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Administrative Conference of the United States

Civil Forteiture: The Issues and Some Recommendations

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Administrative Conference of the United States

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I. Summary of Recommendations

This is an overview of civil forfeiture, the government's method of confiscating property of suspected criminals, particularly those involved in drug dealing. This report sketches the origins and general attributes of civil forfeiture practice in this country, the distribution and management of the hundreds of millions of dollars in cash generated by forfeiture, and sets forth the key legal and policy issues raised by forfeiture's unique procedures and doctrinal approaches.

Because of the traditional, doctrinal view that civil forfeiture is remedial rather than penal, the government, when it utilizes civil forfeiture, avoids in many cases constitutional and criminal procedural requirements required where penal sanctions are being imposed. This avoidance has been increasingly challenged in recent years by the press,[1] members of Congress and the courts on the grounds that civil forfeiture does, indeed, involve a taking of property as punishment and should be constrained by the same procedures as restrain criminal forfeiture. The Supreme Court has begun, most notably in its last session, to respond to the criticism and impose aspects of the Eighth Amendment[2] on all forfeitures, civil as well as criminal, and to impose, as a matter of due process, the administrative procedural requirements of notice and hearing on real property seizures.[3]

The U.S. government--the Department of the Treasury and the Department of Justice--have responded to the criticism by establishing asset forfeiture policy offices at Departmental level. These offices have issued a series of policy guidelines[4] to constrain the actions of its constituent agencies. They have argued these guidelines,[5] self-policing actions, are sufficient to protect the public.

Seizure, forfeiture, and remission determinations result, in general, from decisions and processes wholly within the law enforcement agency itself. The propriety of the seizure; whether there was probable cause; whether the seized property was excessive; whether the seized property bore sufficient connection to the illegal acts to be seized; whether proper notice was given of the intent to forfeit; and whether, in the case of land or commercial property, the property is being handled in a way least likely to cause damage after the seizure, prior to forfeiture, are all decided by the agency. Questions of remission and mitigation are also decided solely by the seizing agency without a hearing or public justification. Going outside the agency would permit the parties to discuss the contending factors of the private interest involved, the risk of an erroneous deprivation, and the government's interest to be openly and fairly determined.

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[1]The series of articles in the *Pittsburgh Press* and *Orlando Sentinel* revealing serious excesses of prosecutorial behavior and, perhaps, racist behavior brought about extensive reviews of forfeiture policy. Schneider and Flaherty, "Presumed Guilty: The Law's victims in the War on Drugs" (*Pittsburgh Press*, August 11-16, 1991); Brazil and Berry and the Sentinel staff (*Orlando Sentinel*, June 14-25, 1992).

[2]*Alexander v. United States*, 509 U.S. 1133, 125 L.Ed.2d 441 (1993) (Excessive fines clause of Eighth Amendment applicable to criminal forfeiture); *Austin v. United States*, 509 U.S. 1133, 125 L.Ed.2d 488 (1993) (Excessive fines clause of Eighth Amendment applicable to civil forfeiture).

[3]*U.S. v. Good Real Property*, 507 U.S. ___, 114 S.Ct. __, 62 U.S.L.W. 4013 (Dec. 13, 1993).

[4]E.g., Executive Office of Asset Forfeiture in the Office of the Assistant Secretary (Enforcement), Dept. of the Treasury, *Policy Directives* (July 1993); Dept. of Justice, *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990).

[5]The guidelines are very similar and, in practice, the two offices coordinate closely with each other reflecting the interweaving of the statutes. Thus, 21 U.S.C. 881(d) incorporates the "provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws." This report frequently discusses only one of the Department's approaches as sufficient to make the point. The GAO has suggested consolidating the two offices.

Given the similarities in Justice's and Customs' seized property programs, consolidation makes sense. Both agencies seize similar types of assets, and those assets are generally located in the same geographic areas. However, under the current operating structure, each agency maintains separate and distinct programs for managing and disposing of its property. Justice, through the Marshals Service, contracts directly with vendors that provide the service. Customs has a nationwide contractor that provides custodial services either directly or through subcontracts with other vendors. GAO, *Asset Forfeiture Programs* (Dec. 1992), p.22

The thrust of the key recommendation in this report is to require that these critical questions, and the critical act of forfeiture particularly, take place outside the enforcement agency to obtain greater openness and stronger public institutional participation in the forfeiture process. The report, therefore, recommends that an administrative tribunal be established where these issues can be addressed publicly and consistently.

As a corollary to this recommendation, detailed information on remissions and forfeitures will be publicly and readily available. At present this information is available only to the enforcement agency which may make it available only in summary fashion. It is expected that as a consequence of this recommendation clear guidelines in law and regulation will be established outside the enforcement agency.

The report recommends as well, consistent with the desire for openness, that a forfeiture registry be established which would act as the one medium to which all notices of forfeiture would appear and the nature and quantity of the property seized can be reported to the public.

II. Introduction

The law classifies forfeitures as criminal or civil according to the procedure by which the government perfects its title in the confiscated property. Criminal forfeiture follows as a consequence of criminal conviction of the property owner. Civil forfeiture is accomplished by civil proceedings, in rem, against the property itself.

The advantage of civil forfeiture, much more widely used than criminal forfeiture, is that it provides for forfeiture regardless of the current status of the property's owner. Even if the owner is dead or has fled the U.S., the property can be forfeited since the property itself, and not any individual, is the "defendant" in the suit. Criminal forfeiture is based upon the jurisdiction the court has over the defendant rather than his or her property. It has the advantage of casting a "wider net," capable of reaching, in one proceeding, all of a defendant's forfeitable assets, regardless of location and scope.

But criminal forfeiture is much less certain and considerably slower than civil forfeiture. Criminal forfeiture of property is contingent upon the conviction of its owner. Criminal forfeiture only divests the convicted defendants of their right in the property. To obtain clear title, the government must address (through a post-trial proceeding known as an ancillary hearing) the interests others may hold in the property.

There may be more than a hundred federal forfeiture laws, but the civil forfeitures which generate the most revenue are those of the Controlled Substances Act,[6] the racketeering statute (RICO),[7] and the money laundering provisions[8] and it is on these upon which we will specifically focus. Cash is the property most often confiscated, followed at some distance by real estate and then conveyances, mostly motor vehicles.[9]

In the course of the discussion, this report, in addition to these guidelines, discusses the alternate statutory provisions being proposed by a number of organizations: the Model Asset Seizure and

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[6]Section 881 authorizes civil forfeiture in narcotics cases. In pertinent part, this law authorizes the following forfeitures:

(a)(4)--All conveyances...used, or...intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [a controlled substance]...,

(a)(6)--All moneys, ...or other things of value furnished or intended to be furnished...in exchange for a controlled substance...[and] all proceeds traceable to such an exchange...; and

(a)(7)--All real property... which is used, or intended to be used...to commit, or to facilitate the commission of a [designated] violation of this title....

[7]18 U.S.C. 1961-68 (1988).

[8]18 U.S.C. 981-982 (1988).

[9]General Accounting Office, *Asset Forfeiture: Noncash Property Should Be Consolidated Under the Marshals Service*, 4-5 (June 28, 1991).

Forfeiture Act (MASFA)[10]; the draft Model Civil Forfeiture Act (Drug Commission Model)[11]; the proposed Article V, Civil Forfeiture, Amendments to the Uniform Controlled Substances Act (the NCCUSL Model)[12]; the Model Civil Forfeiture bill the ACLU Model)[13]; and various Congressionally introduced bills: H.R. 1774 (the Conyers bill)[14] and the Civil Asset Forfeiture Reform Act of 1993, H.R. 2717 (the Hyde bill).[15]

III. Background of Forfeiture Law

Present forfeiture law has its roots in early English law. It is a product of three early English procedures: the law of deodand, common law forfeiture, and, most importantly, statutory or commercial forfeiture.

At early common law, the object that caused the death of a human being--the ox that gored, the knife that stabbed, the cart that crushed--was confiscated as a deodand. Coroner's inquests and grand juries, charged with determining the cause of death, were obligated to identify the offending object and determine its value. The value of the offending instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand--the object forfeited--was put to charitable uses. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness.[16]

Although deodands were not unknown in the American colonies, they appear to have fallen into disuse or been abolished by the time of the American Revolution or shortly thereafter.

Forfeiture of estates or common law forfeiture, unlike deodands, focused solely on a human offender. At common law, anyone convicted and attained for treason or a felony forfeited all his lands and personal property, "estate forfeiture."[17] These forfeitures obviously served to punish felons and traitors. They were justified on the ground that property was a right derived from society, a right which one lost by violating society's laws. In colonial America, common law forfeitures were rare. After the Revolution, they were effectively eliminated when the Constitution restricted the use of common law forfeiture in cases of treason and Congress restricted its use in the case of other crimes.

The third antecedent of modern forfeiture, the one of greatest significance for present forfeiture practice, was statutory forfeiture which was used fairly extensively to combat smuggling and other revenue evasion schemes in the American colonies. In most instances, the statutes called for *in rem* confiscation proceedings in which, as with deodands, the offending object is the defendant. Occasionally, these statutes established *in personam* procedures where confiscation occurs as the result of the conviction of the person, the owner of the property.

