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CIVIL ASSET FORFEITURE REFORM ACT

JUNE 18, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1658]

[Including cost estimate of the Congressional Budget Office]

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

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

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

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

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

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

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

Page 11, line 14, strike "(b) CONTROLLED SUBSTANCES ACT.—".

PURPOSE AND SUMMARY

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

BACKGROUND AND NEED FOR THE LEGISLATION

I. Antecedents of Civil Asset Forfeiture

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

The immediate ancestor of modern civil forfeiture law is English admiralty law. As Oliver Wendell Holmes noted, "a ship is the most living of inanimate things. . . . [E]very one gives a gender to vessels. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible." [2]

Justice Holmes used this example:

> A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principle. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this

[1] *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 681 n.16 (1974).
[2] Holmes, Jr., *The Common Law* 25 (1881).

> means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and the wagon.[3]

Holmes then provided the rationale:

> The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.[4]

II. Federal Civil Asset Forfeiture Statutes

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

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

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

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

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

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

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[3] *Id.*
[4] *Id.* at 26.
[5] *See* Act of July 31, 1789, secs. 12, 36, 1 Stat. 39, 47.
[6] *See* Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process,* 45 U. Miami L. Rev. 911, 940 n.137 (1991).
[7] Criminal forfeiture requires an antecedent criminal conviction of the property owner.
[8] *See* 7 U.S.C. § 2156.
[9] *See* 18 U.S.C. § 2344.
[10] *See* 18 U.S.C. § 1963.
[11] 21 U.S.C. § 881(a).

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

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

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

III. The Success—and Abuse—of Forfeiture

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

In recent years, enormous revenues have been generated by federal forfeitures. The amount deposited in Justice's Assets Forfeiture Fund (from both civil and criminal forfeitures) increased from $27 million in fiscal year 1985 to $556 million in 1993 and then decreased to $449 million in 1998.[17] Of the $338 taken in 1996, $250 million was in cash and $74 million was in proceeds of forfeitable property; $163 million of the total was returned to state and local law enforcement agencies who helped in investigations.[18] As of the end of 1998, a total of 24,903 seized assets valued at $1 billion were on deposit—7,799 cash seizures valued at $349 million,

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

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

[14] *See* 28 U.S.C. § 524(c)(4)).

[15] *See* 31 U.S.C. § 9703.

[16] *See* 28 U.S.C. § 524(c)(1)).

[17] *See* Office of National Drug Control Policy, *National Drug Control Strategy: Budget Summary 1999,* at 107 (hereinafter cited as *“National Drug Control Strategy”); Civil Asset Forfeiture Reform: Hearing Before the House Comm. on the Judiciary,* 105th Cong., 1st Sess. 116 (1997)(statement of Stefan Cassella)(hereinafter cited as *“1997 Hearing”*); U.S. Dept. Of Justice, *Asset Forfeiture Fact Sheet* (1993); *Annual Report of the Dept. Of Justice Asset Forfeiture Program: 1993,* at 15.

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

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

1,181 real properties valued at $205 million, 45 businesses valued at $49 million, and 15,878 other assets valued at $398 million.[19]

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

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

> Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations—from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. . . .
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> Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. . . . [They] allow the government to seize contraband—property that it is simply unlawful to possess, such as illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.
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> Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony $100 bills.
>
> The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits—and any property traceable to it—thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims—like carjacking or fraud—we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.
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> Finally, forfeiture undeniably provides both a deterrent against crime and a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence.

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[19] *See National Drug Control Strategy* at 108.

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

[21] *1997 Hearing* at 112.

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

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

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

[Chairman] Hyde: Would you please state your name and where you live.

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

1Mr. Hyde: Very well, sir. Would you tell us your story involving asset forfeiture.

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

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

Mr. Jones: I am engaged in landscaping.

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

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

Mr. Jones: Yes, sir.

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

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

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

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

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

Mr. Jones: That is correct.

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

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

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

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

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

[26] *1996 Hearing* at 12–14.

instead, they said that the dogs hit on the money. So they told me at that time they was going to confiscate the money.

