BY THE COMPTROLLER GENERAL

To The Honorable Joseph R. Biden
United States Senate

OF THE UNITED STATES

Asset Forfeiture--A Seldom Used Tool In Combatting Drug Trafficking

Billions of dollars of profits are generated by organized crime; drug trafficking revenues alone are estimated at $60 billion annually. Even though legislation designed to attack these profits through asset forfeiture was enacted more than a decade ago, forfeiture of criminal assets has been miniscule.

The primary reason for the limited use of asset forfeiture has been the lack of leadership by the Department of Justice. The Department has not given investigators and prosecutors guidance and incentives to pursue forfeiture. Also, emerging case law indicates the statutes may be flawed. GAO recommends that the Congress clarify and broaden the scope of the criminal forfeiture statutes and that the Attorney General improve forfeiture program management.

1981

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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The Honorable Joseph R. Biden
United States Senate

Dear Senator Biden:

As you requested in your December 27, 1979, letter--as Chairman of the Subcommittee on Criminal Justice--we reviewed the Department of Justice's asset forfeiture program. The report describes the extent forfeiture has been employed in narcotics cases and discusses some of the problems limiting greater forfeiture use. We recommend that the Congress strengthen the criminal forfeiture statutes and that the Attorney General improve forfeiture program management.

The Department of Justice was provided a copy of the draft on February 9, 1981, for their comments. The Department did not respond within the required 30 days as is stipulated in Public Law 96-226. Their comments were received on March 19, 1981. Because of the late submission by Justice and the report issue date you requested, we could not evaluate the comments in detail. We have, however, appended the comments to the report and made some general observations about them in the report.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time we will send copies to the Attorney General and other interested parties. Copies will be made available to others upon request.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE HONORABLE
JOSEPH R. BIDEN
UNITED STATES SENATE

ASSET FORFEITURE--A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING

D I G E S T

The Federal Government's record in taking the profit out of crime is not good. Billions of dollars are generated annually by organized crime; drug trafficking alone is estimated at $60 billion annually. These illicit profits and the assets acquired with them were the target of legislation passed nearly 10 years ago to combat organized crime through forfeiture of assets. However, assets obtained through forfeiture have been minuscule.

The Government has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique. The Department of Justice has not given investigators or prosecutors the incentive or guidance to go after criminal assets. Steps are now underway to do more, but emerging case law indicates legislative changes are also needed if investigators and prosecutors are to make meaningful attacks on the economic base of organized crime.

Whether or not an improved asset forfeiture program will make a sizeable dent in drug trafficking is uncertain. The almost insatiable demand for drugs and the huge dollar amounts involved may be obstacles too great for law enforcement alone to overcome. But a successful forfeiture program could provide an additional dimension in the war on drugs by attacking the primary motive for such crimes--monetary gain.

FEW ASSETS HAVE BEEN FORFEITED

Simply put, neither the dollar value nor the type of assets forfeited to the Government

by criminal organizations has been impressive compared to the billions generated annually through drug trafficking.

--Since enactment in 1970 through March 1980, the Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise statutes (acts authorizing criminal forfeiture) have been used in 98 narcotics cases. Assets forfeited and potential forfeitures in those cases amounted to only $2 million. (See pp. 10 and 11.)

--Since enactment in November 1978 of the Psychotropic Substance Act amendments (providing for civil forfeiture) through March 1980, the Drug Enforcement Administration has seized $7.1 million in currency involved in drug transactions. Of that amount only $234,000 had been forfeited; cases involving $6.8 million of the $7.1 million were pending. Seizures or forfeitures of other types of assets have been minimal. (See p. 12.)

--Most forfeitures have been accomplished under various civil authorizations by the Drug Enforcement Administration and the U.S. Customs Service. However, these forfeitures have been primarily the vehicles and cash used in drug trafficking and represent mere incidental operating expenses for large narcotics organizations. Total civil forfeitures from 1976 through 1979 were $29.9 million. (See pp. 12 and 13.)

Equally disturbing are the kinds of assets forfeited. The Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise statutes were intended to destroy the economic base of criminal organizations and to combat organized crime's infiltration into commercial enterprise. The Department of Justice has estimated that

700 legitimate businesses in this country have been infiltrated by organized crime, yet no significant business interests acquired with illicit drug funds or profits from other criminal activity have been forfeited. (See p. 11.)

WHY MORE FORFEITURES HAVE NOT BEEN REALIZED

The reasons why the forfeiture statutes have not been used more extend across the legal, investigative, and prosecutive areas.

--Emerging case law indicates the forfeiture statutes are ambiguous in some areas or incomplete and deficient in others. (See pp. 30 to 42.)

--Investigators and prosecutors were not given the guidance and incentive for pursuing forfeiture. (See pp. 19 to 24.)

--Access to financial information may be limited. (See pp. 25 to 29.)

But the primary reason has been the lack of leadership by the Department of Justice. Nearly 10 years after the forfeiture statutes were enacted the Government lacked the most rudimentary information needed to manage the forfeiture effort. No one knew how many narcotics cases had been attempted using the Racketeer Influenced and Corrupt Organization or Continuing Criminal Enterprise statutes, the disposition of all the cases, how many cases involved forfeiture attempts, and why those attempts either failed or succeeded. (See pp. 16 to 18.)

Efforts are being made to remedy the matter. The Department of Justice has (1) issued guidance on the use of forfeiture statutes, (2) is analyzing in detail all narcotics Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise cases prosecuted since 1970, and (3) is preparing a manual on how to

conduct financial investigations in drug cases. Also, the Drug Enforcement Administration has made forfeiture a goal of all major trafficker investigations. These initial efforts must be continued and implementation monitored if the Government is going to improve its forfeiture law enforcement effort.

RECOMMENDATIONS TO THE CONGRESS

GAO recommends that the Congress amend the criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organizations statute to:

--Make explicit provision for the forfeiture of profits and proceeds that are (1) acquired, derived, used, or maintained in violation of the statute or (2) acquired or derived as a result of a violation of the statute.

--Authorize forfeiture of substitute assets, to the extent that assets forfeitable under the statute: (1) cannot be located, (2) have been transferred, sold to, or deposited with third parties, or (3) have been placed beyond the general territorial jurisdiction of the United States. This authorization would be limited to the value of the assets described in (1), (2), and (3), above.

GAO recommends that the Congress amend the criminal forfeiture provisions of the Continuing Criminal Enterprise statute to:

--Clarify that assets forfeitable under the statute include the gross proceeds of controlled substance transactions.

--Authorize forfeiture of substitute assets, but only to the extent that assets forfeitable under the statute (1) cannot be located, (2) have been transferred or sold to, or deposited with third parties, or (3) placed beyond the general territorial jurisdiction of the United States. (See pp. 41 and 42;

proposed criminal forfeiture legislation is shown in app. V.)

RECOMMENDATIONS TO THE ATTORNEY GENERAL

Although statutes authorizing the forfeiture of criminal assets are 10 years old, the Government has used them sparingly. Starting in 1980, the Department of Justice began various corrective actions to increase the use of statutes authorizing forfeiture of criminal assets. These initial efforts must be supplemented if forfeiture cases are to increase. Accordingly, GAO recommends that the Attorney General

--direct the Department of Justice's Criminal Division to analyze on a continuing basis the extent to which forfeiture statutes are used and the reasons for the success or failure of their application, and

--evaluate the workability of current forfeiture procedures and take the appropriate steps to effect any necessary revisions. (See p. 29 and p. 42.)

AGENCY COMMENTS

The Department of Justice was provided a draft of this report on February 9, 1981, for its comments. The Department did not respond within the required 30 days as is stipulated in Public Law 96-226. The comments were received on March 19, 1981. (See app. VI.) Because of the late submission by Justice and the report issue date set by the requestor, GAO could not evaluate the comments in detail. In general, however, the agency concurs with the findings but points out the need to clarify certain matters. (See p. 43.)

Contents

ABBREVIATIONS

CCE	Continuing Criminal Enterprise
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
IRS	Internal Revenue Service
RICO	Racketeer Influenced and Corrupt Organization
U.S.C.	United States Code

CHAPTER 1

ATTACKING CRIMINAL ASSETS

Racketeers are motivated by a common desire for financial gain and the power it commands. Law enforcement agencies have traditionally attempted to deter or prevent the perpetration of crime through prosecutions leading to fines and imprisonment. As long as the flow of money continues, however, such traditional measures ordinarily result in a compulsory retirement and promotion system for criminal organizations rather than their elimination. In 1969, the President of the United States put the situation into perspective, stating "* * * as long as the property of organized crime remains, new leaders will step forward to take the place of those we jail."

Traditional measures not only have had limited success in eliminating criminal organizations, but they have rarely been effective in disrupting their leadership. The leaders of criminal organizations, such as narcotics trafficking networks, infrequently have direct contact with illicit substances or the cash used to acquire them, but they participate in any profits derived. However, traditional measures are aimed primarily at individuals participating in transactions involving the illicit substances rather than those who participate exclusively in the derived profits.

Recognizing the deficiences of traditional measures in attacking organized crime, the Congress enacted new statutes in 1970 dealing not only with individuals, but also with the economic base through which they operate.

MONIES DERIVED FROM CRIMINAL ACTIVITIES ARE ASTOUNDING

The amount of money derived from criminal activities is astounding. Billions of dollars are generated through gambling, prostitution, narcotics trafficking, and other illegal activities. Revenues generated through narcotics trafficking alone are estimated in excess of $60 billion annually. For example, a 1980 study conducted by the National Narcotics Intelligence Consumers Committee estimated that the retail value of narcotics supplied

to the illicit U.S. market during 1979 ranged between $55 and $73 billion.

Such enormous amounts of illegal money can adversely affect the banking system and the economy. Additionally, the criminal organizations generating these enormous revenues often invest their illicit profits in legitimate businesses and real estate. The Department of Justice estimates that over 700 legitimate U.S. businesses have been infiltrated by organized crime. In hearings before the Senate Permanent Subcommittee on Investigations during December 1979, a real estate economist testified that in the state of Florida, estimated real estate investments resulting from narcotics trafficking totalled $1 billion in 1977 and 1978.

AVAILABLE FORFEITURE AUTHORIZATIONS

Forfeiture means a judicially required divestiture of property without compensation. Legal title cannot be forfeited to the Federal Government until a legal determination on the propriety of forfeiture is made. Forfeitures may be accomplished either criminally or civilly, depending upon the circumstances of each case, the statute under which the Government proceeds, and the nature of the property involved. On the other hand, seizure, as distinguished from forfeiture, is normally defined as the physical securing of property by law enforcement personnel. Also excluded from the definition of forfeiture are fines, bail, and bond forfeitures, and the imposition of civil damages resulting from a lawsuit.

Classes of property subject to forfeiture

There are important legal distinctions among the classes of property: organized crime basically uses four of them. The first class, contraband, describes property which is deemed inherently dangerous by statute and the possession or distribution of which is itself usually a crime. Certain types of guns, controlled substances, liquor, and gambling devices qualify as contraband. The second class, derivative contraband, describes property such as boats, airplanes, and cars which serve the function of warehousing, conveying, transporting, or facilitating the exchange of contraband. The third class, direct proceeds, describes

property such as cash that is received in exchange or as payment for any of a variety of transactions involving contraband. The fourth class, secondary or derivative proceeds, describes property such as corporate stock, real estate, legitimate businesses, and the like that is purchased, maintained, or acquired, indirectly or directly, with the direct proceeds of an illegal transaction. This latter class of property consists almost entirely of profits.

The level of expertise required to obtain forfeiture is directly related to the class of property subject to forfeiture. Contraband, for example, generally requires no traceable connection to the illegal activity subjecting it to forfeiture, because its possession or distribution is decreed illegal by statute or regulation. The other classes of property, however, all require a connection to the illegal activities to subject them to forfeiture. The degree of financial expertise needed to establish the traceable connection varies directly with the class of property involved and, in some cases, by the statute under which the Government proceeds to accomplish forfeiture.

Derivative contraband, such as automobiles, boats, and aircraft used to facilitate an exchange of contraband, is ordinarily seized at the time of arrest along with the contraband exchanged. As a consequence, extensive financial expertise is not required to establish a connection to the illegal activity. Direct proceeds, however, may require a greater degree of financial expertise unless the actual exchange of proceeds for contraband is observed. For example, even though illegal drugs and cash are found in the same location, forfeiture of the cash cannot be realized unless a connection to the drugs can be established. The final class of property, derivative proceeds, requires extensive financial expertise to show the relationship between the property and the illegal activity. Most major organization assets are included in this final category; therefore, the Government must focus on this property if it is going to make inroads on the economic base of criminal activity.

The Federal Government has obtained forfeiture of properties falling within the first two classes--contraband and derivative contraband--for nearly two centuries.

However, prior to 1970, the Government had no authority to forfeit direct and derivative proceeds.

Criminal forfeiture

In common law England, forfeiture of property to the Crown, without regard to the property's relationship to the crime of conviction, automatically followed most felony convictions. Widespread abuses of this authority account for the historical aversion to criminal forfeitures in the United States. This aversion is reflected in Article III of the Constitution, which provides that while Congress has the power to declare the punishment of treason, "[no] attainder of treason shall work * * * [a] forfeiture, except during the life of the person attainted." The First Congress enacted a statute that some courts believe codifies the negative implication of Article III, namely, that no forfeitures of estate be allowed except in cases of treason. This statute, which has never been expressly repealed, provides:

> "No conviction or judgment for any of the aforesaid offenses [criminal offenses now codified in title 18] shall work * * * [a] forfeiture of estate." 18 U.S.C. §3563.

With the exception of the Confiscation Act of 1862, which authorized the President to forfeit the property of Confederate sympathizers, all forms of criminal forfeiture are believed to have been unknown in U.S. jurisprudence until 1970.

In that year, the Congress enacted two statutes providing the Government criminal forfeiture authority. Title IX of the Organized Crime Control Act, entitled the Racketeer Influenced and Corrupt Organization Act (RICO), provided that upon conviction for racketeering involvement in an enterprise, the offender shall forfeit all interests in the enterprise (18 U.S.C. 1961-64). The Comprehensive Drug Prevention and Control Act provided for criminal forfeiture of, among other things, profits derived through a Continuing Criminal Enterprise (CCE) that traffics in controlled substances (21 U.S.C. 848). The forfeiture provisions of these two statutes show the significance of the historical aversion to criminal forfeiture as described above. Neither statute revives the functional equivalent of forfeiture of estate, as that penalty was

known in common law England. Both adopt a substantially narrower or milder form of criminal forfeiture in that there must be some connection between the property to be forfeited and the criminal activity in which the offender engaged. In common law England, no such connection was required. A more complete description of these statutes is contained in appendix II.

Civil forfeiture

Numerous statutes in the United States Code provide civil forfeiture authority; however, there are fundamental legal differences between civil and criminal forfeiture. Criminal forfeiture is based on a determination of personal guilt; the right of the government in the property subject to forfeiture stems from an in personum criminal judgment against the offender. Almost all other forfeitures are considered civil forfeitures. Civil forfeiture cases usually arise incident to violations of the customs, revenue, and navigation laws; the property subject to civil forfeiture is considered "tainted." The legal proceeding in such cases is theoretically against the property itself; the forfeiture stems from the guilt of the property, or the property's use in or relationship to illegal activity. The rights of the government in the property derive from an in rem judgment against the offending articles of property. Conviction of the property holder for a crime is rarely a prerequisite for the imposition of civil forfeiture. As a general proposition, the innocence of the property's owner is legally irrelevant. If the taint in the property exists, the rights of the property holder are extinguished.