The early cases recognized forfeiture's basic penal character.[18] In these cases, forfeiture was justified on two theories: that the property itself is "guilty" of the offense or that the owner may be held accountable for the wrongs of others to whom he entrusts his property. In the last analysis, both

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[10]MAFSA was prepared by the American Prosecutors Research Institute under contract to the U.S. Department of Justice and was endorsed by the U.S. Department of Justice, the National Association of State Attorneys General and the National Association of District Attorneys.

[11]The Model Civil Forfeiture Act was prepared by the President's Commission on Model State Drug Laws.

[12]The proposed Amendments were drafted and are being discussed by the National Conference of Commissioners on Uniform State Laws.

[13]Proposed by the American Civil Liberties Union.

[14]H.R. 1774, introduced by Congressman John Conyers (D. MI) in the 102nd Congress.

[15]H.R. 2417, introduced by Congressman Henry Hyde (R. MD) in this--the 103rd--Congressional session.

[16]*Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974)

[17]*The Palmyra*, 12 Wheat. 1, 14 (1827)

[18]*Peisch v. Ware*, 4 Cranch 347 (1808)

theories rest on the notion that the owner has acted improperly in allowing his property to be misused and that he is properly punished for that wrongful or negligent action.[19]

The Government's right to take possession of property in all of these early American cases stemmed from the misuse of the property itself. Indeed, until 1967 the government had power to seize only property that "the private citizen was not permitted to possess." In that year, the Supreme Court, in *Warden v. Hayden*,[20] held that the Fourth Amendment did not prohibit the seizure of "mere evidence."[21]

IV. Modern Forfeiture Statutes

Modern forfeiture is a creature of statute. Most state and federal forfeiture statutes authorize civil forfeiture. The original forfeiture provisions in the Comprehensive Drug Abuse Prevention and Control Act of 1970[22] closely paralleled the early statutes used to enforce the customs laws, the piracy laws, and the revenue laws. The 1970 law generally authorized the forfeiture of property used in the commission of criminal activity. It applied to stolen goods but did not apply to proceeds from the sale of stolen goods. It contained no innocent owner defense.

In 1978 Congress amended the 1970 Act, to authorize the seizure and forfeiture of proceeds of illegal drug transactions.[23] This marked an important expansion of governmental power. The Congressional civil forfeiture expansion was intended to give prosecutors an effective mechanism for striking at the profits of narcotics trafficking.[24] When introducing the statute in the United States House of Representatives, Congressman Rogers, a Democrat from Florida, stated:

> The purpose of Title III of the Senate amendment is to provide Federal drug enforcement officials with the ability to strike at the profits of illicit trafficking in abusable controlled substances.[25]

Congressman Carter, a Republican from Kentucky, echoed this purpose stating:

> [T]he Senate amendment expands section 511 of the Controlled Substances Act to require the forfeiture of all moneys or other things of value which are substantially connected to a criminal violation of our drug control laws. In other words, Mr. Speaker, the Senate amendment simply requires the drug pusher to give up his ill-gotten gains.[26]

A prosecutor need not trace the proceeds to a particular narcotics transaction. He must only link the proceeds to narcotics trafficking generally.[27] In 1984, Congress further amended the law to authorize the forfeiture of real property.[28]

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[19]*Austin v. U.S.*, 509 U.S. ___, 113 S.Ct. ___, 12 L.E.2d 488, 501 (1993)

[20]387 U.S. 294 (1967).

[21]A precedent for this expansion had been established in 1970 by the Racketeer Influenced and Corrupt Organizations Act (RICO), see 18 USC Sec. 1963(a). Even RICO, however, did not specifically provide for the forfeiture of "proceeds" until 1984, when Congress added Sec. 1963(a)(3) to resolve any doubt whether it intended the statute to reach so far. *Russello v. United States*, 464 U.S. 16 (1983).

[22]Pub.L. No. 91-513, sec. 511, 84 Stat. 1236, 1276 (1970) (prior to 1978 amendment).

[23]Pub. L. No. 95-633, sec. 301(a), 92 Stat. 377 (1978).

[24]21 U.S.C. Sec. 881(a)(6).

[25]124 *Cong. Rec.* H12790 (Oct. 13, 1978).

[26]*Id.* at H12,793.

[27]*U.S. v. Parcels of Land*, 903 F.2d 36, 38 (1st Cir. 1990). (Massive cash expenditures plus attempt to shield money from government attention indicate drug trafficking.) *United States v. $4,255,000*,762 F.2d 895, 904 (11th Cir. 1985) ("[N]othing in the statute requires evidence of a particular narcotics transaction, and we decline to impose such a requirement here."), *cert. denied*, 474 U.S. 1056 (1986); *United States v. $250,000*, 808 F.2d 895, 899-900 (1st Cir. 1987) ("The government need not, however, produce any evidence linking the money to any particular drug transaction.").

[28]See 21 U.S.C. 881(a)(7); P.L. 98-473, 306, 98 Stat. 2050.

Federal forfeiture legislation, as amended in 1978 and subsequently, and the state counterparts, have been effective from a financial point of view: confiscating millions of dollars in cash, real estate, vehicles, vessels, airplanes, and even businesses.[29]

A. The Seizure

1. Probable Cause

Civil forfeiture begins with a seizure by the government of privately-owned property. The decision to seize is made by the operational prosecutorial agency in the field if the agency believes there is probable cause to link the property to narcotics trafficking. The probable cause standard requires "reasonable ground for belief...[that the property constitutes proceeds of narcotics trafficking], supported by less than prima facie proof but more than mere suspicion."[30]

Direct evidence is not required to meet the probable cause standard. "Circumstantial evidence and inferences therefrom are good grounds for a finding of probable cause in a forfeiture proceeding."[31] Evidence that would be inadmissible at trial may be used as long as the evidence is reliable.[32]

2. Constitutional Limitations on Seizures

The power to seize, if the probable cause standard is met, has few other limitations.

a. *Due Process: The Requirement of Notice and Hearing*

Calero-Toledo v. Pearson Yacht Leasing Co.[33] addressed the constitutionality of summary seizure of property in the context of Puerto Rico's civil forfeiture statute. The case involved the forfeiture of a yacht that the Pearson Yacht Leasing Company, based in the States, had rented to two Puerto Rican residents. After finding a marijuana cigarette on the vessel, Puerto Rican authorities seized the yacht without giving prior notice to the renters or to the Pearson Yacht Company.

The procedure in *Calero-Toledo* raised the constitutional issue of whether it violated due process to seize property without prior notice or hearing. The Supreme Court justified seizure of the yacht without notice or hearing by stressing the public's interest "in preventing continued illicit use of the property" and the risk that advance notice would facilitate the vessel's concealment or even its removal from the jurisdiction. The Court concluded that these circumstances presented "an `extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." Thus, *Calero-Toledo* established the principle that due process does not require a pre-seizure forfeiture hearing.

b. The Special Case of Real Property

(1) The Balancing Test of Matthews v. Eldridge

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[29]In FY 92, total seizures by the Department of Justice were estimated at $1.9 billion and total forfeitures at $641 million. Executive Office of Asset Forfeiture, Office of the Deputy Attorney General, *Annual Report of the Dept. of Justice Asset Forfeiture Program, Fiscal Year 1992*, p.26.

[30]*United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980); *United States v. $250,000*, 808 F.2d 895, 897 (1st Cir. 1987) (quoting *One 1978 Chevrolet Impala*); *United States v. A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986); *United States v. Dickerson*, 857 F.2d 1241, 1244 (9th Cir.), amended and superseded by, 873 F.2d 1187 (9th Cir. 1988) (To pass the point of mere suspicion and to reach probable cause, it is necessary to demonstrate by some credible evidence the probability that the plane was in fact used to transport a controlled substance.)

[31]*United States v. Brock*, 747 F.2d 761, 763 (D.C. Cir. 1984). (Probable cause found and forfeiture of $120,000 worth of jewelry found in claimant's attic sustained. Relying solely on circumstantial evidence.)

[32]*United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991) (probable cause can be established with otherwise inadmissible evidence so long as it is reliable).

[33]416 U.S. 663 (1974).

The Florida Supreme Court held that in the case of real property due process requires the state to use means less restrictive than seizure, if possible, to protect the respective interests and safeguard the constitutional rights being impinged. If the government seeks a restraint greater than a *lis pendens*, notice and an adversarial hearing is required.

> Regarding matters of real property, due process requires that the state must provide notice and schedule an adversarial hearing for interested parties on the question of probable cause *prior* to any initial restraint, other than *lis pendens*, on the real property being subjected to forfeiture. To comply with due process, a real property forfeiture action under the Act would begin with the state's filing of a petition for rule to show cause in the circuit court where the property is located or where the crime is alleged to have taken place. Simultaneously, the state would record a notice of its petition with the property records of the appropriate clerk of court's office, which will serve as a *lis pendens*. This recordation shall be deemed a constructive "seizure" for purposes of commencing a forfeiture action under the Act. The state would immediately schedule an adversarial preliminary hearing to determine if probable cause exists to maintain the forfeiture action, and to resolve all questions pertaining to the temporary restraints on the real property pending final disposition.[34]

The Second Circuit in three recent cases--all decided prior to *Austin*--has elaborated for the Federal courts on the due process limitations of a seizure of assets without a prior hearing or a prompt post-seizure hearing. The three cases involved real property, seized by the government after the issuance of a warrant based on a finding of probable cause by a judicial officer after an ex parte hearing. The Second Circuit utilized the balancing test of *Matthews v. Eldridge*[35] to determine the constitutional adequacy of the *ex parte* procedure, by balancing (1) the private interest involved, (2) the risk of an erroneous deprivation of that interest through the procedures utilized, as well as the probable value of additional procedural safeguards, and (3) the government's interest, including the burden that additional procedural requirements would impose.