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

Mr. Jones: That is what they said.

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

Mr. Jones: Yes, sir.

Mr. Hyde: Therefore, they kept the money?

Mr. Jones: They kept the money.

Mr. Hyde: Did they let you go?

Mr. Jones: They let me go.

Mr. Hyde: Were you charged with anything?

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

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

Mr. Jones: No.

Willie Jones did not challenge the forfeiture under the normal mechanism provided by law[28] because he could not come up with the 10% cost bond required.[29] He instead filed suit in federal district court alleging that his Fourth Amendment right to be secure against unreasonable searches and seizures had been violated.[30] The court determined that the "frisk" which produced the $9,000 in currency was an unconstitutional search,[31] and that the seizure of the currency was undertaken with no probable cause and therefore an unconstitutional seizure.[32] The court did determine that there was "insufficient proof that the officers' investigation of Mr. Jones [who is African-American] himself was racially motivated[,]" but that other investigations were so motivated.[33]

The court's final comments gave rise for pause:

> The Court also observes that the statutory scheme as well as its administrative implementation provide substantial opportunity for abuse and potentiality for corruption. [Drug Interdiction Unit] personnel encourage airline employees as well as hotel and motel employees to report "suspicious" travelers and reward them with a percentage of the forfeited proceeds. The forfeited monies are divided and distributed by the Department of Justice among the Metropolitan Nashville Airport and the Metropolitan Nashville Police Department partners in the DIU and itself. As to the local agencies, these monies are "off-budget" in that there is no requirement to account to legislative

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[27] A federal court later found that "[t]he presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history. A bill may be contaminated by proximity to a large quantity of cocaine, by its passage through the contaminated sorting machines at the Federal Reserve Banks, or by contact with other contaminated bills in the wallet or at the bank." *Jones* v. *U.S. Drug Enforcement Administration,* 819 F. Supp. 698, 720 (M.D. Tenn. 1993)(citation omitted).

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

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

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

[31] *See id.* at 718.

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

[33] *See id.* at 723.

> bodies for its receipt or expenditure. Thus, the law enforcement agency has a direct financial interest in the enforcement of these laws. The previous history in this country of an analogous kind of financial interest on the part of law enforcement officers—i.e., salaries of constables, sheriffs, magistrates, etc., based on fees and fines—is an unsavory and embarrassing scar on the administration of justice. The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested.[34]

Mr. Jones's case typifies the kind that this Committee is gravely concerned about—except that this time there was a happy ending. Individuals very likely innocent of any crime justifying forfeiture meet some sort of "drug courier" profile [here, by buying an airplane ticket with cash] and are subject to a search or investigation. If they have large sums of cash, it is seized. They may not be tried for a crime (Civil forfeiture requires no related criminal conviction or even criminal charge. However, if there is a prosecution, acquittal does not bar a subsequent forfeiture action. The government need only show probable cause for the seizure to justify a civil forfeiture.). To get their property back, owners have to overcome tremendous procedural hurdles such as posting a cost bond and having to prove their property was "innocent" (once probable cause has been shown). The abuse seems even worse under certain state forfeiture laws.[35]

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

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

[34] *Id.* at 724.
[35] *See Forfeiting Our Property Rights* at 38–40.

> Unable to raise enough money to restart his air charter business, Munnerlyn had to declare personal bankruptcy. He is now driving a truck for a living.[36]

For Mr. Munnerlyn, there was no happy ending.

Neither the state of the law nor its usage have improved in recent years. Since 1974, many observers assumed that the Constitution mandated an "innocent owner" defense to a civil forfeiture. However, in 1996, the Supreme Court in *Bennis* v. *Michigan*[37] ruled that the defense was mandated by neither the due process clause of the Fourteenth Amendment (and presumably that of the Fifth Amendment) nor the just compensation clause of the Fifth Amendment. The Court found that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[38]

The dissenting justices in *Bennis* argued that:

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

And, Justice Thomas stated in his concurrence that, "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[40]

