

114TH CONGRESS
2D SESSION

S. 3045

To amend title 18, United States Code, to reform certain forfeiture procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 9, 2016

Mr. GRASSLEY (for himself and Mr. LEAHY) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to reform certain forfeiture procedures, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “DUE PROCESS Act
5 of 2016” or the “Deterring Undue Enforcement by Pro-
6 tecting Rights of Citizens from Excessive Searches and
7 Seizures Act of 2016”.

1 **SEC. 2. GENERAL RULES FOR CIVIL FORFEITURE PRO-**
 2 **CEEDINGS.**

3 Section 983(a) of title 18, United States Code, is
 4 amended—

5 (1) in the subsection heading, by striking
 6 “COMPLAINT” and inserting “COMPLAINT; INITIAL
 7 HEARING”;

8 (2) in paragraph (1)—

9 (A) in subparagraph (A)—

10 (i) in clause (i), by striking “60 days”
 11 and inserting “30 days”;

12 (ii) by striking clause (ii);

13 (iii) in clause (iii)—

14 (I) in the matter preceding sub-
 15 clause (I)—

16 (aa) by striking “60-day”
 17 and inserting “30-day”; and

18 (bb) by striking “does not
 19 file” and all that follows through
 20 “obtain” and inserting “obtains”;
 21 and

22 (II) in subclause (I), by striking
 23 “60 days” and inserting “30 days”;

24 (iv) in clause (iv), by striking “90
 25 days” and inserting “60 days”;

1 (v) in clause (v), by striking “60
2 days” and inserting “30 days”; and

3 (vi) by adding at the end the fol-
4 lowing:

5 “(vi) The notice under this subparagraph shall
6 include an address, which shall also be widely pub-
7 lished, at which the seizing agency can receive until
8 5 p.m. on any business day an interested party’s
9 claim contesting a seizure or forfeiture. The inter-
10 ested party may send such a claim to that address
11 by courier or overnight mail. For the purpose of de-
12 termining compliance with any deadlines in filing
13 such a claim, an interested party completes the filing
14 by placing the communication making the claim in
15 the control of an independent third-party delivery
16 service such as a courier company or the United
17 States mail. In determining whether any legal dead-
18 line for the filing of such a claim has been met, a
19 court shall allow for the equitable tolling of the
20 deadline in appropriate cases.

21 “(vii) The seizing agency shall make publicly
22 available for each nonjudicial forfeiture, with respect
23 to which a request for mitigation or remission is
24 made, a statement of the agency’s disposition of that

1 request, redacted if necessary, including the reasons
2 for the decision.”;

3 (B) in subparagraph (C)—

4 (i) by striking “60” and inserting
5 “30”; and

6 (ii) by striking “which period may”
7 and all that follows through “as nec-
8 essary,”;

9 (C) by adding at the end the following:

10 “(G) Any notice described in subparagraph (A)
11 that is provided to a party shall include notice of—

12 “(i) the right of the party to request an
13 initial hearing in accordance with paragraph
14 (5);

15 “(ii) the right of the party to be rep-
16 resented by counsel at the initial hearing de-
17 scribed in clause (i) and any civil forfeiture pro-
18 ceeding under a civil forfeiture statute; and

19 “(iii) the right of the party to request that
20 the party be represented by counsel at the ini-
21 tial hearing described in clause (i) and any civil
22 forfeiture proceeding under a civil forfeiture
23 statute if the party meets the requirements de-
24 scribed in subsection (b).”; and

1 (D) by striking “nonjudicial” each place it
2 appears;

3 (3) in paragraph (2)(A), by striking “non-
4 judicial”;

5 (4) in paragraph (2)(B)—

6 (A) by striking “35 days” and inserting
7 “65 days”; and

8 (B) by striking “30 days” and inserting
9 “60 days”;

10 (5) so that subparagraph (A) of paragraph (3)
11 reads as follows:

12 “(A) Not later than 90 days after a claim has
13 been filed, the Government shall file a complaint for
14 forfeiture in the manner set forth in the Supple-
15 mental Rules for Certain Admiralty and Maritime
16 Claims or return the property pending the filing of
17 a complaint, except that a court in the district in
18 which the complaint has been filed may extend the
19 period for filing a complaint upon agreement of the
20 parties.”; and

21 (6) by adding at the end the following:

22 “(5)(A) A party claiming property seized in a
23 civil forfeiture proceeding under a civil forfeiture
24 statute may request, not later than 30 days after the
25 date on which a notice described in paragraph

1 (1)(A) is received or if notice is not received, not
2 later than 30 days after the date of final publication
3 of notice of seizure, an initial hearing to take place
4 before a magistrate judge in the appropriate United
5 States district court not later than the date on
6 which a civil forfeiture proceeding under a civil for-
7 feiture statute relating to the seized property com-
8 mences.

9 “(B) If a party makes a request under subpara-
10 graph (A), a magistrate judge shall conduct an ini-
11 tial hearing not later than 10 days after the date on
12 which the request is made.

13 “(C) At the initial hearing—

14 “(i) the magistrate judge shall—

15 “(I) inform the party in easily under-
16 stood terms of—

17 “(aa) the right of the party to be
18 represented by counsel at the initial
19 hearing and any civil forfeiture pro-
20 ceeding under a civil forfeiture stat-
21 ute;

22 “(bb) the right of the party to re-
23 quest that the party be represented by
24 counsel at the initial hearing and any
25 civil forfeiture proceeding under a civil

1 forfeiture statute if the magistrate
2 judge finds that the party meets the
3 requirements described in subsection
4 (b);

5 “(cc) sufficiently detailed facts
6 regarding the seizure of the property
7 if the property was seized pursuant to
8 a warrant described in the matter pre-
9 ceding subparagraph (A) of section
10 981(b)(2); and

11 “(dd) the right of the party to
12 challenge the lawfulness of the seizure
13 of the property, including on the
14 grounds that at the time the property
15 was seized—

16 “(AA) if the property was
17 seized pursuant to a warrant de-
18 scribed in the matter preceding
19 subparagraph (A) of section
20 981(b)(2), the warrant was not
21 supported by probable cause; or

22 “(BB) if the property was
23 seized without a warrant de-
24 scribed in subitem (AA), none of
25 the exceptions described in sub-

1 paragraphs (A) and (B) of sec-
2 tion 981(b)(2) apply to the sei-
3 zure of the property; and

4 “(II) if the party meets the require-
5 ments described in subsection (b), author-
6 ize counsel to represent the party or insure
7 that the party is represented by an attor-
8 ney for the Legal Services Corporation, as
9 applicable, in accordance with that sub-
10 section; and

11 “(ii) the burden of proof is on the Govern-
12 ment to establish that at the time the property
13 was seized—

14 “(I) if the property was seized pursu-
15 ant to a warrant described in the matter
16 preceding subparagraph (A) of section
17 981(b)(2), the warrant was supported by
18 probable cause; or

19 “(II) if the property was seized with-
20 out a warrant described in subclause (I)—

21 “(aa) sufficiently detailed facts
22 regarding the seizure of the property;
23 and

24 “(bb) an exception described in
25 subparagraphs (A) and (B) of section

1 981(b)(2) applies to the seizure of the
2 property.

3 “(D) The magistrate judge shall enter an order
4 for the immediate release of the seized property with
5 prejudice to the right of the Government to com-
6 mence a civil forfeiture proceeding at a later time if
7 the magistrate judge finds that—

8 “(i) the requirements described in subpara-
9 graphs (A) through (E) of subsection (f)(1) are
10 met; and

11 “(ii) the Government did not meet the bur-
12 den of proof described in subparagraph
13 (C)(ii).”.

14 **SEC. 3. REPRESENTATION.**

15 Section 983(b) of title 18, United States Code, is
16 amended—

17 (1) in paragraph (1)(A), by striking “judicial”;
18 and

19 (2) in paragraph (2)(A), by striking “judicial
20 civil forfeiture proceeding under a civil forfeiture
21 statute is financially unable to obtain representation
22 by counsel, and the property subject to forfeiture is
23 real property that is being used by the person as a
24 primary residence” and inserting “civil forfeiture

1 proceeding under a civil forfeiture statute is finan-
 2 cially unable to obtain representation by counsel”.