In *Livonia*,[36] the government seized a home; in *141st Corp.*,[37] the seizure was of an apartment building for commercial purposes; and *Statewide Auto Parts*,[38] involved seizure of a commercial business. The Second Circuit had distinguished among the various types of real property in setting out the procedural protection thereby required prior to seizure.

The Supreme Court in *United States v. Good Real Property*[39] effectively eliminated such distinctions, holding that in all cases of real property seizures, not just residences, notice and an adversary hearing is required prior to seizure. Although it reaffirmed the *Matthews v. Eldridge* balancing test,[40] the Court held since real property "by its very nature can be neither moved nor concealed," due process considerations require notice and hearing. Seizure protections are not limited to the Fourth Amendment but embrace due process under the Fifth and Fourteenth Amendments as well.

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[34]*Department of Law Enforcement v. Real Property*, 588 So.2d 957, 960 (Fla. 1991).

[35]424 U.S. 319, 335 (1976).

[36]*United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265 (2nd Cir. 1989), *rehearing denied*, 897 F.2d 659 (2nd Cir. 1989) (Livonia).

[37]*United States v. 141st Street Corp by Hersh*, 911 F.2d 870, 873 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (*141st Street Corp.*).

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

[39]507 U.S.___, 114 S.Ct. __, 62 U.S.L.W. 4013 (Dec. 13, 1993).

[40]Chief Justice Rehnquist and Justices Scalia and O'Connor specifically dissented from the *Matthews v. Eldridge* reasoning. *Ibid*, slip op.

c. Eighth Amendment: Excessive Fines

Austin v. United States[41] may restrict the *Calero-Toledo* holding. In *Austin*, the Supreme Court held that the Eighth Amendment clause prohibiting the imposition of excessive fines applied to a drug-related forfeiture of property to the United States under sections 881(a)(4) and 881(a)(7) because such a forfeiture constituted payment to a sovereign as punishment for some offense. The Court, however, did not decide on a test to determine whether a particular forfeiture is excessive and it provided no guidance to the lower courts in developing such a test.

Austin may inhibit government action probably preventing the pursuit of a "zero tolerance" policy. On the other hand, *Austin* may prevent egregious acts by the government; i.e., the forfeiture of a yacht because a marijuana cigarette is found aboard or the forfeiture of family farms and homes for growing a small quantity of marijuana.

B. The Claimant

Once the prosecution has established probable cause to support the seizure, the burden of proof shifts to the claimant. The standard of proof then becomes greater. In order to get the property back, the claimant must disprove the allegations by a preponderance of the evidence;[42] or, alternatively, that the seized property falls within one of the exemptions that have been established to protect third party interests, the criminal offense did not occur, or the property lacks the statutorily required nexus to the crime.

The irony is that in *Statewide Auto Parts*, although the property, the court found, was seized illegally, the property was not returned. The court said:

> [A]n illegal seizure of property does not immunize that property from forfeiture...the property itself cannot be excluded from the forfeiture action, and...evidence obtained independent of the illegal seizure may be used in the forfeiture action....

The remedy being offered the claimant was modest:

> The unlawfulness of the initial seizure would only preclude the government from introducing any evidence gained by its improper seizure of the premises.[43]

Not only is the property not returned in the case of improper prosecutorial action, an overzealous prosecutor is provided with prosecutorial immunity. In *Schrob v. Catterson*,[44] the Third Circuit held that the seeking of a search warrant and the filing of an *in rem* action "are so intimately and inexorably tied to the prosecutorial phase of the judicial process as to warrant the blanket protection that absolute immunity affords.[45]

C. Remission or Mitigation

In addition to challenging the seizure, an owner or anyone else with a property interest in the res may petition for remission or mitigation. Remission is a petition for return of all of the property

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[41] 509 U.S. ___, 113 S.Ct. ___, 125 L.Ed.2d 488 (1993).

[42] See, e.g., *United States v. a Single Family Residence*, 803 F.2d 625, 629 (11th Cir. 1986) ("Once the government demonstrates that probable cause exists, the burden of proof in a civil forfeiture proceeding shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture."); *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986) ("Once the government shows that probable cause exists, the burden shifts to the claimant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture...."); *United States v. $84,000*, 717 F.2d 1090, 1101 (7th Cir. 1983) ("The government's burden was only to show probable cause for the forfeiture proceedings...[t]he burden then shift[s] to...claimants to show by a preponderance of the evidence that the property was not subject to forfeiture."), *cert. denied*, 469 U.S. 836 (1984). *United States v. Sandini*, 816 F.2d 869, 872 (3rd Cir. 1987).

[43] *U.S. v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992).

[44] 948 F.2d 1402 (3rd Cir. 1991).

[45] *Ibid* at 1415. Only qualified immunity applies to the government's post seizure actions in managing seized property.

seized or its entire value; mitigation returns only a portion.[46] Mitigation grants the return of the property provided the petitioner pays a penalty. A petition for remission or mitigation of forfeiture is a petition for administrative relief, not judicial relief.[47]

1. Federal Common Law View

a. Limited Character of Judicial Review

The courts have taken the position that "the remission of forfeitures is neither a right nor a privilege, but an act of grace."[48] Therefore, federal common law consistently has held the authority to grant remission or mitigation is totally at the discretion of the enforcement agency[49] and that federal courts lack jurisdiction to review the merits of a forfeiture decision. The Department of Justice guidelines follow this common law view that the Executive Branch decision on the merits is non-reviewable by the judiciary.[50]

Nevertheless, the judiciary has frequently exercised an "equitable or anomalous jurisdiction over agency forfeiture decisions"[51] based on the judiciary's supervisory authority over officers of the court. Further, the judiciary will grant relief upon a showing of refusal to consider a remission petition;[52] but this review, to date, has been very timid even when it finds government impropriety. Thus, in *McCoy v. U.S.*,[53] the district court found the government had failed to respond to claimant's petition for remission or mitigation for a year and four months, a delay which the court found "inexcusable."

A citizen should not be required to wait over a year and four months and forced to file a lawsuit to have a petition for remission or mitigation of forfeiture resolved by the DEA.[54] Despite this finding, the court limited the claimant's remedy to a suit under the Administrative Procedure Act to compel agency action.[55] McCoy, the court ruled, could not claim a due process violation when he could have cured the problem himself by filing such an action.

This result was not unexpected. The courts have consistently refused to decide whether an inordinate delay by the government gives rise to a due process claim[56] since the Supreme Court in its discussion of the issue specifically left that question open.[57]

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[46] 28 C.F.R. sec. 9.

[47] *United States v. United States Currency Etc.*, 754 F.2d 208, 214 (1985).

[48] *Matter of $67,470.00*, 901 F.2d 1540, 1543 (11th Cir. 1990).

[49] *The Laura*, 114 U.S. 411 (1884) (holding that remission was the equivalent to a pardon).

[50] M. Troland, *Asset Forfeiture: Law, Practice and Policy* 119A (U.S. Dept. of Justice, Asset Forfeiture Office, June 1988).

"Courts have very limited authority in the area of petitions for remission or mitigation of forfeiture. They may direct that a particular petition be considered if the government has refused to take action or has been unduly dilatory. *They may not, however, review the merits of a petition or the government's ultimate decision*" (emphasis supplied), citing *One 1977 Volvo 242DL v. United States*, 650 F.2d 660, 662 (5th Cir. 1981) (per Curiam); *DeVito v. United States*, 520 F. Supp. 127, 129 (E.D. Pa. 1981); *Willis v. United States*, 600 F. Supp. 1407, 1417 (N.D. Ill. 1985)). Id. *See also, United States v. One 1972 Mercedes-Benz 250, Etc.*, 545 F.2d 1233, 1236 (1976) (listing cases); *United States v. One 1970 Buick Riviera*, 463 F.2d 1168, 1170 (5th Cir. 1975), *cert denied*, 409 U.S. 980, (1972) (judiciary can require officials to exercise jurisdiction).

[51] *Ibid* at 1544, citing, *inter alia, United States v. Chapman*, 559 F.2d 402, 406 (5th Cir. 1977); *Mason v. Pulliam*, 557 F.2d 426, 428 (5th Cir. 1977).

[52] *In re Sixty Seven Thousand Four Hundred Seventy Dollars ($67,470.00)*, 901 F.2d 1540 (11th Cir. 1990); but see 18 U.S.C. 3668 (judicial remission or mitigation for forfeitures under federal liquor laws).

[53] 758 F.Supp.299 (E.D. PA 1991).

[54] *Ibid*, p.302.

[55] 5 U.S.C. 706(1).

[56] *Matter of $67,470.00*, 901 F.2d 1540, 1545-46 (11th Cir. 1990).