The Seventh Circuit recently issued a decision containing a stinging rebuke of the federal government's use of civil forfeiture. *United States* v. *$506,231 in U.S. Currency*[41] involved the Congress Pizzeria in Chicago. In 1997, the court ordered the return to Anthony Lombardo, the owner and proprietor of this family-owned business, of over $500,000 in currency improperly seized by police from the restaurant in 1993. The court found the need to remind a U.S. Attorney that "the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sin-

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[36] *Id.* at 12 (based on reporting by Schneider & Flaherty & Miniter, "Property Seizures on Trial," *Insight,* Feb. 22, 1993, at 10, 33).
[37] 516 U.S. 442 (1996).
[38] *Id.* at 446.
[39] *Id.* at 458–59 (Stevens, J., Souter, J., and Breyer, J., dissenting).
[40] *Id.* at 456 (Thomas, J., concurring).
[41] 125 F.3d 442 (7th Cir. 1997).

ister activity."[42] The court also found the need to say that "[w]e are certainly not the first court to be "enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.'"[43]

Civil asset forfeiture does not just impact civil liberties and property rights. It can work at total cross purposes with the professed public policy goals of the federal government. Few will argue against the proposition that more private investment needs to be made in our inner cities in order to offer residents hope of a better life. How, then, would anyone explain the actions in 1998 of the U.S. Attorney's Office in Houston in seizing a Red Carpet Motel in a high-crime area of the city?[44] There were no allegations that the hotel owners participated in any crimes. Indeed, motel personnel called the police to the establishment dozens of times to report suspected drug-related activity in the motel's rooms by some of its overnight guests. However, the government claimed the hotel deserved to be seized and forfeited because management had failed to implement all of the "security measures" dictated by law enforcement officials, such as raising room rates. This failure to agree with law enforcement about what security measures were affordable and wise from a legitimate business-operating standpoint was deemed to be "tacit approval" of illegality, subjecting the motel to forfeiture. The U.S. Attorney bragged to the press that he envisioned using current civil asset forfeiture laws in the same fashion against similar types of legitimate commercial enterprises, such as apartment complexes.

A Houston Chronicle editorial pointed to the absurdity and danger of this government forfeiture theory against legitimate business: "Perhaps another time, the advice will be to close up shop altogether."[45] The editorial then correctly noted that:

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

After much bad publicity, the government dropped its forfeiture proceedings after exacting a written "agreement" with the motel

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

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

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

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

owners as to certain security measures that the owners would undertake. The motel owners had lost their motel to the government's seizure for several months, suffered a significant loss of good business reputation, and were forced to spend substantial amounts of time and money on hiring an attorney and defending against the government's forfeiture action, which should never have been undertaken in the first place. The resolution does not detract from the fact that business owners who dare to invest in high crime areas are at the complete mercy of our civil asset forfeiture laws and the predilections of prosecutors.

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

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

The Eight Core Reforms of H.R. 1658

1. BURDEN OF PROOF

When a property owner goes to federal court to challenge the seizure of property under a federal civil forfeiture law, the government is required to make an initial showing of probable cause that the property is subject to forfeiture. Under current law, the property owner must then establish by a preponderance of the evidence that the property is not subject to forfeiture.[46] The government can meet its burden without having obtained a criminal conviction or even having charged the owner with a crime. Since the government doesn't need the proof beyond a reasonable doubt required for a criminal conviction, even the acquittal of the owner does not bar forfeiture of the property allegedly used in a crime. The probable cause the government needs is the lowest standard of proof in the criminal law. It is the same standard required to obtain a search warrant and can be established by evidence with a low indicia of reliability such as hearsay.[47]

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

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

[46] *See* 19 U.S.C. § 1615.