3 **SEC. 4. BURDEN OF PROOF.**

4 Section 983(c) of title 18, United States Code, is
 5 amended—

6 (1) in paragraph (1), by striking “a preponder-
 7 ance of the evidence” and inserting “clear and con-
 8 vincing evidence”; and

9 (2) in paragraph (2), by striking “a preponder-
 10 ance of the evidence” and inserting “clear and con-
 11 vincing evidence”.

12 **SEC. 5. RIGHT TO REQUEST HEARING ON PRETRIAL RE-**
 13 **STRAINT OF PROPERTY TO RETAIN COUNSEL**
 14 **OF CHOICE.**

15 (a) TITLE 18.—Section 1963(d) of title 18, United
 16 States Code, is amended—

17 (1) by striking paragraph (1) and inserting the
 18 following:

19 “(1)(A) Upon application of the United States, the
 20 court may enter a restraining order or injunction, require
 21 the execution of a satisfactory performance bond, or take
 22 any other action to preserve the availability of property
 23 described in subsection (a) for forfeiture under this sec-
 24 tion—

1 “(i) upon the filing of an indictment or infor-
2 mation charging a violation of section 1962 and al-
3 leging that the property with respect to which the
4 order is sought would, in the event of conviction, be
5 subject to forfeiture under this section; or

6 “(ii) prior to the filing of such an indictment or
7 information, if, after notice to persons appearing to
8 have an interest in the property and opportunity for
9 a hearing, the court determines that—

10 “(I) there is a substantial probability that
11 the United States will prevail on the issue of
12 forfeiture and that failure to enter the order
13 will result in the property being destroyed, re-
14 moved from the jurisdiction of the court, or
15 otherwise made unavailable for forfeiture; and

16 “(II) the need to preserve the availability
17 of the property through the entry of the re-
18 quested order outweighs the hardship on any
19 party against whom the order is to be entered.

20 “(B)(i) Upon motion of a defendant charged with a
21 violation of section 1962 for which criminal forfeiture may
22 be ordered under this section, supported by an affidavit,
23 the court shall hold a hearing to determine whether to
24 modify or rescind, in whole or in part, an order entered

1 under subparagraph (A) to allow the defendant to use the
 2 property subject to the order to retain counsel of choice.

3 “(ii) At the hearing, the court shall consider—

4 “(I) the weight of the evidence against the de-
 5 fendant with respect to the violation of section 1962
 6 for which criminal forfeiture may be ordered under
 7 this section;

8 “(II) the weight of the evidence with respect to
 9 whether the property will be subject to forfeiture
 10 under this section;

11 “(III) the history and characteristics of the de-
 12 fendant; and

13 “(IV) the nature and circumstances of the case.

14 “(C) An order entered pursuant to subparagraph
 15 (A)(ii) shall be effective for not more than 90 days, un-
 16 less—

17 “(i) extended by the court for good cause
 18 shown; or

19 “(ii) an indictment or information described in
 20 subparagraph (A)(i) has been filed.”; and

21 (2) in paragraph (2), by inserting “that the de-
 22 fendant committed a violation of section 1962 for
 23 which criminal forfeiture may be ordered under this
 24 section and probable cause to believe” after “be-
 25 lieve”.

1 (b) CONTROLLED SUBSTANCES ACT.—Section 413(e)
2 of the Controlled Substances Act (21 U.S.C. 853(e)) is
3 amended—

4 (1) by striking paragraph (1) and inserting the
5 following:

6 “(1)(A) Upon application of the United States, the
7 court may enter a restraining order or injunction, require
8 the execution of a satisfactory performance bond, or take
9 any other action to preserve the availability of property
10 described in subsection (a) for forfeiture under this sec-
11 tion—