[57] *United States v. Von Neumann*, 474 U.S. 242, 250 (1986).

2. Federal Remission & Mitigation Statute

Historically, the federal government has provided for administrative relief from forfeitures in cases where the party's conduct was undertaken "without willful negligence" or an intent to commit the offense.[58] The current federal remission statute follows this traditional practice. It authorizes the Secretary of the Treasury to remit or mitigate a forfeiture if the Secretary finds the forfeiture was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify" remission or mitigation.[59]

3. Regulations

The specific criteria governing remission and mitigation are set forth in published regulations[60] and provide as follows:

> (a) The Determining Official shall not consider whether the evidence is sufficient to support a forfeiture but shall presume a valid forfeiture.
>
> (b) *Remission*. The Determining Official shall not remit a forfeiture unless the petitioner establishes:
>
> (1) That petitioner has a valid, good faith interest in the seized property as owner or otherwise; and
>
> (2) That petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law; and
>
> (3) That petitioner had no knowledge of the particular violation which subjected the property to seizure and forfeiture; and
>
> (4) That petitioner had no knowledge that the user of the property had any record for violating laws of the U.S. or of any State for a related crime; and
>
> (5) That petitioner had taken all reasonable steps to prevent the illegal use of the property.

The Justice Department's regulations require the petitioner to demonstrate a higher standard of care than mere non-negligence in order to obtain remission, namely that he "had taken all reasonable steps to prevent the illegal use of his property."[61] This standard is a codification of the Supreme Court's reasoning in the *Calero-Toledo*[62] case, which suggested that forfeiture would not be constitutionally appropriate in the case of a party who had "taken all reasonable steps to prevent the illegal use of his property. In effect, the Justice Department regulations restrict remission to cases where the Department of Justice acted unconstitutionally.[63]

4. Department of Justice Guidelines

The Department of Justice has set forth guidelines for evaluating remission petitions, based on the criteria set forth in the regulations. According to the guidelines, the decision maker need not be

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[58] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 n.27, *quoting* 19 U.S.C. § 1618. *See The Laura*, 114 U.S. 411, 414-15 (1885); *United States v. United States Coin & Currency*, 401 U.S. 715, 721 (1971).

[59] 19 U.S.C. § 1618 (1992).

[60] 28 C.F.R. Sec. 9.5. Parallel INS regulations governing remission are at 28 C.F.R. § 274.

[61] 28 C.F.R. § 9.5(b)(5).

[62] 416 U.S. 663.

[63] Smith, *Prosecution and Defense of Forfeiture Cases* (1986) at 15-14 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)) makes the same point, arguing "the Department now has decided to simply ignore the legislatively established traditional standard for granting relief."

concerned with or give consideration to attacks on the merits of the government's case, since a petition for remission or mitigation presumes a valid forfeiture.[64] Thus, challenges to such matters as the admissibility of evidence, the legality of seizure, or the existence of probable cause are misplaced in a petition that is, in essence, requesting an executive pardon.[65]

No hearing is held on petitions for remission or mitigation of either administrative or judicial forfeitures.[66] Therefore, the petition itself must convince the decision maker that the petitioner is entitled to relief and establish that the petitioner meets the five criteria listed in § 9.5(b).[67]

D. The Forfeiture

1. Administrative Forfeiture

In the interests of expediency and judicial economy, Congress has authorized the use of administrative forfeiture as the next step in cases of uncontested seizures. Smaller civil forfeiture actions also are handled administratively in the federal system, rather than judicially, a procedure which is simpler, quicker, and less expensive.[68] Under federal customs law, administrative forfeiture may be used as well if the property to be forfeited is cash in any amount;[69] or if the property is worth less than $500,000; or is a boat, plane or car used to carry or store drugs.[70] The procedure requires that those with an interest in the property be notified of the seizure and given an opportunity to contest the seizure and proposed forfeiture. Although administrative forfeiture is done wholly within the confines of the prosecuting agency, the statute makes no distinction between administrative and judicial forfeiture either procedurally or substantively.

2. Judicial Forfeiture

Judicial forfeiture is required for any property other than monetary instruments and hauling conveyances if:

1. The value of the "other property" exceeds $500,000;
2. A claim and cost bond has been filed;
3. The property is real estate;[71]
4. A contesting claimant has requested judicial forfeiture proceedings.[72]

Where administrative forfeiture is unavailable either because of the nature or size of the forfeited property, or because a claimant has successfully sought judicial proceedings, the government may seek to secure a judicial declaration of forfeiture by filing a complaint or a libel against the property.[73] Since the proceedings are in rem, actual or constructive possession of the property by

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[64] M. Troland, *Asset Forfeiture: Law, Practice & Policy* 117 United States Department of Justice, Asset Forfeiture Office (June 1988).

[65] *Id.* The INS regulations do not contain this provision, however. *Compare* 28 C.F.R. § 9.5 *with* 8 C.F.R. § 274.15.

[66] 28 C.F.R. §§ 9.4(f) & (g), 9.3(d); Although 19 U.S.C. § 1618 authorizes the agency to take testimony on petition for remission or mitigation, nothing requires the agency to do so. *Willis v. United States*, 787 F.2d 1089, 1094 (7th Cir. 1986).

[67] M. Troland at 117-18.

[68] *Warrant to Seize One 1988 Chevrolet Monte Carlo v. United States*, 861 F.2d 307, 310 (1st Cir. 1988).

[69] Until 1990, the law required that all cash seizures over $100,000 be forfeited judicially. The GAO recommended that the law be changed so that all uncontested cash seizures could be forfeited administratively, regardless of amount. That recommendation was implemented in 1990. The seizing agencies reported that this change in law has resulted in seized cash being forfeited much faster without affecting individual due process rights. No outside evaluation of the change has been made. GAO, *Asset Forfeiture Programs* 21 (Dec. 1992).

[70] 19 U.S.C. 1607, 12 U.S.C. 881(d).

[71] The requirement of judicial forfeiture in the case of real estate is not a statutory mandate. Both Department of Justice and Department of Treasury policy require it.

[72] 19 U.S.C. 1607, 1608.

[73] 19 U.S.C. 1608.

the court is a necessary first step in any confiscation proceeding[74] although the court's continued jurisdiction and control over the res is not necessary.[75]

Once the government proceeds to seek forfeiture before the judiciary, for the first time the case is looked at by someone outside the enforcement agency and impartial review of the action of the government can be obtained.

The burden of proof standard is subject to considerable debate. At present, Federal courts generally follow the civil law standard of preponderance of evidence. That standard is based on the principle that civil forfeitures is remedial rather than penal. The *Austin* holding by the Supreme Court erodes that principle; but whether it changes the burden of proof required by the government is still unclear.

The Florida Supreme Court has ruled that the government is constitutionally required to prove its case by "clear and convincing evidence."[76] However, none of the federal circuit courts have held that this higher evidentiary standard was required.

3. Tactical Advantages of Civil Forfeiture Seizures

At present the government enjoys a reduced burden of proof--preponderance of the evidence rather than the criminal law burden of beyond a reasonable doubt--when it utilizes civil forfeiture. This is a key advantage to civil forfeiture. *Austin v. United States*, in applying the Excessive Fines Clause of the Eighth Amendment on the grounds that civil forfeiture does involve punishment, may, in future, have some effect as well on the reduced burden of proof available to the government in civil forfeiture.

In addition to the reduced burden of proof, civil forfeiture also provides prosecutors with a broad opportunity for discovery to compel disclosure of records rather than the limited court-approved discovery in criminal prosecutions, and may appeal an adverse decision, a possibility not permitted under criminal procedure. Perjury and contempt sanctions are potentially available against untruthful or recalcitrant witnesses. The Fifth Amendment may be asserted; but, if criminal charges are pending against the claimant, asserting the Fifth Amendment may result in an adverse inference in a subsequent civil proceeding.

Once the district court has found probable cause, the "equitable discretion" granted under the statutes[77] and confirmed by the Supreme Court is very broad, including the power to freeze the assets in question and prevent their use for any purpose, including attorneys fees.[78]

Appellate review of the probable cause finding is highly deferential to the government and the trial court. In determining whether the district court properly denied claimants' motion to suppress, this court must accept the trial court's findings of fact unless they are clearly erroneous....Furthermore, the evidence must be considered in the light most favorable to the government.[79]

However, one court has held that since the existence of probable cause is a question of law, a district Court's probable cause determination is subject to plenary review.[80]

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[74]*Dobbin's Distillery v. United States*, 96 U.S. 395, 396, (1877); *United States v. Certain Real and Personal Property*, 943 F.2d 1292, 1295 (11th Cir. 1991); *Scarabin v. Drug Enforcement Administration*, 966 F.2d 989, 993 (5th Cir. 1992).

[75]*Republic National Bank v. Miami*, 506 U.S. ___, 113 S.Ct. 554 (1992). For discussion of the doctrine prior to the Supreme Court decision in the *Republic National Bank* case, *see*, Appellate Jurisdiction for Civil Forfeiture: *The Case for the Continuation of Jurisdiction Beyond the Release of the Res*, 65 *Fordham Law Review* 679 (1991).

[76] *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 967 (Fla. 1991).