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

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

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

> The Supreme Court . . . has recently expanded the constitutional protections applicable in forfeiture proceedings to include those of the Eighth Amendment. . . . We therefore agree with the Second Circuit: "*Good* and *Austin* reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure —probable cause—suffices to meet the requirements of due process." *United States* v. *One Parcel of Property Located at 194 Quaker Farms Road,* 85 F.3d 985, 990 (2nd Cir.), *cert denied* . . . 117 S. Ct. 304 . . . (1996).
>
> [W]e observe that allowing the government to forfeit property based on a mere showing of probable cause is a "constitutional anomaly. . . ." As the Supreme Court has explained, burdens of proof are intended in part to "indicate the relative importance attached to the ultimate decision." . . . The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause.[49]

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

Why "clear and convincing evidence" and not "a preponderance of the evidence?" The Justice Department used to argue that federal civil forfeiture provisions were not designed to punish anybody. Justice argued that forfeiture served purely remedial functions—such as to remove the instruments of the drug trade and thereby protect the community from the threat of continued drug dealing, and to compensate the government for the expense of law enforcement activity and for its expenditure on societal problems resulting from the drug trade. The Department made this argu-

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[48] *United States* v. *$12,390,* 956 F.2d 801, 811(8th Cir. 1992)(Beam, J., dissenting).
[49] *United States* v. *$49,576,* 116 F.3d 425, 429 (9th Cir. 1997)(citations omitted).

ment in order to provide a rationale for not applying to civil forfeitures the Eighth Amendment's prohibition against excessive fines. In its 1993 decision in *Austin* v. *United States,*[50] the Supreme Court rejected Justice's argument, finding that:

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

One might ask, punishment for what? Clearly, the punishment is for a property owner's alleged involvement in drug trafficking. Civil forfeiture is being used to punish a property owner for alleged criminal activity. The general civil standard of proof—preponderance of the evidence—is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place. As the Supreme Court has said, civil forfeiture actions are in essence "quasi- criminal in character" designed "like a criminal proceeding . . . to penalize for the commission of an offense against the law."[52] Since civil forfeiture doesn't threaten imprisonment, proof beyond a reasonable doubt is not necessary.[53] The intermediate standard—clear and convincing evidence—is more appropriate.

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

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

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

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

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

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

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

[54] *Department of Law Enforcement* v. *Real Property,* 588 So.2d 957, 967 (Fla. 1991). *See also* Cal. Health and Safety Code § 11470 (clear and convincing evidence in cases involving drug proceeds over $25,000); N.Y. Civ. Prac. L. & R. §§ 1311(1), 1310(6) (clear and convincing evidence in drug cases); Wisc. Stat. Ann. § 973.076(3) (requiring proof "satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence").

2. APPOINTMENT OF COUNSEL

There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened.[55] This is undoubtedly one of the primary reasons why so many civil seizures are not challenged. As the cochairs of the National Association of Criminal Defense Lawyers' Forfeiture Abuse Task Force stated before this Committee in 1996: "The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle."[56] This Committee believes that civil forfeiture proceedings are so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by a seizure, in appropriate circumstances.

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

3. INNOCENT OWNER DEFENSE

The impact of *Bennis*[58] is limited by the fact that many federal civil forfeiture provisions contain statutory innocent owner defenses. For instance, real property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner."[59] Conveyances used in federal drug crimes are not forfeitable "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."[60] Property involved in certain money laundering transactions shall not be forfeited "by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."[61] Other federal civil forfeiture statutes contain no innocent owner defenses. For instance, the statute providing for for-

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

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

[57] 18 U.S.C. § 3006A(d).

[58] 516 U.S. at 442.

[59] 21 U.S.C. § 881(a)(7).

[60] 21 U.S.C. § 881(a)(4)(C).

[61] 18 U.S.C. § 981(a)(2).

feiture of any property, including money, used in an illegal gambling business contains no such defense.[62] Many courts require that to qualify as an innocent owner, an owner have done all that reasonably could be expected to prevent the illegal use of the property.[63]

Not only are these statutory innocent owner defenses nonuniform, but the protections of the ones using the "committed or omitted" language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of *and* provided no consent to the prohibited use of the property.[64] Such an interpretation means that owners who try to end the illegal use by others of their property cannot make use of the defense simply because they knew about such use.