12 “(i) upon the filing of an indictment or infor-
13 mation charging a violation of this title or title III
14 for which criminal forfeiture may be ordered under
15 this section and alleging that the property with re-
16 spect to which the order is sought would, in the
17 event of conviction, be subject to forfeiture under
18 this section; or

19 “(ii) prior to the filing of such an indictment or
20 information, if, after notice to persons appearing to
21 have an interest in the property and opportunity for
22 a hearing, the court determines that—

23 “(I) there is a substantial probability that
24 the United States will prevail on the issue of
25 forfeiture and that failure to enter the order

1 will result in the property being destroyed, re-
2 moved from the jurisdiction of the court, or
3 otherwise made unavailable for forfeiture; and

4 “(II) the need to preserve the availability
5 of the property through the entry of the re-
6 quested order outweighs the hardship on any
7 party against whom the order is to be entered.

8 “(B)(i) Upon motion of a defendant charged with a
9 violation of section 401 of the Controlled Substances Act
10 (21 U.S.C. 841 et seq.) for which criminal forfeiture is
11 ordered under this section, supported by an affidavit suffi-
12 cient to demonstrate a genuine need for the defendant to
13 use the property subject to an order entered under sub-
14 paragraph (A) to retain counsel of choice, the court shall
15 hold a hearing to determine whether to modify or rescind,
16 in whole or in part, the order to allow the defendant to
17 use the property to retain counsel of choice.

18 “(ii) At the hearing, the court shall consider—

19 “(I) the weight of the evidence against the de-
20 fendant with respect to the violation of this title or
21 title III for which criminal forfeiture may be ordered
22 under this section;

23 “(II) the weight of the evidence with respect to
24 whether the property is subject to forfeiture under
25 this section;

1 “(III) the history and characteristics of the de-
2 fendant; and

3 “(IV) the nature and circumstances of the case.

4 “(C) An order entered pursuant to subparagraph
5 (A)(ii) shall be effective for not more than 90 days, un-
6 less—

7 “(i) extended by the court for good cause
8 shown; or

9 “(ii) an indictment or information described in
10 subparagraph (A)(i) has been filed.”; and

11 (2) in paragraph (2), by inserting “that the de-
12 fendant committed a violation of this title or title III
13 for which criminal forfeiture may be ordered under
14 this section and probable cause to believe” after “be-
15 lieve”.

16 **SEC. 6. RECOVERY OF ATTORNEYS FEES.**

17 Section 2465(b) of title 28, United States Code, is
18 amended—

19 (1) in paragraph (1), by striking “substan-
20 tially”; and

21 (2) by adding at the end the following:

22 “(3) If the claim is resolved by a settlement in which
23 the claimant prevails, the claimant is entitled to attorneys
24 fees under this subsection to the same extent that the
25 claimant would be if a judgment were issued in the pro-

1 ceeding for the property recovered under the settlement.
2 The payment of attorneys fees under this subsection may
3 not be waived as a part of any settlement with the claim-
4 ant. That payment is not subject to any offset or deduc-
5 tion by the United States in connection with any claim
6 the United States may have against the claimant.

7 “(4) For the purposes of this subsection, a claimant
8 prevails if the claimant recovers more than 50 percent,
9 by value, of the money or other property that is claimed.”.

10 **SEC. 7. ANNUAL AUDIT OF CIVIL FORFEITURES.**

11 The Inspector General shall annually conduct an
12 audit of a representative sample of Federal civil forfeitures
13 under statutes described in section 983(i) of title 18,
14 United States Code, to ensure those forfeitures are con-
15 stitutionally sound and consistent with the letter and spirit
16 of the law. The Department of Justice Inspector General
17 shall report the results of the audit to the Attorney Gen-
18 eral and to Congress. Such report shall also include the
19 fiscal status of the Asset Forfeiture Fund and Treasury
20 Forfeiture Fund, including any projected growth or
21 shrinking of the Funds in future years, and the viability
22 of the Funds.

