be seized on an ex parte showing of probable cause, and the property owner must post a bond simply for the right to shoulder a higher burden of proof to demonstrate the innocence of his property.

The NACDL strongly supports the enactment into law of H.R. 1658, the "Civil Asset Forfeiture Reform Act. " The Bill as passed by the House, addresses the most important areas of forfeiture abuse law and rationalizes the civil asset forfeiture system in a way that will move closer to ensuring public support for appropriate uses of civil forfeiture. In a series of hearings before the House, a broad coalition of organizations presented testimony regarding ongoing abuses of civil asset forfeiture and the need for comprehensive reform. Chairman Henry Hyde's book *"Forfeiting our Property Rights, Is Your Property Safe From Seizure",* presented striking evidence of the pervasiveness of civil asset forfeiture abuse.

The recent passage of H.R. 1658 was made possible in part by an unprecedented bipartisan coalition that both recognized and supported the pressing need for civil asset forfeiture reform. The NACDL joined the Americans for Tax Reform, Chamber of Commerce of the United States of America, Small Business Survival Committee, Republicans for Choice, Institute for Justice, The Madison Project, Free Congress Foundation, American Conservative Union, National Rifle Association, Association of Concerned Tax Payers, Conservative Leadership Pact, Law Enforcement Alliance of American, Eagle Forum, Seniors Coalition, Frontiers of Freedom, American Civil Liberties Union in supporting this legislation. H.R. 1658 passed the House with 375 votes including 191 Republicans, 183 Democrats and 1 Independent.

THE NEED FOR REFORM

The NACDL has continued to collect instances of abuse of civil asset forfeiture reform. The following case studies illustrate how innocent Americans can suffer substantial financial detriment based on the application of the current civil asset forfeiture system.

Houston, Texas, Red Carpet Motel—Raise Your Prices or Else!

February 17, 1998, the U.S. Attorney's Office in Houston seized the Red Carpet Motel in a high crime area of the city. The government's action was based on a negligence theory—that the motel owners, GWJ Enterprises Inc. and Hop Enterprises Inc., had somehow "tacitly approved" alleged drug activity in the motel's rooms by some of its overnight guests.

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[1] Statement of Stephan D. Casella, Hearings Before the Committee on the Judiciary, House of Representatives, 105th Congress (June 11, 1997).

There were no allegations that the hotel owners participated in any crimes. Indeed, motel personnel called the police to the establishment dozens of times to report suspected drug-related activity. U.S. Attorney James DeAtley readily bragged to the press that he envisioned using current civil asset forfeiture laws in the same fashion against similar types of legitimate commercial enterprises, such as apartment complexes.

The government claimed the hotel deserved to be seized and forfeited because it had "failed" to implement all of the "security measures" dictated by law enforcement officials. This failure to agree with law enforcement about what security measures were affordable and wise from a legitimate business-operating standpoint was deemed to be the "tacit approval" of illegality cited by the prosecutors, subjecting the motel to forfeiture action.

One of the government's "recommendations" refused by the motel owners was to raise room rates. A *Houston Chronicle* editorial pointed to the absurdity and danger of this government forfeiture theory when applied to a legitimate business: "Perhaps another time, the advice will be to close up shop altogether." The editorial went on to make these additional, points:

> The prosecution's action in this case is contrary not only to the reasonable exercise of government, but it contradicts government-supported enticements to businesses that locate in areas where high crime rates have thwarted development. Good people should not have to fear property seizure because they operate business in high crime areas. Nor should they forfeit their property because they have failed to do the work of law enforcement * * *. This case demonstrates clearly the need for lawmakers to make a close-re-examination of federal drug forfeiture laws.

After more bad publicity all over Texas, in July 1998, the government finally released the motel back to the owners and dropped its forfeiture proceedings. It exacted a face-saving, written "agreement" with the motel owners. The agreement, however, in fact only put into words the security measures and goals the owners had already undertaken and those which it had always strived to meet.

The motel owners had lost their business establishment to the government's seizure for several months, suffered a significant loss of good business reputation, and were forced to spend substantial amounts of time and money on hiring an attorney and defending against the government's forfeiture action, which should never have been undertaken in the first place.

Source: Houston Chronicle, Mar. 12, 1998 editorial and 1998 articles. *Dallas Morning News,* 1998 articles.

The motel owners were represented by NACDL member Matt Hennessy of Houston, Texas. (unreported case)

San Jose, California, Aquarius Systems, Inc.—Your Buyer, Your Assets!

October 28, 1998, a federal judge in San Jose, California finally granted summary judgment against the government in a civil forfeiture action, ruling that the government must return to Los Angeles-based Aquarius Systems, Inc. (a.k.a. CAF Technologies Inc.) the $296,000 it had seized from it 6 years ago. Aquarius, and other computer chip dealers, had been accused of marketing stolen chips. Local police then seized $1.6 million of the companies' chip-buying, operating money; Customs later adopted the seizure.

Unknown to Aquarius Systems, Inc., the buyer used by the company had been operating for his *own profit,* by purchasing chips for $50.00 each while reporting to his supervisors at the company a unit cost of $296.00 (which at the time was a reasonable price). (The buyer ultimately served a short sentence for conspiracy to buy stolen property.)

In his ruling ordering the government to return to Aquarius $296,000 of its seized operating money, U.S. District Court Judge Jeremy Fogel blamed the government for dragging its feet on due process, by tying up the company's operating assets for so many years. Ruled the Court: "It is incumbent upon the government to institute civil forfeiture proceedings expeditiously." The judge then denied the government's motion for summary judgment against the company, and granted the company's motion for summary judgment against the government. The Court held that Aquarius Systems knew nothing about what its buyer was doing. As the judge noted, the company was unusual in its ability to stave off ruin from the government's seizure and forfeiture action, and in its ability "to fight [it] for six years."

Source: The (California) Recorder, Nov. 17, 1998.

Chicago, Illinois, Family-Owned and Operated Congress Pizzeria—Restaurant + Money + 3 Handguns = Forfeiture?

September 3, 1997, Anthony Lombardo, owner and proprietor of the family business, Congress Pizzeria of Chicago, was finally returned over $500,000 in currency improperly seized from his restaurant in early 1993. It took him over four years, and much expensive litigation, all the way to the Federal Court of Appeals for the Seventh Circuit, before former U.S. Attorney and Chief Judge Bauer and his colleagues on the Court ordered the government to return Mr. Lombardo's money.

Based on the "confidential informant" testimony of Josue Torres, the Chicago Police Department conducted a search of Congress Pizzeria. Torres, a crack addict, had been employed as a truck driver for the restaurant up until a few months before he told his story to the police. He told the police that he regularly fenced stolen property at various places in Chicago including Congress Pizzeria in order to feed his crack cocaine habit.

On this information, a warrant was issued authorizing police to search the pizzeria and seize a camera, a snowblower, a television, and three VCR's, which are items the informant said he sold to the sons at the restaurant. None of these items were found. During the search, however, the police did "find" and seize three unregistered guns, and $506,076 in U.S. currency.

The money was in a make-shift safe in the family-owned restaurant—a forty-four gallon barrel located inside either a boarded-up elevator or a dumb-water shaft (the record was somewhat unclear). It was wrapped in plastic bags and consisted of mostly small bills—such as might be expected from transactions by a pizzeria.

The owner's son, Frank Lombardo, was present at the time of the search. He was arrested and charged with possessing unregistered firearms (the guns at the restaurant). At the state court proceeding, the guns case was thrown out, because "it was not apparent that the guns were contraband per se" and "the guns were seized prior to the establishment of probable cause to seize them." No other state or federal criminal case was ever investigated or charged against the Lombardos or their pizzeria.

The federal government nonetheless moved to seize and forfeit the $500,000 "found" in the pizzeria, under current civil asset forfeiture *drug laws*. The government's theory of why this money was forfeitable as "drug money" was this: The owner's son, Frank Lombardo, was said to have been "extremely distraught" and "visibly shaken when he was told that the money was being seized" from his family's restaurant; and, said the government, he had "offered no explanation for the cash horde." (Later, Frank went to the police station to explain that the money belonged to his father, the owner of the pizzeria, who was then in Florida.)

Drug-sniffing dogs were also brought to the police station (not in the pizzeria), to check out the money for the presence of drugs. A narcotics canine named Rambo was instructed to "fetch dope" and he grabbed one bundle of money from the table and ripped the packaging apart. To the amazement of the court of appeals, this behavior apparently indicated to the officers presence of drugs on the money.

At best, as the Court noted, the dog only identified narcotics on one bundle of the seized currency even though the officers seized 31,392 separate bills in multiple bundles. And, even the government admitted that no one can place much stock in the results of dog sniffs because at least one-third of all the currency circulating in the United States, and perhaps as much as 90–96 percent, is known to be contaminated with cocaine. (Indeed, as the court of appeals noted, even Attorney General Reno's purse was found by a dog sniff to contain such contaminated currency.)

On this non-evidence of any nexus between the money and drugs, the government kept the money of Mr. Lombardo and his family Pizzeria for *4 years*—until in late 1998, the First Circuit Court finally ruled that it must be returned. The court held that the government had in fact failed to establish even the cursory burden that it is supposed to shoulder under current law—the establishment of "probable cause" to seize property in the first place.

None of the supposed "suspicious factors" cited by the government had "any bearing on the probable cause determination. The existence of any sum of money, standing alone, is not enough to establish probable cause to believe the money is forfeitable." Nor, for the reasons discussed above, was the police station, drug-sniffing dog episode enough for probable cause. And, "putting to one side the fact that the state court suppressed the guns as evidence against Frank Lombardo, [there is] no reason to believe that the presence of handguns should necessarily implicate narcotics activity or that their presence need be seen as anything other than protection in a small business setting."

In conclusion, the Court wrote: "We believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court to be 'enormously troubled by the government's increasing and virtually unchecked use of the

civil forfeiture statutes and the disregard for due process that is buried in those statutes." (quoting *U.S.* v. *All Assets of Statewide Auto Parts. Inc.,* 971 F.2d 896, 905 (2d Cir. 1992))

Source: U.S. v. *$506.231 in U.S. Currency,* 125 F.3d 442 (7th Cir. 1997) (Bauer, J.).

North Dakota and Daytona Beach, Florida Customs v. *Rob's Space Racers*—Who's Amusement?

In 1997, on a routine business trip, a large number of circus employees of the Bob's Space Racers Company, of Daytona Beach, Florida, were traveling to Canada. Bob's Space Racers, a privately held company, is one of the leading providers of amusement park games. The company also provides entertainment at traveling circuses.

As normal, the employees had been provided with their salary and traveling expenses for the project in cash. Thus, each of the 14 employees had several hundred dollars in his or her pockets when the group attempted to cross the border into Canada from North Dakota.

Customs agents at the North Dakota border seized all their money on the theory that, when the Customs agents *aggregated all the money carried by each of the 14 employees,* the total came to just over $ 10,000—the amount of money—triggering the regulations about "declaring" and filing Customs' "cash reporting" forms (Form 4790).

Customs had no basis for "aggregating" the money of the employees. And there was no reason to believe the employees were part of any conspiracy to smuggle money out of the country without filing the appropriate Customs forms. Indeed, the company informed Customs that the money was legitimate traveling expenses.

Into 1998, at least, the company was still trying to get Customs to remit the seized employee travel expenses.

Source: National Association of Criminal Defense Lawyers (NACDL) Asset Forfeiture Abuse Task Force Co-Chair David B. Smith, Alexandria, Virginia.

Haleyville, Alabama—Doctor, Beware Your Banker?

In 1996, after many years and much costly litigation, Dr. Richard Lowe of the small northwest Alabama town of Haleyville, was finally returned his wrongfully seized life savings of almost $3 million, when the Court of Appeals for the Eleventh Circuit ordered the government to return it.

Dr. Lowe, MD, is something of a throwback. He's a country doctor in small-town America, who still charged $5 for an office visit in 1997. He drives a used car and lives in a very modest home.

When he was a small child in the Depression, he lost $4.52 in savings when the local bank failed in his home town in rural Alabama. His parents lost all of their savings when that bank collapsed. Because of that experience, he has always hoarded cash. He'd empty his pockets at night into shoe boxes in a closet at home. Over the years, he had accumulated several boxes of cash in the back of a closet in his home.

In 1988, he consolidated his savings in the First Bank of Roanoke, Alabama—in order to set up a charitable account for a small private K–12 school in his hometown that was about to fail. He transferred all of his life savings into the consolidated account. At the time the government first wrongfully seized his account in June 1991, Dr. Lowe had given the school over. $900,000, saving it from collapse, and was still contributing more.

In the fall of 1990, his wife urged him to do something about the boxes of money in the closet, the Doctor said OK, 'you count it and we'll put it in the school's account.' It came to $316,911 in denominations of ones, fives, tens and twenties. Some of the bills were as much as 20 years old. Dr. Lowe took the money to the bank and gave it to the bank president, who was a longtime friend and former neighbor. This was the first cash ever placed in the bank account; all the other money was transferred by check from other banks when CD's matured.

The bank president knew the Doctor was obsessive about anonymity; he did not want to be known as a "rich doctor." So, instead of depositing the money to the account, the bank president just put the money in the bank vault. He gave the Doctor a receipt for the deposit, but he chose to simply put the money in the bank's vault. Then, with some of the money over the next 6 weeks, the bank president went to neighboring banks in the vicinity of Roanoke, and bought $6,000, $7,000, and $8,000 cashier's checks, and then credited it to Dr. Lowe's account.

When some of the other banks thought it was peculiar that the Roanoke bank president was doing this, they made a report to authorities. When FBI agents came to interview the bank president, he told them exactly what he had done and why.

He told them that it was his idea and not Dr. Lowe's. And he told them that as he understood the reporting laws, he had done nothing wrong. Still, the FBI and U.S. Attorney decided to seize Dr. Lowe's account. They did not just seize the $316,000 in cash deposits. They seized his entire account—his entire life savings of some $2.5 million at the time.

The bank president and his son, who was vice president, were both indicted. The bank president later made a deal with the government to plead guilty to structuring/reporting violations, in exchange for the government's dismissal of charges against his son. And, (a full two years after the seizure and attempted forfeiture of the Doctor's accounts), during which time all of his money was held by the government, the government decided to indict Dr. Lowe as well, for the alleged reporting transgressions of his banker.

It is, however, no violation of law, and certainly no crime, for a bank to send cash to another domestic financial institution. That is not within the definition of illegal "structuring." In short, there was no offense here, by even the banker, let alone the totally innocent, ignorant bank customer, Dr. Lowe.

Prosecutors kept pursuing their case against the Doctor anyway. With just one more week to go before his trial was to start, the prosecutors balked at taking their shoddy case to a jury. The government, to save face, offered the Doctor a "pretrial diversion" rather than simply dismissing the case, as they should have done. Under the diversion, the Doctor had to agree to stay out of trouble for one year and then the case would be dismissed. Of course, the Doctor had no trouble staying out of trouble, as he had never done anything wrong to begin with, or in his entire life.

Still, even then, the U.S. Attorney's office in Birmingham refused to drop its civil asset forfeiture action against Dr. Lowe's life savings account—clinging to the fact that, under current law, the burden remained on the Doctor to prove his money innocent!

The federal district court judge did rule that there was nothing wrong with the underlying account until the $300,000 cash deposit. And thus, he held that these monies should be returned to the Doctor. This was 3 years after the government's initial seizure—for 3 years, Dr. Lowe was denied access to any of his life savings.

The federal district court judge erred in ruling for the government on the $300,000 in currency, "finding" without any evidence that the Doctor "must have exhorted" the bank president (his words) not to file the technical CTR with the government, even though the government itself had never even noticed that a CTR had not been filed when it started its action against Dr. Lowe, the bank president and his son.

Dr. Lowe somehow had the wherewithal to continue his long fight against the government's wrongful taking of his money, and appealed to the Eleventh Circuit Court of Appeals. Finally, in late 1996, the court of appeals vindicated Dr. Lowe. It reversed the lower court's erroneous ruling, holding that, even under current, distorted civil asset forfeiture law, the Doctor had shown by evidence clear beyond a preponderance that he knew nothing of the banker's actions.

Meanwhile, though, he was without access to any of his seized life savings for 3 years, and without access to $300,000 of his accounts (which he had donated to the private school) for 6 years. He faced a wrongful indictment and threat of criminal trial. And he endured the financial, physical and emotional devastation of lengthy, costly litigation against a U.S. Attorneys Office blindly pursuing his assets, no matter the shoddy nature of its case.

Perhaps the government thought it could simply wear "the old man" out? The impact of this experience on him was so severe that Dr. Lowe had to be hospitalized at least once for stress and high blood pressure. Very few victims of such governmental abuse would have been able to keep fighting to win, as did the extraordinary Dr. Lowe.

Source: Hearing before U.S. House Judiciary Committee, on H.R. 1835 (105th Congress), June 11, 1997 (Testimony of National Association of Criminal Defense Lawyers (NACDL) Asset Forfeiture Abuse Task Force Co-Chair E.E. Edwards III, Nashville, Tennessee).

Kent, Washington Maya's Restaurant—The Sins of the Brother?

In 1993, in the Seattle suburb of Kent, Washington, police officers stormed Maya's Mexican food restaurant in the middle of business hours, ordering customers out of the establishment, and telling the patrons that the restaurant was being forfeited because "the owners were drug dealers." Local newspapers prominently publicized that Maya's restaurant had been closed and seized by the government for "drug dealing." Exequiel Soltero is the president and sole stockholder in Soltero Corp., Inc., the small business owner of the restaurant. The actual allegation was that his

brother had sold a few grams of cocaine in the men's restroom of the restaurant at some point.

Exequiel Soltero and the Soltero Corporation Inc. were completely innocent of any wrongdoing and had no knowledge whatsoever of the brother's suspected drug sale inside the restaurant. According to the informant relied upon by the law enforcement officers, the brother had told him that he was part owner of the restaurant. This was not true. It was nothing but puffery from the brother. The officers never made any attempt to check it out. If they had, they would have easily learned that Exequiel Soltero was the sole owner of the Soltero, Corp., Inc, and Maya's.

There was no notice or any opportunity for Mr. Soltero to be heard before the well-publicized, business-ruining raid and seizure of his restaurant. Fortunately, Mr. Soltero, was able to hire a lawyer to contest the government's seizure and forfeiture action, but not until his restaurant had already been raided and his business had suffered an onslaught of negative media attention about being seized for "drug dealing." Further, his restaurant was shut down for 5 days before his lawyer was able to get it re-opened.

Finally, when Mr. Soltero volunteered to take, and passed, a polygraph test conducted by a police polygraph examiner, the case was dismissed. However, the reckless raid, seizure and forfeiture quest by the authorities cost him thousands of dollars in lost profits for the several days his restaurant was shut down, as well as significant, lingering damages to his good business reputation. And he suffered the loss of substantial legal fees fighting the seizure of his business.

Source: National Association of Criminal Defense Lawyers (NACDL) Asset Forfeiture Abuse Task Force Co-Chair Richard Troberman, Seattle, Washington.

KEY REFORMS WORK BY H.R. 1658—THE CIVIL ASSET FORFEITURE REFORM ACT

The bipartisan supported bill implements four critical reforms of civil forfeiture law:

1. The Legislation places the burden of proof on the government, and sets an appropriate standard, clear and convincing evidence;
2. The Legislation provides for the appointment of counsel for indigent claimants who have bona fide claims but lack the resources to protect their property;
3. It establishes a uniform innocent owners defense applicable to all civil forfeitures;
4. It establishes uniform time limits for providing notice of a seizure and for filing a civil forfeiture complaint in court.