Approximately 90 percent of all civil forfeitures resulting from criminal activity are accomplished under Drug Enforcement Administration (DEA) and U.S. Customs Service authorizations. The Drug Enforcement Administrations's civil forfeiture authority is in Section 881 of Title 21, United States Code. Historically, the most frequent applications of this statute have been against contraband (e.g., drugs) and derivative contraband (e.g., vehicles used to convey drugs), not against proceeds of controlled substance transactions. This statute was amended by the Psychotropic Substance Act in November 1978 to cover proceeds and derivative proceeds. If read literally, it seems to have at

least the same reach in terms of classes of property subject to forfeiture as the RICO and CCE criminal forfeiture authorizations.

The U.S. Customs Service has numerous statutes that give forfeiture authority. However, many of these statutes involve importation or other violations related primarily to failure to pay tariffs. Those forfeiture statutes most often used in connection with violations of the drug laws are:

--21 U.S.C. 881: Controlled Substance Act violations,

--49 U.S.C. 781-4: unlawful use of vessels, vehicles, and aircraft involving contraband,

--31 U.S.C. 1102: cash and monetary instruments in violation of currency laws,

--19 U.S.C. 1703: vessels used in smuggling,

--19 U.S.C. 1595a: conveyances used to transport contraband.

OBJECTIVES, SCOPE, AND METHODOLOGY

This report identifies the various statutes providing civil and criminal forfeiture authority, their substantive dimensions; the extent to which the authority has been successfully employed by law enforcement agencies, particularly in narcotics trafficking prosecutions; and points out several reasons why so few forfeitures have been realized.

We conducted our review at DEA headquarters in Washington, D.C.; DEA regional and district offices in Detroit, Indianapolis, Miami, Los Angeles, and New York; Department of Justice's Criminal Division, in Washington, D.C.; and U.S. Attorney Offices in the Eastern District of Michigan, Southern District of Indiana, Southern District of Florida, Central District of California, and Southern District of New York. Some limited work was also conducted at headquarters offices of the FBI and the U.S. Customs Service. Our work included:

--analysis of DEA criminal investigative files and U.S. Attorney criminal prosecutive files;

--discussions with special agents, group supervisors, and other DEA officials;

--discussions with U.S. attorneys; and

--discussions with Department of Justice and other agency officials in Washington, D.C.

In the area of civil forfeitures, we concentrated our work on DEA and Customs because Department of Justice officials informed us that nearly 90 percent of all civil forfeitures resulting from criminal activity involved those agencies. In the criminal forfeiture area, we developed a comprehensive record for all 98 cases in which indictments were returned under RICO and CCE, from their adoption in 1970 through March 1980.

We developed the comprehensive record of RICO and CCE cases because no single source within the Federal Government maintained such a record or could provide us that information. Several sources were used. Legal reference documents, including the United States Code, Federal Supplement, Federal Reporter, and the Supreme Court Reporter were reviewed. We had discussions with Criminal Division officials in the Organized Crime and Racketeering and the Narcotics and Dangerous Drugs Sections who are responsible for approving potential RICO and CCE cases, respectively.

From these sources, we developed our record of 98 CCE and RICO narcotics cases, their disposition, and data on Department of Justice's success in obtaining asset forfeitures. From this universe, we selected for more detailed analysis 31 cases originating in those judicial districts listed above because they had the most concentrated activity of CCE and RICO cases involving forfeiture attempts. This detailed analysis involved studying the objectives and methods of the investigations and prosecutions to determine the reasons for forfeiture success or failure.

We also drew from the experience gained in our other efforts, particularly:

--"The Drug Enforcement Administration's CENTAC Program--An Effective Approach to Investigating Major Traffickers That Needs To Be Expanded" (GGD-80-52, March 27, 1980);

--"Gains Made in Controlling Illegal Drugs, Yet the Drug Trade Flourishes" (GGD-80-4, October 25, 1979);

--"Disclosure and Summons Provisions of the 1976 Tax Reform Act--An Analysis of Proposed Legislative Changes" (GGD-80-76, June 17, 1980);

--"Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978" (GGD-80-54, May 29, 1980).

Additionally, we testified on this topic on July 23, 1980, before the Senate Judiciary Subcommittee on Criminal Justice.

CHAPTER 2

FORFEITURE--A PROMISING STRATEGY NOT REALIZED

Although attacking the financial resources of criminal organizations through forfeiture of their assets has been discussed for several years, little has been done. Forfeitures to date have consisted primarily of the vehicles used to smuggle drugs and the cash used in drug transactions. Compared to the profits realized, these forfeitures have amounted to little more than incidental operating expenses. The illicit profits themselves and the assets acquired with them have remained virtually untouched.

When enacted more than a decade ago, the RICO and CCE statutes were envisioned as a major new law enforcement remedy directed at the financial resources of organized crime. For example, drug trafficking organizations were to be more completely immobilized by not only jailing their key people, but also obtaining forfeiture of their assets. Unfortunately, the potential effectiveness of forfeiture in combatting drug trafficking cannot yet be assessed, because the key statutes authorizing forfeiture have not received extensive use.

VERY FEW ASSETS FORFEITED

Neither the dollar value nor the type of assets forfeited to the Government from criminal organizations has been impressive.

--Even though enacted more than 10 years ago, the RICO and CCE statutes have been applied in only 98 drug cases. Assets forfeited and potential forfeitures in those cases amounted to only $2 million.

--The 1978 Psychotropic Substance Act amendment to DEA's civil forfeiture authorization has been used predominately to forfeit cash directly involved in drug transactions, not to forfeit major assets derived from drug profits. Although $7.1 million in

cash has been seized under this provision, only $234,000 has actually been forfeited as of March 1980; cases involving $6.8 million of the $7.1 were pending.

--Most forfeitures have been accomplished under various civil authorizations by DEA and the U.S. Customs Service. However, these have primarily been the vehicles and cash used in drug trafficking and represent mere incidental operating expenses for large narcotics organizations. Total civil forfeitures from 1976 through 1979 were $29.9 million.

Compared to the astounding profits of narcotics organizations, the amount extracted through criminal and civil forfeitures is indeed small.

RICO and CCE statutes infrequently applied

From 1970 through March 1980, 98 CCE and RICO indictments involving 258 defendants had been returned in narcotics cases. Yet there were more than 5,000 Class I violators arrested by DEA during this period. 1/ A Class I trafficker, DEA's highest classification level, indicates the individual or organization is capable of trafficking in large amounts of drugs. The criteria have changed over the years, but since 1977 they have provided that a Class I violator is a person that must deal in a minimum of $4 million a month in heroin or $2.8 million a month in cocaine.

The RICO and CCE statutes have been applied in only 98 cases. The total value of actual and potential forfeitures for the 10-year period is only $2.0 million, less revenue than one Class I heroin trafficker generates in a month. This forfeiture total consists of $659,000 in

1/DEA has arrested approximately 5,000 Class I violators from June 1972 through March 1980. Prior to June 1972, violators were not classified.

CCE forfeitures and $1.3 million in RICO forfeitures; however, $900,000 of the RICO forfeitures are being appealed. Data as of September 1980 indicates that the forfeiture provisions of the RICO and CCE statutes continue to be used infrequently in narcotics cases. Fiscal year 1980 forfeitures totalled only $135,000 under CCE and $522,000 under RICO.

The kinds of assets forfeited are equally disturbing. The RICO and CCE statutes were intended to, among other things, attack the economic base of organized crime and combat its infiltration into commercial enterprise. However, we found no forfeiture of significant derivative proceeds or business interests acquired with illicit funds. Criminal forfeitures in narcotics cases have included such things as automobiles, boats, and personal residences, but they have not included the types of property that would affect the economic base of criminal organizations.

The chart below summarizes the results of the RICO and CCE narcotics cases and appendix IV gives individual case descriptions.

Total Narcotic Cases
Charged Under RICO And CCE
(For the period 1970 through March 1980)
(note a)

	CCE	RICO (Narcotics)	CCE and RICO Narcotics	TOTAL
Number of cases	73	16	9	98
Amount of forfeitures (thousands) a/	$659	$1,305	(b)	$1,964

a/The litigation status of forfeiture cases indicted as of March 1980 are updated through September 1980.

b/Forfeitures in this case totalled $187,000 and are included in the RICO and CCE totals as follows: $65,000-CCE, $122,000-RICO.

Psychotropic Substance Act amendment used to seize cash

DEA has made only limited use of its civil forfeiture authority granted by the November 1978 Psychotropic Substance Act amendment to 21 U.S.C 881. This law, which gave DEA the authority to forfeit assets traceable to narcotics transactions (derivative proceeds) and the cash involved in narcotics dealings (direct proceeds), previously only provided for forfeiture of contraband and derivative contraband.

For the most part, the 1978 law has only been used to seize cash directly involved in drug transactions. Cash seizures under the new provisions totalled $7.1 million from enactment of the statute through March 1980. Of that amount only $234,000 had been actually forfeited by March 30, 1980; cases involving $6.8 million of the $7.1 million were still pending. Recently, a few narcotics cases have included derivative proceeds pursuant to the new provisions of 21 U.S.C. 881. Currently, three cases involving $1.4 million of derivative proceeds seizures are pending. However, as of March 1981, no forfeitures of derivative proceeds under this provision had been realized.

Civil statutes used to forfeit cash and vehicles

About 90 percent of seizures related to criminal activity are made by the U.S. Customs Service and the Drug Enforcement Administration under civil forfeiture statutes. From 1976 through 1979, these two agencies seized more than $194 million worth of property consisting mostly of vehicles and cash. However, only $29.9 million of this property was ultimately forfeited to the U.S. Government.

Most seized property is not forfeited because

--the seized property is returned to the owner because he was an innocent third party (i.e. the vehicle was stolen or leased),

--the seized property is turned over to a bank which holds a lien against it, or

--the property is seized for a minor violation and is returned to the owner upon payment of a small fine.

Customs and DEA maintain only limited data on the disposition of seized property. In addition, disposition of civil seizures often takes several years. The data below shows the disposition of DEA and Customs seizures for 1976 through 1979.

Disposition Of Seized Property-1976-1979

	Customs (note a)	DEA (note b)	TOTAL
	--------(in thousands)--------		
Total value of seizures	$172,030	$22,019	$194,049
Value pending disposition	18,333	14,462	32,795
Value disposed of	153,697	7,557	161,254
Value returned to owner or lien-holder	128,817	2,526	131,343
Value forfeited to Government	24,880	5,030	29,910
Percent of seized property from closed cases that was forfeited	16.2%	66.6%	18.5%

a/Represents seizures by Customs under selected civil statutes related to criminal activity most closely associated with drug trafficking. See list of statutes on page 6.

b/Represents seizures by DEA under 21 U.S.C 881.

As the chart above indicates, reporting DEA and Customs seizures without corresponding data on how much is forfeited overstates the effect the civil statutes have on the economic base of criminal organizations.

Total civil seizures by DEA under 21 U.S.C. 881 increased in fiscal year 1980 to $31.3 million; however, total civil forfeitures for the same period were only $5.5 million.

Limited amount taken through fines and taxes

In addition to forfeitures, assets can also be taken through fines and Internal Revenue Service (IRS) tax assessments and penalties. Under most Federal criminal statutes convicted violators can be fined, and to the extent illegal income has not been reported, IRS can assess taxes. However, fines and taxes are not a substitute for forfeiture. There is no necessary correlation between the amounts of a fine or tax liability to the amount of ill-gotten gain. Fines are determined by the court on the basis of their punitive value and are not designed to recover illegally derived profits. Tax liability is determined on the basis of income whether derived legally or illegally and is not designed to recover illicit profits.

Violators of drug laws can be fined up to $25,000 for trafficking or up to $100,000 for conducting a Continuing Criminal Enterprise. Court disposition data for the past 2 years shows that about 12 percent of defendants convicted for drug violations were fined.

Narcotics Defendant Dispositions Data

	7/1/77 to 6/30/78	7/1/78 to 6/30/79
Total number of defendants convicted	5768	5004
Total number of defendants fined	655	638
Percent of defendants fined	11.4	12.6
Total amount of fines	$9.9 million	$4.4 million

Fines are often not collected. Although data on fine collections is very limited, several of the DEA and U.S. attorney officials we talked to cited specific instances of uncollected fines in major narcotics cases. For example, in San Diego during September 1979 key members of a major trafficking organization dealing in $330 million worth

of amphetamines were convicted. Fines imposed on organization members totalled $167,000. However, as of June 1980, only $5,330 of these fines had been collected.

Similarly, although data on tax assessments and penalties imposed on narcotics violators is limited, some information on a specific IRS program directed against narcotics violators is available. In accordance with a 1976 DEA/IRS agreement, DEA provides IRS with names and background information on high-level (Class I) drug traffickers. Data for fiscal years 1978 and 1979 indicate that $15.9 million and $13.9 million, respectively, in additional tax and penalties were assessed individuals under this program.

CONCLUSIONS

The traditional law enforcement remedy, incarceration of drug dealers, has not made much of an impact on drug trafficking. Despite years of law enforcement efforts, the drug problem has continued.

The potential effectiveness of forfeiture in combatting the domestic drug problem cannot be projected with any degree of precision, because the statutes authorizing forfeiture remain largely unused. Although an effective forfeiture program may not be a significant factor in curtailing drug trafficking, greater use of forfeiture can provide law enforcement more opportunities to disrupt trafficking activities and diminish the disruptive effect of illegal monies on the economy.

CHAPTER 3

FORFEITURE EFFORT MUST BE BETTER MANAGED

Even though attacking drug traffickers' finances has been a major component of the Government's drug law enforcement policy for several years, it has not been effectively integrated into DEA or U.S. attorney operations. The Department of Justice has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique. Nearly 10 years after the forfeiture statutes were enacted, the Department lacked the most rudimentary information needed to manage the forfeiture effort. No one knew how many forfeiture cases were attempted and why, the disposition of the cases, or why those attempted either failed or succeeded. Investigators and prosecutors lacked incentive and expertise to pursue forfeiture in major drug cases.

Efforts are being made to remedy the lack of forfeiture cases. The Department of Justice

--issued, in November 1980, guidance to prosecutors on the use of forfeiture statutes;

--had in process, as of March 1981, a detailed analysis of all narcotic cases processed under the RICO and CCE statutes; and

--was, as of March 1981, preparing detailed guidance to prosecutors and investigators on how to conduct financial investigations in drug cases.

In addition, DEA

--made attacking the finances of drug dealers a goal of all major trafficker investigations; and

--had, as of February 1980, started to accumulate statistics on forfeitures as a measurement of investigators' performance.

These initial efforts must be continued and implementation monitored if the Government is going to improve its forfeiture law enforcement effort.