[77]E.g., 21 U.S.C. 853(a).

[78]*U.S. v. Monsanto*, 109 S.Ct.

2657 (1989).

[79]*U.S. v. $149,442.43 in U.S. Currency*, 965 F.2d 868, 873 (10th Cir. 1992).

[80]*U.S. v. Parcels of Land*, 903 F.2d 36, 41 (1st Cir. 1990).

Although the Congressional purpose behind the expansion of forfeiture authority was to permit the prosecutor to prevent the drug dealer from hiding his profits, there is every indication that the tactical advantage to the prosecution in the forfeiture procedure has resulted in its more frequent use, more than *20,000* civil and administrative forfeitures by the Department of Justice in 1989 alone.

4. The Question of Bias

In *Marshall v. Jerrico Inc.*,[81] sums collected as civil penalties for the unlawful employment of child labor were returned to the Employment Standards Administration of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. The question for decision was whether this provision violated the due process clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration.

The District Court concluded that the reimbursement provision did create an impermissible risk of bias on the part of the Assistant Regional Administrator. The District Court found that because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, the law could distort the Assistant Regional Administrator's objectivity in assessing penalties for violations of the child labor provisions of the Act.

The Supreme Court reversed. It held the biasing influence was too remote and insubstantial to violate the constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions. However, the Court surrounded its conclusion with considerable precautionary language.

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process....

> ...We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, `justice must satisfy the appearance of justice'....[82]

In *United States v. Good Real Property*,[83] the court, in determining that an adversary hearing was required before seizing real property, emphasized this neutrality in decision making.

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding....[84]

E. Contesting the Seizure and Forfeiture

1. Standing

A claimant must establish standing to contest the forfeiture before the government agency first, and then, if necessary, in court.

Claimants must demonstrate that they have a legal interest in the property. Most courts will not permit forfeitures to be contested by persons holding bare legal title but require dominion and control as well.

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[81] 100 S.Ct. 1610 (1980).

[82] *Ibid*, p. 1613. The Court noted it had invalidated a system in which justices of the peace were paid for issuance but not for nonissuance of search warrants, *Connally v. Georgia*, 429 U.S. 245 (1977) (per curriam), and prohibited a parole officer from making the determination whether reasonable grounds exist for the revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471, 485-486 (1972).

[83] ___ U.S. ___ (December 13, 1993).

[84] *Ibid*, slip. op., p.11.

> [P]ossession of bare legal title by one who does not exercise dominion or control over property may be insufficient to establish standing to challenge a forfeiture. The intent of the forfeiture provision of the Controlled Substances Act is to deprive criminals of the tools by which they conduct their illegal activities. A failure to look beyond bare legal title would foster manipulation of nominal ownership to frustrate this intent....
>
> [Once] the government establishes probable cause to believe that a claimant is merely a nominal or straw owner,...a claimant cannot meet its burden of establishing standing to challenge a forfeiture by presenting proof of legal title alone. The claimant must also present evidence of dominion and control or other indicia of true ownership.[85]

Claimants must post a bond equal to ten percent of the value of the property. Advocates argue some people lose their property at this stage because they are unable to post the cost bond within the time limit. Procedures exist for claimants to proceed *in forma pauperis* (without paying the cost bond).[86] It is the seizing agency which has jurisdiction to rule on the validity of the *in forma pauperis* petition. If the agency rules adversely, the decision is subject to judicial appeal. However, the time and cost necessary to do so presents another obstacle to challenging a seizure and may preclude a valid claim.

At this point, after seizure but prior to forfeiture, in theory at least, the property, although seized and controlled by the government, still is not owned by the government. The property is in limbo. This loss of possession and control--where certain property or an on-going business is concerned--may cause considerable damage to the claimant. Although cash is not a deteriorating asset, its denial to an innocent owner may be extremely damaging. In sum, proceeding promptly to a forfeiture inquiry is most important to the claimant.

Speed of action, however, may not be to the government's interest and, if not, the government is under little time constraints to initiate a forfeiture action after seizing the property even if a claimant has contested the seizure and posted the appropriate bond.

2. Time Limitations

The government's ability to seize and proceed to forfeiture generally is liberally construed but a claimant contesting the forfeiture may find it tougher going. The period in which a claimant must register his or her intent to contest may be a fairly narrow window. This decision of whether the claimant contested the seizure in time is determined at the outset by the forfeiting government agency itself in an adversarial context which can be far from generous to the claimant,[87] and sympathetic to its own errors of omission.[88] If then a claimant challenges the seizure in court, and the courts will

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[85] *United States v. Premises Known as 528 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1989). *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (standing requires proof of dominion and control beyond mere legal title).

[86] 19 U.S.C. 1607, 1609, 21 U.S.C. 881(d), 21 C.F.R. 1316.71-1316.81.

[87] *United States (Drug Enforcement Administration) v. One Jeep Wrangler*, 972 F.2d 472, 481 (2d Cir. 1992)("Once the notice of claim was received, the government could not arbitrarily decide that the notice of claim, although received some 68 to 87 days after the previously abandoned forfeiture, was in response thereto and not in response to the then current seizure"); *Moskovits v. Drug Enforcement Administration*, 774 F.Supp. 649 (D.D.C.1991).

[88] *Sammons v. Taylor*, 967 F.2d 1535, 1547-548 (11th Cir. 1992)("The regulations... appear to contemplate that at least under certain conditions a claimant may be provided some notice of any inadequacy of the documents filed in connection with the claim. Here, [the government agents] apparently did not advise Sammons that his filing was inadequate--if, in fact, it was inadequate--in order to give him an opportunity to submit a corrected filing. In that regard, the following observations...are noted: 'Although the purpose of the administrative forfeiture is merely to allow the government to avoid the necessity of filing suit and obtaining a default judgment in uncontested cases, the government has been using the procedure to deny would-be claimants access to courts....[L]aw enforcement agencies are declaring administrative limits for filing a claim and cost bond or when the agency believes that an in form pauperis affidavit submitted in lieu of a cost bond is not meritorious.'

ordinarily consider time of the essence. Even if the government sustains no appreciable damage, a claim not promptly filed is generally a claim lost.[89]

Delay by the government is more liberally construed. In *United States v. $8,850*, the Supreme Court concluded that the balancing test of *Barker v. Wingo*,[90] developed to determine when Government delay has abridged the right to a speedy trial, provides the relevant framework for determining whether the delay in filing a forfeiture action was unreasonable and may give rise to a due process claim.[91] The *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[92] Applying the *Barker* test to the facts at hand, the Court concluded an 18 month delay did not violate due process. The court noted the Government's diligent efforts in processing the petition and pursuing related criminal proceedings and that the claimant did not indicate a desire for the early commencement of civil forfeiture proceedings nor did she assert or show prejudice from the delay.[93]

In *Gonzales v. Rivkind*, a vehicle seizure case, the Eleventh Circuit held that a district court's mandate that the INS hold a probable cause hearing within 72 hours of a claimant's request was too inflexible, and that a case-by-case analysis of the *Barker* factors is required.[94] In *McCoy v. United States*, a one year and four month delay did not give rise to a due process claim, since the claimant could have cured the delay by filing suit under the Administrative Procedures Act. Further, any due process violation that may have existed was cured by the DEA finally ruling on the petition.[95]

If the judiciary has now established that the *Barker* factors determine the Constitutional due process question, how are the interlinking statutory mandates to be read? There is an overall statutory limitation on forfeiture actions of five years.[96] Thus, the customs laws also contain a series of internal requirements relating to the timing of forfeitures, a requirement that a customs agent "report immediately" to a customs officer every seizure for violation of the customs laws and every violation of the customs laws;[97] that the customs officer "report promptly" such seizures or violations to the U.S. Attorney;[98] and, finally, that the Attorney General "forthwith cause the proper proceedings to be commenced" if it appears probable that any fine, penalty, or forfeiture has been incurred.[99]

The Supreme Court in *Good Real Property* read the statute of limitations as the only mandatory restriction with the other provisions as an indication of Congressional intervention which does not, in the last analysis, limit the agency's discretion.[100]

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[89] *United States v. Lot 65 Pine Meadow*, 976 F.2d 1155, 1156-157(8th Cir. 1992) (upholding a decree of forfeiture by default for filing a verified claim and answer on August 26, 1991 instead of on August 13 when the claim should have been filed and on August 20 when the answer was due).

[90] 407 U.S. 514 (1972).

[91] 461 U.S. 563, 564 (1983). See also, *United States v. Premises Located at Route 13*, 946 F.2d 749, 754-56 (11th Cir. 1991).

[92] 407 U.S. 514, 530 (1972).

[93] 461 U.S. at 569-70.

[94] 858 F.2d 657, 662 (11th Cir. 1988).

[95] 758 F.Supp. 299, 302 (E.D.Pa. 1991).

[96] 19 U.S.C. 1621. "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." The statute of limitations is incorporated in Dept. of Justice drug enforcement via 21 U.S.C. 881(d).

[97] 19 U.S.C. 1602.

[98] 19 U.S.C. 1603.

[99] 19 U.S.C. 1604.