BURDEN OF PROOF

Under current civil forfeiture practice, the burden of proof is placed upon the claimant. A party whose property has been seized on a mere showing of probable cause must come to court and prove by preponderance of the evidence, that probable cause for forfeiture does not exist. In the alternative the claimant can show lack of knowledge or consent to legal activities. This defense is not uniformly applied.

Normally, the burden and standard of proof is based upon the risk of erroneous decision making. It is remarkable that the burden is placed upon the claimant when it is the government that has instituted the lawsuit and the greatest risk of erroneous fact finding is in unbridled application of this governmental authority. The burden is a constitutional anomaly in view of the quasi-criminal nature of forfeiture and the important privacy interest at stake in forfeiture proceedings. The House bill would reestablish a constitutional balance by requiring that in all civil forfeiture actions the burden of proof is on the United States to establish by clear and convincing evidence that the property is subject to forfeiture. This provision recognizes both the appropriateness of the United States shouldering this burden and the necessity for a clear and convincing evidence standard in light of the risk of erroneous fact finding and the importance of the rights at issue. The clear and convincing evidence standard has been used successfully by law enforcement in some of the major state jurisdictions including California, New York and Florida.

APPOINTED COUNSEL

The House Bill provides that if a person filing a claim is financially unable to obtain counsel, the court may appoint counsel to represent the person with respect to the claim. The bill does not provide counsel for all claimants, and not even all indigent claimants, but rather requires courts to consider the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith and to be non-frivolous. The bill would do no more than provide discretion to District Court judges to appoint counsel for indigent claimants and does not constitute a

radical departure from current law. Fundamental due process considerations dictate that indigents be provided. with counsel in order to contest the seizure of their property. The bill would provide an important safeguard for indigents who face civil forfeiture actions but who do not face related criminal charges. Under current practice, those facing criminal charges have more ready access to counsel than claimants who do not. Whatever other reforms are passed, an indigent claimant facing the loss of a significant portion of their property will still not face a fair process if he must face it unrepresented.

INNOCENT OWNER

The House bill provides a uniform innocent owner defense. Under current law a variety of standards, or none at all, govern claims by innocent owners regarding their property that is subject to forfeiture. The statute carefully defines the interest of an innocent owner and provides relief only where the owner did not know of the conduct giving rise to the forfeiture or upon learning of the conduct did all that reasonably could be expected under the circumstances to terminate illegal use of the property. For property interests acquired after the conduct giving rise to forfeiture, an innocent owner must show that he is either a BFP for value or that the interest was acquired through probate or inheritance or at the time of the acquisition he was reasonably without cause to believe that the property was subject to forfeiture. Special rules apply to real property in order to ensure that spouses or minor children of a person who committed an offense are not unnecessarily deprived of their homestead.

This provision codifies an important standard of fairness and centers forfeiture law in a critical area that the public can support. The notion that even an innocent owner can lose his property because of its involvement in a crime garners little public support.

UNIFORM TIME LIMITS FOR NOTICE OF SEIZURE AND FILING A CIVIL FORFEITURE COMPLAINT

The bill establishes uniform and enforceable time limits for the government to provide notice and commence a forfeiture action. First, the bill establishes a much needed sixty day time limit for the government to provide notice of the seizure and its intent to forfeit the property. Second, it establishes a ninety day time limit in which the United States Attorney must file a civil forfeiture complaint following a receipt of a notice of claim.

CONCLUSION

As I stated at the beginning of my testimony, ultimately an understanding of and respect for the rationale and fairness of forfeiture laws are the best way to ensure their continued vitality. The provisions of H.R. 1658 take critical steps towards ensuring the necessary balance between the necessities of law enforcement and the fairness of the processes. Additionally, the process, untethered by any easily understood rationale, will not garner public confidence. Forfeiture has grown on the back of arcane notions of medieval law and complex rules relating to custom seizures that bear little relationship to the reality of an average citizen's life. The Bill positions forfeiture closer to the central concept that a wrongdoer should not profit from his illegal activity. The NACDL supports Senate passage of the Bill as passed by the House.

NOTE: Neither Mr. Buffone nor NACDL has received any federal grant, contract or subcontract in the current and preceding two fiscal years.

Senator THURMOND. Mr. Pilon.

STATEMENT OF ROGER PILON

Mr. PILON. Thank you, Mr. Chairman, Senator Biden. My name is Roger Pilon. I am the Vice President for Legal Affairs at the Cato Institute, and it is good to be here to be speaking on behalf of the House bill. We are here, of course, because that bill passed by a vote of 375 to 48.

Now, unless most of those 375 did not know what they were doing, we must assume that there is something that is motivating this bill, and something very serious. And as my colleague, Mr. Buffone, has just said, unfortunately that has not come out over

the course of the last eight straight witnesses who have testified adverse to the House bill.

What brings us all here is not the successes. This is a point you, Senator Biden, brought out in your cross-examination, if I may call it that, of the first panel when you said you are doing a very bad job of defending your case. All the successes in the world will not bring us here today. We are here because of the failures. Indeed, the person charged with a crime cannot pose all the good deeds he has done over the course of his life as his defense.

The problems that surround forfeiture law are very real. Mr. Buffone cited a few. My own testimony cites others. The book that Chairman Hyde wrote that the Cato Institute published is replete with examples of one abuse after another.

Sheriffs in Volusia County, FL, stopping motorists going south on I–95, drivers fitting a drug courier profile, and seizing on the spot any cash in their possession in excess of $100 on the theory that it must be drug money—this kind of thing goes on across the country everyday because there is a perverse incentive involved in forfeiture. The police get to keep the money. We have heard the other colleagues on this panel discuss that very point. Through adoption procedures with the Justice Department, 80 percent of the proceeds are returned to the police department. This goes on all across the country.

Let me then address very briefly in the time that I have some of the other confusions that were brought up in earlier parts of this session. In particular, let's look at forfeiture in a nutshell. It is an action against the property, civil forfeiture is. The principles have been carried over uncritically from antiquity and from medieval deodand theories and applied to modern situations.

There is an ex parte proceeding in which, by a mere probable cause, the prosecution seizes the property and then the burden shifts to the owner to prove his innocence, which is to say to prove a negative. The procedures are three-fold; there are administrative, civil and criminal procedures. Eighty percent of forfeitures, the Justice Department tells us, are done thruogh administrative procedures. They are done by default; nobody ever shows up to make the claim.

Thus, when Senator Sessions asked Mr. Fiano about whether the police would have to prove by clear and convincing evidence before they could seize the cash in that van, there was a profound mistake there. It was a confusion of seizure with forfeiture. They are two different procedures. Seizure is by mere probable cause. Now, the burden shifts to the owner to prove his or the property's innocence. This bill would keep the burden with the government to prove by clear and convincing evidence that the property is subject to forfeiture.

Again, in 80 percent of the cases, no one even comes forward to claim the property, and there are two fundamental reasons for that. In most cases, DOJ is probably right; the evidence is overwhelming. Why come forward? But there are other cases where the person simply walks away because he realizes, especially in a small seizure, that it just isn't worth his time. It is going to cost him more to hire a lawyer to try to get his property back.

Indeed, look at the dilemma that the owner is put in under those circumstances. If he files the claim and posts a cost bond in order to offset the cost to the government, let me be clear—if he does that, he is now faced with a perilous situation. The government can bring either a civil action against him or it can bring a criminal action against him, incorporating a forfeiture count in an indictment.

If it brings a civil action against him, then discovery takes place. During the course of discovery, the action that originally led to the seizure could involve the person in self-incrimination even if this action turns out to be ultimately trivial or baseless. So he is faced with the possibility of a criminal indictment.

Or if the government can go straightforwardly to a criminal indictment—and in some ways the owner is better off under those circumstances because if the forfeiture count is part of the criminal indictment, it can follow only upon conviction by the ultimate standard, namely beyond a reasonable doubt. However, what you have got now is a situation whereby this dilemma is what faces the owner, and many people facing it simply walk away because it simply is not worth the risk, especially if the forfeiture is of a small amount, which most forfeitures are.

So as Chairman Hyde said, this system is simply stacked against the owner, which is why he has called for clear and convincing evidence because, as he said, this is a quasi-criminal proceeding. The allegation is made that forfeiture follows because it was property that was used to facilitate a crime. Well, if there is a crime that is being alleged here, let the government come forward with at least clear and convincing evidence that that is the case.

And so let me sum up in the following way. Most forfeitures under this bill will go on exactly as they have in the past. Nothing will change. What will change is that the innocent owner will finally get a break because the burden will stay with the government and it will be clear and convincing evidence.

Accordingly, it seems to me that this is the kind of thing that law enforcement should get behind. Why? Because most cases will continue as before. They will continue to get all the proceeds they are getting now. They will get rid of the cases that are causing all the trouble in the press, and I should think that is a win/win for both sides.

There is no law that is going to be perfect. At the end of the day, what we have to decide is which side we are going to err on. Are we going to err on the side of the individual whose property has been taken, or are we going to err on the side of the government?

Yes, forfeiture is a useful tool and it should be preserved, but only in a corrected form, only in a form that will allow us to get the people who should be gotten while protecting the innocent citizen.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you, Dr. Pilon.

[The prepared statement and letters of Mr. Pilon follow:]

PREPARED STATEMENT OF ROGER PILON

Mr. Chairman, distinguished members of the subcommittee: My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to thank you, Mr. Chairman, and thank Mr. Schumer as well, for inviting me to testify before the subcommittee today on federal asset forfeiture law and practice.

Late last month, as we all know, the House of Representatives passed H.R. 1658, the Civil Asset Forfeiture Reform Act. The vote was by an overwhelming margin of 375 to 48. The bill that passed had been refined over several years by its author, Henry Hyde, chairman of the House Judiciary Committee, whose book on American forfeiture law I edited and the Cato Institute published in 1995. Sponsorship of the House bill was broad and bipartisan. For some time now an equally broad and diverse range of citizens and organizations has urged its passage. (I am attaching copies of several letters indicating the broad support the bill enjoys.) That alone suggests that there is something fundamentally wrong with our forfeiture law and practice, which is why these hearings in the Senate are important.

PRELIMINARY MATTERS

Before discussing the substance and procedure of the matter, however, I want to make four preliminary points. First, it should be clear that most of those who support the House bill see a role—and an important role—for forfeiture in law enforcement. That is why the bill was written to reform the law, not to abolish it. I say that because some who oppose any changes, or who advocate only minor changes, sometimes charge that opponents of our present law want to abolish that law entirely. That is not true.

Second, it is sometimes said, in a related way, that opponents of our present law are really opponents of the so-called war on drugs, and that the forfeiture reform movement is a stalking horse, the ultimate target being the drug war. Here, too, that is not true. To be sure, many of us are of the view, shared by a growing number of Americans, that the war on drugs, like Prohibition before it, is an extremely costly failure, and that drug use should be treated not as a criminal but as a medical matter. But there is no necessary connection whatever between that view and the view that our forfeiture law needs reform. Indeed, in the House, many of the most ardent supporters of the war on drugs are ardent supporters of forfeiture reform.

Third, although the law enforcement community does not speak with a single voice in opposition to forfeiture reform—indeed, some in that community strongly support reform—it is fair to say that the majority there oppose the House bill. And in support of that opposition, they will cite success after success—the use of forfeiture to deprive drug kingpins of their ill-gotten gains and the tools of their trade, for example. No one can deny those successes, whatever their larger effect. But that is not the point. The point, rather, is that this body of law—because its foundations and practices are so foreign to our system of justice, as I will demonstrate in a moment—leads too often to flagrant miscarriages of justice, to the seizure and forfeiture of property from ordinary, innocent citizens. Given that stark reality, the law needs to be reformed. Just as a man charged with a crime cannot put up as his defense all the good deeds he has done in his life, so too our forfeiture law cannot escape reform simply because it produces many good results. Those results are to its credit. But it is the wrongs that result from our forfeiture law that should concern us—and prompt us to ask just why those wrongs are occurring. After all, it was not for nothing that the House vote was as overwhelming as it was.

Finally, and closely related to my third preliminary point, law enforcement often argues that forfeiture is an important tool in the war on crime. They are right. Forfeiture is an important tool in that effort. And under the House bill it will continue to be an important tool, for most forfeitures will occur in the future exactly as they have in the past. But in a free society, not any forfeiture law or practice will do. To state the point most generally, in our society, law enforcement officials may not use any means they wish in their efforts to reduce or remedy crime. After all, a police state would doubtless reduce crime. But we cannot have a police state in this nation because we have a Constitution and a body of law promulgated under it that limits what police, prosecutors, courts, and Congress may do—both substantively and procedurally.

In fact, it is precisely on that fundamental point—that first principle, the rule of law—that those of us who urge reform ultimately rest our case.[1] Modern American asset forfeiture law, especially civil forfeiture, rests on animistic and authoritarian principles, leading to practices that are utterly foreign to our first principles as a nation. Something is terribly wrong when a body of "law" enables officials to stop

[1] I have discussed the issues that follow more fully in Roger Pilon, "Can American Asset Forfeiture Law Be Justified?" 39 *New York Law School Law Review* 311 (1994).

motorists and other travelers and seize their cash on the spot, returning it, if they do, often years later, only after the person proves his innocence—where such a defense is possible; when that "law" enables officials to seize and sometimes destroy boats, cars, homes, airplanes, and whole businesses because they suspect the property has somehow been "involved" in a crime; or when it encourages officials to maim and even kill in their efforts to seize property for forfeiture to the government.[2] Lawyers who come upon this body of law for the first time are often taken aback by the injustice and irrationality of it all. Imagine what the ordinary citizen must think.

FORFEITURE IN A NUTSHELL

The very styling of the relatively few cases that make it to court tells much of the story: *United States* v. *$405,089.23 U.S. Currency*[3]; *United States* v. *92 Buena Vista Avenue*[4]; *United States* v. *One Mercedes 560 SEL.*[5] Civil forfeiture actions are brought against the *property,* not against the person. They are *in rem* proceedings—not for the purpose of gaining jurisdiction over a real person but for the purpose of seizing property for forfeiture to the government. Fantastic as it may sound, it is the *property* that is charged.

How can that be? Finding its origins in the Old Testament and in medieval doctrine, in the idea that animals and even inanimate objects involved in wrongdoing could by sacrificed in atonement or forfeited to the Crown, modern forfeiture law, filtered through early American admiralty and customs law, has simply carried forward, uncritically, the practice of charging things.

Thus, officials today can seize a person's property, real or chattel, without notice or hearing,[6] upon an *ex parte* showing of mere probable cause to believe that the property has somehow been "involved" in a crime. Neither the owner nor anyone else need be charged with a crime, for the action, again, is against the thing. The allegation of "involvement" may range from a belief that the property is contraband to a belief that it represents the proceeds of crime (even if the property is in the hands of someone not suspected of criminal activity) , that it is an instrumentality of crime, or that it somehow "facilitates" crime. And the probable cause showing may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party with interests adverse to the property owner.

Once the property is seized, the burden is upon any owner who wants to get his property back to prove its "innocence"—not by a probable-cause but by a preponderance-of-the-evidence standard. Yet that is possible only where innocent-owner defenses have been enacted or allowed.[7] In defending the innocence of his accused property, the owner must prove a negative, of course. Moreover, he must do that against the overwhelming resources of the government. And if he has been involved in activity that in any way might lead to criminal charges—however trivial or baseless those charges might ultimately prove to be—he has to weigh the risk of self-incrimination entailed by any effort to get his property back against the value of the property. As a practical matter, the burden is simply too high for many innocent owners, who end up walking away from their loss.

That, in a nutshell, is the state of much of our modern civil asset forfeiture law, despite periodic efforts in the House to reform some areas, and despite court challenges in recent years that have succeeded, when they have, only in chipping away at the doctrine. It is a body of law that enables prosecutors to go directly against property—a ruse that permits the abandonment of elementary notions of due process. And it does so, most notoriously, on the ground that the property is guilty of "facilitating" a crime—a doctrine that is infinitely elastic.

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[2] For those and many more examples of abuses perpetrated under our forfeiture law, see Henry Hyde, *Forfeiting Our Property Rights* (1995).

[3] 518 U.S. 267 (1996).

[4] 507 U.S. 111 (1993).

[5] 919 F.2d 327 (5th Cir. 1990).

[6] In the case of real property, that changed after 1993 when the Supreme Court ruled that owners had to be given notice and an opportunity to be heard before their real property could be seized. *United States* v. *James Daniel Good Property,* 510 U.S. 43 (1993).

[7] Thus, in *Bennis* v. *Michigan,* 516 U.S. 442 (1996), a case the Supreme Court decided under state law, Mrs. Bennis lost her half-interest in the family car when officials seized the car after her husband used it for an assignation with a prostitute. Although Mrs. Bennis was given "due process," nothing she could have said in any proceeding would have made a difference since the law provided no innocent-owner defense. Wronged by her husband, she was wronged again by the Michigan law.

THE PROCEDURE OF THE MATTER

To illustrate more fully how this law works in practice, however, it may be useful to distinguish three procedures—administrative, civil, and criminal—through which the government moves to complete a forfeiture after seizing a person's property.[8] Administrative forfeiture is essentially a default proceeding: if no one files a claim to the seized property, it forfeits by default to the government. The Justice Department's principal spokesman for forfeiture has claimed that 80 percent of forfeitures "are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless."[9] That may be true in many cases. But there are also many other cases that involve amounts too small to make it worth the owner's contesting the forfeiture, especially in light of the legal fees and the extraordinary burden of proving one's innocence.

But if an owner does contest the seizure, he has to file a claim and post a "cost bond" amounting to ten percent of the value of the property or $5,000, whichever is less. That does not release the property to the owner, however; incredibly, it is designed to defray the government's litigation and storage costs. Once the owner files a claim and posts a cost bond, the government has to file a complaint in federal district court. But it can wait up to five years—the statute of limitations—before doing so, whereas the owner has a mere ten days to answer the complaint, failing which the property forfeits to the government. Except in a criminal proceeding, there is no right of counsel, which means, again, that many small seizures end by default to the government.

Worse still, when the owner contests the seizure and posts a cost bond, his situation is perilous; for under many statutes the government has a choice. It can file a civil complaint, initiating a civil forfeiture action; or it can include a forfeiture count in a criminal indictment. Think about the dilemma that puts the owner in. If the government initiates a civil action in response to his contesting the seizure, not only can it wear him down through long and costly discovery but, through that very process, it can try to generate evidence for a subsequent criminal prosecution. Thus, the effort to get his property back exposes the owner to the risk of self-incrimination—even when the actions that led to the seizure in the first place prove ultimately to be trivial or innocent. And even if he is not indicted, the procedural hurdle the owner faces is daunting: whereas the government has to show the court simply that there is probable cause to believe that the property is subject to forfeiture—which it can do using rank hearsay evidence, inadmissible in a normal trial—the owner, once the burden shifts, has to prove the *property's* "innocence" by a preponderance of the evidence, with no hearsay allowed.