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

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

Thus, a safe harbor is created for an owner who notifies police and revokes or attempts to revoke (to the extent permitted by law) permission to use the property by those who are using it in the course of criminal activity. The owner's obligations end right there—property owners should not have to assume the responsibilities of police to stop crime. In the Red Carpet Motel incident described earlier, the hotel owner could have taken advantage of the bill's safe harbor by (as he did) notifying police of drug sales taking place at the motel and making a good faith attempt to evict the responsible motel guests from their rooms. In the situation of an apartment building where a tenant is selling illegal drugs, the owner could take advantage of the safe harbor by notifying police and making a good faith attempt to evict the tenants. The term "good faith attempt" is used because in many instances, an owner may be constrained in revoking permission to use property because of provisions of local, state or federal law (i.e., contract or landlord-

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[62] 18 U.S.C. § 1955(d).

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

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

tenant law). For instance, in many parts of the country it is extremely difficult to evict a tenant because of allegations of illegal drug sales without the tenant having already been convicted of drug trafficking.[65]

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

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

However, the bill makes exceptions to this formulation in two instances to avoid unjust results. First, a person is considered to be an innocent owner if he acquired an interest in property through probate or inheritance, and was at the time of acquisition reasonably without cause to believe that the property was subject to forfeiture. The risk of a moral hazard here is slight. It is hardly likely that many criminals will commit suicide for the express purpose of foiling imminent seizures by having their property devolved to their heirs. And this policy has a sound basis. A person may have inherited property from a relative without cause to believe that it had been involved in some criminal activity. Years later, the government might decide to institute forfeiture proceedings against the property. Without the availability of an innocent owner defense, the inheritor would be put in the position of having to rebut the government's case that the property was forfeitable, that it had been involved in criminal activity. To do this, the inheritor would have to know what a dead person had done with the property and what was in the mind of that dead person. It is fundamentally unfair to put someone in this position.[67]

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

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[65] In some areas of the country, it might be generally agreed to be impossible to evict a tenant without a preexisting criminal conviction—in such a case, the bill would not require an owner to go through the futile motion of seeking eviction in order to enjoy the protection of the safe harbor.

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

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

ably without cause to believe that the property was subject to forfeiture at the time of the acquisition of his interest in the property.

4. RETURN OF PROPERTY UPON SHOWING OF HARDSHIP

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

The case of Michael and Christine Sandsness is instructive:

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

Current law does allow for the release of property pending final disposition of a case upon payment of a full bond.[69] However, most property owners do not have the resources to make use of this provision. Therefore, in order to alleviate hardship, H.R. 1658 provides that a property owner is entitled to release of seized property if a court determines that its continued possession by the government pending the final disposition of forfeiture proceedings will likely cause substantial hardship to the owner and that this hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred it if is returned during the pendency

[68] *Forfeiting Our Property Rights* at 13.
[69] *See* 19 U.S.C. § 1614.

of the proceedings. The court may place such conditions on release of the property as it finds are appropriate to preserve the property's availability for forfeiture.

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

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

Seized property awaiting forfeiture can be quickly damaged:

> Seized conveyances devalue from aging, lack of care, inadequate storage, and other factors while waiting forfeiture. They often deteriorate—engines freeze, batteries die, seals shrink and leak oil, boats sink, salt air and water corrode metal surfaces, barnacles accumulate on boat hulls, and windows crack from heat. On occasion, vandals steal or seriously damage conveyances.[71]

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

6. ELIMINATION OF COST BOND

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

The bond is unconstitutional in cases involving indigents, because it would deprive such claimants of hearings simply because of their inability to pay.[73] Even in cases not involving indigents, the bond should not be required. It "is simply an additional financial burden on the claimant and an added deterrent to contesting the forfeiture."[74] H.R. 1658 eliminates the requirement.

7. ADEQUATE TIME TO CONTEST FORFEITURE

Currently, a property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim with the seizing agency challenging the government's administrative forfeiture of property.[75] To challenge a judicial forfeiture, the property

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[70] 26 U.S.C. § 2680(c).

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

[72] *See* 19 U.S.C. § 1608.