JUSTICE MUST OVERSEE FORFEITURE EFFORTS

For several years one of the major objectives of drug law enforcement has been to attack the finances of traffickers. The 1975 White Paper on Drug Abuse prepared for the President by the Domestic Council Drug Abuse Task Force stated that because "trafficking organizations require large sums of money to conduct their business . . . [and] are vulnerable to any action that reduces their working capital," the Government should focus on the traffickers' fiscal resources. Since that time each annual Federal Strategy for Drug Abuse and Drug Traffic Prevention has stressed the importance of concentrating on drug dealers finances. For example, the 1979 Federal Strategy stressed "the importance of attacking the financial base of drug trafficking," and said that "enforcement efforts will concentrate on the assets of known suspected drug traffickers * * *"

Despite these statements of policy, Federal drug law enforcement management paid scant attention to the task of attacking criminal assets. Neither the investigators' agency (DEA) nor the prosecutors' agency (Justice's Criminal Division) compiled data on forfeiture cases.

Through the years, all CCE and RICO prosecutions required the authorization of the Criminal Division. But not until 1980 were prosecutors required to explain the intended use or non-use of the forfeiture provisions of the statutes. Hence, before 1980, little data on forfeiture cases was gathered. The 1980 information requirement concerns the intended use of forfeiture but will not provide data on how successful forfeiture attempts were and why.

Our review of the extent to which the Government uses forfeiture to take the profit out of narcotics trafficking clearly demonstrated the lack of data necessary for managing the forfeiture effort. First, no one knew how many forfeiture cases had been attempted. To determine the number of narcotics RICO and CCE cases and those which involved forfeiture, we were required to accumulate data from a

variety of sources, including: applicable case and statutory law reference documents, Department of Justice Criminal Division files, information accumulated by DEA's Office of Enforcement, and interviews with various Justice Department officials. Second, to identify reasons for the use or non-use of criminal forfeiture we examined selected case files and interviewed various investigators and prosecutors involved in the cases.

Information on the number of forfeiture cases attempted, the disposition of the cases, and the reasons for case failure or success is essential for managing the Government's forfeiture effort and should be continually updated. For example, as noted in chapter 2, we determined that there were only 98 RICO and CCE narcotics cases from inception of the statutes in 1970 through March 1980. Of the 31 we examined in detail, only 8 had forfeiture as a goal in the investigative plan.

The reasons for the little use of forfeiture are many. As discussed in subsequent sections of this chapter, investigators and prosecutors generally lacked the incentive and expertise to pursue forfeiture, and the disclosure of financial information vital to forfeiture cases is hindered by domestic and foreign laws. And, as discussed in chapter 4, the forfeiture statutes are difficult to apply, being ambiguous in some areas or incomplete and deficient in others.

Some meaningful management data is being developed by Justice. For example, in June 1980, DEA and the Criminal Division began an in-depth analysis of all prosecuted RICO and CCE drug cases to determine how the forfeiture provisions can be more effectively used. In November 1980, the Criminal Division required prosecutors to provide the Division an explanation for those cases where forfeiture is not being pursued when they seek authorization to use RICO or CCE.

These and other actions being taken are steps in the right direction. However, Justice needs to continually evaluate the reasons for success or failure of CCE or RICO forfeiture. In addition, Justice's current procedures for evaluating the desirability of analyzing forfeiture are triggered only when a U.S. attorney wants to use the CCE or

RICO statute. Justice also needs to accumulate information to monitor whether U.S. attorneys could utilize the statutes more.

EXPERTISE AND INCENTIVES TO INVESTIGATE AND PROSECUTE FINANCIAL CASES MISSING

Even though attacking the assets of major narcotics organizations has been a stated objective of drug law enforcement for several years, most of the investigations we studied did not have forfeiture of the trafficker's assets as a goal. We reviewed 31 of 98 narcotics cases indicted under the RICO and CCE statutes since their enactment in 1970 through March 1980. Only eight cases had an investigative plan to identify assets for forfeiture purposes. In four of the eight cases where this was done, a forfeiture verdict was returned.

For the most part, forfeiture goals had not been established because investigators were not trained for financial investigations, particularly those involving derivative proceeds; investigators were rewarded on the basis of arrests of major violators rather than forfeiture of their assets; and prosecutors have not been given the challenge or the guidance to pursue forfeiture cases.

DEA does not have financial experts

Most DEA agents do not have sufficient financial expertise to conduct the sophisticated financial investigations required to obtain forfeiture of derivative proceeds. Although about 200 of the 2,000 DEA agents have backgrounds in accounting or business management, DEA does not have any positions classified as financial investigator or agent/accountant. All agents, including those with financial backgrounds, are assigned to general investigative duties rather than to specialized functions. DEA officials say their limited resources do not permit such specialization. Instead of specialization, DEA relies on a short in-house training program to provide a general overview of financial investigative techniques and the cooperation of other agencies to provide specialized financial expertise.

The Financial Investigations Training course represents the principal financial training offered DEA agents. The overall objective of this course is to give special agents and supervisors a thorough understanding of DEA's primary civil statute authorizing forfeiture (21 U.S.C 881), and an introduction to RICO and CCE, the criminal forfeiture statutes. Nearly one-half of DEA's 2,000 agents received this training by the end of fiscal year 1980, with the remainder scheduled for fiscal year 1981.

Although this course is a step in the right direction, it is doubtful that it will enable agents to conduct complex investigations of sufficient scope to obtain forfeiture of significant assets, such as derivative proceeds. The course is of insufficient length to provide extensive training on complex financial analyses, particularly for agents without financial backgrounds. The course for supervisors is 5 days in length; for special agents, it is shortened to 3 days.

Considering the number of topics covered and their complexity, it is unrealistic to expect that more than an introduction to the various techniques can be covered in a week. Topics covered include: history of banking and the Federal Reserve System, 2 hours; Financial Privacy and Bank Secrecy Act, 3 hours; civil statute (21 U.S.C 881), 6 hours; RICO and CCE, 3 hours; and net worth and concealed income analysis, 8 hours.

As one DEA official explained, Financial Investigations Training is still in the "awareness" phase rather than the "how to" phase. Recognizing this, DEA management relies on other law enforcement agencies having financial investigative experience, particularly in complicated financial cases.

The use of other agencies' financial experts, particularly those from IRS, may provide needed expertise on a short-term basis but seems an unlikely long-term solution to the expertise problem. For example, an IRS/DEA memorandum of understanding provides that although the two agencies agree to share certain data on drug cases, IRS will concentrate on the tax aspects of high-level traffickers. Only on a temporary basis will IRS detail personnel to DEA for analyzing financial information other than tax-related information.

Whether or not DEA's in-house financial training and reliance on other agencies' financial experts will result in the types of significant forfeiture cases needed to make inroads on the economic base of drug trafficking organizations is uncertain. The Attorney General's budget guidelines for for fiscal year 1982 said that DEA needs to enhance the financial investigative expertise of its agent force by

--the "recruitment of new agents . . . with special knowledge and skills that can be used particularly for financial investigations," and

--the training of DEA special agents in financial investigations utilizing courses sponsored by the FBI and Treasury Department.

We agree with the need for these actions.

Forfeiture data should be used in evaluating agent performance

DEA's performance measurement system has historically been based on arrests of major violators, not forfeitures of their assets. In addition, cases involving forfeitures are complicated, time consuming, and require extensive investigative resources. As a consequence, agents have had little incentive to develop a case for forfeiture of illicitly derived assets before arresting violators.

A current effort by DEA to make forfeiture data an integral part of the performance measurement system, and thereby encourage forfeiture type investigations, is a step in the right direction. DEA officials stated, however, that although asset seizures and forfeitures may eventually approach the arrests statistics in relative importance, the latter is, and will continue to be, DEA's chief performance measurement.

DEA's asset seizure performance measurement was started in February 1980. Instructions for collection of the data state that "asset seizure" be considered in the broadest sense and include not only seizures but also other revenue producing actions which can be credited to DEA, such as the following:

--Any nondrug seizure made under the civil statute (21 U.S.C. 881) or 21 U.S.C. 848 (CCE) which DEA develops unilaterally or in conjunction with another agency.

--Any seizure made under 18 U.S.C. 1961-64 (RICO) stemming from a drug-related investigation developed by DEA either unilaterally or in conjunction with another agency.

--Any assessment or levy made by IRS on the basis of information furnished by DEA ("information" as used here may consist of an investigative lead).

--Any nondrug seizure made by U.S. Customs on the basis of information furnished by DEA.

--Any nondrug seizure made by any other Federal, State, or local agency on the basis of information furnished by DEA.

--Any nondrug seizure made by a foreign government on the basis of information furnished by DEA.

--Any forfeiture of bond as a result of a defendant becoming a fugitive in any case in which a DEA case file number has been assigned.

--Any fine imposed as a result of a conviction stemming from an investigation conducted by DEA or another agency based upon information furnished by DEA.

--Any abandoned property acquired in connection with a criminal investigation and valued in excess of $100.

Distinctions are made in recording data for RICO, CCE, and civil (21 U.S.C. 881) cases between that which is merely seized and that which is seized and forfeited to the U.S. Government.

Although some of these categories of "seizures" include significant assets requiring considerable agent effort and expertise, many do not. DEA should recognize this difference in evaluating agents' performances and give more weight to forfeitures than to seizures of significant assets of the

type required to destroy the economic base of criminal organizations.

Additional incentives and expertise needed for Federal prosecutors

As with investigators, prosecutors have had neither the incentive nor the expertise to attempt forfeiture of criminal assets. Forty of the 42 prosecutors we held discussions with said they were inexperienced with or unsure of the specific forfeiture procedures under the RICO and CCE statutes. Not only is forfeiture complicated, but cases brought under the RICO and CCE statutes are more difficult to prosecute in that they require proof of a pattern of crime rather than one specific criminal incident. The lack of forfeiture expertise coupled with the proof burden of RICO and CCE prosecutions explains why many U.S. attorneys have been reluctant to use the criminal forfeiture authorizations.

In an earlier report, "The Drug Enforcement Administration's CENTAC--An Effective Approach to Investigating Major Traffickers That Needs to be Expanded" (GGD-80-52, March 27, 1980), we noted that many U.S. attorneys had limited knowledge of, or had a tendency not to use, the forfeiture provisions of CCE and RICO. 1/ Eight of 10 U.S. attorneys involved in the CENTAC prosecutions reviewed advised that attempting to use the forfeiture provisions in those cases could have made them much more difficult to prosecute and may have jeopardized the conviction. Citing their scarcity of resources, two attorneys in charge of Major Drug Trafficker Prosecution Units expressed concern that attempting to obtain forfeiture would not be an efficient use of their time. The U.S. Attorney in one of the primary districts prosecuting large-scale narcotics cases explained that:

> "It takes considerably more time to develop a case when you're going to attempt forfeiture of a trafficker's assets. It might be more efficient to work on another case and get an additional trafficker in jail."

1/DEA's CENTAC program is the premier effort to develop conspiracy investigations of high level narcotics violators.

Prosecutors, like investigators, have traditionally defined success in terms of convictions, not forfeitures. As a consequence, once the evidence necessary to prosecute a case has been developed, the tendency has been to proceed to indictment on a case's substantive counts rather than attempt forfeiture. Twenty-five of the 42 Federal prosecutors we held discussions with said adding forfeiture to an already complicated RICO or CCE case was not worth the effort.

Justice has attempted to solve these problems by providing increased training and guidance to prosecutors as incentives for pursuing forfeitures. Justice has stated that official Department policy is to vigorously seek forfeiture in every CCE and RICO prosecution where substantial forfeitable property exists and there is a reasonable likelihood of success. Justice has also:

--Issued general guidance in November 1980, to prosecutors on the use of forfeiture statutes.

--Presented lectures on forfeiture and the forfeiture provisions of applicable Federal statutes at conferences for narcotics prosecutors and agents.

--Published summaries of the lectures in the U.S. Attorneys' Manual and U.S. Attorney's Bulletin, both of which are distributed to all U.S. attorneys.

--Initiated a study of all CCE and drug-related RICO cases brought to indictment to, among other things, identify the strengths and weaknesses in developing forfeiture cases from inception through prosecution.

--Begun compiling a manual on how to conduct financial investigations in drug cases for detailed guidance to prosecutors and investigators.

The actions taken by the Department of Justice should, in the long run, help solve these problems and change the attitude of prosecutors concerning the pursuit of forfeitures.

Other obstacles to investigating and prosecuting financial cases

Clearly, expertise and incentive are needed to obtain forfeiture of a drug trafficker's assets. Phony names, fictitious corporations, and foreign bank accounts are just a few of the obstacles blocking the road to forfeiture. Compounding the difficulty of the task are the foreign and U.S. laws restricting access to financial information.

Obtaining forfeiture requires investigators and prosecutors to, not only identify the potential defendant's assets, but prove a connection between the assets and the crime. Although some of the defendant's assets can be identified and traced to the crime simply through observation, other types of assets can be easily hidden by the criminal. For example:

--Real estate can be held under a fictitious name or corporation.

--Cash and precious metals can be hidden.

--Stocks and bonds may be held by nominees or in bearer form.

One of the primary methods used by criminals to hide assets is the use of offshore bank accounts to "launder" the illicitly derived profits. The investigator's problem is the bank secrecy laws of some foreign countries which prohibit the disclosure of needed bank information.

In one scenario, a courier smuggles currency from the United States to a bank in the Carribean and deposits it in a bank account of a Carribean corporation used as a front. The money is then wire-transferred to the U.S. bank account of a domestic front corporation using a false loan document that not only justifies the money transfer, but also makes it appear exempt from U.S. income taxes. This money can then be used to invest in legitimate corporations or real estate. The secrecy laws of this Carribean country prevent U.S. investigators from obtaining information on bank accounts, front corporations, or money tranfers, making it difficult to trace the illegally generated profits to the legitimate assets.

The Government has tried to breach the cover that foreign banking laws provide through agreements with foreign countries. Such Mutual Judicial Assistance Treaties provide for assistance in acquiring banking and other records, locating and taking testimony from witnesses, and serving judicial and administrative documents. One such agreement with Switzerland already exists. Another treaty with Colombia was finalized in August 1980 and is waiting ratification by the Senate, and two others (with Turkey and the Netherlands) are being negotiated. Even if treaties with these countries are successfully implemented, numerous other countries with strict bank secrecy laws are more reluctant to cooperate because of their desire to protect the lucrative offshore financial business that often is a primary basis of their local ecomony.

Tax Reform Act of 1976 has limited IRS' role in drug enforcement

The Tax Reform Act of 1976 not only limited IRS' role in drug enforcement, but it also has restricted access to tax information by law enforcement agencies. In previous congressional hearings and reports, we have outlined our position on the Tax Reform Act of 1976. 1/ We supported revisions to the Tax Reform Act of 1976 aimed at striking a proper balance between privacy concerns and law enforcement needs. We were particularly concerned that the law provided no means for IRS to disclose on its own initiative the information it obtains from taxpayers regarding the commission of nontax crimes. We recommended that the Congress authorize IRS to disclose such nontax criminal information by obtaining an ex parte court order.

1/GAO testimony before the Senate Permanent Subcommittee on Investigations, 12/13/79; GAO testimony before the Senate Appropriations Subcommittee on Treasury, Postal Service, and General Government, 4/22/80; GAO report "Disclosure and Summons Provisions of 1976 Tax Reform Act--Privacy Gains with Unknown Law Enforcement Effects," (GGD-78-110, 3/12/79); GAO report "Disclosure and Summons Provisions of 1976 Tax Reform Act--An Analysis of Proposed Legislative Changes" (GGD-80-76, June 17, 1980).