But on the other hand, once the owner contests the seizure the government can respond with an outright indictment. In some ways, of course, the owner would be better off under those circumstances: the burden of proof would be on the government; the standard of proof would be beyond a reasonable doubt; and forfeiture, where it is included as a count in the indictment, would follow only upon conviction. But who wants to face a criminal indictment and trial just to get his property back? At the same time, who wants to go through a civil action either, against the government, just to get his property back, especially at the risk of ultimately being indicted? Faced with that dilemma, is it any wonder that owners often simply walk away from their loss when the government seizes their property? Is that the kind of dilemma we want to put often innocent citizens in? As Chairman Hyde put it, "the system is stacked against innocent citizens and in favor of government"?[10] After all, prosecutors are not empowered simply to score victories and enrich government coffers. They have an obligation to do justice as well. Regrettably, the conflict of interest is so stark under our forfeiture laws that it is all too easy to shirk that obligation.

From this much, then, it should be clear just why the House bill puts the burden of proof on the government—where it should have been all along—and why it requires the government to discharge that burden by clear and convincing evidence. In a free society, if government takes a person's property, it had better have good reason for doing so, not simply probable cause, not even a mere preponderance of the evidence, but clear and convincing evidence. These are, after all, quasi-criminal proceedings: the allegation is that the property is ill-gotten, or contraband, or that it facilitated a crime. Even though they may be styled "civil," these are much closer

[8] For a detailed discussion of forfeiture law, see David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1998).

[9] Stefan D. Cassella, "Forfeiture Is Reasonable, and It Works," *Criminal Law and Procedure News* (The Federalist Society) vol. 1, no. 2 (Spring 1997), at 8.

[10] Hyde, *supra* note 2, at 8.

to criminal proceedings than to any ordinary civil action involving a private dispute or even a dispute with the government. If the government is going to allege criminal activity as the ground for its taking private property, it should at least have clear and convincing evidence to support that allegation.

RETURNING TO SUBSTANCE

We return, finally, to the substance of the matter and to a point made at the outset, namely, that under the House bill, most forfeitures will continue exactly as they have until now. For if Justice is right about most forfeitures not being contested due to the overwhelming evidence that supports them, that will not change even if the government does carry the burden of proof and carries it by a higher standard of evidence. Drug dealers will still not contest a seizure if it means running the risk of an indictment: it's simply too easy to recoup that loss through another deal. And where there are parallel criminal proceedings, there too the process will continue as it does today; for if there is enough evidence to prosecute a criminal action, there is probably more than enough evidence to effect a civil forfeiture.

What *will* change is that innocent owners will finally get a break. Here, we are not talking about contraband but about the other two most common substantive rationales for forfeiture—ill-gotten gain (or the proceeds of crime) and "facilitation." Taking first the proceeds rationale, with the burden on the government to prove, by clear and convincing evidence, that the money or property it seized was derived from crime, it will be more difficult to turn a seizure into a forfeiture, especially if the owner is in fact innocent—which is exactly as it should be. Does that mean that some innocent owners may still lose their property—and that some guilty owners may keep theirs. Of course it does. Justice can never be perfect, but it can be better than it is today. Again, we cannot fight crime by any means. In a free society, we err on the side of the innocent, not against them.

In the case of facilitation forfeiture, the issues are not as easy because the rationale is not as rational. The idea that property that "facilitates" a crime is thereby forfeitable to the government takes us to the darkest roots of forfeiture and to the greatest abuses in our own time. For the "instruments" of crime can be read so broadly as to include anything even "involved" in a crime. Indeed, for the crime of failing to fill out a customs form saying that he was taking more than $10,000 in U.S. currency out of the country, Mr. Hosep Bajakajian and his family, fearful of making such a declaration, would have forfeited the legally-acquired $357,144 they had in their possession as they waited to board an airplane in Los Angeles in 1994—but for the five-to-four decision of the Supreme Court last year saying that the statute allowing the forfeiture of anything "involved" in the crime violated the Excessive Fines Clause of the Eighth Amendment.[11] Whole bank accounts have been lost due to a single questionable deposit: the account "facilitated" the laundering of money. And stories of a home lost when one member of a family made an illegal phone call from it are too numerous to recount.[12]

No one has ever offered a satisfactory justification for facilitation forfeiture, although a Justice Department spokesman, attempting recently to explain why the Department did not limit itself to criminal forfeitures, inadvertently exposed the irrationality of the doctrine. The "most important" reason for doing civil forfeitures, he said, is because "criminal forfeiture is limited to the property *of the defendant.* If the defendant uses someone else's property to commit a crime, criminal forfeiture accomplishes nothing [for the government]. Only civil forfeiture will reach the property" (original emphasis).[13]

That is a striking admission. Proceeding "normally," against the accused, we can't reach the property of someone else. Thus, when Billy Munnerlyn, who ran a charter jet service, accepted a fare from a man who turned out, unknown to Mr. Munnerlyn, to be carrying drug money, the government could not have seized his plane unless it had brought a civil action—not against the drug dealer, nor even against Mr. Munnerlyn, who did no wrong, of course, but against the plane.[14] For the plane, you see, was "guilty" for having "facilitated" the crime. Yet the same Justice official who tells us how to reach property of people who haven't committed a crime says also

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[11] *United States* v. *Bajakajian,* 524 U.S. 321 (1998). *See* Roger Pilon, "High Court Reins In Overweening Government, *Wall Street Journal,* June 23, 1998, at A20.

[12] *See, e.g., United States* v. *Real Estate Known as 916 Douglas Ave.,* 903 F.2d 490 (7th Cir. 1990), cert. denied, 111 S. Ct. 1090 (1991).

[13] Cassella, *supra* note 9, at 4. For a critique, see Roger Pilon, "Forfeiting Reason," *Criminal Law and Procedure News, supra* note 9, at 1ff.

[14] For a discussion of this case, see Hyde, *supra* note 2, at 12.

that "property doesn't commit crimes; people do."[15] Just so. Then why charge the plane? Why? Because that's the only way the government can get the property of someone who's *not* guilty—by personifying the property and charging *it* with "facilitating" a crime. We're right back with the "goring ox" of antiquity and with a rationale that no one any longer believes, if anyone ever did.

Unfortunately, the House bill does not do away, once and for all, with facilitation forfeiture. Nevertheless, it does mitigate the effects of the doctrine by incorporating in all federal forfeiture statutes a fairly robust innocent-owner defense. Here again, the bill may not be perfect—and that defense may need to be strengthened—but the breadth of coverage is much greater than under current law.

CONCLUSION

In sum, the House has presented the Senate with an opportunity to help correct the considerable injustices that have been taking place for too long in this nation under the banner of forfeiture law. As I noted earlier, under the House bill, most forfeitures will go on as they have in the past. The illegitimate forfeitures, the ones that should never have taken place to begin with, will mostly fail—as they should—assuming they are even undertaken. Those, however, are a small fraction of all forfeitures, yet they have given the law enforcement community—to say nothing of the victims—the greatest problems; for they have given all of forfeiture a bad name, which is why this bill should be welcomed even—indeed, especially—by law enforcement. But above all, it should be welcomed by every American who wants to see our law and legal institutions grounded on our first principles as a nation. Forfeiture has a place in law enforcement, but like every tool in that effort, it must spring from principles of justice if it is to serve justice.

Thank you, Mr. Chairman and Mr. Schumer, for the opportunity to testify before the subcommittee today.

AMERICANS FOR TAX REFORM,
Washington, DC, June 18, 1999.

Hon. HENRY J. HYDE, *Chairman,*
House Committee on the Judiciary,
Rayburn, House Office Building,
Washington, DC.

DEAR MEMBER OF CONGRESS: We strongly urge your support for and co-sponsorship of the "Civil Asset Forfeiture, Reform Act of 1999." This critical piece of legislation warrants your strongest consideration. H.R. 1658 was introduced on May 4, 1999 in the U.S. House of Representatives, by Judiciary Committee Chairman Henry J. Hyde (R–IL). Original sponsors are Representatives Bob Barr (R–GA), John Conyers, Jr. (D–MI) and Barney Frank (D–MA).

The Civil Asset Forfeiture Reform Act of 1999 is a bi-partisan proposal which will provide substantive, and critically needed, reform to this area of the law. All of us and many other organizations all support this reform measure. The Cato Institute's Roger Pilon testified, "that the state of our forfeiture law today is a disgrace is hardly in question." Grover Norquist, President of Americans for Tax Reform urged, "No greater damage could be done to our basic liberties than to deprive U.S. citizens of their fundamental right to property."

In considering the impact of this legislation one must put themselves in the innocent property owner's shoes. Imagine this. You make the mistake of buying an airplane ticket with cash—behavior that is deemed to fit a drug courier profile—so you are detained and searched. No drugs are found, but the agents seize the cash in your wallet, saying they have "probable cause" to believe that the money was intended to buy drugs. You are allowed to leave and are not charged with any crime, but the agents keep your property.

What recourse do you have to get your property back. Very little, because the law treats the property, rather than you, as the offending object. None of the Constitutional or procedural safeguards of the criminal law are available, because you are not being threatened with a deprivation of liberty. In fact, the law doesn't require that you ever be charged with a crime. You have to prove a negative, that your property was never used in a crime., that it was "innocent". But the alleged criminal conduct needn't even involve you—it could just as easily be a crime allegedly committed by the previous owner of your property, or by someone who, unbeknownst to you, used your property in a criminal endeavor.

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[15] Cassella, *supra* note 9, at 4.

And if this wasn't bad enough, you must provide a 10 percent cost bond for the privilege of even contesting the government's seizure. Don't expect to have attorney provided to help you if you are indigent, but familiarize yourself with legal procedure quickly—you have less than 20 days to file your claim. Even assuming you somehow prevail, the government is not liable for any interest on your money, or in the case of seized property, any damage caused by its handling or storage.

As unbelievable its this all seems, this is now the law! It is incumbent on the Congress to reform the system to make it consistent with the basic presumption in American law—that you are innocent until proven otherwise, and that you should not lose your property without due process of law. This bill puts the burden of proof back where it belongs—with the government. The strongest provisions of the Bill are those which clearly safeguard or clarify existing Constitutional rights, including the following:

- Placing the burden of proof on the government to prove by "clear and convincing evidence" that the property is subject to forfeiture;
- Prohibiting the forfeiture of an innocent owner's interest in the property under any civil forfeiture statute;
- Allowing for the immediate release of seized property under certain circumstances evidencing substantial hardship to the claimant, pending the final disposition of the forfeiture proceedings;
- Providing, out of appropriated funds, court-appointed counsel to property owners who are financially unable to assert their rights and interests in seized property (e.g. because the government has seized all of the individual's or business' assets); and
- Granting property owners the right to sue the federal government for damages done to property due to handling and storage of seized assets while in government custody, if the property is not ultimately forfeited.

We also urge your strong opposition to *any* amendments to this bill which would expand the Department of Justice's powers to seize property and file forfeiture complaints. Such amendments serve no other purpose than to undermine and severely compromise the bill's essential purpose. Some unacceptable amendments include:

- Altering or reducing the burden of proof on the government from "clear and convincing evidence" to "preponderance of the evidence;"
- Permitting an "After-Acquired Evidence Exception" to the government (i.e. Seize Now, Fish Later) which would allow the government to seize and hold property without probable cause until the government completes discovery to "justify" its seizure of property;
- Granting U.S. Attorneys the option of pursuing criminal forfeiture proceedings as an alternative to civil forfeiture, if civil forfeiture is otherwise authorized; and
- Restricting the appointment of counsel for indigent claimants or subjecting citizens,to broad cross-examination by the federal prosecutor before any appointment can be undertaken.

The Civil Asset Forfeiture Reform Act of 1999 is solid legislation which undertakes fundamental reforms needed to prevent further forfeiture abuse. We as for your consideration of this matter and request that you become a co-sponsor of this legislation, as it is of great concern to our members. If you are interested in co-sponsoring this bill, please contact George Fishman. counsel at the House Judiciary Committee office at 225–5727.

Thank you very much for your consideration. If you have any questions on this or related issues, please do not hesitate to contact any of us.

AMERICANS FOR TAX REFORM
REPUBLICANS FOR CHOICE
THE MADISON PROJECT
AMERICAN CONSERVATIVE UNION
ASSOCIATION OF CONCERNED TAXPAYERS
LAW ENFORCEMENT ALLIANCE OF AMERICA
SENIORS COALITION
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
SMALL BUSINESS SURVIVAL COMMITTEE
INSTITUTE FOR JUSTICE
FREE CONGRESS FOUNDATION
NRA/ILA
CONSERVATIVE LEADERSHIP PAC
EAGLE FORUM
FRONTIERS OF FREEDOM
ACLU

CHAMBER OF COMMERCE,
Washington, DC, June 23, 1999.

Hon. HENRY J. HYDE, *Chairman,*
House Committee on the Judiciary,
Rayburn House Office Building,
Washington, DC.

DEAR CHAIRMAN HYDE: The U.S. Chamber of Commerce supports passage of H.R. 1658, the bipartisan Civil Asset Forfeiture Reform Act reported from the House Judiciary Committee on June 18, 1999. The Chamber opposes the addition of any weakening amendments to this legislation, such as the Hutchinson-Weiner amendment that would lower the bill's burden of proof standard.

As the world's largest business federation, representing over three million businesses and organizations of every size, sector and region, the Chamber has a vital interest in protecting the private property rights of business owners.

Criminal asset forfeiture can be a legitimate means for punishing criminal acts and has served as a valuable law enforcement tool. However, within the area of civil asset forfeiture, we are witnessing an increasing number of property seizures in cases where no crime has been committed, nor any criminal charges ever filed. Under current civil asset forfeiture law, federal agencies may seize private property simply for "probable cause," the same minimal standard used to obtain search warrants. In our view, probable cause, may certainly be a sufficient basis for seeking "evidence" of wrongdoing, but it should not serve as the basis for the permanent seizure of an individual's property.

As a result of civil asset forfeiture, individuals and business owners are often robbed of more than their property; they are robbed of their basic due process rights. Once an individual's property is seized, it is the property owner not the government that must establish by a "preponderance of the evidence" that the property in question was not involved in criminal wrongdoing. This amounts to a presumption of guilt where, in order to regain one's property, a business owner must essentially prove the negative, Moreover, individuals and business owners who wish to contest a property seizure must first produce a bond valued at 10 percent of the assets seized merely to receive a review of their case. Clearly, this law must be reformed.

H.R. 1658 would provide several important changes to current civil law to achieve these necessary reforms. By requiring the appropriate "clear and convincing" standard of proof, the bill would reestablish the time-honored presumption of innocence to individuals subject to asset forfeiture. In addition, the bill contains a hardship release provision, which would allow businesses to continue operating pending an actual judicial determination as to whether the government's seizure is warranted. The Chamber also supports language in the bill that allows for a court-appointed counsel mechanism for individuals of limited resources facing a civil forfeiture proceeding.

Once again, the U.S. Chamber supports passage of H.R. 1658, as reported from the House Judiciary Committee, and will oppose the addition of any weakening amendments, such as the Hutchinson-Weiner amendment.

Sincerely,

R. BRUCE JOSTEN,
Executive Vice President, Government Affairs.

AMERICAN BANKERS ASSOCIATION,
Washington, DC, May 14, 1999.

Hon. HENRY J. HYDE, *Chairman,*
House Committee on the Judiciary,
Rayburn House Office Building,
Washington, DC.

DEAR CHAIRMAN HYDE: Thank you for your recent letter to the American Bankers Association concerning the Civil Asset Forfeiture Reform Act of 1999 (H.R. 1658). ABA has long supported the use of the civil forfeiture laws as deterrents to crime. However, we remain opposed to the use of those same laws to either punish innocent lienholders, or to delay justice and increase bank's costs by placing the burden of proof on a bank instead of on the government agency bringing the civil forfeiture. Your bill takes the necessary step of requiring the *government* to establish, by clear and convincing evidence, that the property being seized is subject to forfeiture. This is truly a fair approach.

In addition, the measure will protect lenders from quickly losing the value of their interest in property by creating streamlined and efficient rules in all civil forfeiture proceedings. Our Association also supports the provision in the bill that protects innocent owners who acquire the property interest after the illegal conduct occurred.

Mr. Chairman, the ABA supports your bill as a truly bipartisan approach to the problem of balancing legitimate law enforcement needs with the free flow of commerce. Our Association stands ready to work with you on this proposal as you move it through Congress.

Sincerely,

EDWARD L. YINGLING,
Deputy Vice Presdent,
Executive Director of Government Relations.

Senator THURMOND. Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

Dr. Pilon, let me pick up where you left off, and you make a very persuasive case. Let me ask the threshold question. Would you support legislation that would eliminate civil forfeiture? Do you think it would be better just to simplify civil forfeiture?

Mr. PILON. No, because there are going to be some cases where you are going to have to do that and those are the cases of, for example, a deceased owner or an owner who has fled the jurisdiction, especially abroad, in which case you will have a default procedure. Now, it will not be a civil procedure in the sense that no one will come forward to make a claim. It will be a default procedure, and therefore an administrative procedure.

Senator BIDEN. I was under the impression that ultimately, although you believe that the Hyde amendment—and I may be totally mistaken—that the Hyde amendments improve it, the best way to improve it would be to scrap it, to scrap the entire civil forfeiture statute as it exists now and not replace it.

Mr. PILON. Well, you will be left then with cases in which property has been abandoned, and the question arises, well, whose property is it, because you can't bring a conviction and get it through a forfeiture count in a criminal indictment.

Senator BIDEN. I just wanted to established then that my impression was mistaken. Now, let me ask you another question. You pointed out that the burden of proof shifts to the owner to prove the negative and you said that is a bad thing, and apparently everyone agrees with you, including the Deputy Attorney General of the United States.

Mr. PILON. I, too, am struck by how much agreement there is that we need to reform. I think all we need now is a vehicle coming out of the Senate.

Senator BIDEN. And that is what I am trying to get to. There are two pieces of the burden of proof argument. One is shifting the burden from the claimant to the government, and there seems to be agreement on that. The second piece is raising the standard from probable cause to clear and convincing.

And I don't want to put words in your mouth, but I thought you said, in the circumstance you were describing of civil versus criminal forfeiture, that, in fact, it might be better for the government to come forward with a criminal charge and establish through clear and convincing evidence that the forfeiture was justified. Why would you raise the standard beyond what any other criminal charge would call for, and that is come forward with a criminal charge and have probable cause that the charge is justified?

In other words, it seems to me you speak against your own case. You want the standard in civil forfeiture, once the burden is shifted back to the government for what constitutes the appropriate level of justification for confiscation in the first place, to be higher than it would be if it were criminal. Is that correct?

Mr. PILON. I don't believe so. Criminal would be beyond a reasonable doubt.

Senator BIDEN. Not for the confiscation in the first instance.

Mr. PILON. That is mere probable cause for the seizure.

Senator BIDEN. For the seizure. So you are not suggesting that the seizure require anything beyond probable cause?

Mr. PILON. That is right, that is absolutely right.

Senator BIDEN. OK.

Mr. PILON. I mean, we have to distinguish the two procedures, as I said.

Senator BIDEN. I thought you were suggesting the seizure required clear and convincing.

Mr. PILON. Oh, no, no. In fact, that is the confusion that came up in the colloquy between Senator Sessions and Mr. Fiano.