23 **SEC. 8. PUBLICLY AVAILABLE DATABASES.**

24 (a) QUARTERLY UPDATED DATABASE ON DETAILS
25 OF FORFEITURES.—The Attorney General shall establish

1 and maintain, with updates on a quarterly basis, a publicly
2 available database that describes with respect to seizures
3 for all Federal civil forfeiture containing the following:

4 (1) For each such seizure:

5 (A) Unit of an agency responsible for the
6 seizure, and the location, including at a min-
7 imum the State, city, and judicial district where
8 and date when the seizure took place.

9 (B) The type of initial seizure (such as
10 during a stop based on probable cause, or pur-
11 suant to a Federal warrant).

12 (C) The nature and value of the seized
13 property.

14 (D) In what manner forfeiture of seized
15 property was conducted (whether by a civil or
16 administrative proceeding, through settlement,
17 or otherwise).

18 (E) Whether a forfeiture of the seized
19 property was of the entire property, or only a
20 part, and if partial, the proportion of the whole
21 that was forfeited.

22 (F) The disposition of the seized property,
23 the date of forfeiture, if any, and the date the
24 disposition took place.

1 (G) What type of criminal activity any for-
2 feited property relates to.

3 (H) Whether any forfeited money was re-
4 turned to the victim of a crime in connection
5 with which the forfeiture occurred, and the
6 amount returned.

7 (I) The status of any concurrent or related
8 criminal proceeding against the owner of the
9 property, any pending case under title 11 in
10 which the owner of record of the property is the
11 debtor, and any pending civil case in which a
12 receiver has been ordered to take control of the
13 property.

14 (J) Whether the forfeiture was contested.

15 (K) Whether the innocent owner made a
16 claim on the property.

17 (L) The total expenses associated with the
18 forfeiture.

19 (M) The total net proceeds of the for-
20 feiture.

21 (N) Demographic information on the per-
22 son or persons subject to the seizure.

23 (2) A statistical breakdown for each agency of
24 the cases of remission and mitigation, including—

1 (A) the numbers of requests for remission
2 and mitigation that were—

- 3 (i) fully granted;
4 (ii) partially granted; or
5 (iii) returned; and

6 (B) with respect to requests that were par-
7 tially granted—

8 (i) the average percentage of the value
9 of seized property that was returned to the
10 owner; and

11 (ii) what percentage of requests re-
12 sulted in returned property in each of the
13 following categories:

14 (I) More than zero but less than
15 25 percent of the property was re-
16 turned.

17 (II) 25 percent or more of the
18 property was returned, but less than
19 50 percent.

20 (III) 50 percent or more of the
21 property was returned, but less than
22 75 percent.

23 (IV) 75 percent or more of the
24 property was returned, but less than
25 100 percent.

1 (3) Any money given from the Asset Forfeiture
 2 Fund or Treasury Forfeiture Fund to State or local
 3 law enforcement for Joint Law Enforcement Oper-
 4 ations (commonly referred to as “JLEO”) funding,
 5 or for any other purpose, and the name of the State
 6 or local entity receiving that funding.

7 (b) REAL-TIME DATABASE TO ASSIST PERSONS
 8 WHOSE PROPERTY IS SEIZED.—

9 (1) ESTABLISHMENT.—The Attorney General
 10 shall establish and maintain, with updates on a real-
 11 time basis, a database, organized by State and coun-
 12 ty, with respect to each Federal seizure of real and
 13 personal property for Federal civil forfeiture under
 14 statutes described in section 983(i) of title 18,
 15 United States Code.

16 (2) DESIGN.—The Attorney General shall de-
 17 sign the database to allow any interested party, in-
 18 cluding any owner, creditor, or lienholder, to deter-
 19 mine whether that party has an interest in any such
 20 property and to inform that party, and the general
 21 public, on the specifics of how to contest each sei-
 22 zure before the forfeiture.

23 (c) HEADS OF AGENCIES TO SUBMIT INFORMATION
 24 FOR DATABASES.—Not less frequently than quarterly, on
 25 a schedule determined by the Attorney General, the head

1 of each Federal agency shall submit to the Attorney Gen-
 2 eral a report that provides, in such form as the Attorney
 3 General may prescribe, the information the Attorney Gen-
 4 eral is required to include in the databases established
 5 under this section.