As a result of the hearings, identical bills (S.2402 and H.R. 5826) significantly revising the disclosure statute were introduced in the 96th Congress. In our June 1980 report (GGD-80-76), we said that, although we agree with the basic thrust of the proposed amendments, we believe the legislation can be further refined to authorize a more effective disclosure mechanism and to improve the balance between privacy and law enforcement concerns. Our recommended refinements include more clearly defining tax information categories and providing a court order mechanism through which IRS may unilaterally disclose information concerning nontax crimes.

Right to Financial Privacy Act of 1978 hampers law enforcement access and use of certain financial information

The Right to Financial Privacy Act, which became effective in March 1979, has also complicated forfeiture investigations. Among other things, the act requires that a customer be notified if his records, maintained by a financial institution, are being sought by a law enforcement agency. This provides potential defendants notice of actions the Government is planning, allowing them the time necessary to sell or conceal their assets.

In our report "Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978" (GGD-80-54, May 29, 1980), we noted that several difficulties had occurred since the act's passage. These included:

--Controversy between some bank supervisory agencies and Federal law enforcement agencies over the interpretation of criminal referral procedures.

--Refusal by financial institutions to provide sufficient data on suspected criminal violations to law enforcement agencies.

--Refusal by financial institutions to honor the formal written requests for information by Federal law enforcement agencies.

We concluded in the report that agencies involved in implementation of the act should be given more time to work out problems before changes in the law were considered.

Currency information not being effectively used against drug traffickers

The Bank Secrecy Act passed by the Congress in 1970 furnished Federal agencies with additional tools to fight organized crime, including drug trafficking. It was felt the act's financial reporting requirements would help in investigating illicit money transactions and those persons using foreign bank accounts to conceal profits from illegal activities.

Basically, the Bank Secrecy Act regulations require three reports to be filed with the Federal agencies:

--Domestic banks and other financial institutions must report to IRS each large (more than $10,000) and unusual transaction in any currency.

--Each person who transports or causes to transport more than $5,000 in currency and other monetary instruments into or outside the United States must report the transaction to the U.S. Customs Service.

--Each person subject to U.S. jurisdiction must disclose interests in foreign financial accounts to the Treasury Department.

Treasury has overall responsibility for coordinating the efforts of Federal agencies and assuring compliance with the act.

Numerous problems have been identified restricting the act's effectiveness, including

--delays in implementing the act's requirements,

--slow dissemination of information,

--inconsistent compliance by banks, and

--limited analysis of reported information.

Treasury recently strengthened its regulations governing the reporting of currency transactions. However, to be useful in investigating financial transactions, these reports will have to be employed more often by criminal investigators. Of the 31 RICO and CCE cases we examined, agents used financial information available through the Bank Secrecy Act in only 4.

CONCLUSION

Statutes authorizing the forfeiture of criminal assets are 10 years old, yet the Government only recently began to use them. In 1980, the Department of Justice began various actions to encourage forfeiture cases. These initial efforts, involving both investigators and prosecutors, must be supplemented and implementation monitored if forfeiture cases are to increase.

RECOMMENDATION TO THE ATTORNEY GENERAL

We recommend that the Attorney General direct Justice's Criminal Division to analyze on a continuing basis the extent forfeiture statutes are used and the reasons for their success or failure. When problems restricting forfeiture use are identified, the Criminal Division should propose solutions, whether or not they involve administrative or legislative action.

CHAPTER 4

EMERGING RICO AND CCE CASE LAW SUGGEST LEGISLATIVE ACTION WARRANTED

The Judiciary's views on the RICO and CCE forfeiture authorizations are only now emerging through case law. Several court decisions forebode problems and suggest that the Congress needs to strengthen the criminal forfeiture statutes. Four problems have been identified:

--The scope of the forfeiture authorizations has been narrowly defined.

--Forfeiture under RICO has been limited by some courts to interests in legal enterprises or has been construed so as not to include "profits."

--The extent to which assets must be traced to the crime of conviction is unclear.

--Transfer of assets prior to conviction limits the effectiveness of forfeiture.

In addition, the procedures necessary to accomplish a forfeiture have not been clearly defined. The Attorney General should evaluate the workability of current procedures and take the appropriate steps to affect any necessary revisions.

SCOPE OF FORFEITURE AUTHORIZATIONS NOT CLEARLY DEFINED

The scope of the RICO and CCE forfeiture authorizations were defined in general terms by the applicable statutes. The courts, in some cases, have construed the forfeiture authorizations narrowly. There also is a lack of consensus on what assets are forfeitable under present law.

The CCE authorization speaks in terms of forfeiture of, among other things, "profits"--a term commonly defined as the proceeds of a transaction less its cost. Since CCE

does not explicitly define "profit," questions have been raised whether costs, such as the cost of narcotics to the dealer, are "profits," and hence forfeitable in criminal litigation. 1/ RICO, on the other hand, speaks only in terms of forfeiting "interests" in an enterprise. Several courts have questioned whether profits generated by a RICO violation qualify as an interest in an enterprise, thus subjecting them to forfeiture.

For example, in a case in Los Angeles, the Government brought RICO indictments against several defendants for fraud, bribery, and racketeering in connection with a scheme to rig competitive bids involving $8.8 million in contracts. The Government had sought forfeiture of the amounts payable to the defendants for the contracts. In January 1980, the Ninth Circuit Court of Appeals ruled that this amount was not forfeitable because it represented profits from the enterprise, not interests in the enterprise. The court ruled that unlike CCE, RICO does not provide explicit coverage of profits. Because CCE and RICO were passed by the same Congress the court said "had Congress intended forfeiture of racketeering income [profits], we believe it would have expressly so provided." 2/

In addition to the case in the Ninth Circuit, decisions of courts in the Second, Third, Fourth, and Fifth Circuits indicate that assets forfeitable under RICO extend only to actual holdings of the defendant in corporate-like entities (e.g., partnership interest, union office held by defendant, stock, debt, or claim ownership). 3/ As a general proposition, so-called fruits--profits or distributed returns on investments--are not forfeitable under this view. Dividends or profits obtained by a criminal

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1/United States v. Mannino, 79 Cr. 744 (S.D.N.Y. 1980).

2/United States v. Marubini, 611 F.2d 763 (9th Cir. 1980).

3/United States v. Thevis, 474 F. Supp. 134 (N.D.Ga. 1979); United States v. Mannino, 79 Cr. 744 (S.D.N.Y. 1980); United States v. Meyers, 432 F. Supp. 456, 461 (W.D.Pa. 1971); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977); United States v. Grande, 620 F.2d 1026 (4th Cir. 1980).

and nonstock assets acquired by the criminal with the profits or dividends would therefore be immune from forfeiture, as would cash received on the sale of the interest in the enterprise.

The analytical basis for these decisions is that: (1) RICO, unlike CCE, does not provide explicit coverage of profits, and (2) the "interests" forfeitable under RICO are limited strictly to the defendant's interests in an enterprise. 1/ These decisions thus reject the notion that all assets traceable to an ill-gotten gain are forfeitable under RICO. Courts holding this view, point to RICO's legislative history to show that forfeiture, together with a combination of other criminal and civil sanctions, was designed to rid commercial enterprises of organized crime. When, for example, a racketeer receives cash in exchange for his interest in an enterprise (e.g., cash in exchange for stock or other proprietary holding), the interest in the enterprise ceases to exist, and forfeiture can no longer serve a useful purpose within the framework of RICO's legislative scheme.

Reasoning that retention of ill-gotten gain provides the racketeer with a source of potential control or influence over an enterprise, the Justice Department has argued, to date unsuccessfully, that all interests acquired in violation of RICO are forfeitable, regardless of whether the assets involved are technically interests in an enterprise or interests derived from that enterprise.

LIMITATIONS ON INDIVIDUALS ASSOCIATED IN FACT

A related point of controversy is whether RICO can reach any of a defendant's ill-gotten gains when a de facto combination of individuals constitutes the only enterprise through which the defendant engages in racketeering activity. RICO covers forfeiture of interests in the enterprise, but a de facto enterprise lacks the attributes of

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1/United States v. Marubini, 611 F.2d 763 (9th Cir. 1980).

a corporate entity, and hence is not capable of owning, purchasing, holding, or transferring any property in its own right.

This raises the very troublesome issue of whether there exists any interest in a de facto enterprise which can be forfeited under RICO. If there is not, the assets of individuals informally associated to engage in narcotics trafficking or other illicit activity would be exempt from forfeiture under RICO.

Aside from coverage of the forfeiture remedy in this area, there is the more fundamental and perplexing question of whether RICO authorizes the prosecution of individuals associated in fact to engage in exclusively illegal activity unrelated to a legitimate business enterprise. To the extent RICO does not cover de facto enterprises, forfeiture clearly is not an available remedy.

In a 1980 decision, the U.S. Court of Appeals in the First Circuit said such informal de facto enterprises were not covered by the RICO statute. 1/ In this case the evidence established the existence of an informal criminal association which engaged in several kinds of activities including: stealing and illegally selling licit drugs, facilitating insurance frauds by arson, and bribing police officers. On appeal, the First Circuit reversed the primary defendant's RICO conviction, holding that RICO does not apply to wholly illegal enterprises such as the criminal association charged in the case. It concluded that if the Congress had intended to include "criminal enterprises" within the statute's coverage it would expressly have done so.

On the other hand, the U.S. Fifth Court of Appeals in 1978 ruled that RICO does cover an "informal de facto association." 2/ The case involved defendants who conducted a conspiracy engaging in such criminal activities as theft, fencing stolen property, and narcotics distribution.

1/United States v. Turkette, Crim. No. 79-1545 (1st Cir. decided Sept. 23, 1980).

2/United States v. Elliot, 571 F.2d 880 (5th Cir. 1978).

As of December 1980, 10 of the 11 U.S. Court of Appeals have ruled on whether the RICO statute covers de facto enterprises: generally, 2 have said no and 8 have said yes.

Questions surrounding RICO's applicability to de facto enterprises and the forfeitable status of a defendant's interest in those enterprises are of special significance in narcotics cases, in which many assets could be considered part of the de facto drug enterprise.

EXTENT OF TRACING REQUIRED FOR FORFEITURE IS UNCLEAR

A third problem area is that confusion exists about the degree to which assets must be followed to their illicit origin to be forfeited. Unlike common law forfeiture of estate, RICO requires a nexus other than mere ownership between the defendant's misconduct and the property to be forfeited.

If the forfeitable property represents immediate cash proceeds seized at the scene of an illicit transaction, there is little difficulty in showing its origin. Also, where the medium of exchange in a drug transaction is cash, and the cash is later commingled with other cash assets, some authorities believe the Government could obtain a cash forfeiture under CCE simply by showing that the defendant's net worth was swollen as a result of the trafficking.

For forfeiture of noncash assets, however, serious asset identification problems may arise if the property subject to forfeiture has changed hands in multiple transfers, changed form, or both. This is so because RICO and CCE require a relationship between the property to be forfeited and the offense of conviction. As both a legal and practical matter, this imposes an obligation on the prosecution to show, through asset identification and tracing, that the property to be forfeited was itself purchased, acquired, or maintained with illicitly derived funds.

Although RICO and CCE provide almost no guidance on the amount of tracing required to sustain a criminal forfeiture, the Justice Department is of the view that because

forfeiture under both statutes is a criminal sanction, the tie between the property and the wrong-doing must be proven beyond a reasonable doubt. For cases involving carefully hidden or laundered assets, application of the "beyond a reasonable doubt" standard would suggest that a net worth analysis would be insufficient to sustain a forfeiture, and a much more thorough and comprehensive financial investigation would be essential.

PRECONVICTION TRANSFER OF ILL-GOTTEN GAINS LIMITS FORFEITURE

A fourth problem area deals with the uncertain status of assets that would otherwise be subject to forfeiture but which, for any of a variety of reasons, are transferred before forfeiture can be accomplished.

These transfers may occur in three basic ways. One is for the property to be transferred to a third party, with or without consideration. The difficulty with tranfers of this type is that a criminal trial under RICO and CCE determines the guilt or innocence of the defendant and, by implication, the defendant's rights in the property. Once the property is transferred, there are serious conceptual and legal difficulties in requiring the defendant to forfeit property he no longer has or, alternatively, in requiring third parties to forfeit property without a trial. A second type of transfer occurs when a defendant places ill-gotten gains in foreign depositories beyond the jurisdiction of the United States, yet retains so-called "clean" money in domestic depositories and domestic investments. Neither RICO nor CCE make explicit provision for forfeiture of clean assets in substitution for illicit assets, the latter being beyond the reach of the United States. Yet a third type of transfer is for a lien to be filed against the property by, for example, the defendant's attorneys. After defense counsel's fees are deducted, the remainder of the property is forfeited to the government.

Transfer of assets by narcotics violators in a case in South Florida limited the amount of forfeitures. In this case, a Florida-based organization imported over one million pounds of Colombia marijuana and grossed about $300 million over a 16-month period. Forfeiture was

attempted on several items, including two residences worth $750,000. However, a $559,000 lien was filed against the property to pay for the defendant's counsel, and $175,000 was returned to the unindicted wife of a defendant as joint owner of one of the residences. After these liens were paid, the Government ended up with only $16,000. Although the court in this case agreed that forfeited assets could be used to pay the defendant's attorney, other courts have ruled to the contrary. 1/

Preconviction transfers of assets raise two fundamental legal questions. The first is whether the Government may seek forfeiture of "clean" assets once a transfer has occurred. The second is whether transferred assets in the hands of a third party are forfeitable. There is very little case law on either issue.

RICO and CCE clearly require a connection between the property to be forfeited and the offense for which the defendant is convicted. Neither statute contains language, expressly or by clear implication, that authorizes the substitution of so-called clean assets. This accounts for the Department's view that remedial legislation would be a necessary precondition to a successful substitute assets forfeiture.

The legal status of assets in the possession of a transferee is considerably more confused. Justice argued in one case that property becomes tainted at the moment it is connected with or generated by illegal activity. Reasoning that RICO and CCE direct the Attorney General to make "due provision for the rights of innocent persons," Justice suggests that a third party transferee's recourse is to petition the Justice Department for mitigation/remission after he has forfeited his assets. This theory was rejected in United States v. Thevis, 474 F. Supp. 134, 145 (N.D.Ga. 1979), at least as it might apply to unindicted transferees who receive the property prior to indictment of the defendant. The result in a second case, United States v. Mannino, 79 Cr.

1/United States v. Bello, 470 F.Supp. 723 (S.D.Ca. 1979).

744 (S.D.N.Y., decided April 21, 1980), suggests the taint theory might be viable when applied to transferees who are merely holding the property as nominees of the defendant or who receive the property with constructive notice (presumably by indictment or restraining order) of its forfeitable status.