Senator BIDEN. Now, let me ask you one other question. You indicated that the Justice Department suggests that 80 percent of the forfeitures are administrative, and 80 percent of those are a consequence—I am going to ask you to correct me. There is administrative, civil and criminal. The majority are administrative, you said, I thought. And did you say 80 percent are administrative, or 80 percent are defaulted?

Mr. PILON. I will read from Mr. Casella, who has been quoted more than once here today.

Senator BIDEN. OK.

Mr. PILON. He is Mr. Forfeiture in the Justice Department. "An administrative forfeiture is essentially a default proceeding. It occurs when property is seized and no one files a claim contesting the forfeiture. By definition, all administrative forfeitures are uncontested. Between 80 and 85 percent of all forfeitures handled by the Department of Justice fall into this category."

Senator BIDEN. Now, what percentage of those 80 to 85—and then what you did is you then parsed that further. You said there are those cases where clearly they are uncontested because they are bad guys. They are not going to come back and say I want my drug money back.

Mr. PILON. Probably, most of them.

Senator BIDEN. Most of them. And then you said there are some, though, where it is just too difficult; it is too risky in terms of involvement in a potential criminal charge and too expensive relative to the value of what was seized. What percentage fall in that second category? And I know you don't have any empirical data to prove it, but I mean what is your sense of what percentage falls into that second category?

Mr. PILON. Well, you are absolutely right. I don't have the data, but then neither does anyone else have the data.

Senator BIDEN. No, I am not suggesting anyone does. I am just wondering how big a problem this is. I am trying to get a sense of it.

Mr. PILON. In fact, if I am not mistaken, there is some data to the effect that most forfeitures are under $5,000. I believe either David Smith, who is the author of a case book on the subject, or Bo Edwards, who is an attorney who is here in the room as well, can address that.

Do you know, Sam, what the actual figure is?

Senator BIDEN. I don't want to pressure——

Mr. PILON. Under $10,000, or under $5,000, actually, under $5,000.

Senator BIDEN. To the extent that you can supply for the record any reasonable guess as to what percentage of the default cases are defaulted because either they don't want to run the risk, they are innocent and don't want to run the risk, or it is not worth the candle——

Mr. PILON. The seizure of a $5,000 car and it is going to cost you $10,000 to get an attorney.

Senator BIDEN. Well, to the extent that you can give us any data to sustain that point and what percentage of the defaults that makes up, it would be useful for us to have for the record. You don't have to do it now, but if you could do it to the extent you can, it would be a useful thing for us to know.

Mr. PILON. And mind you, this is not a large number, I expect, in the grand total of things, but that is just my point. Most forfeitures under this bill will continue exactly as they have in the past. The huge forfeitures especially will continue exactly as they have in the past.

Senator BIDEN. Well, let me explain how this pedestrian mind working in this field for 28 years kind of approaches it. And I say to Mr. Buffone, in my other life I was a defense attorney. So I believe you guys are good guys, not bad guys. I don't approach it from the perspective that whatever you have to say doesn't make sense. I approach it from the perspective that you are looking out for people's civil liberties.

But having said that, what I have found as I kind of look at this is the way I am breaking this out, Mr. Pilon, for me—and again I realize I may be suffering from the sin—when I got here at age 29, I used to accuse some of my more senior colleagues that they wrote a law, they got wedded to the law and they couldn't bring themselves to change what they wrote.

I admit to you that I may be suffering from the criticism I used to apply 25 years ago to folks who were then as senior as I am now. I acknowledge that up front. But I am trying to educate myself, and to the extent that I am mistaken about how this law applies, and to the extent that the abuses are not aberration but are a standard practice or something close to that, then I want to be educated on it.

But here is how I look at this. I look at this in the context of if there are only a few cases—I am going to oversimplify it for the purposes of time and for my ability to understand it. If the abuses are few in number and the remedy to eliminate those few abuses allows for a circumstance where we provide great latitude for the criminal element that these guys are going after, then I start balancing that in my mind because I am not talking about, in my view, a constitutional right here when we are on an edge. We are

not denying people because ultimately they get their day in court. Ultimately, they get their day in court to determine whether or not it was rightly or wrongly confiscated at the end of the day.

You are correct, I believe, at least in some circumstances—and I think less than you think—that the day in court may be denied for practical reasons because I don't want to spend the money, I don't want to run the risk, the cost is too high, et cetera. But that is the case in a whole range of civil circumstances where I don't sue AT&T because of the fact that they have—and by the way, if the Cato Institute and others have their way, we will have no class actions and no one like me will ever be able to sue because relative to AT&T it ain't worth me trying to recover the $4.70 I think they cheated me out of by rounding up instead of rounding down. But that is another question for another hearing.

My point is this. It is important for us to be able to on this side of the table figure out the balance here, which will lead me, Mr. Buffone, to a question to you. I don't doubt for a moment that you can cite for me myriad cases whereby you think there was an abuse of the civil forfeiture process. What I would like to ask you—and the best way for me to try to get at this again for me to understand it is of the reforms in the Hyde legislation, could you prioritize for me which ones you think would remedy the most common abuse that takes place, in your view?

In other words, if I said to you, OK, boss, here is the deal, I guarantee I can give you two of the six or seven or eight major Hyde reforms, which two do you want to solve the problem you believe exists out there?

Mr. BUFFONE. Senator, there are two answers to your question. First, we believe that the Hyde bill is that effort; it is the effort to focus only on what is necessary. Not all abuses——

Senator BIDEN. I have got that, but you are not going to get that. So as I said to the Justice Department, let's get real. Which ones do you think are the most important?

Mr. BUFFONE. Four principal reforms that we believe are necessary. First of all is the shift of the burden of proof and the standard of proof to an appropriate standard of clear and convincing evidence. Second, indigents under appropriate circumstances will be provided with counsel so that they can contest forfeitures; third, the establishment of a uniform and meaningful innocent owner defense; and, fourth——

Senator BIDEN. And what do you think that entails? What uniform innocent owner defense do you think this should be? I mean, can you tell me?

Mr. BUFFONE. I think it is in the Hyde bill. I think it has been stripped down to its bare essentials.

Senator BIDEN. OK, that is what I am asking. For example, bona fide transfer of the innocent owner—are you just talking about the innocent owner?

Mr. BUFFONE. I am talking about the entire provision of the Hyde bill, Senator, that deals with both those that acquire an interest after a criminal act and must establish one standard, and those who have a preexisting claim to property prior to the commission of the offense. And, finally—and I would put this fourth on the list—rationalization of forfeiture notice, time and bond provisions.

Senator BIDEN. Well, let me ask both you gentlemen the notice question. Let's say we stop legally four folks on I–95—five folks, six folks, on I–95 in an automobile. And the trooper smells marijuana in the automobile and he asks the occupants to step out of the car, and under the seat he notices there is what is later determined to be after they bring in dogs $50,000 and a quantity of cocaine after the canine unit comes in.

The driver says he got the money from a guy in New York, and the guy in New York said the money is going to be taken to his sister in Florida and the sister in Florida is going to send it to Mexico, to a guy in Mexico. And now you seize the $50,000 and you send out notices and notice only gets to five of the six folks. Do you have to return under the Hyde bill the $50,000 if only five of the six got notice? What do you think? How would the Hyde bill work? By the way, do they all get a free lawyer?

Mr. BUFFONE. First of all, I am not sure any of them get a free lawyer. I don't know whether or not they are indigent, whether or not they have non-frivolous claims, and whether or not you could persuade a district court judge that he should, in fact, appoint one.

Senator BIDEN. Are they required under Hyde to be indigent?

Mr. BUFFONE. They must be not able to afford an attorney.

Senator BIDEN. The same standard you get for a public defender?

Mr. BUFFONE. To be honest with you, Senator, I am not sure whether or not the provisions of the Criminal Justice Act would apply under this.

Senator BIDEN. I am just wondering because I don't know from the Hyde bill how that is determined. But it is probably written there and I——

Mr. PILON. This is all done under the supervision of the presiding judge, and what the Hyde bill does is give him a certain discretion that currently he does not have.

Senator BIDEN. Well, when you say "certain," it means it gives him total discretion, right?

Mr. PILON. No, not total discretion.

Senator BIDEN. Well, let me put it this way. It says what? What is the operative language the judge has to apply to determine whether or not he or she makes a judgment that they get a free lawyer?

Mr. PILON. Well, here is, for example, the language on page 9 of the bill relating to the hardship issue. "A claimant's likely hardship from contingent possession by the government of the property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred." That is about the best you can do in a statute.

Senator BIDEN. I have got it, but that is the judge has total discretion within that definition.

Mr. PILON. That is right. How else are you going to do it?

Senator BIDEN. I don't want to get off on that. I want to focus again on what Mr. Buffone and I were talking about.

Two issues. Notice gets sent out and it gets to five of the six people in the car where the property was seized. Does that mean the government, if it can't get to all six, has to return the $50,000?

Mr. BUFFONE. Senator Biden, first of all, I believe that the provision of the bill requires only reasonable notice to those the government knows have a claim over the property.

Senator BIDEN. Well, all of them are claimants in the car. None of them said they owned the car, the rental car.

Mr. PILON. Well, the statute reads, "Unless the agency shows good cause for a failure to give notice to that person or that the person otherwise had actual notice of the seizure." So I mean I think it has covered the bases.

Senator BIDEN. Wait a minute. How does that cover the bases? You know, the example used in the book, I am told, and in the hearings was, well, they are in prison. And the one guy is in prison and he gets moved to another prison he didn't get notice, and therefore the government cannot keep the property, cannot dispose of the property.

Mr. PILON. The statute reads that the court may extend the period for filing a notice for good cause shown, and among the good causes are that he——

Senator BIDEN. He is not at the address I sent it to.

Mr. PILON. That is right.

Senator BIDEN. That is sufficient? I thought that was the abuse you were trying to correct.

Mr. PILON. No, that is not an abuse we are trying to correct.

Senator BIDEN. I thought that is what characterizes the abuse. The guy is not at the right address. You can't find him, and what you have done is you have gone ahead and gotten rid of his property. And doggone it, you should have followed further; he had moved from that address.

Mr. BUFFONE. Senator Biden, I think it is a well-established concept, as I know you are aware, in both civil and criminal jurisprudence that a fundamental element of due process is notice.

Senator BIDEN. Right.

Mr. BUFFONE. You simply don't proceed against an individual or his property in other circumstances without service of process upon him or some notice of the proceeding.

Senator BIDEN. Or a legitimate attempt to serve him.

Mr. BUFFONE. Well, in some circumstances even that legitimate attempt wouldn't work, as you know, if you didn't have personal jurisdiction over someone.

Senator BIDEN. That is right.

Mr. BUFFONE. Here, we have jurisdiction over the property.

Senator BIDEN. Yes.

Mr. BUFFONE. The jurisdiction of the court is based on the $50,000 that was seized under the seat. So the question becomes, given that circumstance where you don't have to go through the normal process of service of process and other forms of notification, what is fair and equitable. And I think the Hyde bill requires nothing more than fundamental fairness. Make an effort to locate those individuals that you know have a claim and provide them with actual notice.

If for some reason you didn't do that and that rises to the level of good cause—the individual absconded; you weren't aware through the exercise of due diligence that they had, in fact, been moved—then you can get additional time and try it again. But the

real abuse here is what happens to the person who has a claim? The government knows it, and through no fault of his own he simply hasn't been told that his property has been confiscated.

Senator BIDEN. Well, see, that is the point I am trying to make because I don't know that many—how often does that happen? I mean, I am not aware—I may be wrong, but how often does that happen? I mean, I have asked my staff. I have been banging them over the head for the last 3 weeks.

OK, I agree with that. If, in fact, they haven't been notified and the government really hasn't tried to notify them—the old sheriff says, look, I tell you what I am going to do down here. I am going to build myself the Strom Thurmond Training Center, in South Carolina. I know old Jones is living over there in Harford County. I know he has moved and I am not going to tell him, and therefore we are going to confiscate. I mean, I don't hear where that happens. I don't know what you all are trying to correct here. Right now, you are required to give notice, aren't you?

Mr. PILON. Senator Biden, may I invite you to read carefully the Hyde book, where you will see case after case of the kinds of abuses we are talking about.

Senator BIDEN. On notice?

Mr. PILON. Some of them involving notice, others——

Senator BIDEN. I am just focusing one at a time. I am focusing on notice here.

Mr. PILON. Well, frankly, I think this is probably a relatively small aspect of the overall reform.

Senator BIDEN. Good. That is all I am trying to get at.

Mr. BUFFONE. Senator Biden.

Mr. GALLEGOS. Senator——

Senator BIDEN. Go ahead, finish your thought, and then you, Gil.

Mr. BUFFONE. I will finish my thought. I think there is certainly a kernel of wisdom in what you are saying. The NACDL certainly doesn't want to press for reforms where reforms are not necessary. I think there should be study and analysis of the scope of the notice problem. If it is not a big problem and, as you apparently believe, it is one that could be easily solved——

Senator BIDEN. I don't know that it is a big problem. That is what I guess I am trying to say.

Mr. BUFFONE. No one is looking for a "gotcha" provision here for the guilty to get out of their responsibility for forfeiture of property.

Senator BIDEN. Let me tell you what one of my hang-ups here is in this whole thing. I remember when we started writing this legislation years ago the ACLU, my allies in many things, did not like it, period, period, period, in any way, shape or form, number one. Number two, I know from experience now the black helicopter guys don't like it, period, period, under any circumstances, period.

So I am looking at this bill and it looks to me like overkill. It looks to me like built into this bill is a big chunk of "gotcha." Now, maybe I have been here too long, and that is why I am trying to be as precise or methodical as I can about what provisions do what because it seems to me, taken together, there are provisions in this bill that are overkill.

I mean, look, this crew sitting down in front of you to your right, even though I am a defense attorney, they are my buddies. I have

been working with them for 27 years. Gil, for example, can tell you when I think the cops are wrong, they have got a problem with me. And I told them right up front I think we have got a problem on this notion in terms of burden of proof, and I told the Justice Department that. I think we should change that.

So what I am trying to get down to here is I think if we all sort of go back to what I said in the beginning—and I will end with this after the witnesses, Mr. Chairman, say what they have to say because I won't press this any longer. I think we both exaggerate; both sides of this are exaggerating what is at stake here, and that is I think there is a logical, reasonable way to make about a third of the changes that the Hyde bill does, or some compromise on those changes, to get this thing straight.

But I don't see the notice provision. It seems to me that the notice provision should be basically, look, did the government make a good-faith effort to try to notify. If they did, bingo, period, done, over. That is what I think. But the way I read the Hyde bill, it goes a heck of a lot further than that.

Now, again, I am taking too much time, Mr. Chairman, and as usual you are indulging me and I appreciate it.

Mr. President, you wanted to say something, and Sheriff Brown wanted to say something, and with the chairman's permission, why don't you comment?

Mr. GALLEGOS. My understanding is that the sixth person you asked about, even if they didn't receive notice, may come back at a later time because of the extended time limits and make a claim at that time that the government would have to defend. And I think that is a real issue, and then the government would have to prove maybe 10 years later that they gave notice and that there may be some difficulty in that. So I think that that is a practical problem with the notice issue and the time limits to lay claim on that. And then you might have to give them back the $50,000.

Senator BIDEN. Sheriff.

Mr. BROWN. Senator Biden, in the late 1970's you and Senator Thurmond gave law enforcement the greatest tool it has had in years. If we are abusing it, let's punish the abusers, but let's don't whip the whole class because Johnny misbehaved in class.

Senator BIDEN. Well, let me conclude, and I don't want to cut off Mr. Pilon and I don't want to cut off Mr. Buffone, but let me say this. I hope there is enough, and I am confident there is enough goodwill here that we get the defense bar, the police organizations, the Justice Department, the Cato Institute and other well-respected intellectual fora together to figure out whether or not we can put together something that makes sense here.

And I would just say in answer to Mr. Pilon's question about the lop-sided vote, I will bet you if you asked 60 percent of the people who voted, because it is not their thing, there is a bit of confusion about asset forfeiture. And I think if we can sort of work our way through it, we may get something done.

Mr. Chairman, my intention is that—and I can't guarantee this, but as one Senator I can probably affect it. The Hyde bill, as is, I am going to do all in my effort to make sure does not become law, and I think I can probably do that in this session.

Conversely, I say to my friends in law enforcement you have to figure out and you have got to admit to the extent you can where you, in fact, think the changes would work to protect individuals, yet at the same time not hamper what you are doing. And I think there is a middle ground here, and it doesn't mean it is down the middle. There is a middle ground here. I strongly encourage you all to do that, but I think we can get something positive done here.

Mr. Chairman, I will yield to the——

Mr. GALLEGOS. Mr. Chairman, if I may just say something, we, in fact, did try that in the House and were rebuffed at every turn.

Senator BIDEN. Well, this is old Joe Boy you are talking to now, so you have got somebody who will listen. And we may be able to get something done because I think on both sides of the aisle here, including the chairman and Senator Sessions and others, there is a receptive ear to trying to figure out if we can work this out.

I am not implying that either side has been unwilling. I am just suggesting that we are where we are now and maybe it is the time now to focus on the most egregious things. And that is why I asked you, Mr. Buffone, if you only got one or two, what were the most important things to change. And that is why I am asking the police officers the reverse, what are the things that are the least that they could handle in terms of the practical application of civil forfeiture. What are the most damaging aspects, in their view, of the Hyde bill?

Mr. PILON. Senator Biden, the way you have couched the matter puts us to a kind of Sophie's choice. You have said which of your principles are you willing to abandon?

Senator BIDEN. You got it.

Mr. PILON. That is right, and I think that there are a number of us who think that justice is not a matter of a utilitarian calculation. And it behooves you, if you are going to do all you can to resist this bill, to show what it is that is offensive about it, and I have yet to hear anything from the other side, including your side, that shows what precisely it is that you find offensive.

Do you find offensive the burden of proof shift?

Senator BIDEN. No.

Mr. PILON. Apparently not. Do you find offensive the innocent owner defense?

Senator BIDEN. Yes, the way you have it written.

Mr. PILON. You do?

Senator BIDEN. The way it is written, yes.

Mr. PILON. Well, in fact, the innocent owner defense is in some respects weaker in this bill than is the case under current law with respect to the scienter thing.

Senator BIDEN. I understand.

Mr. PILON. And I realize your pride of authorship, and as an author myself I can understand that. But there are times when it seems to me that you have got to look at these issues and say where are the real problems. And the real problems are occurring out there in the world.

Senator BIDEN. That is exactly right.

Mr. PILON. They are occurring in the form of people who are utterly innocent and are losing their property because, as Chairman Hyde said, the system is stacked against them. That is what needs

to be addressed, and in addressing it, it may turn out that he has just struck upon the right principles for doing it whereby we can get the guilty and allow the innocent to go free.

Senator BIDEN. The bottom line is I do not believe that is what the bill does. I do not think it does that.

Mr. PILON. We need further hearings, I guess.

Senator BIDEN. Well, no. It is easy in this outfit. Do you know what I mean? It is one of the strange things about a democracy and the way the Senate works. So what I am doing is inviting you to tell me what you think your bottom line is, for me to determine personally whether or not I think it is principled in terms of what I think the legislation should be. Otherwise, you have an alternative. You can run for office and you can be here and you can then decide. That is kind of the way it works. It is a funny system.