6 **SEC. 9. STANDARD OF PROOF RELATING TO POSSIBLY IN-**
 7 **NOCENT OWNERS.**

8 (a) BURDEN OF PROOF.—Paragraph (3) of section
 9 983(c) of title 18, United States Code, is amended to read
 10 as follows:

11 “(3) if the Government’s theory of forfeiture is
 12 that the property was used to commit or facilitate
 13 the commission of a criminal offense, or was in-
 14 volved in the commission of a criminal offense, the
 15 Government shall establish by clear and convincing
 16 evidence that—

17 “(A) there was a substantial connection
 18 between the property and the offense; and

19 “(B) the owner of any interest in the
 20 seized property—

21 “(i) intentionally used the property in
 22 connection with the offense;

23 “(ii) knowingly consented to the use
 24 of the property by another in connection
 25 with the offense; or

1 “(iii) knew that the property was
2 being used in connection with the of-
3 fense.”.

4 (b) INNOCENT OWNER DEFENSE.—

5 (1) SECTION 983(d)(1).—Paragraph (1) of sec-
6 tion 983(d) of title 18, United States Code, is
7 amended to read as follows:

8 “(1) An innocent owner’s interest in property
9 shall not be forfeited under any civil forfeiture stat-
10 ute. The Government shall have the burden of prov-
11 ing that the claimant is not an innocent owner by
12 clear and convincing evidence.”.

13 (2) SECTION 983(d)(2)(A)(i).—Paragraph
14 (2)(A)(i) of section 983(d) of title 18, United States
15 Code, is amended by inserting “or consent to” after
16 “did not know of”.

17 **SEC. 10. PROPORTIONALITY.**

18 Section 983(g) of title 18, United States Code, is
19 amended—

20 (1) in paragraph (1), by inserting “or otherwise
21 disproportional to the gravity of the offense” before
22 the period at the end; and

23 (2) by amending paragraph (2) to read as fol-
24 lows:

1 “(2) In making this determination, the court
 2 shall consider, in addition to the analysis as to
 3 whether the forfeiture is constitutionally excessive,
 4 the value of the property, the seriousness of the of-
 5 fense, the level of the claimant’s culpability in the
 6 offense giving rise to forfeiture, the claimant’s prior
 7 record, the claimant’s financial condition, and
 8 whether the forfeiture statute is intended to address
 9 the type of conduct alleged as the basis for for-
 10 feiture.”.

11 **SEC. 11. SEARCH AND FORFEITURE OF MONETARY INSTRU-**
 12 **MENTS.**

13 Section 5317(c) of title 31, United States Code, is
 14 amended by striking paragraph (2) and inserting the fol-
 15 lowing:

16 “(2) CIVIL FORFEITURE.—

17 “(A) IN GENERAL.—Any property involved
 18 in a violation of section 5313 or 5316, or any
 19 conspiracy to commit any such violation, and
 20 any property traceable to any such violation or
 21 conspiracy, may be seized and forfeited to the
 22 United States in accordance with the proce-
 23 dures governing civil forfeitures in money laun-
 24 dering cases pursuant to section 981(a)(1)(A)
 25 of title 18.

1 “(B) STRUCTURING.—Any property in-
2 volved in a violation of section 5324, or any
3 conspiracy to commit any such violation, and
4 any property traceable to any such violation or
5 conspiracy, may be seized and forfeited to the
6 United States in accordance with the proce-
7 dures governing civil forfeitures in money laun-
8 dering cases pursuant to section 981(a)(1)(A)
9 of title 18 only if the property to be seized and
10 forfeited is derived from an illegal source or if
11 the structuring offense was used to conceal vio-
12 lations of other criminal laws.”.

13 **SEC. 12. EFFECTIVE DATE AND APPLICABILITY.**

14 This Act and the amendments made by this Act shall
15 take effect on the date of the enactment of this Act and
16 apply only with respect to seizures made on or after that
17 date. Seizures made before that date shall continue to be
18 governed by the law as it existed without regard to this
19 Act or the amendments made by this Act.

○