Beyond situations of this type, neither case law nor the forfeiture statutes provide clear guidance on criminal forfeiture of transferred assets. Although the taint theory has been successfully applied to certain types of assets in civil forfeiture cases, we know of no reported case, civil or criminal, where it has been successfully argued to obtain forfeiture of direct or derivative proceeds transferred to another party. 1/ Also, the defendant in a criminal forfeiture case forfeits nothing until he has been tried and found guilty. Under one version of the taint theory, however, third parties could be called upon to forfeit assets, possibly made illicit without their knowledge, in the absence of a trial and without an adjudication of personal guilt. Justice recognizes that the ultimate effectiveness of forfeiture under RICO and CCE may well depend on the judiciary's acceptance of this legal theory.

INADEQUATE PROCEDURES FOR CRIMINAL FORFEITURE

A fifth problem area concerns the lack of procedures that must be followed to accomplish a criminal forfeiture. The Federal Rules of Criminal Procedure were amended in 1970 to make provision for the inclusion in the indictment of a forfeiture count and the return of a special jury verdict on such count. If the indictment does not contain a forfeiture count, criminal forfeiture automatically ceases to be an available remedy. 2/ Once an indictment is obtained, RICO authorizes the court where the action is pending to issue a restraining order prohibiting the

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1/Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and cases cited therein.

2/United States v. Hall, 521 F.2d 406 (9th Cir. 1975).

transfer of assets subject to forfeiture, require a performance bond, or to take such other action as it may consider appropriate.

Beyond these basic procedures, the issues of obtaining control of the property, taking care of it, settling the rights of third parties, and selling the property have not been fully addressed. In the RICO statute, the Congress simply provided that customs law procedures should be followed "insofar as applicable and not inconsistent with the provisions [of RICO]." The same is true of the procedures applicable under the CCE statute. The lack of clear procedures gives rise to considerable uncertainty.

Customs procedures are difficult to apply in the context of criminal forfeiture for four basic reasons:

--First, customs procedures were intended to cover civil forfeiture in rem, where it is the guilt of the property that is at issue--not the guilt of the property holder. In criminal forfeiture, however, it is the guilt of the property holder that is generally at issue.

--Second, customs procedures permit buy backs of forfeited property. The application of this procedure to criminal forfeiture has resulted in at least one convicted RICO defendant "buying back" interests in an enterprise ordered forfeited. 1/ This seems to fly in the face of a primary RICO objective, namely, to remove racketeers from commercial enterprises.

--Third, customs procedures are tailored to forfeitures involving tangible objects--automobiles, jewelry, and the like--and offer almost no guidance regarding the procedures for disposing of a corporation, stock, or other proprietary holding, the latter being a more likely object of forfeiture under RICO and CCE.

--And fourth, Customs procedures deal with third parties as if they had already forfeited assets, not in terms of asset forfeitability. The innocence of third party transferees is largely irrelevant for purposes of civil forfeiture.

1/United States v. Huber, 603 F.2d 387 (2d Cir. 1979).

Justice is aware of these problems, and observes that there are no reported cases to which one can look for guidance. The Department's advice to attorneys as stated in the November 1980 manual on the RICO and CCE statutes is to "devise procedures on a case by case basis, using the customs law procedures as a guide or analogy but adapting them to the different circumstances of a RICO or CCE case." If forfeiture is to be a frequently used remedy, we doubt the ad hoc, case by case approach advanced by Justice will always prove reliable. As experience is acquired with RICO and CCE, there may well be a demonstrable need for prescribing uniform and comprehensive forfeiture procedures, either legislatively or administratively.

POTENTIAL USE OF CIVIL FORFEITURE OF DERIVATIVE PROCEEDS

The Drug Enforcement Administration believes there is potential for significant forfeitures of derivative proceeds of narcotics trafficking organizations under its civil forfeiture authorization (21 U.S.C. 881). 1/

DEA's civil forfeiture statute (21 U.S.C. 881) was amended in 1978 to cover proceeds and derivative proceeds. In addition to authorizing forfeiture of contraband and derivative contraband, the statute now provides for the forfeiture of:

> "All money, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance * * *, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used to facilitate any [controlled substance] violation * * *" 21 U.S.C. 881 (a)(6).

1/Although RICO's civil remedies provide for divestiture and and dissolution, they do not authorize civil forfeiture. The civil counterpart to CCE, though not authorizing the civil injunctive remedies available under RICO, does make provision for civil forfeiture in certain circumstances.

If read literally, DEA's civil forfeiture statute generally seems to have a broader reach than either the CCE or RICO criminal forfeiture authorizations. For example, Section 881, unlike RICO, does not limit the property subject to forfeiture to interests in an enterprise. Nor, unlike the CCE statute, is forfeiture keyed to profits realized. Section 881 authorizes forfeiture of, among other things, "proceeds"; Justice believes that it generally is easier to show proceeds than profits, and that the total forfeiture would obviously be greater where it encompasses all proceeds rather than merely profits and interests in an enterprise. The basic operation of civil forfeiture is discussed on page 5. Other advantages to civil forfeiture in DEA's view are the lower standards of proof and the fact that Section 881 authorizes seizure of the property to be forfeited prior to judicial proceedings, thus reducing possibilities of asset transfer or dissipation.

Despite the seemingly broad reach of Section 881, however, the statute has never been tested in the derivative proceeds area. The extension of civil forfeiture to reach proceeds could raise an issue about the extent to which the civil process may be used to administer sanctions also available under a criminal statute like CCE and RICO, and to accomplish a proceeds forfeiture without regard to the constitutional safeguards and burden of proof applicable in a criminal prosecution.

Until it is clear that Section 881, as applied to proceeds, will not be considered the functional equivalent of criminal forfeiture and trigger some or all of the constitutional requirements, burden of proof standards, and other safeguards usually associated with criminal prosecutions under CCE and RICO, the positive potential of civil forfeiture to reach the assets of traffickers cannot be fully assessed. We were advised by DEA officials that they are actively looking for opportunities to test Section 881 with a view toward obtaining a derivative proceeds forfeiture.

CONCLUSIONS

Recent decisions by the Judiciary and questions raised by several courts suggest the need for close congressional scrutiny of the adequacy of the RICO and CCE forfeiture authorizations. Several legislative modifications to RICO

and CCE could increase the potential for use of criminal forfeiture, particularly in narcotics cases. The lack of specific procedures also may be a factor discouraging greater use of the criminal forfeiture authorizations.

RECOMMENDATIONS TO THE CONGRESS

We recommend that the Congress amend the criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. 1961 et seq., to:

--Make explicit provision for the forfeiture of profits and proceeds that are (1) acquired, derived, used, or maintained in violation of RICO or (2) acquired or derived as a result of a RICO violation.

--Authorize forfeiture of substitute assets, to the extent that assets forfeitable under RICO: (1) cannot be located, (2) have been transferred, sold to, or deposited with third parties, or (3) have been placed beyond the general territorial jurisdiction of the United States. This authorization would be limited to the value of the assets described in (1), (2), and (3), above.

--Clarify that interests forfeitable under RICO include assets illicitly derived, maintained, or acquired that are held or owned in an individual capacity by defendants convicted of using a de facto association/enterprise to violate RICO.

We recommend that the Congress amend the criminal forfeiture provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. 848, to:

--Clarify that assets forfeitable under CCE include the gross proceeds of controlled substance transactions.

--Authorize forfeiture of substitute assets, but only to the extent that assets forfeitable under CCE (1) cannot be located, (2) have been transferred or sold to, or deposited with third parties, or

(3) placed beyond the general territorial jurisdiction of the United States.

Proposed criminal forfeiture legislation is shown in appendix V.

RECOMMENDATION TO THE ATTORNEY GENERAL

We recommend that the Attorney General evaluate the workability of current forfeiture procedures and take the appropriate steps to effect any necessary revisions.

CHAPTER 5

AGENCY COMMENTS

The Department of Justice was provided a copy of our draft report on February 9, 1981, for comment. However, the Department did not respond within the required 30 days as prescribed in Public Law 96-226. Subsequently, on March 19, 1981, the formal comments were received. (See app. VI.) The late response, coupled with the issue date set by the requestor, precluded us from evaluating the comments in detail.

Overall, the Department generally agreed with the report findings. Comments were received from four Justice organizations: DEA, Criminal Division, FBI, and the Executive Office for U.S. Attorneys.

DEA concurred with our findings and recommendations but noted several areas needing clarification. For example, DEA (1) contends that asset forfeiture should be viewed in the light of being but one part of the three-prong attack on drug trafficking (interdiction of drugs and incarceration of traffickers being the other two), (2) states that asset forfeitures in 1980 have increased 20-fold over the 1979 amount, and (3) stresses the difficulties of using criminal forfeiture statutes, particularly prosecution-related problems.

The Criminal Division agreed with our conclusions except for placing overall responsibility for limited forfeiture actions on the lack of leadership by Justice; made various comments on our legislative recommendations; and noted the problems of reaching criminal assets. The Division, however, questioned the data on which the conclusions were based. Certain RICO cases, in its opinion, were not properly used in presenting the Government's forfeiture effort over the last 10 years. The Division said its biggest problem, however, was the absence of data on key questions, such as the magnitude of assets subject to forfeiture under RICO at the time of indictment and how much of the assets could be traced and preserved from dissipation for forfeiture. We agree these are problem areas. To increase the amount of assets subject to forfeiture, ease tracing requirements, and preserve assets for forfeiture are the purposes of our legislative recommendations.

The FBI fully supported our legislative recommendations and suggested several additional recommendations to the Congress to combat drug trafficking.

The Executive Office for U.S. Attorneys said it agrees with the overall objectives espoused by our report, supports the recommendations to the Attorney General, and agrees with our recommendations to the Congress.

APPENDIX I

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

December 27, 1979

Honorable Elmer B. Staats
The Comptroller General of the
United States
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Staats:

Improving the ability of law enforcement agencies to take the profit and incentives out of organized crime has been a matter of continuing concern to this subcommittee. Although there is general agreement on the importance of seizing and causing forfeiture of the criminals' illicitly derived assets, apparently little has been done in this area.

By early summer we intend to hold the first of what will probably be a series of hearings on this subject. As a starting point we will focus on the dimensions of criminal asset seizures by law enforcement agencies. We would like GAO to assist us by identifying the various statutes that provide seizure and forfeiture authority and the substantive dimensions of each and by determining the extent and value of such seizures made by the various agencies.

Included within such a study should be an analysis of a representative sample of DEA investigations of the highest level traffickers and Department of Justice prosecutions where they occurred. The cases selected should be the ones involving the highest level of illicit profits and accumulated assets, whether or not prosecutions resulted or assets were forfeited. The study should attempt to assess the financial status and the magnitude of operations of the targeted illicit conspiracy at the commencement of law enforcement interest as compared with the present, regardless of whether indictments were obtained.

APPENDIX I

We realize that the statutes authorizing seizures are relatively new and complex and that the large criminal organizations are sophisticated; complex technical financial investigations must be performed in conjunction with traditional investigative techniques. Consequently, we do not expect to be able to cover all of these areas by early summer. However, because our goal is to improve the ability of law enforcement agencies to take the profit out of crime, we would like GAO's further assistance in identifying any legal or practical stumbling blocks that hamper agencies' efforts as well as your suggestions as to what corrective actions can be taken.

Sincerely,

Joseph R. Biden, Jr.

RICO AND CCE CRIMINAL SANCTIONS

RICO

If convicted, a RICO violator faces a maximum $25,000 fine and 20 years imprisonment for each violation. Although fines and incarceration are common sanctions for criminal violations, the maximum fine and term of imprisonment available under RICO are somewhat higher than those for other Federal offenses. However, the most unique feature of RICO's criminal sanctions is the statute's provision for criminal forfeiture of ill-gotten gains. RICO provides that upon conviction, the defendant shall forfeit to the United States (1) any interest acquired or maintained in violation of RICO and (2) any interest in any enterprise that the defendant participated in, set up, or controlled in violation of RICO. Section 1963(a) of title 18, U.S.C., states:

> "Whoever [violates RICO] shall forfeit to the United States (1) any interest he has acquired or maintained in violation of [RICO] and (2) any interest in, security of, claim against, or property or contractual rights of any kind affording a source of influence over, any enterprise which he established, operated, controlled, conducted or participated in the conduct of, in violation of [RICO] * * *."

CCE

If convicted, a first-time CCE offender faces a maximum $100,000 fine, a minimum prison term of 10 years, and a maximum term of life. Unlike those convicted under RICO, CCE violators are not eligible for sentence suspension, probation, or parole. CCE is unique among Federal offenses in requiring imposition of a mandatory minimum term of imprisonment and in nullifying parole eligibility. Like RICO, however, CCE does provide for forfeiture of certain illicit assets:

> "(2) Any person who is convicted * * * of engaging in a continuing criminal enterprise shall forfeit to the United States

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise." 21 U.S.C. §848(a) (2).

APPENDIX III

DRUG REVENUES VERSUS FORFEITURES FOR 31 SELECTED TRAFFICKING ORGANIZATIONS

Drug organization trafficked in	Year of investigation	Annual revenues	Forfeitures		
			Civil	Criminal	Total
			(thousands of dollars)		
heroin	1978	$ 30,000	$ 0	$260	$260
hashish oil	1977	15,000	0	0	0
methaqualone	1979	1,350	0	800*	800
heroin	1976	540,000	0	0	0
marijuana	1979	8,157	0	0	0
cocaine/marijuana	1974	26,285	0	0	0
cocaine	1974	150,000	0	0	0
marijuana	1978	n/a	0	0	0
cocaine	1977	18,240	0	0	0
marijuana	1978	225,000	0	16	16
marijuana	1979	3,558	0	0	0
cocaine	1979	9,600	0	0	0
marijuana	1979	8,640	1,100	0	1,100
heroin	1977	17,000	10	0	10
marijuana	1976	7,364	0	0	0
marijuana	1977	n/a	0	0	0
LSD/PCP	1975	151	0	0	0
heroin/cocaine	1978	30,060	85	0	85
cocaine	1970	5,500	0	0	0
PCP	1976	129	0	0	0
heroin/cocaine	1977	182	0	0	0
marijuana	1975	1,959,000	2	0	2
heroin	1977	n/a	27	200	227
hashish	1977	171	0	0	0
heroin	1978	6,360	0	0	0
heroin/cocaine	1973	1,200,000	0	0	0
cocaine	1978	6,000	0	0	0
heroin	1979	1,223,000	0	0	0
hashish	1977	162	0	0	0
heroin	1976	12,000	34	0	34
dangerous drugs	1979	155	14	0	14

n/a - data not available
* - forfeiture is being appealed

LISTING OF ALL NARCOTICS CASES IN WHICH CCE AND RICO INDICTMENTS WERE RETURNED SINCE ENACTMENT OF STATUTES (THROUGH MARCH 30, 1980)