But at any rate, I don't have anything more to say, Mr. Chairman. I thank you for your time. I would like to work with you all to see if there is a, "principled way" we can correct the abuses without eliminating the system. And if we can, I am prepared to do that. In the meantime, I don't think the Hyde bill does that.

Thank you. Thank you, Mr. Chairman.

Senator THURMOND. Thank you, Senator. I just have a few questions before we wind up.

Mr. Gallegos, in your statement you say that Federal civil forfeiture provides State and local agencies with important supplemental resources. Are these resources critical to many agencies?

Mr. GALLEGOS. Absolutely, they are, Mr. Chairman. The civil forfeiture statutes have provided funds, as has been asserted here, for additional officers, equipment, and to fight the war on drugs and for other purposes. And a reduction in the civil forfeitures would, in fact, have a very profound effect on the efficiency of law enforcement throughout this country, and especially the fact that this very Congress is now looking at cutting back on funds for State and local law enforcement, especially in the area of drug interdiction and drug enforcement.

Senator THURMOND. Sheriff Brown, how does equitable sharing of forfeited assets help improve cooperation between local law enforcement and Federal law enforcement?

Mr. BROWN. Mr. Chairman, the 60 acres in South Carolina was seized during a task force operation with Federal, State and local law enforcement all working together to better the community. So having this asset forfeiture and equitable sharing gives all of us an opportunity to work together and get the proceeds from our hard work.

Senator THURMOND. Sheriff Brown, I understand that up to 15 percent of the money that State and local law enforcement receives from equitable sharing can be used to support community-based programs. Can you explain how this money is being used to benefit communities?

Mr. BROWN. Yes, sir. Some of the monies, I know, have been given to Boy Scouts of America. I have personally out of our accounts given money to the Urban League in Greenville for furtherance of drug education of young people who could not afford to go anywhere to get it. So the money is being used, up to 15 percent, in community projects all across the country.

Some of us obviously have councils at home and supervisors at home that don't like to spend money, so the monies we use are furthering our efforts to have the best training at our training center, building a good training center to help everybody.

Senator THURMOND. Mr. Hughes, what provision of the Civil Asset Forfeiture Reform Act that was recently passed by the House causes you the most concern and why?

Mr. HUGHES. I brought out five points, Mr. Chairman, and the one that bothers us the most——

Senator THURMOND. Speak into your loud speaker.

Mr. HUGHES. The one that bothers us the most is the one that Senator Biden brought up, and we were elaborating on that and what that does. As you know, asset forfeiture is the lifeblood of law enforcement organizations, and when you talk about frivolous claims and when you talk about property, under the criminal windfall provision the government sends notice to a prisoner that his property is going to be forfeited, but sends it to the wrong jail, the remedy currently is to give the property back to the prisoner. Quite frankly, that is wrong; it stinks.

Senator THURMOND. Mr. Buffone, you note in your testimony that you believe the government should have the burden of proving a civil forfeiture by clear and convincing evidence. It appears to me that most areas of civil law require proof by a preponderance of the evidence. Do any areas of civil law currently require proof by clear and convincing evidence?

Mr. BUFFONE. No, Your Honor, Judge—excuse me—Senator Thurmond, they do not.

Senator BIDEN. By the way, he is a judge, a general, and a Senator. You can use any title and it will fit. [Laughter.]

Mr. BUFFONE. Senator Thurmond, no, to my knowledge it does not, and I think there is a good reason for that. It is, first of all, that civil forfeiture is one of the rare areas of the law that are quasi-criminal. They are unlike other civil proceedings because they are a hybrid proceeding involving both aspects of civil and criminal law.

Second, traditionally the burden of proof and the standard of proof is determined by allocating the risk of erroneous fact-finding. And in civil forfeiture, the risk of erroneous fact-finding is particularly unique because only the property is in court and not the owner or the person who can defend it.

Senator THURMOND. Now, my last question is to Dr. Pilon. In your prepared testimony, you described forfeiture as being rooted in authoritarian principles leading to practices that are utterly foreign to our first principles as a Nation. Isn't it true that forfeiture has been authorized within the American legal system since the founding years of our country, especially in the area of admiralty law?

Mr. PILON. Yes, and its use there was perfectly understandable. It was because the customs duties, which were the only revenue source for the Federal Government, unlike today, were very important to the Federal Government. And so when a ship captain did not pay the duties, the only way to get custody or to remedy the matter was to seize the ship and its cargo because the owner of the cargo and/or the ship was 3,000 miles away. So it was primarily

for jurisdictional reasons, and if the duties were not forthcoming, then, of course, the forfeiture would follow.

Senator THURMOND. Senator Biden, do you have any more questions?

Senator BIDEN. I was just going to say kind of like drug trafficking.

Mr. PILON. No, it isn't at all.

Senator THURMOND. Now, before adjourning the hearing, I would like to place into the record a written statement from the Federal Bureau of Investigation.

[The statement referred to appears in the appendix:]

Senator THURMOND. I would also like to place in the record a letter from the Federal Law Enforcement Officers Association.

[The letter referred to appears in the appendix:]

Senator THURMOND. We will leave the hearing record open for one week for additional materials to be placed in the record and for follow-up questions.

Is there anything else to come before the hearing?

[No response.]

Senator THURMOND. If not, we stand adjourned, and I want to thank all of you for your presence and your testimony.

[Whereupon, at 5:06 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF ERIC HOLDER TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Holder, I understand that the Civil Asset Forfeiture Reform Act as passed by the House would apply retroactively to pending forfeiture cases. What impact would the retroactive application of a forfeiture reform bill have in this area?

Answer. The civil asset forfeiture reform bill passed by the House, H.R. 1658, would elevate the government's burden of proof in civil forfeiture cases, and would apply that burden of proof not only to future but also to *pending* cases. There are currently thousands of forfeiture cases now pending in the federal courts and before federal law enforcement agencies, including cases pending on appeal. Making the change in the burden of proof apply retroactively to pending cases will cause substantial disruption to law enforcement and judicial functions and cause hundreds of cases to have to be re-tried.

Question 2. Mr. Holder, please explain how funds from the Department's Asset[s] Forfeiture Fund are disbursed, and how they are used in the Weed and Seed Program.

Answer. The primary purpose for existence of the Assets Forfeiture Fund (AFF) is to provide a stable source of funds to cover the many costs (including satisfaction of innocent lien- holder, victim, and owner claims) associated with execution of a national asset forfeiture program. Authority to spend AFF monies is established through a formal allocation process. Each fiscal year, the Department's Asset Forfeiture Management Staff (AFMS) requests budget submissions from the AFF member agencies. AFMS analyzes the requests and prepares funding recommendations, taking into account an estimate of the funding that will be available, primarily from the upcoming year's revenues. The allocation recommendations are forwarded to the Office of the Deputy Attorney General for review and approval. Allocations are amended during the year in response to changing needs.

Allocations are based on projected forfeiture program costs of the member agencies. Allocations are reimbursements of eligible costs, not grants based on estimated revenues to the AFF produced by a particular agency's forfeiture activities. Since inception of the AFF, the Department has purposely avoided a "quid pro quo" approach to allocations to discourage a "bounty hunter" mentality in the federal forfeiture program. The U.S. Marshals Service (USMS) consistently receives the largest annual AFF allocation, approximately 60 percent of the total. The USMS is both the custodian of property seized for federal forfeiture, as well as the disbursement office for the program. The USMS issues equitable sharing payments to state and local governments, payments to innocent parties with a recognized interest in forfeited property, and payments to contractors who provide custodial and disposal services.

The highest priority for allocations must be satisfaction of the business expenses of the forfeiture program, including asset management and disposal costs, third party-payments, case-related expenses, awards based on a forfeiture, and equitable sharing payments. Second, AFF monies are made available to support general forfeiture program expenses, including training, audits, ADP equipment, and contract support.

Once these direct forfeiture program expenses are covered, if sufficient funds are estimated to be available, allocations are provided for other purposes, authorized under the AFF statute, that are not directly related to the forfeiture program. These expenses include support for state and local law enforcement officers engaged in joint law enforcement operations with an AFF member agency, as well as general

federal investigative expense needs, including informant awards, purchase of evidence and equipping of conveyances. Investigative expense allocations are provided only when a portion of AFF funds are appropriated for that purpose. Since fiscal year 1997, Congress has permitted $23 million per year to be used for general investigative expenses.

Since 1994, a portion of AFF funds have been made available each fiscal year under our joint law enforcement operation authority to the Department's Weed and Seed Program. To date, more than $55 million in AFF monies have been provided for this purpose, including $9 million in fiscal year 1999. The funds are used for, state and local officer costs, primarily overtime salaries, for "weeding" activities in areas designated as Weed and Seed sites. Determinations regarding what sites receive AFF monies are made by the Executive Office for Weed and Seed.

In addition, the Weed and Seed program has benefited from excess unobligated balances produced by the forfeiture program. At the end of each fiscal year, after expenses are covered and earmarked funds are reserved, a portion of the unobligated AFF balance is retained as carryover to meet initial program expenses for the subsequent fiscal year. If additional unobligated balances are available, this excess balance, or surplus, may be used by the Attorney General, with prior notification to Congress, to meet any federal investigative, litigative or correctional expenses, or other needs of the Department of Justice. During fiscal year 1999, the Attorney General used $6.5 million of the available surplus to support the Weed and Seed program. These monies may be used to make Weed and Seed grants to support both "weeding" and "seeding" activities in the designated Weed and Seed locations.

Funds for state and local officers in joint operations, for general federal investigative expenses, and for other needs under our authority to distribute surplus balances from prior years are sensitive to declines in AFF revenues. If revenues decline sharply, these largely discretionary uses will be affected first. Civil forfeiture reform could result in a sharp decrease in AFF revenues, depending on the nature of the specific reform provisions. For example, the Department estimates that the House-passed reform bill will reduce annual revenues by almost $200 million. This approach to the needed reforms will have a serious adverse effect on AFF allocation levels and virtually eliminate the possibility of end-of-year surplus funds. The Department supports civil forfeiture reform but in a manner that avoids this result.

RESPONSES OF ERIC HOLDER TO QUESTIONS FROM SENATOR LEAHY

Question 1. One of the questions that always arises in the debate over civil forfeiture is why the government cannot handle more civil forfeitures as criminal forfeitures, so that property owners are afforded the same due process protections as criminal defendants. You gave a number of responses to this question on page four of your written testimony. Among other things, you explained:

> "[A] substantial majority of the DEA and FBI's forfeiture cases are uncontested, often because the defendant in jail sees no point in claiming property that most likely connects him to the crime. Civil forfeiture allows us to dispose of these uncontested cases administratively."

Would you agree that other factors play a role in a property owner's decision not to contest a civil forfeiture, including that the property owner cannot afford an attorney, the cost of an attorney is greater than the value of the property, or the owner cannot hope to meet his burden of proof under existing civil forfeiture laws?

Answer. As an initial matter, the Department of Justice does not agree, as implied in the question, that criminal forfeiture provides additional due process protections for property owners. It is not necessarily the case that persons other than the defendant would prefer that the government use criminal forfeiture instead of civil forfeiture. While the procedures governing third party claims are very much the same in most respects, there are critical differences that make civil forfeiture the better environment from the third party's perspective in some cases, and criminal forfeiture the better one in others.

In both cases, the third party is entitled to notice of the forfeiture proceeding, and has a fixed time in which to file a claim. In civil cases, however, the third party is able to litigate his claim immediately. In criminal cases, third party issues are deferred until after the criminal case against the defendant has been resolved.

In civil cases, the third party is entitled to a jury trial, but he or she must prove that he was an "innocent owner" of the property. In criminal cases there is no jury trial, but the third party only has to prove that he or she was a "superior owner" of the property; innocence is not required. Spouses, unindicted co-conspirators and other associates of the defendant who have an interest in the property used to com-

mit the offense, and who collaborated with the defendant in the commission of the crime, therefore tend to favor criminal forfeiture. Truly innocent owners, on the other hand, may favor civil forfeiture in some cases and criminal forfeiture in others.

For these and many other reasons, it is impossible to say that third parties necessarily benefit if the government chooses criminal forfeiture.

The Department of Justice believes that the principal reason a substantial majority of DEA and FBI forfeiture cases are uncontested is that the seizure in such cases was carried out in a lawful and proper manner and that seized property was either used in the commission of a crime (facilitating property) or is the proceeds of criminal activity, and that the property owner knows or reasonably believes that the United States would therefore prevail on the merits in any civil forfeiture litigation. An additional reason may be, as stated in Deputy Attorney General Eric Holder's testimony, the property owner's knowledge or belief that the property may constitute evidence of a crime or criminal activity on his part, and he therefore does not want to admit or assert any relationship with the property.

We would agree that in some civil forfeiture cases, as in any other type of civil litigation, a property owner or other potential plaintiff may decide not to litigate a particular case based on other factors, including economic; *e.g.* that the cost of litigation, including attorney's fees, would ultimately be greater than the value of the property.

With respect to the burden of proof, the Administration supports revision of current asset forfeiture laws to require that the burden of proof in a civil forfeiture case be on the government to prove by "a preponderance of the evidence" that a crime was committed and that the seized property was involved in that crime.

Question 2a. A study done by the Pittsburgh Press in 1991 concluded that as many as 80 percent of the people who lost property to the federal government through forfeiture were never charged with any crime. This would appear inconsistent with your testimony that there is a parallel criminal arrest and prosecution in the "overwhelming majority" of civil forfeiture cases. Please explain this apparent inconsistency.

Answer. The 80 percent figure in the *Pittsburgh Press* article appeared to represent the percentage of forfeiture cases reviewed by *The Press* which were completed through administrative forfeitures. Administrative forfeiture is a non-judicial process by which certain types of property seized by federal law enforcement agencies (cash or monetary instruments, vehicles or other conveyances used to transport illegal drugs, illegally imported property and personal property valued at not more than $500,000) may be forfeited to the United States where no person files a claim for return of the property. An administrative forfeiture is a civil action against the seized property itself, and is separate from any arrest or criminal prosecution of the property's owner or any other person. No criminal charges are filed in *any* administrative forfeiture proceeding. The *Press* appears to have mistakenly assumed that because no criminal charge against an individual was made or adjudicated *as part of the administrative proceeding* by which the property was forfeited in 80 percent of the cases the newspaper looked at, this meant that the forfeiture was unrelated to *any* arrest or criminal prosecution in 80 percent of all forfeiture cases. This assumption was, and is, in error. Based on a review by the Department of Justice in 1996, the Department concluded that there was a related or parallel federal or state criminal arrest or prosecution in 80 percent of the cases where there was a seizure for forfeiture.

Question 2b. Please provide the committee with specific numbers for the past five years of the people who had their property seized by the federal government who were also charged with a crime.

Answer: The Department of Justice does not maintain records showing the specific number of individuals from whom property was seized by the federal government who were also charged with a crime, whether federal or state. There is no existing database that provides the government with a list of all properties seized and forfeited, which is also cross-referenced to those persons who were arrested in connection with the specific seizure by either federal or state authorities. Many criminal cases are related to corresponding administrative, civil judicial and criminal forfeiture cases. These cases may be resolved in a variety of ways, including litigation, plea agreements, and/or settlement agreements where the defendants or others with an interest in the property either agree to forfeit the property or otherwise do not pursue the forfeiture administratively or judicially. To determine those property owners who have had their property seized for forfeiture and were also charged with either a federal or state crime would require a manual review of each case file for each of the last five years.

Question 3. When the government has the choice of instituting either a criminal or a civil forfeiture proceeding, what are the relevant considerations, and who is responsible for making the final determination?

Answer: There are numerous considerations that go into the decision whether to file a forfeiture action criminally, as part of a criminal indictment, or civilly, as either an administrative forfeiture or a civil judicial forfeiture. The decision is made by the Assistant U.S. Attorney assigned to the case, in consultation with the seizing agency, if property has been seized.

The most important consideration is whether Congress has enacted statutory authority for both civil and criminal forfeiture, or only for one or the other. Most forfeiture statutes authorize only civil forfeiture, and some recently- enacted statutes authorize only criminal forfeiture. In those instances, the government has only one choice as to how to proceed.

If both types of forfeiture are authorized, the first consideration is whether the forfeiture is contested. Uncontested forfeitures are generally handled administratively (*i.e.,* as civil forfeitures handled exclusively by the seizing agency), even if there is a parallel criminal prosecution. A great many forfeitures fall into this category.

If the forfeiture is contested, and the government has the option of proceeding either criminally or civilly, the following factors come into play:

1. Is there going to be a criminal prosecution? Criminal forfeiture is only available if there is a criminal conviction. If there is no prosecution—because, for example, the defendant is dead or is a fugitive, is abroad and cannot be extradited, or cannot be identified—there can be no criminal forfeiture.

2. Is the defendant being prosecuted for the same crime as the one leading to the forfeiture? In criminal forfeiture, the court may only order forfeiture of the property involved in the offense for which the defendant is convicted. If a drug dealer, for example, is convicted of conducting a certain drug sale, only the proceeds of, or property used to facilitate, that particular sale may be criminally forfeited. Proceeds obtained by the defendant from other drug sales would have to be forfeited civilly.

3. Are there third party claims to the property? Criminal forfeiture is limited to the property of the defendant. If a defendant uses a family member's property to commit a crime, that property may not be forfeited in the criminal case, even if the family member had full knowledge of the crime and consented to the use of his or her property to commit it. That is because the family member is not a party to the criminal case. In such cases, the government must file a parallel civil forfeiture.

4. Was the property transferred after the crime to a third party? The criminal forfeiture statutes bar a defendant from transferring property subject to forfeiture to innocent third parties for the purpose of avoiding forfeiture. Only if the third party is a "bona fide purchaser" can the third party successfully challenge a forfeiture action against property he did not acquire until after it was involved in an offense. The civil forfeiture statutes have no bona fide purchaser requirement, thus allowing criminals to defeat civil forfeiture by transferring property to innocent donees. To avoid this result, the government must proceed with the forfeiture criminally.

5. Should the forfeited property be returned to victims as restitution? The criminal forfeiture statutes allow the Attorney General to restore forfeited property to victims; the civil forfeiture statutes do not, except in cases where the victim is the "owner" of the property and thus could have filed a successful judicial challenge to the forfeiture. For this reason, the government must use criminal forfeiture in cases involving restitution to non-owner victims.

6. Is the case ripe for prosecution? In many cases, the government must seize property to prevent its being dissipated, hidden, or transferred abroad before the grand jury has completed its investigation of the underlying criminal case. In such cases, the property is generally seized under the civil forfeiture laws, and the government then files a civil forfeiture action which may or may not be stayed until a grand jury indictment is returned. It is quite common for cases to begin as civil forfeitures but later be turned into criminal forfeitures for this reason. *See United States* v. *Candelaria-Silva,* ——— F.3d ———, 1999 WL 16782 (1st Cir. Jan. 22, 1999) (there is nothing improper in the government's beginning a forfeiture case with a civil seizure, and switching to criminal forfeiture once an indictment is returned; it is commonplace).

7. What prosecutorial resources are available? Forfeiture law is complex and requires specific expertise. In many U.S. Attorneys' Offices, the forfeiture experts are in the Civil Division of the office, and hence are inclined to bring cases civilly where all other factors are equal. In other U.S. Attorneys' Offices, a high percentage of the criminal prosecutors have been trained in criminal forfeiture law, or the forfeiture experts are co-located with those prosecutors. In those offices, the inclination is to file forfeiture actions criminally, where all other factors are equal.