[100] *U.S. v. Good Real Property*, 507 U.S. ___, 114 S.Ct. __, 62 U.S.L.W. 4013, 4019. (Dec. 13, 1993). In *United States v. Land and Building at 2 Burditt Street*, 924 F.2d 383 (1st Cir. 1991), a case brought prior to *Good Real Property*, the First Circuit questioned the lower court's reliance on the five-year statute of limitation contained in the forfeiture statutes noting that the statutes prohibit forfeiture proceedings after that time, not that they can be brought at any time within five years. The court noted that "an unexplained delay of up to five years in asserting and adjudicating the existence and validity of a retroactive property taint and limbo may have due process implications." *Id.* at 385-386. The Florida Supreme Court in its review of the issue prior to *Good Real Property* states that with respect to real property it "would anticipate that the adversarial hearing will take place within ten days of the filing of the petition." With respect to

Current Department of Treasury policy is to require its constituent agencies to proceed to forfeiture within sixty (60) days of seizure.[101] The consequences of proceeding after sixty days are unclear but after the *Good Real Property* case the sanction for not meeting the internal guideline is left to the enforcement agency discretion.[102]

3. The Innocent Owner Defense

In *Calero-Toledo v. Pearson Yacht Leasing Co*, the Puerto Rican authorities confiscated a leased vessel pursuant to civil statutes that subjected to forfeiture any conveyance used to transport or facilitate the transportation of controlled substances. Pearson Yacht Company, however, was innocent of a narcotics activity. Indeed, the company did not even learn of the yacht forfeiture until it attempted to recover possession after the lessee defaulted on the rental contract.

Could the government constitutionally forfeit an innocent party's property without just compensation? The Supreme Court answered "yes." The *Calero-Toledo* court justified forfeiture of the vessel without any compensation on historical and policy grounds that reflect the unique nature of civil forfeiture.

Most recently, Justice Kennedy questioned whether the bald holding in *Calero-Toledo* is still good law.

> At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question....[103]

a. Lack of Knowledge/Lack of Consent

Regardless of the constitutional situation, the innocent-owner defense, as codified, states that property will not be forfeited when the illegal act occurs "without the knowledge or consent of that owner."[104]

The innocent owner amendment to section 881(a)(4) was introduced in the House without the terms "willful blindness," and only required the owner to establish his lack of "knowledge or consent."[105] During debate, some Representatives complained that the original bill "would lead to a 'look-the-other-way' defense,"[106] and that "owners will be encouraged...to know as little about their property as possible...."[107] The bill was later amended to include the "willful blindness" language.[108]

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personal property, the court required a postseizure adversarial preliminary hearing to be held as soon as is reasonably possible. *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 967 (Fla. 1991).

[101]Office of the Asst. Secy., Executive Office for Asset Forfeiture, U.S. Dept. of the Treasury, *Policy Directives*, Directive No. 5, p.1/1 (July, 1993).

[102]*U.S. v. Good Real Property*, 507 U.S. ___, 114 S.Ct. __, 62 U.S.L.W. at 4019. (Dec. 13, 1993).

[103]*Austin v. United States*, 509 U.S. ___, 113 S.Ct. ____, 125 L.Ed.2d 488,510 (1993). (Concurring opinion of Justice Kennedy joined by the Chief Justice and Justice Thomas.)

[104] 21 U.S.C. § 881(a)(6) & (7) (1992). These sections define innocent owner defenses with respect to real estate and other property. In 1988, Congress amended the drug forfeiture statute, 21 U.S.C. § 881, to extend the "innocent owner" defense to owners of aircraft, vehicles, and vessels. This section now provides for relief for acts or omissions committed or omitted "without the knowledge, consent or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(C). The Eighth Circuit has interpreted the "willful blindness" standard as a way of inferring knowledge. *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1174-75 (8th Cir. 1992).

[105]134 *Cong. Rec.* 22,653, 22,672.

[106]134 *Cong. Rec.* 24,086 (statement of Rep. Archer).

[107]*Ibid*, (statement of Rep. Gibbons).

[108]134 *Cong. Rec.* at 33,193.

Rep. Jones described the new provision as "virtually identical to the existing defenses [in 21 U.S.C. Sec. 881(a)(6) and (a)(7)] ...except that the concept of willful blindness is incorporated." This is intended to prevent the owner of a conveyance from closing his eyes to a violation.[109]

Courts are divided as to whether in establishing the innocent owner defense the claimant must show by a preponderance of the evidence that the illegal activity took place on the property both without his lack of knowledge *and* lack of consent; or whether even if a claimant has actual knowledge, the claimant may avoid forfeiture by establishing lack of consent.[110] Most courts have construed the forfeiture provisions to allow the innocent owner defense if the claimant can establish *either* his lack of knowledge *or* his lack of consent.[111] The National Association of Criminal Defense Lawyers has asked the Congress to correct this legislatively.[112]

b. Reasonable Precautions to Prevent the Violations

Many courts have added an additional requirement to the statutory innocent owner defense, relying on the *dicta* in *Calero-Toledo* case. Justice Brennan observed in *Calero-Toledo*, while holding there was no constitutional violation, that Pearson Yacht Leasing Co., the innocent owner, voluntarily entrusted the vessel to the lessees and that "no allegation [had] been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."

Relying on Justice Brennan's language but reversing its import, some courts, like the Department of Justice, have demanded that an innocent owner prove that he is entirely free of any involvement in or knowledge of the unlawful conduct and also meet the *Calero-Toledo* test;[113] namely, that they demonstrate that he took all reasonable precautions to prevent the violation, in order to avoid forfeiture.[114]

Other courts have avoided the issue. The Eleventh Circuit's response when faced with the issue typifies the judicial confusion over the conflict between section 881, actual-knowledge, standard and *Calero-Toledo*'s, reasonable precautions, standard. In *United States v. $4,255,000*,[115] the Eleventh Circuit left "for another day the question of the applicability of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. § 881(a)(6)."[116]

A donee may claim to be an innocent owner[117] and the innocent owner defense applies to interests purportedly acquired after the commission of the trigger offense, the time at which the government's title to the property vests.

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[109] In *Mattingly v. United States*, 924 F.2d 785, 792 (8th Cir., 1991), a civil tax fraud case, the Eighth Circuit stated that knowledge may be inferred when a person deliberately closes his eyes to the existence of facts that would otherwise be obvious or demonstrates a conscious purpose to avoid enlightenment.

[110] *See, 141st Street Corp.*, 911 F.2d at 877-878 (collecting cases); *United States v. 8848 South Commercial Street, Chicago, Ill.*, 757 F.Supp. 871, 886 (N.D. Ill. 1990) (discussion of various circuits' positions).

[111] *See, e.g., United States v. Real Property Located at Section 18*, 976 F.2d 515, 520 (9th Cir. 1992); *United States v. 141st Corp.*, 911 F.2d 870, 878-79 (2d Cir. 1990), (allowing lack of consent defense to owner who did all that could reasonably be expected to prevent the illegal activity), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989) (holding that claimant can prove innocent ownership by establishing that the illegal use occurred either without her knowledge or without her consent).

[112] Testimony of Nancy Hollander, Esq., on behalf of the National Association of Criminal defense Lawyers given before the House Committee on Government Operations, Legislation and National Security Subcommittee (June 22, 1993).

[113] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974).

[114] *United States v. One 1983 Homemade Vessel Named Barracuda*, 858 F.2d 643, 647 (11th Cir. 1988). *See also, e.g., United States v. One (1) 1982 28' Int'l Vessel*, 741 F.2d 1319, 1322 (11th Cir. 1984); *United States v. One (1) Cessna Model 210L Aircraft*, 890 F.2d 77 (8th Cir. 1989).

[115] 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

[116] *Id.* at 906 n.24.

[117] *United States v. A Parcel of Land Known as 92 Buena Vista Avenue*, 112 S.Ct. 1260 (1992).

F. Equitable Sharing

As part of the Comprehensive Crime Control Act of 1984, Congress mandated that forfeited assets would no longer go into the general Treasury. Instead, the property (or the money derived from its sale) is allocated exclusively for law enforcement purposes.[118] In addition, the Department of Justice gained authority to transfer forfeited property and cash to state and local agencies that directly participate in law enforcement efforts leading to seizures and forfeitures. The Customs Bureau similarly has authority to share forfeited assets.[119] The applicable statutes do not set out any restrictions on the equity sharing program nor does it address how state and local agencies are to use shared assets.

1. Purpose of the Program

The Department of Justice's guidelines state the program's goals are three, including raising money:[120]

> (1) to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities;
>
> (2) to enhance cooperation among foreign, federal, state and local law enforcement agencies through the equitable sharing of assets recovered through this program; and, as a by-product;
>
> (3) to produce revenues to enhance forfeitures and strengthen law enforcement.

The conflict of interest issue we noted earlier affects the asset sharing program. The Supreme Court commented: "...it makes sense to scrutinize governmental action more closely when the State stands to benefit."[121]. Critics have noted the extent of the practice:

> ...[M]any prosecutors' offices are also being heavily funded with forfeiture revenues. So not only police agencies but even prosecutors are in thrall to a reward system that resembles bounty-hunting.[122]

The asset sharing program is large and growing very rapidly both in the number of participating local agencies and amount of funds. Forfeited assets can be cash and bank accounts or property such as automobiles, boats, airplanes, jewelry, art objects, or real estate. Thus, the Department of Justice asset sharing program shared over $736 million in cash and $90 million in property with state and local agencies from the start of the program in fiscal year 1986 through fiscal year 1991. In fiscal year 1991, the Justice Department total exceeded $284 million; and in Fiscal Year 1992, the total sum was $242 billion.[123] Over 3,000 state and local agencies have participated in the Justice asset sharing program, the largest number in California, Florida, New York, and Texas. Although state and local agencies may receive property, the shared distributions have mainly been forfeited cash or the cash proceeds of forfeited property sold by the Marshals Service or Customs.