Main defendant(s)	Year investigation initiated (note a)	Judicial district (note b)	Charge (CCE or RICO)	Disposition (note c)	Criminal forfeitures (note d)
Abraham	1972	SD New York	CCE	CCE conviction	None
Adams	1976	SD Ohio	RICO	RICO conviction	None
—	1971	ED/SD New York	CCE	Acquitted	—
Amaya	1977	ED Michigan	CCE	CCE conviction	None
Avila-Araujo	1978	CD California	RICO/CCE	CCE conviction and 1 fugitive	Forfeited $260,000 (estimated value) in vehicles, real estate, and a residence under CCE
—	1978	ND California	RICO	Acquitted	—
Barnes	1976	SD New York	CCE	CCE conviction	None
Bergdoll	1975	Dist. of Delaware	CCE	Convicted of lesser charges	None
—	1976	ND Illinois	RICO	Acquitted	—
Boyd	1979	SD Florida	CCE	Pending	—
Burt	1979	CD California	CCE	CCE conviction, but defendant is a fugitive	CCE forfeiture of a ranch (estimated value $55,000) and $47,000 cash
Cady	1975	ED Michigan	CCE	CCE conviction	None
Carr	1979	SD Indiana	CCE	Convicted of lesser charges	None
Casey	1978	ED Michigan	CCE	Pending	—
Cason	1977	ED Michigan	CCE	CCE conviction	None
Castro	1977	SD Indiana	RICO	RICO conviction	Forfeiture under RICO of a taxi company having no value
Chagra	1977	WD Texas	CCE	CCE conviction	None
Christian/Palmeri	1975	SD California	RICO	RICO convictions (3)	Forfeited $100,000 cash pursuant to RICO plea in lieu of real property
Collier	1970	ED Michigan	CCE	CCE conviction	None
Cortez	1978	WD Michigan	CCE	Convicted of lesser charges	None
Cravero	1974	SD Florida	CCE	CCE conviction	None
—	1974	SD Florida	CCE	Acquitted	—
Douglas/Stone	1976	ED Michigan	CCE	CCE conviction (Douglas); convicted of lesser charges (Stone)	None
Enriquez	1977	Dist. of Arizona	CCE	CCE conviction	None
Farese	1978	SD Florida	CCE	Pending	—
Fry	1975	ED Michigan	CCE	CCE conviction	None
Gallardo	1976	SD New York	CCE	Fugitive	None
Gamba	1977	ND California	RICO	Pending	—
Gant/Hawkins	1975	WD Missouri	CCE	Convicted of lesser charges	None
Gibson	1976	Dist. of New Jersey	CCE	Convicted of lesser charges	None
Godoy	1979	CD California	RICO	RICO convictions (4)	A RICO forfeiture (currently under appeal) of $800,000 (estimated value) in properties.
Gottlieb	1979	SD Florida	CCE	Convicted of lesser charges	None
Gordon	1979	SD Florida	CCE	Pending	—
Gramatikos	1977	ED New York	CCE	CCE conviction	U.S. Government realized nothing although a boat and disco in Greece were forfeited under CCE
Grant	1972	SD New York	CCE	Convicted of lesser charges	None
Griffin	1975	SD New York	CCE	Convicted of lesser charges	None
Harris/Young	1973	ED Pennsylvania	CCE	Convicted of lesser charges	None
Hawkins	1977	SD Florida	RICO/CCE	Pending	Pending RICO forfeiture of a property having an estimated value of $100,000
Helton	1979	SD New York	CCE	CCE conviction	None
Hicks	1975	ND Texas	CCE	CCE conviction	None
Holman	1978	ED Pennsylvania	CCE	Convicted of lesser charges	None
Howard	1977	Dist. of Maryland	CCE		

[illegible]	1977	ND Texas	RICO	Convicted of lesser charges	None
Jackson	1974	Dist. of Utah	CCE	CCE conviction	None
Jeffers	1973	ND Indiana	CCE	CCE conviction	None
—	1972	SD West Virginia	CCE	Acquitted	—
Johnson	1976	ND Florida	CCE	CCE conviction	None
King	1977	Dist. of Colorado	RICO	Convicted of lesser charges	None
Kirk	1974	ED Missouri	CCE	CCE conviction	None
Kulik/Davis	1977	CD California	CCE	CCE conviction (Davis); Convicted of lesser charges (Kulik)	None
Lombardozi	1977	SD Florida	RICO	RICO conviction	None
Lucy	1978	ED Virginia	RICO/CCE	RICO conviction	A trailer, land and dwellings (estimated value of $167,000) were forfeited under RICO
Lurtz	1978	Dist. of Maryland	CCE	CCE conviction	None
Lyles	1975	Dist. of Maryland	CCE	CCE conviction	None
Lynch	1977	Dist. of Columbia	RICO/CCE	CCE and RICO convictions	None
Maddin/Broussard	1975	WD Texas	CCE	Convicted of lesser charges	None
Manfredi/LaCosta	1972	SD New York	CCE	CCE conviction (LaCosta); Convicted of lesser charges (Manfredi)	None
Mannio	1979	SD New York	RICO/CCE	RICO and CCE conviction	A RICO and CCE forfeiture of property valued at $187,000 ($65,000-CCE; $122,000-RICO)
McLaughlin	1975	MD Tennessee	CCE	Convicted of lesser charges	None
McNeely	1979	WD Tennessee	CCE	Pending	—
McPartland	1975	Dist. of Oregon	RICO	Convicted of lesser charges	None
Meinster/Platshorn	1978	SD Florida	RICO	RICO convictions (4)	$16,000 ultimately realized from forfeiture of residences (estimated value $750,000) and an auto auction (no value) under RICO
Meneley	1976	SD California	RICO/CCE	CCE conviction	$12,000 realized from a CCE forfeiture of a yacht
Motten	1975	SD New York	CCE	Convicted of lesser charges	None
Muller	1975	SD Texas	CCE	Convicted of lesser charges	None
Mullins	1980	SD New York	CCE	Pending	—
Nichols	1979	Dist. of Delaware	CCE	Convicted of lesser charges	None
Parce	1976	ND Texas	RICO	Convicted of lesser charges	None
Pellon	1978	SD New York	CCE	CCE conviction	None
Pereira	1977	SD New York	CCE	Convicted of lesser charges	None
Perez	1976	SD California	CCE	Fugitive	None
Phillips/Wagner	1976	Dist. of Maryland	CCE	Convicted of lesser charges	None
Pokorney	1977	ED Michigan	CCE	CCE conviction	$200,000 forfeiture under CCE of a residence
Rittenberg	1977	SD California	RICO	Pending	—
Robinson	1977	SD New York	CCE	CCE conviction	None
Rose	1976	SD Indiana	CCE	CCE conviction	None
Rosenthal/Rawls	1979	CD Georgia	CCE	CCE conviction (Rawls); Convicted of lesser charges (Rosenthal)	None
—	1975	Dist. of Hawaii	CCE	Acquitted	—
Sanders	1979	SD Indiana	CCE	Convicted of lesser charges	None
Santos	1979	Dist. of Guam	CCE	Convicted of lesser charges	None
Savage	1979	SD Florida	CCE	Pending	—
Schneider	1977	ED Michigan	CCE	Convicted of lesser charges	None
Schwartz	1979	SD Florida	CCE	Convicted of lesser charges	None
Sisca	1972	SD New York	CCE	Convicted of lesser charges	None
Sneed	1979	ED Texas	RICO/CCE	CCE and RICO convictions	None
Sotelo-Casterena	1975	ND California	RICO/CCE	Convicted of lesser charges	None
Sperling	1973	SD New York	CCE	CCE conviction	None
Stepeney	1978	SD New York	CCE	CCE conviction	None
—	1974	WD Texas	CCE	Acquitted	—
Stuckey	1979	Dist. of Columbia	CCE	CCE conviction	Forfeited two vehicles (estimated value $10,000) and apartment in which defendant had $10,000 equity interest under CCE.
Swiderski	1976	Dist. of Columbia	RICO	RICO conviction	Forfeited under RICO a bar/restaurant having no value to the Government after satisfaction of encumberances against it.
Tramunti/Inglese	1973	SD New York	CCE	Convicted of lesser charges	None
Valencia	1976	ED New York	CCE	CCE conviction	None
Valenzuela	1976	CD California	CCE	CCE conviction	None
Vasquez	1976	ED New York	CCE	Could not determine	None
Webster	1977	Dist of Maryland	RICO/CCE	CCE conviction	None
Wheeler	1975	Dist. of New Hampshire	RICO	Convicted of lesser charges	None
Wind	1974	ED Michigan	CCE	CCE conviction	None

Notes:

a/Represents original involvement of DEA or FBI in investigation.

b/Abbreviations used in this column: ED - Eastern District, WD - Western District, ND - Northern District, SD - Southern District, and CD - Central District.

c/Acquitted includes cases in which the CCE or RICO counts were dropped. Convicted of lesser charges includes pleas to lesser charges.

d/Includes forfeitures under CCE and RICO only. In addition

IV

Proposed Legislation On Criminal Forfeiture

Criminal Forfeiture Amendments Act of 1981

A Bill

to improve the effectiveness of criminal forfeiture, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Criminal Forfeiture Amendments Act of 1981."

Section 102. Section 1963 of Title 18, United States Code, is amended by redesignating existing subsections (b) and (c) as subsections (e) and (f), and inserting following subsection (a), the following new subsections:

"(b) In addition to any other penalties prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States: (1) any profits and proceeds, regardless of the form in which held, that are acquired, derived, used or maintained in violation of section 1962; and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962."

"(c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or

d/Includes forfeitures under CCE and RICO only. In addition data on forfeitures has been updated through September 1980.

charges.

directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals."

"(d) To the extent that assets, interests, profits, and proceeds forfeitable under this section: (1) cannot be located; (2) have been transferred, sold to, or deposited with third parties; or (3) have been placed beyond the jurisdiction of the United States, the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsection (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court."

Section 103. (a) Section 408 of Pub. L. No. 91-513, title II, 84 Stat. 1265 (21 U.S.C. §848) is amended by inserting "by this section" in substitution for "in paragraph (2)", and by adding after the phrase "the profits obtained by him in such enterprise" in subsection (a)(2)(A) thereof, the following: "including any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained, indirectly or directly, in connection with or as a result of a violation of paragraph one."

(b) Section 408 of Pub. L. No. 91-513, title II, 84 Stat. Stat. 1265 (21 U.S.C. §848), is further amended by adding the following new subsection after subsection (d) (21 U.S.C. §848(d)):

"(e) To the extent that assets, interests, profits, and proceeds forfeitable under this section: (1) cannot be located; (2) have been transferred, sold to, or deposited with third parties; or (3) have been placed beyond the territorial jurisdiction of the United States, the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsection (a) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsection (a) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court."

Section 104. If any provision of this Act or the application thereof is held invalid, the remainder of the Act and its application shall not be affected thereby."

CHANGES IN EXISTING LAW

Changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in brackets; new matter is underlined; existing law in which no change is proposed is shown in roman):

Racketeer Influenced and Corrupt Organization (RICO) statute, 18 U.S.C. §1963.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In addition to any other penalities prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States: (1) any profits and proceeds, regardless of the form in which held, that are acquired, derived, used or maintained in violation of section 1962; and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962.

(c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals.

(d) To the extent that assets, interests, profits, and proceeds forfeitable under this section: (1) cannot be located; (2) have been transferred, sold to, or deposited with third parties; or (3) have been placed beyond the jurisdiction of the United States, the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may

authorize redemption of assets forfeited under this subsection, provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.

[b](e) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

[c](f) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. §848.

§848. Continuing Criminal Enterprise--Penalities; Forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed [in paragraph (2)] by this section; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which

may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200, 000, and to the forfeiture prescribed [in paragraph (2)] by this section.

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States--

(A) the profits obtained by him in such enterprise, including any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained, indirectly or directly, in connection with or as a result of a violation of paragraph (1), and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have

jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

(e) To the extent that assets, interests, profits, and proceeds forfeitable under this section: (1) cannot be located; (2) have been transferred, sold to, or deposited with third parties; or (3) have been placed beyond the territorial jurisdiction of the United States, the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsection (a) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsection (a) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.

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U.S. Department of Justice

Washington, D.C. 20530

MAR 19 1981

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Asset Forfeiture--A Seldom Used Tool in Combatting Drug Trafficking."

The subject of the report--asset forfeitures--extends across several functional areas of the Department, including legal, investigative and prosecutive areas. Since these functions relate to the activities of several organizations within the Department, the comments of each organization are set out separately to provide an in-depth perspective of the Department's position and concerns regarding asset forfeitures.

DRUG ENFORCEMENT ADMINISTRATION (DEA)

DEA agrees with the General Accounting Office (GAO) that the overall Federal Government's asset forfeiture activities have not made significant inroads into drug trafficking by attacking traffickers' profits. GAO correctly points out that incentive and guidance to prosecutors and investigators have been lacking in the past. that criminal forfeiture statutes need revision if they are to provide the proper framework upon which successful forfeiture cases can be built, that restrictions on access to financial information has hampered financial investigations, and that the degree of expertise required to conduct complex financial investigations and prosecutions has been lacking.

DEA concurs in GAO's recommendations to the Congress involving efforts to strengthen the criminal forfeiture authorization statutes. DEA further agrees that the uses and successes of the various statutes should be continually analyzed, and that the workability of current forfeiture procedures--both within DEA and at the Departmental level--should be subject to review on an ongoing basis. Indeed, an ad hoc evaluation effort aimed at DEA's asset forfeiture program is currently underway, and the program is being integrated into the agency's institutionalized performance evaluation system.

With respect to the findings and conclusions presented in the body of the report, there are several areas that DEA believes require clarification. GAO's contention that there has been a lack of information concerning Racketeer Influenced and Corrupt Organization (RICO) and Continuing

Criminal Enterprise (CCE) cases is correct, although a joint effort by DEA and the Criminal Division is currently underway to correct this deficiency.

DEA does not agree, however, that this lack of information bespeaks an absence of sound management and policy. For its part, DEA's asset forfeiture policy and the program that supports it are firmly in place. The integrated enforcement approach, upon which domestic drug supply reduction effort is based, involves a three-dimensional thrust: the arrest and incarceration of major traffickers, the removal of drugs from illegitimate distribution networks, and the removal of the lifeblood of trafficking organizations--their assets. It is important to emphasize that DEA is primarily a narcotics law enforcement agency. DEA believes it would be inappropriate to become involved in financial investigations to such an extent that other components of its mission are jeopardized. Because of its commitment to this multi-dimensional approach, and given the limited resources with which it now operates, DEA would resist the creation of a specialized financial investigative function comprising a cadre of agents assigned to pursue only financial aspects of narcotics investigations. In accordance with the Attorney General's budget guidelines for fiscal year 1982, DEA is committed to recruiting new agents with special financial knowledge and skills, and efforts are underway toward that goal. DEA further believes that such a commitment should go hand in hand with the development of specialized financial expertise on the part of prosecutors.

Within this context, DEA's asset forfeiture program is designed to vigorously pursue asset removal through the exploitation of all high-level cases. The successful conduct of these exploitative actions is tied to a financial investigations management system embracing numerous functions, most notably case review at several levels, strategic and operational intelligence support, interface with U.S. Attorneys and the Criminal Division, an established asset removal reporting system, incorporation of asset removal activities into the performance measurement scheme, and close cooperation with other agencies.

It is unfortunate that the GAO report has assessed the success of asset forfeitures through analysis of data aggregated into a single ten-year period--1970 to 1980--rather than looking at year-to-year trends. A recent GAO report on DEA's Central Tactical (CENTAC) Program dated March 27, 1980, had identical conclusions, with which DEA readily agreed. The current report could have reflected the very notable progress that has been made since that report. Had it done so, GAO would have been able to present a more complete and accurate picture of the progress of the asset removal program in the context of key policy, management, and legislative changes, such as the November 1978 amendments to 21 U.S.C. 881, the creation of a Financial Investigation Section in DEA's Office of Enforcement, and various interagency agreements. In addition, asset removal statistics comparing calendar year 1979 and fiscal year 1980 show a marked improvement in DEA's seizure and forfeiture performance. DEA reports reflect over $90 million in asset removals in fiscal year 1980 as compared with $13 million in calendar year 1979--a six-fold increase in total seizures and a better than 20-fold increase in forfeitures.