Question 4. The Justice Department opposes the appointment of counsel for indigent claimants in civil asset forfeiture cases, and argues that claimants are already adequately protected by the Equal Access to Justice Act ("EAJA"). That statute provides that a court shall award fees and expenses to certain prevailing parties (*i.e.,* small businesses and individuals whose net worth does not exceed $2 million) in civil actions brought by or against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust," 28 U.S.C. § 24120(d)(1)(A).

a. Over the last five years, (i) how many times has a prevailing claimant in a civil asset forfeiture action sought an award of fees and other expenses under EAJA? (ii) how many times has the United States opposed such an award? (iii) how many times has the claimant prevailed? and (iv) what percentage of the claimant's actual fees and costs were awarded?

Answer. The Department of Justice does not maintain records showing how many times the prevailing claimant in a civil asset forfeiture action sought an award of fees and other expenses under EAJA, how many times the United States opposed such an award, how many times the claimant prevailed or what percentage of the claimant's actual fees and costs were awarded.

However, the Department of Justice was able to identify payments made during the last five fiscal years (fiscal year 1994 through fiscal year 1998), totaling $625,517.51 from the Assets Forfeiture Fund in attorneys' fees and other costs assessed against the Department under the Equal Access to Justice Act in forfeiture cases broken down as follows:

Fiscal year 1994: 4 claims totaling $356,920.
Fiscal year 1995: 4 claims totaling $102,276.
Fiscal year 1996: 1 claim totaling $4,700.
Fiscal year 1997: 1 claim totaling $150,608.
Fiscal year 1998: 1 claim totaling $11,013

b. EAJA is, in effect, a "bad faith" provision; prevailing parties cannot recover under EAJA unless they can show that the position of the United States was not "substantially justified." Presumably, the position of the United States is "substantially justified" with respect to most civil asset forfeitures. If so, then most indigent property owners whose property is seized by the Government will not be able to recover under EAJA, even if judgment is entered in their favor. Would the Department object to a more automatic fee-shifting provision in civil forfeiture cases, such that a claimant who substantially prevailed would be entitled to reasonable attorney fees and other litigation costs reasonably incurred by the claimant?

Answer. The Department of Justice opposes any revision of the Equal Access to Justice Act to permit a person to recover from the government attorneys, fees or other litigation costs in any case where the position of the United States was substantially justified. Under EAJA, a prevailing claimant is entitled to recover unless the government's position was substantially justified *at all stages of the litigation. United States* v. *Real Property known as 22245 Dolorosa Street* ———, F.3d ———, WL 692000 (9th Cir. September 8, 1999). In other words, if the government starts out with a case that is substantially justified, but later learns through discovery or otherwise that its position is not what it seemed at the outset, the government must abandon its position or be subject to EAJA fees. *Id.* Thus, a provision that awarded attorneys' fees beyond what EAJA provides would provide a windfall for claimants where the government was justified *at every stage of the proceeding* but for whatever reason failed to convince a jury that it should prevail. We cannot support such a rule.

Question 5. Please explain whether the Department would support a provision authorizing the appointment of counsel in a civil forfeiture case under any of the following conditions (and if not, why not):

a. where,the Government seeks to forfeit real property that is being used as a primary residence?

b. where the claimant is eligible for legal assistance under the poverty guidelines established by the Legal Services Corporation (45 C.F.R. 1611)?

c. where the claimant is also a defendant in a related Federal criminal case, and is represented by a court-appointed attorney in that case?

Answer. The Department of Justice is opposed to authorizing the appointment of counsel in civil forfeiture cases. We believe that the availability of attorney's fees under the Equal Access to Justice Act provides the needed protection for innocent property owners in civil forfeiture cases. In addition, indigent claimants may file a petition *In Forma Pauperis* for waiver of the cost bond.

Question 6. As the Senate considers civil forfeiture reform, we need to know how much various local law enforcement agencies gain from using federal equitable sharing in asset forfeiture. Please provide the Committee with a list of all shared money from asset forfeiture for all law enforcement agencies nationwide for the past three years, with specific information on the amount of cash and type of asset, and the police agency and location participating in the equitable sharing.

Answer. Enclosed, on a computer disk, is information from the Consolidated Asset Tracking System (CATS) for calendar years 1996, 1997, 1998 and 1999. We are providing it on disk because the complete printouts of the data contained on the disk is over 1,500 pages. For each reported year, there are two saved files. The first is a Equitable Sharing Distribution Summary Report listing the amount, in dollars, of sharing received by each recipient state or local law enforcement agency. The second is a Equitable Sharing Distribution Detail Report, which includes more specific information on the type of assets shared (cash or currency, vehicles, real property, etc.), as well as monetary value of such shared assets, listed by recipient state or local law enforcement agency NCIC/ORI code number. The NCIC/ORI numbers are utilized in CATS for agency identification and asset tracking purposes.

RESPONSE OF JAMES E. JOHNSON TO A QUESTION FROM SENATOR THURMOND

Question. What reforms has Treasury implemented internally in recent years regarding its use of civil asset forfeiture?

Answer. Since the establishment of the Treasury Forfeiture Fund in 1992, the Treasury forfeiture program has always set as one of its principal goals the safeguarding of individual rights. While civil forfeiture actions can be pursued either administratively by the seizing agency or judicially in court, they always proceed against property and not persons. It is, however, readily apparent that property, by definition, cannot exist without someone, somewhere, having an ownership or other interest in it. Fairness demands that those persons having any interest in seized property be notified of the seizure and the intent to forfeit so that they may have an opportunity to come forward and be heard. In Treasury's forfeiture program, such notice begins a process designed to safeguard the rights of affected parties. Some of the main points of this process include:

- *Personal Notice*—This is the most direct form of notice and occurs whenever the true owner or owners of the property are known or if there is a valid lien against the property held by an individual or an institution. In these circumstances, these persons must be extended personal notice of the seizure and intended proceedings by registered or certified mail. We have even held discussions with the Bureau of Prisons to be certain that interested parties who may be incarcerated actually receive the notice of intent to forfeit.
- *Publication*—To be sure that anyone with an interest in the property is not overlooked, even if they are unknown to the seizing agency, personal notice is supplemented by publishing a notice of the specific seizure and pending proceedings in a newspaper of general circulation.
- *The Claim and Cost Bond*—Upon being notified of the seizure of the property, the interested person may choose to contest the forfeiture of the property by filing a claim and cost bond. This action stops the investigative agency from ruling on the forfeiture and requires that the matter be resolved in civil court. At this point the action is referred to the U.S. Attorney. If an interested person cannot afford the cost bond, he or she may file an *in forma pauperis* petition to have the requirement of the cost bond waived and still move the matter into the judicial arena.
- *Petitions for Remission or Mitigation*—Filing a claim and cost bond is only one course of action available to the interested party. Alternatively, the party may acknowledge the validity of the seizure and file what is known as a petition for remission or mitigation. In this course of action, the party is asking, in effect, that the property be pardoned. For a remission, the party must prove that they have an interest in the property and that they had no knowledge that the property would be used illegally. If the petition for remission is granted, the government will return the property or make a payment equal to the petitioner's interest in the property. A mitigation is a partial pardon and usually results in the government returning the property on the condition that the petitioner pay a penalty.

We go to great lengths to ensure that federal civil forfeiture is not a covert activity bereft of concerns for process and rights. Whether civil forfeiture is accomplished administratively by the investigative agency or judicially in a court of law, the De-

partment of the Treasury insists that it always proceed through a very structured and delineated process—a process that comprehensively notifies affected parties, invites arguments against the intention to forfeit, accommodates the indigent and offers opportunities to achieve compromise resolutions short of forfeiture.

To further ensure that the Department of the Treasury and its law enforcement bureaus are vigilant in seeing to it that due process is fully granted in civil asset forfeiture cases, our Executive Office for Asset Forfeiture issued a policy directive in 1995 on the timely processing of administrative and civil judicial forfeitures. Twice each year, Treasury enforcement bureaus are asked to examine their open civil forfeiture cases and determine how many have exceeded what are general timeliness standards in the administrative and judicial categories. If more than a minimal amount are found to be untimely, i.e. older than six to nine months in the administrative category or older than two years in the judicial category, then a report on these cases is forwarded to our Executive Office for Asset Forfeiture. This policy promotes active caseload monitoring so that all seized property will either proceed to forfeiture or be returned to an interested party without suffering any undue delay.

Additionally, in cases involving real property, seizures are usually accomplished with explicit instructions from a court. Typically, when a warrant of arrest in rem for the real property is issued, our agents serve the warrant on the individuals occupying the premises and post a copy of the notice of intent to forfeit in a conspicuous place on the property. Our institution of this post and walk policy, as it is known, has allowed claimants to remain in possession of the premises while contesting the forfeiture proceeding in court.

Our management of the forfeiture program and the use of its funds are very important. We have taken measures in several other areas to ensure that we effectively fulfill our responsibilities to the public. We have conducted comprehensive training for all Treasury forfeiture personnel—from our special agents and their supervisors to our seized property managers. We have repeatedly underscored the importance of considered and responsible seizures and the need for the pre-seizure planning that makes these possible. We have emphasized quality in the management of seized property so that its value, whether the property is forfeited or returned, is never carelessly diminished.

In sum, we believe that we have implemented appropriate administrative measures to achieve our goal of having a civil asset forfeiture program that safeguards individual rights. While specific refinements to the asset forfeiture process would be useful, they should not be allowed to undo asset forfeiture's longstanding record of accomplishment in serving the best interests of our citizens. If the use of civil forfeiture is curtailed, it will seriously undermine our effectiveness in investigating drug trafficking, money laundering, fraud and other financial crimes.

RESPONSES OF BONNI G. TISCHLER TO QUESTIONS FROM SENATOR THURMOND

Question 1. If the Congress changed the government's burden in civil forfeiture to "clear and convincing evidence," what impact would this have on border cases?

Answer. H.R. 1658 would require the Government to establish the forfeitability of property by clear and convincing evidence. This higher burden of proof will more adversely affect the Customs Service than other law enforcement agencies, such as the Drug Enforcement Administration or the Federal Bureau of Investigation. Most of Customs seizures occur at the borders with the discovery of property imported in violation of law, such as illegal drugs or adulterated foods. Generally in these cases there is neither any prior notice of illegal activity nor any opportunity for previous investigative work. Thus, the owner of the property is in the best position, and perhaps the only one, to know the purpose of the shipment of goods and any mitigating circumstances.

Currently, the Government must establish the appropriateness of a seizure, and therefore the forfeiture, under a probable cause standard, which makes hearsay evidence admissible (a crucial point). The claimant then must establish by a preponderance of the evidence that the property was not used illicitly. If the claimant succeeds in such a showing, the Government then bears the burden to demonstrate by a preponderance of the evidence that the forfeiture is justified. This has been the statutory scheme for civil forfeitures for over 200 years, the constitutionality of which is beyond challenge. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974).

BORDER FORFEITURES

It is important for national self-protection reasons not to increase the burden of proof for border forfeitures. Congress has long enacted civil forfeitures to ensure strict compliance with the Customs laws. Desiring aggressive enforcement at the border to protect the nation from contraband and to protect the revenue, Congress placed the burden of proof on claimants to show that property seized for forfeiture was not illegally used. Congress built in the protection that the Government would have to demonstrate to the court, probable cause for forfeiture before a claimant was required to meet his burden. Congress also vested the Secretary of the Treasury with broad remission/mitigation authority to temper the severity of any forfeiture's incurred. *See* 19 U.S.C. 1618.

In establishing this scheme, Congress realized that any other rule would seriously impede enforcement of laws at the borders. This is precisely why Congress created *in rem* forfeitures which focus on the property's use (rather than the property owner's state of mind, as in criminal cases). Realizing that property owners, not Customs, are in the best position to know how and why property was used, Congress placed the burden on them to explain why property seized pursuant to probable cause was not subject to forfeiture.

H.R. 1658 fundamentally alters this long-standing statutory rule and will make civil forfeiture more like a criminal case, focusing on state of mind, rather than illegal use of the property, with the result that the Government will lose one of its few tools against violators. This is because unlike investigative cases where the Government can attempt to establish intent before conducting a seizure, in almost all cases at the border Customs comes across a forfeiture violation without any prior information. Given this fact, and the sovereign's interests in protecting its borders, it makes imminent sense to allow the Government to institute border forfeiture actions on probable cause rather than clear and convincing evidence or a preponderance of the evidence.

OTHER FORFEITURES

Imposing the stringent burden of establishing by clear and convincing evidence will adversely affect other forfeitures as well. To cite a few examples:

In *United States* v. *Four Million, Two Hundred Fifty-Five Thousand, etc., et al.,* 762 F.2d 895 (11th Cir. 1985), the court found, among other evidence, that (1) money was delivered by Colombian couriers, many of whom were unidentified, (2) the couriers did not request and even at times refused receipts for cash, (3) that on one occasion the couriers delivered the cash in the trunk of a car equipped with a secret compartment, and when followed, abandoned the car, (4) the cash consisted of small and medium denomination bills, and was delivered in suitcases, cardboard boxes, duffel and flight bags, (5) the alleged "sellers" of cash were not on record with Customs as exporters or importers, and (6) the sheer amount of money involved, over $242,000,000 during a period of less than 8 months, established probable cause to believe that a "substantial connection" existed between the forfeited money and narcotics transactions. That the government's evidence was circumstantial and did not show a connection with a particular narcotics transaction was found irrelevant by the court; the circumstances supported a finding of probable cause. Using these facts as a basis, the government would not have met the burden of "clear and convincing" evidence and the money would not have been forfeited.

In *United States* v. *Brock,* 241 U.S. App. D.C. 324, 747 F.2d 761 (D.C. Cir. 1984), the forfeited property consisted of jewelry found in the attic of a house. Drugs, money, a gun, and narcotics equipment were found in a different room of the same house. The D.C. Circuit noted that "there was no direct evidence to connect the jewelry with the claimant's alleged narcotics activities," although they affirmed the judgment of forfeiture. The court explained that "circumstantial evidence and inferences therefrom are good grounds for a finding of probable cause in a forfeiture proceeding."

In *United States* v. *$13,000 in United States Currency,* 733 F.2d 581 (8th Cir. 1984), the forfeited money was found in the shoulder bag of a person who previously had been charged with conspiracy to distribute cocaine, but who was released on bond. Also found within the bag were plastic bags, tape, and rubber bands. The seizure was made at an airport, the person was using an assumed name, and was about to board a plane for New York. The person had placed several toll calls to the same apartment in New York that he had called just prior to his arrest on the cocaine conspiracy charge. From this circumstantial evidence, and in the absence of any direct evidence of narcotics, the 8th Circuit concluded that the person intended to use the $13,000 in exchange for a controlled substance.

HEARSAY EVIDENCE

A point that cannot be ignored is that the increased burden of proof would preclude the Government from using hearsay evidence to establish border forfeitures. Currently, a law enforcement officer can offer as testimony, hearsay information from a confidential informant or cooperating witness, in support of the forfeiture. *See e.g., United States* v. *Parcel of Land and Residence at 18 Oakwood Street,* 958 F.2d 1 (1st Cir. 1992); *United States* v. *One 1986 Chevrolet Van,* 927 F.2d 39 (1st Cir. 1991); *United States* v. *1964 Beechcraft Baron Aircraft TC–740,* 691 F.2d 725 (5th Cir. 1982). Under the Hyde bill, this use of hearsay would no longer be allowed, complicating or making impossible certain cases (e.g., where the witness is unavailable or where the witness is a confidential informant and cannot testify without jeopardizing his or her life or compromising ongoing criminal investigations).

Question 2. As you know, seized conveyances sometimes devalue from aging, lack of care, inadequate storage, and other factors while waiting for forfeiture. What is Customs doing to protect the value of seized assets prior to the government being successful in a forfeiture action?

Answer. The Department of the Treasury maintains a national seized property contract, by which the U.S. Customs Service, and other Treasury Departments, consign seized property for storage and upkeep. A major requirement of this contract is that the contractor must maintain the seized property in the same or better condition than when originally seized by the government. This unique requirement mandates that a maintenance plan is tailored for each asset transferred to the Customs contractor for storage. The use of such a program is required for seized property, because in the majority of cases the property is returned to the original owner upon the payment of a fine in lieu of forfeiture or a mitigated penalty.

The Customs Service has worked closely with the contractor to establish maintenance plans and to hire specialized subcontractors to store and maintain all types and quantities of seized items. Depending on the type of property consigned various factors are taken into account. For example, vintage and exotic automobiles are stored in humidity-controlled facilities and the vehicles are checked each month for routine maintenance requirements. Vessels are routinely removed from the water where appropriate, and all essential equipment removed and properly stored and covers installed. Aircraft receive special review by a FAA certified mechanic, the logbooks are secured and stored in a hangar or appropriate storage facility. Before any aircraft or vessel is transported to a storage facility, our contractor ensures they meet FAA Certifications and Coast Guard Vessel Safety Standards. Should a conveyance fail a maintenance review, the Customs Service may authorize repairs for such items as broken windows, bad tires, batteries and safety equipment. All storage facilities utilized by the contractor must meet government security requirements to protect against loss or pilferage. While no action can be taken to halt the depreciation of a seized article from the date of seizure to the date of adjudication, Customs has taken extraordinary measures to maintain the value of seized property until a disposition is reached by the court.

Question 3. I understand that the government is currently not liable when property that it has seized is damaged while in its care, even when the property is eventually returned to the owner. Would it be fair to hold the government responsible when it negligently damages property while in its care?

Answer. Normally, the government is considered to be self insured, however in regard to the Department of the Treasury's national seized property contract, the contractor is required to carry an insurance policy covering all seized property that has been placed in contractors custody. The majority of property seized by the Customs Service is consigned to the contractor for storage with the only exceptions being narcotics, weapons, and currency. Should property be damaged while in the hands of the government or the contractor, it will be repaired prior to return to the owner, or in the case of a complete loss, the owner will be paid the fair market value of the items destroyed. This policy also insulates the government in case of natural disasters such as hurricanes, tornadoes, and fires which can destroy seized property regardless of storage method or location.

RESPONSE OF RICHARD FIANO TO A QUESTION FROM SENATOR THURMOND

Question. Mr. Fiano, I understand that the courts have rejected the fugitive disentitlement doctrine, and fugitives are allowed to challenge civil forfeitures in Federal court while they remain in another country outside the reach of our law enforcement. Is this a problem in drug cases, and should Congress prohibit such fugitives from challenging civil forfeitures?

Answer. In response to conflicting conclusions by the Federal Courts of Appeal considering the issue; the U.S. Supreme Court rejected the application of the fugitive disentitlement doctrine in civil forfeiture proceedings. In the absence of legislation barring fugitives from challenging civil forfeitures, courts must now resort to protective orders, sanctions and other ad hoc devises to prevent fugitives in a drug cases from abusing the discovery rules available in civil forfeiture proceedings or otherwise taking advantage of their fugitive status when litigating a civil forfeiture. These devises, however, are not adequate to address the problems that arise when fugitives contest civil forfeitures. Moreover, if a forfeiture action involves a business, perishable property, or any other asset whose value depreciates with time, the government cannot simply seek a stay in the civil case until the fugitive is apprehended. Lastly, the law should not facilitate the spectacle of a defendant who successfully thwarts the jurisdiction of the court in the criminal prosecution while simultaneously invoking such jurisdiction in a related civil forfeiture proceeding. The following provision addresses these concerns and I hope that you and the other Committee members will consider this remedy in any future legislation affecting civil forfeiture.