Most sharing results from joint investigations, those in which the Federal law investigative agencies work with state or local law enforcement agencies or foreign countries, to enforce Federal

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[118] 28 U.S.C. 524.

[119] 19 U.S.C. sec. 1616a (c)(1) and (2) (1993).

[120] Dept. of Justice, *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990), p.3.

[121] *Harmelin v. Michigan*, 501 U.S. ___, ___, 111 S.Ct. 2680, 2693, n.9 (1991).

[122] Statement of David Smith Before the House Committee on the Judiciary, Subcomm. on Economic and Commercial Law (July 28, 1992).

[123] Executive Office for Asset Forfeiture, *Annual Report of the Department of Justice Asset Forfeiture Program* (1992), p.30.

criminal law and the investigation or prosecution results in a federal forfeiture.[124] The non-Federal agency may request an equitable share of the net proceeds of the forfeiture.

In addition, a state or local law enforcement agency, or foreign country, that has seized property may request that one of the Treasury investigative agencies (Customs Service, Internal Revenue Service, Secret Service, or Bureau of Alcohol, Tobacco & Firearms) adopt the seizure and proceed with forfeiture. State and local law enforcement agencies may have at least three incentives for the adoptive forfeiture: (1) federal administrative forfeiture may be faster; (2) federal law often permits forfeitures not permitted under state law; and (3) federal law often permits a more generous share for the state or local law enforcement agency than state law.

The agencies of the U.S. Treasury, for example, may adopt the seized property for forfeiture where the conduct giving rise to the seizure is in violation of Federal law enforced by Treasury. The request for the adoption of the seizure must be made within thirty (30) calendar days of the date the property was originally seized and the equity in the property must exceed various dollar amounts.[125]

The only apparent restriction on the Attorney General's discretion in the area of equitable sharing with state and local law enforcement agencies is the requirement that she determine that the amount to be shared is proportionate to the recipient's contribution to the forfeiture and that the transfer will encourage federal-state law enforcement cooperation. Treasury determines the local agency participation normally by comparing the number of local agency hours to the time of the seizing agency's officials.

The Treasury share in *adoptive* cases is based on a "flat rate" of the net proceeds; either 20% if 100% of the pre/seizure activity was performed by a local agency or 10% where 100% of the pre/seizure activity was performed by a non-Treasury Federal law enforcement agency.

In all[126] forfeiture cases under its jurisdiction, either judicial or administrative, Treasury determines the amount of the equitable share.

Justice and Treasury have not routinely monitored the use by local government of shared assets but depended on reporting. In some cases Justice and Treasury have learned of actual or planned misuses of shared assets and have written letters to law enforcement agencies and governing bodies threatening not to share with them in the future unless they stop the inappropriate uses.

Local law enforcement officials reported that sharing not only has increased the resources they have available to fight crime but also has helped support programs that would have been impossible to support without sharing.

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[124]The text describes the Department of Treasury practice as set out in that Department's program guidelines. See, Dept. of Treasury, *Guide to Equitable Sharing for Foreign Countries and Federal, State Local Law Enforcement Agencies* (July 1993 draft). The Dept. of Justice guidelines are in revision but it is expected to follow the same pattern as Treasury.

[125]Conveyances: Vehicles - $3,500

Vessels - $10,000

Aircraft - $10,000

Real Property--land and any improvements--$20,000 or 20% of the appraised value.

All other property--currency, bank accounts, monetary instruments, jewelry, etc.--$2,000.

These thresholds may be waived where forfeiture will serve a compelling law enforcement interest; e.g., forfeiture of a vehicle, vessel or aircraft outfitted for the smuggling of drugs.

[126]There is an exception for foreign sharing requests or real property.

2. Proposed Limitations

Nevertheless, the propriety of a system which would directly benefit financially the prosecution has been queried by the courts[127] and academics and has given rise to a variety of reform suggestions. NCCUSL in its proposed draft[128] provided three alternatives: Its preferred alternative recommended varying from federal law and MASFA and requiring that forfeited property be deposited in the general State or local treasury and be subject to ordinary local legislative appropriation. Both federal law and MASFA earmark these funds for law enforcement use.[129] The NCCUSL alternative takes the position that giving seizing agencies direct financial incentives in forfeiture is an unsound policy that risks skewing enforcement priorities.[130]

NCCULS recognized that many States have "earmarked" or restricted the utilization of the proceeds of forfeitures. Accordingly, the Conference on Uniform State Laws offers two additional alternatives in its draft.

The first alternative, similar to 28 U.S.C. Sec. 524(c), ensures continuing legislative oversight and control over the actual utilization of the proceeds of forfeitures, but nonetheless "earmarks" such proceeds for purposes relating to the enforcement and implementation of the Uniform Controlled Substances Act. Under this alternative the State legislature or local governing body determines how funds will be allocated and the specific purposes for which the funds may be used. The use of funds is restricted to purposes relating to the administration and enforcement of the Uniform Controlled Substances Act, but is not limited to appropriations made directly to law enforcement agencies. Accordingly, although not specifically itemized in the alternative, such funds could be used for prison construction, crime victims' compensation, public defenders, and drug addition treatment and rehabilitation costs.

The final alternative dedicates forfeiture proceeds exclusively for drug law enforcement activities and exempts the utilization and control of these funds from the ordinary legislative process. Many State and local prosecutors favor this alternative in order to ensure access to additional resources to finance the "war on drugs". This alternative is based upon the rationale that the fruits of illegal drug activity should be used directly to counter such activity and that public purposes served by such expenditures are so great as to justify circumventing the ordinary appropriation process.

V. Recommendations

Recommendation 1: Establishment of an Administrative Tribunal to Adjudicate the Act of Forfeiture

After the seizure, the taking of property, the act of forfeiture, at present is a ministerial act conducted within the agency which carried out the seizure. Usually, a paralegal or a relatively low-level official examines the file and writes up a forfeiture action, generally parroting the seizure findings. The forfeiture action document then is reviewed and signed by a high-level law enforcement official within the agency. Throughout the process, from the decision to seize to the decision to forfeit, no one outside the agency has seen the file or, indeed, has the authority to see the file. The thrust of this recommendation is to change this procedure by requiring that before the act of forfeiture takes place--before an irrevocable act divesting a person of ownership of property but

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[127] *United States v. That Certain Real Property*, 798 F.Supp. 1540, 1551 (N.D. Ala. 1992); *Jones v. Drug Enforcement Administration*, No. 3:91-0520, slip op. 62 (M.D. Tenn. April 21, 1993) (fact that local law enforcement agencies have a direct financial interest in the forfeiture creates dangerous potential for abuse and requires heightened scrutiny by the courts); *United States v. Currency, In the Amount of $150,660.00*, 980 F.2d 1200, 1208 (8th Cir. 1992) (Bright, J. dissenting) (court should not find probable cause based on opinion of police officer that cash smelled of marijuana when his department would receive a direct financial benefit from the forfeiture).

[128] See 522, NCCUSL model.

[129] 28 U.S.C. Sec. 524; MASFA See 16.

[130] Cf. *Connally v. Georgia*, 429 U.S. 245 (1977) (declaring unconstitutional a system whereby unsalaried justice of peace received $5 for each issued search warrant but nothing for refusing to issue a warrant); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2693 n.9 (1991) (opinion of Scalia, J.) (Eighth Amendment may demand more careful scrutiny of fines than terms of imprisonment because "fines are a source of revenue").

after seizure--the agency *must* proceed outside its own confines. The agency must obtain a decision by an independent authority or tribunal in order to forfeit the property.

As a corollary, there are a number of other questions that the agency must address at this stage and satisfy the tribunal even if the seizure and subsequent forfeiture is uncontested. They are:

a. The propriety of the seizure, whether the seized property was properly seized, whether proper procedures were used, including an examination of the evidence establishing probable cause for the seizure itself.

b. Whether the property seized is proportionate to the criminal offense involved.

c. Whether proper notice was given of the intent to forfeit.[131]

d. If requested by the claimant, whether remission or mitigation is appropriate in this case. At present, remission and mitigation are both regarded as acts of grace[132] by the administrative agency and are kept within the agency's own confines. Since we are recommending an administrative tribunal that will in the normal course review seizure and forfeiture actions, it is appropriate that remission and mitigation questions be decided at the same time by this tribunal.

e. Whether it is likely that the law enforcement agency will proceed to bring criminal action against the owners or related actors to the forfeited property. Asset forfeiture is part of a law enforcement effort directed at criminal activity and criminal prosecution of malefactors. There are frequent public charges that the agency seeks only to seize and never intended a forfeiture or a criminal prosecution.[133] It may be, of course, that there were good reasons not to proceed to bring an indictment. This recommendation seeks to require the agency to address this question.