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

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

[75] 19 U.S.C. § 1608.

owner has an exceedingly short 10 days (after process has been executed): [76]

> Even assuming that notice is published the next day after process is executed, the reader of the notice will have a mere nine days to file a timely claim. Most local rules require that notice be published for three successive weeks, on the assumption that interested parties will not necessarily see the first published notice. But by the time the second notice is published, more than ten days will have elapsed from the date process is executed. Thus anyone who misses the first published notice will be unable to comply with the exceedingly short time limitation for filing a claim. . . .[77]

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

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

8. INTEREST

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

H.R. 1658 provides that upon entry of judgment for the owner in a forfeiture proceeding, the United States shall be liable for post-judgment interest on any money judgement. The United States shall generally not be liable for pre-judgment interest. However, in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments, the government must disgorge any funds representing interest actually paid to the United States that resulted from the investment of the property or an imputed amount that would have been earned had it been invested.

HEARINGS

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

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

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

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

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

rial was submitted by Nadine Strossen, President, American Civil Liberties Organization, and Roger Pilon, Director, Center for Constitutional Studies, CATO Institute.

COMMITTEE CONSIDERATION

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

VOTE OF THE COMMITTEE

Vote on final passage: Adopted 27 to 3.

AYES	NAYS
Mr. Sensenbrenner	Mr. Bryant
Mr. Gekas	Mr. Hutchinson
Mr. Coble	Mr. Weiner
Mr. Smith (TX)	
Mr. Gallegly	
Mr. Canady	
Mr. Goodlatte	
Mr. Chabot	
Mr. Barr	
Mr. Jenkins	
Mr. Cannon	
Mr. Rogan	
Mr. Graham	
Mr. Scarborough	
Mr. Conyers	
Mr. Frank	
Mr. Berman	
Mr. Nadler	
Mr. Scott	
Mr. Watt	
Ms. Lofgren	
Ms. Jackson Lee	
Mr. Delahunt	
Mr. Wexler	
Mr. Rothman	
Ms. Baldwin	
Mr. Hyde	

COMMITTEE OVERSIGHT FINDINGS

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

COMMITTEE ON GOVERNMENT REFORM FINDINGS

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

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

COMMITTEE COST ESTIMATE

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

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

CONSTITUTIONAL AUTHORITY STATEMENT

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

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short title.

Section 1 contains the Short Title of the bill.

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

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

Subparagraph (A) of paragraph (1) of subsection (j) provides that in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must give written notice to interested parties, such notice

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

shall be given as soon as practicable and in no case more than 60 days after the later of the date of the seizure or the date the identity of the interested party is first known or discovered by the agency, except that the court may extend the period for filing a notice for good cause shown.

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

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

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

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

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

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

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

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

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

Subparagraph (B) of paragraph (3) provides that a person asserting an interest in seized property in accordance with subparagraph (A) shall file an answer to the government's complaint for forfeiture within 20 days of the filing of the claim.

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

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

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

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

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

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

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

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

The use of the term inheritance recognizes that property interests often pass at the death of previous owners outside of formal

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

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

This provision recognizes that one spouse might acquire an innocent, legitimate ownership interest in a residence through formal "dissolution" of marriage (divorce)—without any reasonable cause to believe that the property is tainted by the other spouse's conduct. Some states recognize separate property interests between spouses after a certain period of separation, even without formal marriage "dissolution" proceedings. An annulment, too, may not be regarded as a "dissolution" of marriage, per se, but rather, an official pronouncement that no legitimate marriage ever existed between the "spouses." A community property agreement between spouses, in community property states like California and Texas, is another common example of how one spouse could innocently acquire an interest in his or her primary residence by operation of (state) law, other than dissolution of marriage. Such standard agreements exist during the life of a marriage, after marriage, and indeed, serve as a non-probate asset after death of a spouse. The

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

provision for acquisition by an innocent spouse "by operation of law", as well as "dissolution of marriage", is intended to cover all of the similarly innocent situations regarding spousal acquisition of a primary residence under various, legitimate operations of state and commercial laws.