"Any person who, in order to avoid criminal prosecution, purposely leaves the jurisdiction of the United States, declines to enter or re-enter the United States to submit to its jurisdiction, or otherwise evades the jurisdiction of the court in which a criminal case is pending against the person, may not use the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third-party proceedings in any related criminal forfeiture action."

RESPONSE OF GILBERT G. GALLEGOS TO A QUESTION FROM SENATOR THURMOND

Question. Mr. Gallegos, are you concerned that fundamental changes in Federal civil forfeiture laws might have a ripple effect, causing States to greatly restrict their civil forfeiture laws?

Answer. The question of possible ramifications on State forfeiture laws stemming from a fundamental reform of Federal law depends solely on the type of reform enacted by the Congress. The success of asset forfeiture in helping to rid our communities of the scourge of crime and drugs, as well as the deterrent effect that it has on individuals considering a life of crime, is unquestioned. However, as I stated in my testimony before the Subcommittee, there are certain reforms that could be enacted which would not weaken law enforcement's use of this important crime-fighting tool and would ensure that the property rights of law abiding citizens are protected.

The reforms incorporated in H.R. 1658, as passed by the House of Representatives, overstep the bounds of what the Fraternal Order of Police would consider appropriate reform of existing forfeiture laws. Enactment of legislation which mandates the return of a criminal's, ill-gotten gains for an administrative error, places an unacceptably high burden of proof on the government, and establishes an "innocent owner" defense that allows criminals and drug dealers to pass on their property through sham transactions, would set a bad precedent for the States to follow when considering possible reform initiatives.

However, codifying in law the administrative reforms established by the Justice and Treasury Departments and the holdings of the Supreme Court on this issue may actually have a positive effect on forfeiture in State and local jurisdictions. These provide a firm basis from which to draft legislation which would adequately address the concerns of both law enforcement officials and anti-forfeiture advocates.

As I stated in my testimony before the Subcommittee, the Fraternal Order of Police believes that while existing forfeiture laws are not perfect, it is of critical importance that any contemplated revision does not hamper the ability of law enforcement to separate the proceeds of illegal activity from criminals and drug traffickers.

RESPONSE OF GILBERT G. GALLEGOS TO A QUESTION FROM SENATOR LEAHY

Question. H.R. 1658's "innocent owner" provision protects bona fide purchasers for value who were, at the time of their purchases, reasonably without cause to believe that the property was subject to forfeiture. Please explain your contention that this provision would allow criminals to pass on their fortunes "through sham transactions."

Answer. In the decision of *Bennis* v. *Michigan,* the Supreme Court held that the Constitution does not require an "innocent owner" defense in civil forfeiture stat-

utes. The Fraternal Order of Police believes, however, that this is an important provision which should be included in any final civil asset forfeiture reform legislation. One that enables property owners who take certain reasonable steps to defend against the government's claims.

During my testimony before the Subcommittee, I stated that property owners must have the opportunity to defeat a forfeiture action, if, at the time of the criminal offense, they had no knowledge of the illegal use of their property; or upon learning of the illegal activity, took all reasonable steps to revoke permission for the use of their property. In addition, I stated that a person should be considered an innocent owner if they were a bona fide purchaser for value and were, at the time of purchase, reasonably without cause to believe that the property had been used for criminal purposes.

It was never the contention of the Fraternal Order of Police that protecting a bona fide purchaser for value would allow criminals to pass on their fortunes "through sham transactions." That statement referred to our position with respect to Sec. 2 of H.R. 1658, which creates new section 981(j), subsection (6)(C)(i)(II) of 18 USC. This section states, among other things, that a person is also to be considered an "innocent owner" if they acquire "an interest in property through probate or inheritance." Thus, under the provisions of H.R. 1658, a criminal could be allowed to amass sizable illegal fortunes and then pass it on legitimately to their children, spouses, or associates. This could place normally forfeitable assets into the hands of individuals who may or may not have had prior knowledge of criminal offenses committed with the property or purchased with the ill-gotten gains of a crime.

Allowing individuals to maintain possession of the means of a criminal act or criminal proceeds simply because they obtained the property through a divorce settlement or inheritance could create a loophole for criminals and drug traffickers not available under current law. Therefore, it is not outside the realm of possibility to envision situations where a criminal who believes that the civil forfeiture of their property is imminent, could pass on his ill-gotten gains through "sham transactions."

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF THE FEDERAL BUREAU OF INVESTIGATION

THE FBI'S USE OF CIVIL ASSET FORFEITURE TO ADDRESS MAJOR CRIME PROBLEMS

The civil asset forfeiture statutes are important tools which the FBI is using to attack some of the most critical criminal and national security threats facing the United States at the close of the 20th Century. Money is the lifeblood of the vast majority of the criminal and terrorist organizations against which the FBI is directing its resources. While the existing forfeiture statutes are not perfect, they enable the FBI to disrupt and dismantle dangerous enterprises by destroying their financial infrastructure. In many instances it is not possible to convict the property holder, and thus civil forfeiture offers the only potential means for achieving this objective.

Much of the recent discussion of civil asset forfeiture has focused on its use in drug and money laundering investigations, particularly as it relates to the seizure of vehicles and cash. Although the FBI also uses asset forfeiture extensively in drug investigations, it is important to recognize the other types of cases in which civil asset forfeiture is utilized. In many of these instances, the forfeited assets are ultimately returned to the victims of the crime.

CIVIL ASSET FORFEITURE IN INTERNATIONAL TERRORISM CASES

The FBI has recently begun to use civil asset forfeiture to dismantle the financial structure of groups which are, involved in international terrorism. Certain of these organizations raise money from expatriates living in the United States, often by misrepresenting how the funds will be used. These monies are then laundered through various banks accounts and transferred out of the country to fund terrorist activities. By working with foreign law enforcement and intelligence agencies, the FBI has been able to obtain evidence sufficient to seize bank accounts containing these funds. These cases must be done using the civil statutes since the seizure is ultimately based on foreign crimes and the terrorists are not available for prosecution in the United States.

CIVIL ASSET FORFEITURE IN FRAUD CASES

While court-ordered restitution is a valuable remedy, it is often the case that a very small percentage of the restitution which is ordered is ever paid. In many instances, by the time restitution is ordered at sentencing the defendant is able to claim that he or she is unable to make any substantial payments. Under the criminal forfeiture laws, assets can usually only be restrained if the defendant has been located, arrested, and convicted. The civil asset forfeiture statutes provide a means whereby criminal proceeds can be immediately restrained at the time they are discovered by law enforcement before they can be wired out of the country, transferred to relatives or associates, or used to maintain an extravagant lifestyle. This ensures that the assets will be available to be returned to the victims, whether they are elderly victims of telemarketing fraud, government agencies, banks, health insurance companies, etc.

The return of forfeited assets to victims is one of the major goals of the FBI asset forfeiture program. The FBI refuses to allow forfeited funds to be used to fund law enforcement if it is at all possible to return those funds to victims. One of the problems with the existing civil forfeiture statutes is that they limit the instances in which funds can be returned to the victims of the crime. The FBI strongly supports any legislative proposals which will increase its ability to return money to the victims of crime.

CIVIL ASSET FORFEITURE IN INTERNATIONAL MONEY LAUNDERING CASES

For a number of reasons, including the gains in our stock market and the stability of our currency, the United States is a favored location for international organized criminal organizations to invest the proceeds of foreign crimes. This is particularly true with regards to groups operating in Eastern Europe and Asia. These groups operate without regard to international borders, committing crimes in many foreign countries while the whereabouts of the leadership is often unknown. While the United States may never be able to identify, arrest, and convict the leaders under United States law, by cooperating with foreign law enforcement agencies it is sometimes possible to develop enough information to seize and forfeit the assets of these

groups. The resulting funds are restored to foreign crime victims whenever possible under the existing statutes, or shared with the foreign law enforcement agencies which cooperated in the investigations if the laws allow.

CIVIL ASSET FORFEITURE IN CHILD PORNOGRAPHY CASES

The subject of a recent FBI case died during the pendency of the investigation. The subject had made sexual videos of at least four minors. Because of his death, the only means for the government to obtain legal title to the instrumentalities of this heinous activity so that they may be destroyed is through civil forfeiture. Without civil forfeiture the government is placed in the position of having to offer to return the property to the subject's estate as it sought to obtain title through the abandonment process.

INNOCENT OWNERS AND THE STRATEGIC USE OF CIVIL ASSET FORFEITURE

One of the major issues in civil asset forfeiture is the handling of property in instances where there are "innocent owners". FBI policy indicates that under no circumstances will property be forfeited from "innocent owners". This term is defined differently in various statutes, but generally refers to persons who did not consent to the illegal use of their property, or who reasonably should not have known that the property was the proceeds of crime or otherwise subject to forfeiture. The FBI strongly supports the creation of a uniform innocent owner statute.

An example of the FBI's emphasis on protecting innocent owners is a forfeiture initiative currently underway in the drug program. Along the U.S.-Mexico border many properties and businesses have been utilized by drug trafficking organizations to smuggle their product. The FBI and the U.S. Border Patrol are working with the property owners to prevent the further illegal use of their properties, and are only seeking forfeiture in those instances in which the owners are themselves shown to be drug traffickers or where they actively assist the traffickers.

The civil asset forfeiture statutes are an essential tool of law enforcement as it strives to deal with increasingly powerful and sophisticated criminal and terrorist threats, particularly those who function without regard to national boundaries. These laws provide an important means to protect our society and economy from the damaging effects wrought by the vast wealth of many criminal enterprises.

PREPARED STATEMENT OF THE DEPARTMENT OF JUSTICE—THE FACTS

RED CARPET INN

The Red Carpet Inn was a center for illegal drug trafficking and other crimes including auto theft, aggravated robbery, kidnaping and sexual assault. Calls to the Houston Police and subsequent arrests at the hotel for drug-related offenses increased over 300 percent when the current owner took over in 1994, and police seized narcotics worth nearly $800,000 at the hotel in 1996 and 1997.

The hotel's owner and manager were well aware of the illegal drug activity. The Houston City Attorney sent numerous letters to the owner putting him and the corporation on notice of the ongoing criminal activity, and officers from a Houston anti-drug task force held repeated meetings with the hotel's owner/manager to discuss recent drug and criminal activity and to offer suggestions for controlling narcotics activity at the hotel. These requests and suggestions were ignored.

After nearly three years of fruitless appeals by Houston officials to the hotel's owner for cooperation in curtailing illegal drug activity at the hotel, the United States Attorney's Office commenced a civil legal action in February 1998 seeking forfeiture of the Red Carpet Inn. The hotel was *never* seized, controlled or operated by the United States or any federal agents; it remained at all times in the possession and control of its owner, who continued to operate the business; and we have no evidence to confirm that an employee suggested raising the room rates, this would have been inappropriate and something we wouldn't condone. Faced with the prospect of forfeiture, however, the owner finally agreed in July 1998 to implement steps suggested by local law enforcement authorities to help curtail illegal drug activity and other crimes on the property, including the installation of additional lighting, maintaining and monitoring the hotel's existing security cameras 24 hours a day, and having a licensed security guard on the premises at night who would notify the police if he became aware of any drug law violations. In return, the United States Attorney agreed to discontinue the forfeiture lawsuit. Since that agreement, the number of narcotics-related police service calls for the Red Carpet Inn has de-

clined and police narcotics officers have observed significantly less drug activity at the hotel.

u.s. v. $506,231 in u.s. currency (chicago pizzeria case)

In February 11, 1993, the Chicago Police Department obtained and executed a search warrant for the Congress Pizzeria, a Chicago business owned by Anthony Lombardo, based on information provided by a Jose Torres, who told police that he regularly fenced stolen property at that location in order to feed his crack habit. Torres said he brought stolen property to the pizzeria's back door, where he would sell it to Anthony Lombardo's sons. Executing the warrant, police did not find any stolen property, but did find and seize three unregistered guns and $506,076 in U.S. currency, consisting of mostly small bills wrapped in plastic bags inside a 44-gallon barrel, which was located in a boarded-up elevator or dumbwaiter shaft.

After a drug detection dog alerted to the presence of drugs on the money, a judge issued a seizure warrant, finding probable cause to believe that the money was subject to federal forfeiture under the federal drug laws. The government then filed a complaint, and the U.S. District Court granted summary judgement in favor of the government and ordered the money to be forfeited to the United States.

The 7th Circuit Court of Appeals vacated the district court judgment on the ground that the government did not establish probable cause to believe that the currency was tied to drug trafficking. The government's case failed because there was no allegation that cocaine was ever brought inside the pizzeria, and there was no other allegation of narcotics trafficking or use inside or at the pizzeria. Despite the alert by the drug dog, the circumstantial evidence was insufficient to meet the probable cause standard.

MAYA'S MEXICAN RESTAURANT

Exequiel Soltero was the owner of Soltero Corporation, Inc., whose sole asset was Maya's Mexican Restaurant in Kent, Washington. Exequiel Soltero's brother, Roberto "The Onion" Soltero, known to local law enforcement authorities as a high level drug trafficker in southern King County, was reportedly using the restaurant to conduct his drug business. The police also had information that Exequiel Soltero had been present in the restaurant during some of Roberto's drug deals. Using a confidential informant, the police made several drug purchases from Roberto Soltero at the restaurant. The informant, who had numerous meetings with Roberto Soltero at the restaurant discussing drug trafficking, money laundering and concealing drugs and money from the police, arranged to purchase one kilo of cocaine from Roberto Soltero for $26,000 at the restaurant. The police thereafter arrested Roberto Soltero, and in executing several search warrants found cocaine at the home of Rosalba Soltero, Vice President of Soltero Corp.

Roberto Soltero had boasted to police informants that he was, in fact, the real owner of the restaurant. He was also the person who handled all face-to-face dealing with the Liquor Control Board for the restaurant's liquor license. Exequiel Soltero's wife told police that Roberto and Exequiel Soltero were each half-owners of the restaurant, as did a waitress present at the restaurant during the service of the search warrant. Roberto Soltero's wife corroborated this information in a written statement. Acting on this information, the Kings County Prosecutor's office seized the restaurant under a state law permitting forfeiture of property used to facilitate violations of the state's Controlled Substances Act. The County Prosecutor's office later agreed to vacate the seizure after Exequiel Soltero submitted to a polygraph examination which indicated he was being truthful when he stated that he was the sole owner of the restaurant and that he had no knowledge of his brother's drug dealings in the restaurant. Roberto Soltero was convicted on drug charges and sentenced to state prison.

There was *no* federal involvement in this case, which was handled entirely by local and county law enforcement officers and the King County Prosecutor's office, acting pursuant to *state* criminal and forfeiture statutes.

U.S. V. $1,646,000/CAF TECHNOLOGY, INC.

In October 1992, in the course of an investigation by the Santa Clara Police Department into the trafficking of stolen computer chips in Silicon Valley, an undercover police officer and a confidential police informant met in a motel room with two individuals who expressed an interest in purchasing computer chips. One of those individuals, John Priadi, was a purchasing agent for CAF Technology, Inc. (CAF). The police officer repeatedly told Mr. Priadi that the chips had been stolen from the Intel Corporation. Priadi acknowledged this and told the officer that once purchased, the chips would be shipped to Taiwan. Priadi also indicated that he had previously been involved in the purchase of stolen computer chips. Priadi subsequently con-

tacted his boss, CAF Chief Executive Officer Earl Yang, telling him of the availability of the chips and of the possibility that they might be stolen. Yang initially told him not to make the purchase because it was "illegal," but several days later he contacted Priadi and told him that due to a shortage of such chips in Taiwan, CAF would buy some of the stolen chips if the seller would provide a fake invoice to make the sale appear legitimate. Arrangements were then made for CAF to purchase 1,000 stolen chips for $296,000.

Yang directed CAF's accountant and financial officer, Evan Tseng, to use CAF funds to obtain $ 10,000 cash and three cashiers checks in specific amounts totaling $286,000, payable to individuals, and to deliver the funds to the hotel room where John Priadi was registered. When Tseng arrived at the hotel, a desk clerk called the police, and the cashiers check and cash were seized.

The Santa Clara police investigation led to the seizure of a total of $1,646,000 from CAF and five other companies. The seizure was subsequently adopted by federal authorities and in November 1992 a U.S. Magistrate authorized federal seizure warrants. The five other companies filed claims and answers, which were promptly resolved. CAF, however, chose to avail itself of a provision of Customs law that permits a property owner to waive its right to immediate commencement of forfeiture proceedings in favor of asking Customs to act favorably on a Petition for Remission or Mitigation. The Customs Service denied the petition in June 1995. At any time during this period, CAF could have withdrawn its petition and requested immediate commencement of administrative forfeiture proceedings, but did not do so. In July 1995, CAF posted a bond and requested referral for judicial forfeiture. The matter was referred to the U.S. Attorneys Office, which filed a Forfeiture Complaint in April 1997.

The U.S. District Court held that the evidence established probable cause for the seizure, but it found that there had been undue delay between the date of the seizure and the scheduled trial of the forfeiture action. On that basis, the Court granted summary judgement in favor of CAF.

BOB'S SPACE RANGERS

Long-standing federal law requires persons transporting more than $10,000 in currency into or out of the United States to declare the currency to the U.S. Customs Service. It is also an offense to divide the money among travelers to avoid the reporting requirement. *See* 31 U.S.C. § 5324(b). The reporting requirement is essential to the ability of the United States to control currency smuggling, and the penalty for this violation includes forfeiture of the entire amount being transported.

Bob's Space Rangers is a Florida-based circus and amusement park company. In 1997, a large number of employees were traveling to Canada from the U.S. When they reached the border in North Dakota, the company's Operations Manager, Jack Cook, entered a Customs Service office to complete the required declaration form stating that the business was not transporting more than $10,000 in currency. He declared that he was carrying $1,000 in currency on his person and that his wife was carrying $2,800 in currency on her person. But he failed to declare an additional $6,000 in a safe in one of the office trailers and identical envelopes containing between $300 and $700 in other vehicles. In all, a total of $15,212 was found.

Questioning of Mr. Cook by Customs officials revealed that Mr. Cook and his corporation had been crossing the U.S. border for 21 years and were well aware of the currency reporting requirements. Mr. Cook also admitted that in previous years, the money had been split between drivers so that no one individual was carrying more than $10,000 in currency. The Customs Service then seized the currency. In light of Mr. Cook's and the company's admitted knowledge of the currency reporting requirements and their deliberate violations of those requirements, the Customs Service assessed a 25 percent penalty ($3,800). The balance of the money was returned to the company.

FERNANDO MARQUEZ

As part of a three-year investigation by New York City law enforcement authorities into the illegal gambling activities of two brothers, Raymond and Robert Marquez, their nephew, Peter Marquez, and associates, police executed a court-approved search warrant at the home of Peter's father, Fernando Marquez. During the search, police observed Fernando Marquez attempt to hide behind a couch what turned out to be safe deposit box keys. The safe deposit boxes, belonging to PM Pinebrook, Inc., were found to contain a total of $490,920 in cash. Fernando Marquez is the President and sole shareholder of PM Pinebrook, Inc., his son Peter is the Vice-President.