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Consideration of more recent advances in DEA's program would have given a truer picture of the status of its asset removal efforts. For example, forfeitures from a recent enforcement effort (Operation GATEWAY) have so far totalled over $2 million in "derivative proceeds," and forfeitures stemming from DEA compliance and regulation activity amounted to $2.8 million in fiscal year 1980. These specific instances of asset forfeiture illustrate the growing commitment and continuous progress DEA has made in this area.

Progress in the development of financial investigative expertise has also accelerated. As of the end of fiscal year 1980, over 60 percent of DEA's criminal investigator force had specialized training in financial aspects of investigations. Expertise gained as a result of actual work on cases involving real or potential asset removals has also progressed as agents have placed greater emphasis on the asset removal component of their investigative efforts.

A crucial aspect of DEA's progress in the asset removal area is the formulation of interagency agreements, most notably with the Internal Revenue Service (IRS) and U.S. Customs Service (Customs). In February 1980, DEA and IRS updated a formal agreement involving not only the sharing of information but also the provision of specialized assistance in the financial investigative area. DEA is currently conducting 35 cooperative investigations with IRS. Similarly, Department of Treasury guidelines permit the provision of currency transaction information to DEA for case exploitation and targetting purposes. The potential for identifying and removing the assets of major violators via the mechanisms established under these cooperative agreements would be greater if not for the obstacles presented by the Tax Reform Act of 1976 and the Right to Financial Privacy Act of 1978, as GAO has also noted in its report.

Further evidence of DEA's recent progress in the asset removal area is the development of program management improvements such as the institution of an asset seizure and forfeiture reporting system, the continuous distribution of policy and procedure guidelines to DEA's field offices, and the incorporation into DEA's internal evaluation system of performance measures aimed at assessing asset forfeiture results.

A specific point requires technical clarification. On page 1 of the report GAO states that, "Law enforcement agencies have traditionally attempted to deter or prevent the perpetration of criminal activity through fines and imprisonment." The report should be revised to point out that the levy of criminal sanctions is the province of legislatures and courts, not law enforcement agencies.

Comments on RICO and CCE

The draft report is predicated upon several questionable themes which pervade the study. Conceptually, the report leads the reader to believe that the 1970 passage of the RICO and CCE Statutes gave instant birth to a pair of highly promising enforcement tools that every prosecutor and investigator should have, and could have easily utilized, especially as they relate to the forfeiture of assets. This is simply not the case. Between 1790 and 1970, Federal law specifically prohibited the criminal

forfeiture--as opposed to civil forfeiture--of property. The passage, therefore, of these two statutes marked the embarkation into a completely new and uncharted area of law. Their enactment and potential use were viewed by some as constitutionally questionable.

The legislative histories of the two acts gave little guidance or support. No new resources were allocated to develop this new law and no pressure or apparent interest from any source was evidenced for the development of criminal indictments and forfeitures in these areas. The approach dictated was to proceed with caution, use a high degree of selectivity, and obtain prior approval. With no historical precedent for support and no Departmental guidance or instruction, prosecutors and investigators tended to ignore the new laws. (It is generally accepted that unless a prosecutor can "cite a case precedent," he is most reluctant to seek an indictment on a new and complex statute, especially when he can usually convict the defendant on another substantive and related violation.) In addition to this lack of guidance and historical precedent concerning criminal forfeitures, this new body of law presented law enforcement officials with two criminal statutes that were extremely cumbersome and difficult to explain to either court or jury, much less to a new prosecutor or investigator. Yet the GAO report singles DEA out for its failure to produce an array of indictments under the umbrella of "financial investigations." The complaint is apparently that if DEA had "financial investigators," the problem would be resolved. In response to this complaint, it must be noted that the IRS, with its large number of apparent financial investigators, and the FBI, with its cadre of accountant/agents, have produced scarcely more than 50 reported RICO cases from the appellate courts in 10 years (and some of these cases have involved controlled substances). DEA, created in 1973, produced 20 RICO cases. The basic reason for this lack of productivity is that statutes are extremely complex and nonconducive to effective investigation and prosecution--nor will they be remedied by simple amendments. Conceptually, the statutes need to be completely overhauled to make them more understandable and workable.

Traditionally, the Department has not engaged in substantive law training of its prosecutors and attorneys, preferring the concept of on-the-job training. At best, even today, only "familiarization" lectures are given in substantive law subjects. RICO and CCE have only recently become the subject of such "familiarization" lectures. The lack of basic in-depth training, and Departmental policy to develop these cases, combined with the lack of requisite resources, conributed to prosecutors refusing to seek criminal indictments under RICO or CCE, much less criminal forfeitures within these indictments. There are other reasons for the nonproduction of such indictments, which would exist even if DEA produced a plethora of such cases:

1. The Assistant U.S. Attorney (AUSA) turnover rate does not lend itself to the development of expertise for such complex cases, especially without the essential substantive law training.

2. Prosecutors are "defendant-oriented" not "property-oriented." There is neither incentive nor desire to develop such property or asset interests. Forfeitures are generally thought of as civil actions--historically relating to cars and boats--and therefore do not affect a conviction.

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3. A forfeiture count in a RICO or CCE indictment tends to complicate the case, confuse the jury, and jeopardize the possibility of conviction.

4. Speedy trial considerations may hamper the development of evidence necessary to trace the assets for successful criminal forfeitures.

5. RICO and CCE indictments require "Departmental" approval before they can be returned. There is a natural reluctance to pursue cases that require "Departmental" approval, especially when the pressure to do so, or the credit for having done so, is nonexistent.

6. Criminal Division policy concerning RICO indictments at the present time is that an illegal association of violators will not be approved as a viable element of proof within a RICO indictment unless the enterprise has an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal. Since most potential narcotic RICO prosecutions involve "illegal associations," the prospect of such indictments being approved by the Criminal Division is very slim.

The GAO report notes that as of November 1980 the Criminal Division has required prosecutors to provide explanations for failure to pursue forfeitu when seeking authority to use RICO or CCE. This highlights a very practica problem that exists--and has existed for the past 10 years--regarding the lack of prosecutive use of RICO and CCE generally, and the collateral failure to use the applicable forfeiture procedures specifically.

Since enactment of the RICO and CCE provisions in 1970, the Department, as stated above, has required prosecutors to obtain the approval (or clearance) of the Department before using either statute. The clearance requirement itself is one of the major reasons for the lack of use of the RICO and CCE provisions--U.S. Attorneys prefer to operate independently of Department clearance procedures.

The report's contention on page 37 that CCE is silent on the matter of control and care of property, settling the rights of third parties, and selling property is not technically correct. The CCE provisions, like the RICO provisions, incorporate basic Customs procedures. Section 511(d) of the Controlled Substances Act (CSA) (21 U.S.C. 881(d)) states that "All provisions of law relating to seizures . . . for violation of the Customs laws . . . shall apply to seizures . . . under the provisions of this subchapter . . . " (underscore supplied). The forfeiture procedures contained in the CCE provisions in Section 408 of the CSA (21 U.S.C. 848) are part of the "subchapter" cited in 881(d). Hence, 881(d) seizure and forfeiture provisions (which by reference incorporate Customs procedures) do apply to forfeitures under CCE.

Comments on 21 U.S.C. 881 (Controlled Substances Act)

In November 1978, Congress amended 21 U.S.C. 881 and provided for the civil forfeiture of assets derived from controlled substance transactions. This concept of civil asset forfeiture is supported by a 200-year history of case law. After only two years, rapid progress is being realized. Attorney education is still a problem--again, no substantive training of AUSAs in this area has been attempted. Sporadic familiarization lectures of short duration have been given to limited audiences of selected

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attorneys. DEA initially produced a 17-page outline of the statute when it was passed. DEA has now completed a 350-page treatise on the law of forfeitures to be published in April 1981. This DEA treatise is the only one of its kind, and should make a significant contribution to the training of both agents and prosecutors.

Civil dockets are generally slower than criminal dockets. Consequently, judicial forfeitures suffer unavoidable delays. Coordination between the civil and criminal sides of the U.S. Attorneys' offices needs improvement since asset forfeitures, although civil in nature, essentially derive from a criminal investigation.

The statement on page 11 of the report that "Of that amount ($7.1 million) only $247,000 had been actually forfeited . . . ; cases involving $6.8 million of the $7.1 million were still pending," leaves the impression that some type of Justice/DEA culpability is present because a large percentage of the forfeiture actions are pending. In fact, most of the actions involve judicial forfeitures (over $10,000 in value) that are pending because of the delays on the civil dockets of U.S. District Courts, which must process these civil forfeitures.

DEA believes that its record in taking the profit out of crime should be measured not from the passage in 1970 of the RICO and CCE statutes (which GAO has acknowledged are ambiguous and problematic for forfeiture), but rather from the November 1978 passage of the amendments to 21 U.S.C. 881, which GAO has recognized as having positive potential for all classes of forfeitable property.

CRIMINAL DIVISION

GAO's draft report analyzes the ten year history of the Government's use of the statutory provisions--civil and criminal--which enable the Government to seek forfeiture of profits, proceeds, or property, or interest in property, which can be proven to be generated by an illegal enterprise conducted in violation of the statutes prohibiting racketeering or narcotics trafficking. The GAO report reaches several principal conclusions:

1. The amount of money and the dollar value of property forfeited pursuant to these statutes has been small in relation to the high level of profit of drug trafficking. Although the impact of forfeitures cannot be projected precisely, greater use of forfeitures can provide law enforcement with more opportunities to disrupt trafficking activities and diminish the disruptive effect of illegal monies on the economy.

2. Investigative and prosecution efforts to seek forfeitures have been hampered by obstacles including statutory and regulatory provisions in the Tax Reform Act of 1976 and the Right to Financial Privacy Act of 1978. The Department has taken actions which in the long run should have a beneficial effect on these efforts, and the Department should regularly oversee these efforts, recommending administrative and legislative changes when appropriate.

3. Recent decisions of the courts which have interpreted the provisions of these statutes have focused on certain ambiguities and limitations in these statutes, and Congress should amend certain provisions of the RICO and CCE statutes pertaining to forfeitures.

Although we agree essentially with these general conclusions of the draft report, we believe that the report fails to present a true perspective, not only of the difficulties encountered in successfully identifying and forfeiting illegally generated assets, but in recognizing the efforts of the Department in addressing the task as well. Further, we believe that the methodology employed by GAO is flawed, particularly as it pertains to RICO.

The following comments address (a) the methodology employed by GAO, (b) the differences between the scope of the RICO and CCE Statutes, (c) the background of the problems which attend the general area of forfeitures, (d) specific comments pertaining to the recommendations contained in the draft report, and (e) initiatives which we believe will be instrumental in bringing about greater success in reaching assets of drug trafficking.

Defects in Methodology Employed by GAO

The GAO auditors, based solely on an analysis of 31 narcotic cases in which RICO, or CCE or both were charged, concluded that the potential for forfeiture has not been realized. While noting that "[T]he reasons why the forfeiture statutes have not been used more extend across the legal, investigative, and prosecutive areas," the report still concludes that the ". . . primary reason is the lack of leadership by the Department of Justice."

We are troubled by many aspects of this report. We believe the methodology is flawed because two distinct statutes with different statutory language and Congressional intent have been lumped together for statistical purposes. Further, by looking exclusively at narcotics cases, and not at all RICO cases, the GAO analyst does not obtain an accurate assessment of the effectiveness of RICO's forfeiture provisions (i.e. in labor racketeering cases). In fact, most RICO narcotics prosecutions, and the vast majority of those cases analyzed by GAO, charge the enterprise as a group associated in fact, a situation in which there is frequently nothing of practical value to forfeit at the time of indictment. For this reason, as well as those that follow, we believe the conclusions drawn by the GAO auditors rest on invalid assumptions, inaccurate data, and questionable methodology.

As a starting point, it seems clear that GAO failed to devise a methodology which would distinguish between those cases in which forfeiture should have been sought and was not, and those cases in which forfeiture was inapplicable, and for that reason alone was not attempted. Instead, GAO looked at 99 cases and "selected" 31 for analysis, of which purportedly 16 were RICO cases. Of the 31 cases, 14 involved forfeitures, 7 were RICOs, 6 were CCEs, and 1 charged both offenses. We could not determine from the data which of the 16 RICO cases were subjected to the in-depth analysis, but this much we are able to say:

In at least two instances, GAO has included within its statistics as RICO cases--in which forfeiture was not sought--cases in which RICO was not even charged in the indictment returned.[1] In three other RICO cases

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[1] United States v. Wheeler, O.N.H. 1975; United States v. King, D. Colorado, 1977; see Appendix IV.

surveyed by GAO, the defendants were acquitted, which certainly precludes forfeiture.[2] In yet three other cases the defendants were convicted on, or pled to, lesser charges.[3] In one case, listed by GAO as "pending" and under criminal forfeitures reflected "none," there has been a subsequent judgment of forfeiture worth approximately $400,000.[4] In yet another pending case the forfeiture is reflected as "none", despite the fact that the case has yet to go to trial and the indictment seeks forfeiture.[5] How, one is tempted to ask, can a pending indictment that seeks forfeiture, be the factual basis for concluding that no forfeiture was obtained?

In the Meinster/Platshorn case, the forfeiture is reflected as:

> "$16,000 ultimately realized from forfeiture of residences (estimated value $750,000) and an auto auction (no value) under RICO."

While a forfeiture judgment worth $750,000 was obtained, the court also ruled that the defendant's Sixth Amendment right to counsel had precedence over the Government's right, and therefore the assets could be sold to pay the attorneys fees. After the sale, and payment, apparently only $16,000 remained.

Of the 16 RICO cases GAO reviewed, only one was handled by the Organized Crime and Racketeering Section,[6] and that involved an enterprise consisting of a group associated in fact. The enterprise was involved in diverse criminal conduct, including narcotics, and there literally was nothing to forfeit.

The most glaring error in methodology, however, was GAO's comparison of the estimated drug trafficking revenue with the dollar amount forfeited. In the first place, what is the evidence of record to substantiate these amounts as they relate to a particular prosecution? Secondly, assuming arguendo that the revenue figures are roughly accurate, the key question is still how much was subject to forfeiture under RICO at the time of indictment; and how much could be traced and preserved from dissipation for ultimate forfeiture by a special jury verdict?

We believe that the foregoing calls into serious question the validity of the conclusions drawn by GAO on this data as to RICO forfeitures, and we would be happy to discuss with the auditors the merits of forfeiture vel non on a case-by-case basis.

2/ Barger, Blasco, Parce.

3/ King, McPartland, Huffine.

4/ Gamba.

5/ Rittenberg.

6/ Appendix IV; Lombardozzi.