There is an additional reason for a required public act of forfeiture in all cases. The government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. Further, it cannot profit from the statutory version of that doctrine in section 881(h) until respondent has had the change to invoke and offer evidence to support the innocent owner defense under section 881(a)(6).[134] The establishment of the date from which the property is contaminated openly by an objective, public authority will avoid embarrassment and disputes about ownership and control of the property, especially with banks and other financial institutions.

Recommendation 2. Establishment of a Forfeiture Registry

The establishment of a Forfeiture Registry would perform three functions.

a. First, it would be a place, like the *Federal Register*, where forfeiture notices not only could be published but it would be the one medium through which all notices of forfeiture could be given. This would eliminate issues which arise, from time to time, as to whether the place of publication--sometimes coupled with a letter addressed to the last registered address of the owner of the property--was adequate. Thus, in *U.S. (Drug Enforcement Agency) v. One 1987 Jeep Wrangler*:[135]

> The DEA claims to have served a Notice of Seizure upon the appellant on this date and to have advertised the seizure on May 29, 1991 in a national daily newspaper.

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[131] Notice of civil forfeiture can be given when a proceeding is initiated, notice of criminal forfeiture cannot be given until after a criminal conviction. *United States v. Tit's Cocktail Lounge*, 873 F.2d 141 (7th Cir. 1989).

[132] The current federal remission statute is found at 19 U.S.C. sec. 1618. It permits the Secretary of the Treasury to remit or mitigate a forfeiture if he finds the forfeiture was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify" remission or mitigation. 19 U.S.C. sec. 1618 (1992).

[133] If a criminal conviction has been obtained or where the claimant pled guilty, the civil forfeiture action may still be contested. The general rule is that only matters necessarily decided in the prior action are barred from relitigation by collateral estoppel. Issues concerning the land or property's character or its use in facilitating the crime of drug manufacture may still be litigated. *United States v. Real Property Located at Section 18*, 976 F.2d 515 (9th Cir. 1992).

[134] *United States v. Parcel of Land*, 507 U.S. ___; 122 L.Ed. 2d 469 (1992).

[135] 972 F.2d 472 (2nd Cir. 1992).

> Appellant contests the existence of these notices and the record contains no actual proof of either.[136]

b. Second, it will assure on a continuing basis that the details of the forfeiture, the nature of the property forfeited (real vs. personal) and amount are all subject to public view. Except for annual reports on an aggregate level, access is not available for outsiders to determine the true impact of the forfeiture process. Are there many cases where the seizure was inappropriate and, nevertheless, the government agency staff proposed a forfeiture action? How many mistakes are in fact made? How much discretion is abused and how much not? Abuse of discretion may exist more in the public mind than in reality. This perception can be easily avoided by a centralized, uniform process where seizures can be exposed before final forfeiture.

Recommendation 3. Establish Time Limits After Seizure for Forfeiture and Remission Decisions

Congress should amend the federal forfeiture statutes to require the government to commence any administrative forfeiture action (by providing notice to the owner of the seized property and intent to forfeit) within *sixty* (60) days of the seizure. If judicial forfeiture action is required, the statute should also require the government to commence the action in district court within *sixty* (60) days of receipt of the claim.

Some time limitation is generally accepted. Current DOJ policy is sixty (60) days. MASFA allows the government 90 days to initiate forfeiture proceedings after which if public claim has been filed the property must be returned. NCCUSL also provides 90 days. The ACLU provides 30 days. Conyers and Hyde do not consider this issue.

Under this recommendation, if the government agency fails to file a forfeiture action within 60 days, the seizure action should be nullified and the property returned to the original owner. Under the MAFSA statute in the absence of the government proceeding to forfeiture the government retains the property unless requested that it be returned. It is believed that seizures without proceeding to forfeiture should have greater consequence.

Recommendation 4. Restriction on Federal Adoption or Equitable Sharing

State or local officials may request the Federal government to adopt a case as their own and proceed to forfeit the property. Once that adoption takes place, the normal State law governing the seizure is supplemented by Federal law. As a result, under Federal law proceeds from forfeited property may be returned to state and local law enforcement officials who first seized the property rather than returned, according to state law, to the local general treasury.

This is questionable. It is not desirable to forge a doctrine that as a key element results in the avoidance of State law. Therefore, the adoption should be permitted only if there is a law enforcement purpose; e.g., where Federal officials could handle the case better than local officials. If that is not true, then the adoption process should not be given effect.

The distribution of the proceeds of the forfeiture should proceed via State law without any priority accorded to the referring local law enforcement agency. The special administrative tribunal will decide whether the adoption process was valid under this standard.

MASFA basically codifies the existing practice. The bill creates a Special Asset Forfeiture Fund in which all monies obtained pursuant to the Act are to be deposited. Property or monies in the fund are to be distributed to the appropriate local, state, or law enforcement or prosecutorial agency (after satisfaction of any exempt security interest or lien and after expenses) so as to reflect the agency's contribution to the seizure or forfeiture of property or deposit of monies into the fund. Monies from the fund are not subject to appropriations restraints and may not supplant other local, state, or federal funds.

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[136] *Ibid* at 475.

NCCUSL and ACLU allows transfer of a portion of the proceeds to the state to the extent of either the agency's participation in the activity leading to forfeiture or the conduct giving rise to forfeiture that occurred in that state.[137] Remaining funds are to be deposited in the general state treasury and subject to ordinary legislative appropriation. When the disposition of forfeited property is governed by a specific state law, the attorney for the state shall dispose of the property in accordance with that law.

The Conyers bill provides that one-half of the Department of Justice Asset Forfeiture Fund be used for community-based crime control programs, with the distribution to the various communities to be determined by the states.[138] The bill also mandates that seized low value real property be offered for sale to tax exempt organizations that provide direct services furthering crime control, housing or education efforts.

The Hyde bill removes the qualification that funds in the Department of Justice Asset Forfeiture Fund be used only for "law enforcement" purposes.[139]

Recommendation 5. Restrictions on Seizures of Residences and On-going Business.

The seizure of residences and on-going businesses raise special questions. The government is not a good manager and business and residences, if seized, even for a short period of time, can suffer irreparable damage. Abuses, which are, admittedly few, have been exceptionally destructive where residences and on-going businesses were involved. It is recommended that actual, physical seizure of this property should not be permitted until the government has proved in a forfeiture proceeding before an independent tribunal the propriety of its action. Notice of lien should be sufficient.[140] This recommendation is supported by such unlikely allies as American Prosecutors Research Institute,[141] and Cong. Conyers.[142] The rule suggested would prevent improper sale of property either inadvertently or as a result of an excess of zeal.[143]

Since seizures of residences and businesses do invade in a special way private interests, the public has a special interest in assuring the prosecuting agency has an immediate criminal process at hand. Residences and on-going businesses should not be forfeited without an indictment against the actual owner or beneficial owner of the residence or business.

Recommendation 6. Property Should Be Exempt from Forfeiture if the Interest Holder Did Not Know or Acted Reasonably to Prevent Illegal Conduct.

All of the proposed bills address this question. MAFSA exempts the property from forfeiture if the owner or interest holder acquired the property before or during the conduct giving rise to its forfeiture, and, in addition, the owner (1) did not know and could not reasonably have known of the act or omission or that it was likely to occur; or (2) acted reasonably to prevent the conduct giving rise to forfeiture.[144] In addition, the property is exempt if the owner or interest holder acquired the property after the conduct giving rise to its forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and he acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.[145]

The NCCUSL, in addition to the MASFA defense based on knowledge, provides that the interest in the property is exempt from seizure regardless of knowledge if the owner or secured

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[137]NCCUSL sec. 518d).

[138]H.R. 2774, 102d Cong., 1st Sess., sec. 1(1991).

[139]H.R. 2417, 103d Cong., 1st Sess., sec. 7 (1993).

[140]*United States v. Property at 4492 S. Livonia Road, Livonia*, 889 F.2d 1258 (2nd Cir. 1989).

[141]Model Asset Seizure and Forfeiture Act of 1991 (Sec. 6(c)).

[142]The Civil Asset Forfeiture bill.

[143]*United States v. Certain Real and Personal Property*, 943 F.2d 1292 (11th Cir. 1991).

[144]MASFA sec. 5(a)(1)(i) & (ii).

[145]*Id.*, sec. 5(a)(2).

interest holder acted reasonably to attempt to prevent the conduct[146] and if the owner gave value for the property. The ACLU has a provision similar to the NCCUSL draft.

The Hyde bill confers innocent owner status on one who can establish that the illegal activity occurred "either without the knowledge of that owner or without the consent of that owner."[147]

NCCUSL has focussed as well on the question of legal fees. NCCUSL generally provides for an exemption for lawyers who acquire an interest in the property as reasonable payment for legal services in a criminal matter earned before the lawyer learned of a judicial determination of probable cause that the property is subject to forfeiture and who did not have actual knowledge, at the time the interest was acquired, that the illegal conduct had occurred.[148]

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[146]*Id.*, sec. 504(a)(1)(i)(B).

[147]H.R. 2417, 103d Cong., 1st Sess., sec. 8 (1993).

[148]*Id.*, sec. 504(3).