Paragraph (7) provides that (for purposes of paragraph (6)) one way in which a person may show that he did all that reasonably could be expected would be to demonstrate that he, to the extent permitted by law, gave timely notice to an appropriate law enforcement agency of information that led him to know the conduct giving rise to a forfeiture would occur or has occurred while in a timely fashion revoking or attempting to revoke permission for those engaging in such conduct to use the property or taking reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property. To meet the requirements of the last clause of the preceding sentence, the person is not required to take every conceivable action which could be considered reasonable, but only to take actions which are in total a reasonable response to the conduct giving rise to the forfeiture. In determining what is a reasonable response, the economic situation of the property owner (and his business, if applicable) should be taken into account. Paragraph (7) also provides that in order to do all that could reasonably be expected (for purposes of paragraph (6)), a person is not required to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

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

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

Paragraph (2) provides that a claimant seeking release of property under subsection (k) must request possession of the property

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

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

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

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

Section 3. Conforming amendment to the Controlled Substances Act.

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

Section 4. Compensation for damage to seized property.

Subsection (a) of section 4 amends the Federal Tort Claims Act, which currently does not allow a claim for damages to be brought against the United States in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer (see 28 U.S.C. § 2680(c)). The subsection provides that claims can be brought that are based on the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited.

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

Section 5. Prejudgment and postjudgment interest.

Section 5 amends section 2465 of title 28 of the United States Code to provide that upon entry of judgment for the claimant in

any proceeding to condemn or forfeit property seized or arrested under any Act of Congress, the United States shall be liable for post-judgment interest as set forth in section 1961 of title 28 of the United States Code. The United States shall not be liable for pre-judgment interest, except that in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, the United States shall disgorge to the claimant any funds representing interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest- bearing account or instrument, and for any period during which no interest is actually paid, an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961. The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

Section 6. Applicability.

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

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

SECTION 981 OF TITLE 18, UNITED STATES CODE

§ 981. Civil forfeiture

(a) * * *

* * * * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) In all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on

the United States Government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(8) As used in this subsection:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) The district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the

date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

[(j)] *(l)* For purposes of this section—

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

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

SECTION 518 OF THE CONTROLLED SUBSTANCES ACT

[EXPEDITED PROCEDURES FOR SEIZED CONVEYANCES

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

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

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

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

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

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

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

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

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

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

TITLE 28, UNITED STATES CODE

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PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 163—FINES, PENALTIES AND FORFEITURES

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

(a) Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

(b) INTEREST.—

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

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

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

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

(3) LIMITATION ON OTHER PAYMENTS.—The United States shall not be required to disgorge the value of any intangible

benefits nor make any other payments to the claimant not specifically authorized by this subsection.

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CHAPTER 171—TORT CLAIMS PROCEDURE

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§ 2680. Exceptions

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

(a) * * *

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

* * * * * * *

DISSENTING VIEWS

While we support the general concept of reforming our asset forfeiture laws and believe it is important to ensure that innocent citizens do not have their property taken away by an over-zealous government, we oppose this particular legislation as it tilts the balance too far in favor of the alleged criminal.

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

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

BURDEN OF PROOF

Current law requires that the government only have probable cause to seize property, but requires citizens to prove by a preponderance of the evidence that the property or proceeds were not used in illegal activity. H.R. 1658 shifts the burden of proof to the government and requires that the government prove by clear and convincing evidence that the property was used in an illegal manner. While we support shifting the burden of proof to the government, the clear and convincing standard is too high. The standard of proof in these cases should be the same as in all civil cases—that of preponderance of the evidence.

APPOINTMENT OF COUNSEL

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

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

INNOCENT OWNER DEFENSE

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

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

RETURN OF PROPERTY FOR HARDSHIP

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

NOTIFICATION TO CLAIMANT

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

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

EFFECTIVE DATE

H.R. 1658 applies its new standard of proof (that of clear and convincing evidence) to cases pending at the time of the bill's enactment. This provision has the potential for reeking havoc on on-

going cases and cases on appeal. We believe that any change in the standard of proof should apply prospectively.

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

ASA HUTCHINSON.
ED BRYANT.
ANTHONY WEIVER.

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