At the request of the New York County District Attorney's office, the F.B.I. commenced administrative forfeiture proceedings against the money. Fernando Marquez filed a claim seeking return of the seized money on behalf of himself and the corporation, and the matter was referred to the U.S. Attorney's office for judicial forfeiture. The federal court initially ruled that it lacked in rem jurisdiction over the money because, under New York state law, even though federal authorities had initiated their forfeiture proceedings at the request of the N.Y. County D.A., since the money had been seized by state or local officials, it was still under the jurisdiction of state court until that court relinquished jurisdiction.

After returning to state court, where the judge advised federal authorities to seek an anticipatory seizure warrant for the funds, the case returned to federal court. The federal court granted the Government's request for a anticipatory seizure warrant, stating in its decision: that "the Government attempted in good faith to satisfy (the state court judge's) order and fulfill its prosecutorial responsibilities under the federal forfeiture statutes"; that the Marquez Organization was involved in a large-scale illegal gambling business generating approximately $31 million in gross revenue; that the claimants had acknowledged that they would "abscond" with the money "if given the chance"; that claimant Fernando Marquez has a history of engaging in illegal gambling activities and PM Pinebrook, Inc., was not actually engaged in the conduct of business, and; "that probable cause exists to believe the Funds represents proceeds traceable to illegal gambling activities and are subject to forfeiture" under federal law. *United States* v. *$490,930 in U.S. Currency;* 937 F.Supp 249 (S.D.N.Y. 1996). Following the issuance of the seizure warrant, Fernando Marquez agreed to forfeit half of the seized funds. Peter Marquez and Robert Marquez were convicted of felony gambling charges.

DR. RICHARD LOWE

In October 1990, Dr. Richard Lowe contacted Joseph Lett, President of First Bank of Roanoke, Alabama, and a long-time friend, about depositing approximately $60,000 in cash into the bank account of the Chambers Academy, a private, all-white school organized after desegregation of the local public schools. Federal banking regulations require banks to file currency transaction reports (CTR's) for cash transactions over $10,000. In February 1990, Dr. Lowe had a disagreement with another bank over the filing of a CTR when his wife withdrew $11,000 in cash to purchase a car. Aware that large currency transactions are subject to federal reporting requirements, Dr. Lowe discussed with Bank President Lett depositing the money in increments of less than $10,000 over a period of time, to avoid the reporting requirement.

In November 1990, Dr. Lowe arrived at Mr. Lett's home after banking hours and gave him $315,520 in cash. The following day, Mr. Lett took the money to the bank, but rather than depositing it in the school's account, he placed it in the bank's vault. No CTR was prepared to reflect a cash deposit. Mr. Lett then used the money to make numerous purchases of cashier's checks and other instruments in amounts less than the $10,000 reporting threshold, which he deposited into the school's account. Although the deposits were supposedly a donation by Dr. Lowe to the school, and the account was listed in the name and under the tax number of the school's board of directors, Dr. Lowe maintained complete control over the account, and had to approve any withdrawal by the board.

Lett was indicted and pleaded guilty to federal "structuring" charges based on his handling of Dr. Lowe's deposit and his evasion of the reporting requirement. Dr. Lowe was indicted for conspiracy in connection with the structuring scheme. He entered into a "pre-trial diversion agreement," in which he accepted responsibility for committing the alleged offense and agreed to serve a one year probationary period, at which time the charge against him would be dismissed. The U.S. District Court entered an order forfeiting the deposited cash, holding that the money was subject to forfeiture because Dr. Lowe had caused the bank to fail to file a CTR when the funds were deposited. A divided panel of the 11th Circuit Court of Appeals reversed the forfeiture, holding that while the district court was correct in finding a factual basis for the forfeiture, it erred with respect to Dr. Lowe's "innocent owner defense." The panel held that he had produced sufficient evidence demonstrating that he did not have actual knowledge that First Bank would fail to file a CTR on the cash delivered to Mr. Lett's home for deposit into the CCEF account. In his dissenting opinion, Senior Judge Fay stated that the findings and conclusion of the district court were reasonable and that this was a close case which "could have gone either way." *U.S.* v. *Account No. 50–2830–2, Located at First Bank,* 95 F.3d 59 (11th Cir. July 31, 1996) (Table), reversing 884 F. Supp. 455 (M.D. Ala. 1995).

WILLIE JONES

The most oft-repeated tale of so-called forfeiture abuse involves Mr. Willie Jones who testified before the House Judiciary Committee in 1996. On February 27, 1991, Mr. Jones, carrying only a small overnight bag, went to the American Airlines ticket counter at Nashville Airport, where he purchased a round trip ticket to Houston with cash. The itinerary allowed him only a short time (90 minutes) in Houston. A ticket agent alerted the Drug Interdiction Unit (DIU) at the airport. After observing Mr. Jones for a period of time, DIU officers approached him and asked the purpose of his trip to Houston and for consent to search his bag. The officers then noticed a bulge under Mr. Jones shirt, and in a subsequent search discovered that Jones was carrying a pouch containing $9,000 in currency, in small denomination bills bundled with rubber bands in $1,000 increments. Such packaging is consistent with the way drug money is transported. Mr. Jones was then taken to the DIU office, where a narcotics-trained dog twice, in separate tests, alerted to the pouch containing the money. The currency was seized by the police and was later the subject of a forfeiture proceeding by the U.S. Drug Enforcement Administration.

Jones contended that he was traveling to Houston to purchase plant stock for his landscaping business from nurseries that offered better prices than nurseries in the Nashville. The district court concluded that Jones' explanation was "not credible." *Jones* v. *U.S. Drug Enforcement Administration,* 819 F. Supp 698, 708 (M.D. Tenn. 1993). It concluded that "Mr. Jones created the story after the seizure to support his claim that the trip has a legitimate purpose." *Id.* As for the source of the $9,000, Jones contended that $1,500 was loaned to him by a Mr. Gentry, $6,200 came from a Mr. Alexander ($3,500 for work performed and a $2,700 loan) and the remaining $1,300 came from his own funds. The court found this explanation "entirely unpersuasive." *Id.* at 710. Mr. Gentry not only denied having loaned Jones the money, but testified that Jones and Alexander had telephoned him after the seizure asking Gentry to lie to the authorities and tell "whoever asked" that Gentry had loaned Jones the money in anticipation of his trip to Texas.

The district court concluded, however, that the DIU officers lacked sufficient probable cause for the search of the bulge under Mr. Jones' shirt which led to the discovery of the pouch containing the money. It also held that the agents lacked a sufficient basis to detain him in the DIU office while the drug dog tests were performed. The court therefore excluded the evidence pertaining to Mr. Jones' possession of the currency, the way it was packaged and carried, and the drug dog alert. Absent such evidence, the court concluded that the government had failed to prove probable cause for the forfeiture.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS® AND THE INSTITUTE OF REAL ESTATE MANAGEMENT

On behalf of the over 730,000 members of the NATIONAL ASSOCIATION OF REALTORS, and its affiliate, the Institute of Real Estate Management, we thank the Subcommittee for holding this important hearing on civil asset forfeiture.

Our nation's forfeiture laws were originally enacted nearly 200 years ago to protect our nation from smugglers. These same laws are now being used by law enforcement officials as an aggressive weapon in the war against drugs. In recent years, the federal government has seized millions of dollars in property and cash. These laws hit the drug lords where it hurts—in the ill- gotten profits of their drug trade. Innocent property owners, however, are being caught in the crossfire. The NATIONAL ASSOCIATION OF REALTORS® and the Institute of Real Estate Management encourage the swift, timely eviction of drug dealers. We support the war on drugs, and advocate the development and implementation of community programs designed to alleviate drug activity. However, seizure of rental property where there may be an innocent owner constitutes a taking of private property without just compensation.

We are concerned that the rights of innocent real property owners be upheld in all cases of the forfeiture of real property. Innocent real property owners are those who had no knowledge of the use of their property for illegal activity or who, if they had such knowledge, made reasonable efforts to alleviate the use of their property for illegal drug activity. Any legislation addressing the forfeiture of real property needs to contain language which protects the rights of innocent owners. We strongly support H.R. 1658, the "Civil Asset Forfeiture Reform Act of 1999", which passed the House with an overwhelming bipartisan vote earlier this summer.

We have heard a number of anecdotal stories that demonstrate the serious need for reform of these laws. A property owner in Jackson, Mississippi, alerted the police

of possible drug activity in his apartment building. The property owner had successfully evicted the tenants involved in this activity, but now non-residents were coming onto the property to deal drugs. This owner contacted the police in the hopes of getting their help in stopping this illegal activity. Instead, the law enforcement agency used this information to seize the building out from under him. Although the property owner had evicted the tenants he knew were involved, and remained in constant contact with local police while attempting to clean up the property, the property was seized.

In another case, police had been investigating a rental property for suspected illegal activity. Although their investigation lasted for over half a year, the property owner (who lived in a neighboring town and was registered as the legal owner and contact for the property) was never notified about the suspected activity. The owner only learned about any investigation after receiving notice that his property had been seized. If the owner had been made aware of the suspected activity, he may have been able to work with police to rid the property of the offenders.

There are a number of reforms, which would preserve the valuable tool of property seizure, while protecting the rights of innocent property owners. We urge that the federal government, when enacting seizure procedures, require proof of owner complicity in the illegal drug activity before authorization for seizure of real property can be granted. The government should not be allowed to seize property without clear and convincing proof of that property owner's involvement in the crime. Further, those owners whose property is seized must be given time to contest the forfeiture and access to legal counsel. If found innocent, a property owner must have the ability to receive compensation for negligence or loss of property due to seizure, and the cost to recover such assets. We would like the following changes to be made to protect innocent property owners:

1. Place the burden of proof on the government, requiring them to provide clear and convincing evidence that the property is subject to forfeiture, and not belonging to an innocent citizen.
2. Allow for the appointment of counsel for individuals who are financially unable to obtain representation.
3. Allow for the release of property pending the final decision of the case when the owner can show substantial hardship caused by the holding of the property.
4. Create a uniform "innocent owner" defense, so that either lack of knowledge or lack of consent by the owner is sufficient defense, assuming the owner took reasonable steps to prevent the illegal use of the property.

   Reasonable steps should include that the owner: gave timely notice to law enforcement officials; *or* revoked permission to those engaged in the activity to use the property; *or* worked with local law enforcement officials to discourage or prevent the illegal use of the property. As owners have met with reluctance from some law enforcement officials in the past, attempts to work with such offices should also be defined as reasonable. In addition, owners should not be required to take such steps that he/she believes would be likely to subject them to physical danger.
5. Allow property owners sufficient time to challenge a forfeiture, a minimum of 30 days.
6. Eliminate the cost bond requirement for the property owner.
7. Allow innocent property owners to recapture costs associated with damage or loss of the property while in the government's possession, by allowing them to sue for negligence.
8. Require law enforcement officials to notify property owners if illegal activity is suspected in their property. This will allow them to work with law enforcement to discourage/remove the offending parties.

We believe these common sense reforms will allow law enforcement officials to continue to use forfeiture laws, without taking away the civil rights of innocent property owners. Our nation was founded on the principal that we are innocent until proven guilty. As currently written, these laws violate that underlying tenant of our Constitution by requiring property owners to prove their innocence. Again, the NATIONAL ASSOCIATION OF REALTORS, and the Institute of Real Estate Management thank you for holding this hearing today, and urge you to quickly introduce a companion bill to H.R. 1658 in the Senate, to complete the important work the House has begun.

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION,
East Northport, NY, July 20, 1999.

Hon. STROM THURMOND,
U.S. Senator,
Russell Building,
Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the more than 16,000 members of the Federal Law Enforcement Officers Association (FLEOA), I am taking this opportunity to state, for the record, FLEOA's *strong opposition* to H.R. 1658, the Civil Asset Forfeiture Reform Act of 1999, passed by the House of Representatives. FLEOA views civil asset forfeiture as an important tool for all of law enforcement. Our opposition does not imply total satisfaction with the forfeiture laws. Some areas should be amended and improved. However, improvement should not be rushed through Congress; it should, come only after a deliberative process ensuring a fair and effective deterrence to crime.

FLEOA has several misgivings regarding H.R. 1658. We request the Senate to carefully debate its elements, and ask itself if the provisions are really necessary to protect innocent citizens or are instead only likely to benefit criminals and their lawyers.

Instead of accelerating the process for Congressional passage, the Senate should hold up H.R. 1658 to the sunlight and carefully review several provisions, such, as:

Burden of Proof;
Appointment of Counsel;
Release of Property;
Notice of Seizure; and,
Innocent Owner Defense (especially through probate).

FLEOA believes the sanitizing light of a deliberative process allows for the ramifications of the debilitating provisions to become fully known. Several elements are purely punitive in nature, and not rooted in common sense. Regarding the five points above, we sincerely hope the Senate listens to reason and the vast majority of law enforcement.

FLEOA truly appreciates your contribution to this debate, and we look forward to working with you and your staff. If you have any questions, or need further information please free feel to contact me.

RICHARD GALLO.

AMERICAN BAR ASSOCIATION,
CRIMINAL JUSTICE SECTION,
Washington, DC, May 20, 1999.

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

DEAR CHAIRMAN HYDE: I write to you to express the ABA's support for H.R. 1658, the Civil Asset Forfeiture Reform Act of 1999. We commend you for your leadership in addressing an area of law which, unfortunately, has been characterized by varied, ambiguous and conflicting statutory provisions, which often lack basic elements of procedural due process.

The ABA has been an advocate of forfeiture law reform for more than a decade. This advocacy was memorialized in February 1996 when the ABA's House of Delegates endorsed a Statement of Principles calling for specific legislative reforms of current forfeiture laws. A copy of this Statement is attached. The adoption of the Statement reflected a consensus within the ABA that civil forfeiture laws, while important and useful law enforcement tools, place considerable power in the hands of the government to take private property and that measured reform is necessary to ensure that these powers are not abused.

While our ABA policy does not address all the provisions of H.R. 1658, the legislation embodies many of the principles for revision of the federal asset forfeiture laws supported by the Association. It encompasses the Statement of Principles' call for uniformity and simplicity, as well as the recognition that civil forfeiture laws are important law enforcement tools. The legislation also includes several specific legislative reforms consistent with other provisions of the Statement, including a uniform innocent-owner defense for all civil forfeitures, although the ABA has no position on whether an "innocent owner" includes someone who obtains forfeitable property through probate (Principle 3); shifting of the burden of proof to the government

to prove that assets are forfeitable, although the ABA recommends a "preponderance" standard (Principle 5); and the extension of time limits to contest forfeitures (Principle 6). The legislation also provides that the court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain counsel.

H.R. 1658 seeks to balance the need to enhance the ability of property owners to contest forfeiture actions while ensuring that civil forfeiture remains a useful tool of law enforcement. In this regard, we recommend two changes to further this goal. First, we suggest that the time period allowed an agency conducting a seizure of property to notify interested parties be lengthened. Second, we recommend that the Committee report clarify that the "appropriate conditions" the court is authorized to impose on the release of property pending final disposition of the case under a claim of hardship may include the appointment of special masters and the imposition of a cash bond.

The criminal forfeiture laws are also in need of reform, but many of the civil forfeiture proposals circulated to date actually expand the government's forfeiture authority and introduce new levels of complexity to forfeiture law. Such controversial criminal forfeiture proposals should not be allowed to delay the enactment of H.R. 1658, a principal virtue of which is its limited focus on critical reforms to the civil asset forfeiture system.

H.R. 1658 is an important step in addressing the inconsistencies and unfairness in the use of civil forfeiture laws and we urge prompt passage of the legislation.

Sincerely,

MYRNA RAEDER.

Adopted February, 1996.

AMERICAN BAR ASSOCIATION—CRIMINAL JUSTICE SECTION

Report To The House of Delegates

RECOMMENDATION

RESOLVED, That the American Bar Association urges that federal asset forfeiture laws be amended to comply with the attached "Statement of Principles on the Revision of the Federal Asset Forfeiture Laws," dated November 11, 1995.

STATEMENT OF PRINCIPLES OF THE REVISION OF THE FEDERAL ASSET FORFEITURE LAWS

(November 11, 1995)

1. *Uniformity and simplicity.* The statutory procedures regarding administrative, civil and criminal forfeiture are mutually inconsistent and unnecessarily complex. In revising these statutes, Congress should simplify the procedures and make them as uniform as possible.

2. *Terms used to describe what is forfeitable.* Likewise, the statutory language describing what property is subject to forfeiture should be amended to avoid use of confining and inconsistent terms such as "proceeds," "gross receipts" and "gross proceeds" in favor of uniform, well-defined terms.

3. *Innocent owner defense.* Congress should enact a uniform innocent owner defense applicable to all civil and criminal forfeitures.

4. *Forfeiture as a law enforcement tool.* The seizure and forfeiture of the proceeds and instrumentalities of criminal acts is an important and appropriate tool of federal law enforcement. Congress should encourage the continued use of both civil and criminal forfeiture not orgy to deter and diminish the capacity of the criminal to commit future criminal acts, but to provide a means of restoring criminal proceeds to victims.

5. *Burden of proof.* Civil forfeiture statutes should be amended to provide that the government bears the burden of proof regarding the forfeitability of property at trial. That is, the government should be required to prove, by a preponderance of the evidence, that the crime giving rise to the forfeiture occurred, and that the property bears the required relationship to the offense.

6. *Time limits.* To enhance the ability of property owners to contest forfeiture actions, Congress should extend and make uniform the time limits for filing claims in civil and administrative forfeiture proceedings.

7. *Third party interests in criminal cases.* Congress should amend the provisions of the criminal forfeiture statutes regarding pre-trial restraining orders to provide

a mechanism for addressing the interests of third parties in a timely manner that does not unduly interfere with the criminal trial.

8. *Attorneys fees.* The civil and criminal forfeiture statutes should contain a mechanism by which the court may make an early determination as to whether seized or restrained property may be made available to a criminal defendant to pay attorneys fees.

9. *Restraint of substitute assets.* If Congress provides for the pre-trial restraint of substitute assets in criminal cases, it should exempt assets needed to pay attorneys fees, other necessary cost of living expenses, and expenses of maintaining the restrained assets.

10. *Forfeiture of criminal proceeds.* No person has a right to retain the proceeds of a criminal act. Accordingly, Congress should provide for the civil and criminal forfeiture of the proceeds of all criminal offenses, and it should authorize the government to restore forfeited property to the victim of the offense. In particular, this change in the law will eliminate the risk of overuse of the money laundering statues to forfeit proceeds and restore property.

11. *Scope of criminal forfeiture.* To avoid the necessity of filing and defending successive criminal and civil forfeiture proceedings arising out of the same course of conduct when property is held jointly by defendants and non-defendants, Congress should provide a mechanism for adjudicating the forfeitability of the non-defendants' interests in the forfeited property as part of the ancillary proceeding in criminal cases.

12. *Facilitating property.* When property used to facilitate the commission of a criminal offense is made subject to forfeiture, Congress should enact a standard defining the required nexus between property and the offense.

13. *Availability of criminal forfeiture.* Current law outside of the drug enforcement context requires the government to bring most forfeiture actions as civil actions. The statutes should be amended to give the government the option, in all instances where civil forfeiture is presently authorized, of bringing a criminal forfeiture action as part of the criminal indictment in accordance with the standard rules for criminal forfeiture.