Differences Between the Scope of the RICO and CCE Statutes

Compounding the problems of methodology in GAO's approach, is the notion that runs throughout the report--namely that RICO can be used to forfeit whatever assets have been acquired by drug traffickers. The short answer is that RICO, doesn't make assets forfeitable, only interests, and then only under very limited circumstances.7/ In sharp contrast to RICO, CCE comes much closer to making assets per se subject to forfeiture by providing that upon conviction any person shall forfeit to the United States:

(a) the profits obtained by him in such enterprise, and

(b) any of his interest in, claim against, or property or contractual right of any kind affording a source of influence over such enterprise.8/

As then Deputy Attorney General Kleindienst's testimony reflects during the Senate Hearings, forfeiture was to be restricted to " . . . one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender." Id. at 406. While GAO would like to see us obtain forfeiture of real estate, cash, precious metals, and stocks and bonds, these assets would not be forfeitable under RICO just because they were purchased with profits derived from drug trafficking.

Problems Which Have Attended Investigative and Prosecution Efforts to Reach the Assets of Drug Traffickers

Historically, forfeiture has not been a goal of criminal prosecutions in the United States. The Department urged the passage of the statutes which enable the Government to seek the forfeiture of assets generated by drug-related activity and indeed assisted in the drafting of the legislation. Our experience in utilizing these tools, however, indicates that their availability to the prosecutors began an evolutionary process that would not bring immediate or easily attained success in dealing with the financial activities of major drug traffickers.

Although the process of educating the investigative and prosecution community may not have been as intensive as it could have been, education was nevertheless a necessary process. Additionally, there has been an understandable reluctance on the part of even the most aggressive and active United States Attorneys' offices in the country to commit the time to the forfeiture aspect of the cases, considering the time available to devote to gathering evidence necessary for a criminal conviction. There have been competing demands on attorney resources to be addressed in the day-to-day running of a prosecution staff. The Department demonstrated its commitment to reserve attorney resources for complex

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7/ 18 U.S.C. 1963(a).

8/ 21 U.S.C. 848(a)(2).

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drug litigation by establishing Major Drug Traffickers Prosecution Units in 24 United States Attorneys' offices across the country. The Department has relentlessly promoted the conspiracy-oriented drug investigations that is the paradigm of criminal forfeiture investigations. Indeed, the Department insisted upon a broader commitment of investigative resources to conspiracy-oriented drug investigations in the early days of the Drug Enforcement Administration.

We have recognized that these efforts were not enough and that the tools enabling forfeiture must become the subject of more intensive training, that greater emphasis must be given to their importance as part of the criminal prosecution effort, and that a higher level of priority be established as a matter of policy of the Department. We have addressed these areas and will continue to oversee the efforts of attorneys from the Department's Criminal Division and from the United States Attorneys' offices.

However, we caution against the simplistic view that reaching the 60 billion dollar income of drug trafficking is an easy task. Traffickers deal in cash, and cash transactions are easily camouflaged, particularly if the currency is laundered through the banking system of an offshore tax haven. The principals are insulated and the ownership of assets is easily hidden. Additionally, no single agency can be the exclusive investigative instrument to trace the flow of dollars of drug trafficking. The agency with the principal responsibility to investigate drug trafficking does not have the responsibility for monitoring the income or currency transactions of the drug trafficker either by statute, by tradition, or by expertise. There must of necessity be a multi-agency approach to this task. In multi-agency efforts, we have experienced not only the traditional strains of competing interests and varying priorities among the agencies, but also barriers to cooperation imposed by statute and by regulation. To characterize the problem as one of a failure of leadership on the part of the Justice Department is, we believe, an oversimplification of the problems which have been encountered. Indeed, initiatives to address some of these problems have come from the Criminal Division of the Department, including proposals to change the statutory and regulatory provisions of the Tax Reform Act of 1976, prosecution leadership in multi-agency investigative efforts such as Operation Banco (which gave rise to the prosecution of the Black Tuna case in Miami) and Operation Greenback, and training conferences for DEA agents and Assistant United States Attorneys which have included lectures on the forfeiture provisions since 1976.

It has been our experience that RICO cases involving narcotic traffickers have been brought in roughly two factual settings. The first involves the large-scale international drug importation scheme, in which the enterprise is a group of individuals associated in fact, and is charged with violating Section 1962(c). In such a situation, the interest of the defendants in the enterprise consists usually of the cash contributions to finance the actual purchase of the drugs; ships, planes, and motor vehicles used to bring them into the country; and sometimes storage facilities. The cash, while subject to forfeiture, is usually unrecoverable at the time of indictment; the vehicles are subject to in rem forfeiture; and the real estate presents some special policy problems. If

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the "stash pad" is the defendant's home, or the home of a relative, we question whether we should seek forfeiture under RICO on both legal and public policy grounds. If the "stash pad" is a rented barn or an old aircraft hanger, is it really worth forfeiting? What about the rights in the real estate of a nondefendant?

What GAO really would like to see forfeited, is the profit from drug importation, but unfortunately RICO doesn't mention the word profit. Our attempts to reach the proceeds of enterprises conducted in violation of 18 U.S.C. 1962(c), have been rejected by the courts.9/ What RICO requires, unlike CCE, for profits to be forfeitable is that they be used to acquire, or maintain an interest in an enterprise in violation of 18 U.S.C. 1962(a). Clearly Section 1962(a) in that context refers to a legitimate enterprise, which is engaged in or the activities of which affect interstate or foreign commerce. Therefore, by the language of the statute itself, homes, cars, jewelry, etc. are not forfeitable under RICO.

To the extent that major narcotic traffickers do invest in legitimate enterprises within the jurisdiction of the United States, those interests are subject to forfeiture under RICO. There are practical reasons, however, as to why there have been so few prosecutions brought under 18 U.S.C. 1962(a).

In the first place, one usually cannot begin to trace the investment of the proceeds of the pattern of racketeering until the Section 1962(c) and/or (d) violations are established. In the second place, for all the reasons GAO found, this tracing is a difficult, time consuming, and sometimes impossible task requiring special investigative skills. And in the third place, if you put the case on "hold" while the financial investigation is conducted, the prosecutor may well encounter severe difficulties, such as lost witnesses, uncooperative informants, fugitives, and statute of limitations problems, which may jeopardize the entire case. Prosecutors must be allowed to exercise discretion as to when to bring an indictment, even if it means foregoing potential forfeitures.

The second type of RICO narcotics case brought using 18 U.S.C. 1962(c), involves the use of a "front", usually a bar or a drug store, to distribute narcotics. In those situations forfeiture has been sought,10/ however, the report deprecates the intrinsic value of these assets. Frequently, what we can forfeit has no market value--does that mean forfeiture should not be sought, or that if it is sought its use is ineffective?

Comments on GAO Recommendations to the Congress

The GAO draft report concludes that court decisions have limited the potential for greater use of the forfeiture provisions of the RICO and CCE Statutes and recommends, at pages 40-41, that Congress amend the

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9/ See United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980); United States v. Thevis, 474 F. Supp. 134 (M.D. Ga., 1979).

10/ See United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978).

criminal forfeiture provisions of the statutes. Initially, we note the draft report does not mention that the legislative proposals for Criminal Code Reform (S. 1722 of the last Congress) may, if reintroduced and enacted, substantially affect the statutes discussed in the report. The criminal offense of CCE would be eliminated, along with its mandatory minimum sentence provision upon conviction. Additionally, the Government's burden in prosecuting a racketeering organization would be more difficult in requiring the Government to prove that if such proceeds cannot be located or identified, then any other property of the defendant, to the extent of the value of such unlocated or unidentified property, could be forfeited instead.

The GAO report recommends that the RICO Statute, 18 U.S.C. Section 1961 et seq. be amended as follows:

> "--Make explicit provision for the forfeiture of profits and proceeds, that are (1) acquired, derived, used, or maintained in violation of RICO; or (2) acquired, or derived as a result of a RICO violation."

This recommendation is an attempt to legislatively overrule the Court of Appeals decision in United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980), where the court held that Section 1963(a)(1) applied only to "interests in an enterprise" illegally acquired or maintained, and not to income derived from the enterprise. We support a change in the legislation to address this issue. We believe, however, that the recommended language contains surplusage, and we recommend alternative language as follows:

> --Make explicit provision for the forfeiture of profits and proceeds that are acquired in violation of RICO.

GAO also recommends that Congress:

> "--Authorize forfeiture of substitute assets, to the extent that assets forfeitable under RICO: (1) cannot be located; (2) have been transferred, sold to, or deposited with third parties; or (3) have been placed beyond the general territorial jurisdiction of the general territorial jurisdiction of the United States. This authorization would be limited to the value of the assets described in (1), (2) and (3), above."

We concur in principle in this recommendation. However, the ramification of this proposal should be considered further.

GAO further recommends that Congress:

> "--Clarify that interests forfeitable under RICO include assets illicitly derived, maintained, or acquired that are held or owned in an individual capacity by defendants convicted of using a de facto association/enterprise to violate RICO."

We have several comments on this recommendation. The recommendation attempts to deal with what are really two separate questions:

(a) whether a group of individuals associated in fact to commit unlawful acts can constitute an "enterprise" within the meaning of Section 1961(4), and

(b) the conceptual problem of how one can own a forfeitable interest in an association in fact, which is not a legal entity.

The first question is now pending in the United States Supreme Court in the case of United States v. Turkette, 632 F.2d 396 (1st Cir. 1980), cert. granted January 26, 1981, No. 80-808. We believe we should await the outcome of this case in the Supreme Court before supporting a legislative change in the Congress. In the event the Government prevails in Turkette, we would support an amendment to Section 1963 to:

> --Clarify that interests forfeitable under RICO include assets that are held or owned in an individual capacity or group capacity by defendants convicted of using a de facto association/enterprise to violate RICO (underscore provided to indicate added language).

Should the Government lose Turkette, we would seek a change in the language of Section 1961(4) (which defines "enterprise") to make it clear that a group of individuals associated in fact to do illegal acts is an "enterprise," in addition to seeking the legislative change to Section 1963.

With regard to the recommendations on page 41 of the report to change the Continuing Criminal Enterprise Statute, we concur in the recommendations.

Finally, we note that the draft report, in a brief treatment of Section 881 of Title 21, mentions that the extension of this statute to proceeds of drug trafficking raises a ". . . wide variety of due process questions about the extent to which the civil process may be used to administer sanctions also available under a criminal statute . . . ." Although we are not unmindful of the due process issues which arise in the context of judicial forfeiture, we do not concur in the analysis of Section 881 as a simple attachment of a civil "label" to forfeiture proceedings to avoid the constitutional safeguards of the criminal process.

Department of Justice Initiatives Directed Toward More Effective Use of Forfeiture Statutes

There are several initiatives which we believe merit comment in the analysis of what the Department is currently addressing to bring about more effective utilization of the civil and criminal forfeiture statutes.

1. Establishment of Task Forces in Selected Geographic Areas

A task force can effectively deal with the multi-agency character of the investigative approach needed to be successful in these cases. In selected instances, such as Operation Greenback in Miami, task forces will be supported by attorneys from the Narcotic and Dangerous Drug Section of the Criminal Division to acquire the expertise in financial

investigations, including the prosecution of tax violations and violations of the provisions of the Bank Secrecy Act. Also, assigning attorneys from the Department enables the Department to control and assess the investigative and prosecution efforts to identify and forfeit criminally derived assets.

2. Multi-agency Cooperation

The Criminal Division is in a position to bring about stronger headquarters support for multi-agency efforts in the investigation of these cases and in the establishment of task forces in certain areas of the country. In the instance of Operation Greenback, the Criminal Division met with the Treasury Department in designing the initial proposal to establish the task force and assigned attorneys from the Narcotic and Dangerous Drug Section to supervise that effort in Miami.

3. Litigation Support for Major Drug Cases in Offices of the United States Attorneys

In appropriate cases, the Department provides litigation support to individual United States Attorneys' offices in the prosecution of major drug trafficking organizations to enhance the expertise of the prosecution team and to insure that Department priorities are preserved. A recent example of this approach is the prosecution of United States v. Mitchell, et al., No. 80-50032 (S.D. Ill.) in which a Narcotic Section trial attorney played a central role in achieving criminal forfeitures exceeding $3,000,000 in a prosecution resulting in an 84-year sentence for the main defendant. Additionally, we are directing attorneys in the Narcotic and Dangerous Drug Section to monitor RICO and CCE investigations and prosecutions in United States Attorneys' offices across the country in order to identify obstacles to achieving significant forfeitures and to ascertain the benefits derived in specific cases.

4. Training of Assistant United States Attorneys

One of the institutional problems which we continue to face is the turnover of lawyers every several years in the United States Attorneys' offices. It is not infrequent for the most senior and experienced prosecutors to leave the office for private practice. We have intensified our training schedule in the Attorney General's Advocacy Institute and will include in the agenda courses of instruction and seminars on financial investigations. The next Institute Seminar will be held in April 1981. We have also included instruction in financial investigations to Assistant United States Attorneys and agents of the Drug Enforcement Administration in the Major Drug Traffickers' Conference.

The Criminal Division has recently issued to all United States Attorneys' offices an instruction manual on the use of the criminal forfeiture provisions of the RICO and the CCE Statutes.

FEDERAL BUREAU OF INVESTIGATION (FBI)

The FBI's jurisdiction in connection with controlled substances violations of Federal law is narrowly delimited. The draft report primarily addresses problem areas relevant to the investigation and prosecution of narcotic offenses wherein civil and criminal forfeiture opportunities exist. Such problem areas are not the jurisdictional concern of the FBI, nevertheless, to the extent that the GAO draft report raises questions and makes recommendations concerning RICO, as well as several other statutes which directly impact upon the FBI's primary jurisdiction, appropriate commentary is being provided.

GAO's Recommendations to Congress

As drafted, GAO's recommendations propose important and necessary legislative changes both to the RICO Statute and to the CCE Statute (21 U.S.C. 848), which are fully supported by the FBI. By amending RICO as suggested by GAO, three fundamental legal problems currently impeding and disabling criminal forfeiture remedies under Section 1963 would be resolved. That is, (1) the proposed changes would authorize criminal forfeiture of enterprise "proceeds" which are more inclusive and expansive than the currently leviable "profits," (2) the amended Section 1963 would help resolve the current labyrinth problem of tracing displaced "profits" by authorizing the forfeiture of available "substitute assets," and (3) the proposed changes would allow the Government to effect forfeiture of assets of a de facto racketeering enterprise rather than legitimate, corporate-like entities to which the courts have restricted Section 1963.

However, while the proposed amendments to Section 1963 of RICO, as discussed above, are necessary and appropriate, these amendments should not be made in a legislative vacuum. As correctly observed by the GAO report on pages 31-33, several recent cases have raised "the more fundamental and perplexing questions whether RICO authorizes the prosecution of individuals associated in fact to engage in exclusively illegal activity unrelated to a legitimate business enterprise." Besides United States v. Turkette cited in the report, the Eighth Circuit Court of Appeals has similarly disabled the RICO Statute in terms of prosecuting association in fact enterprises.11/

Therefore, only amending Section 1963 to authorize criminal forfeitures of de facto enterprise assets is inadequate without also amending Section 1961 to clarify the definition of "enterprise," and 1961(4) which occasions the "profits" and "proceeds" to be forfeited. Although the Supreme Court of the United States granted certiorari to hear Turkette on January 26, 1981, depending on the final decision by the Court, any amendment of Section 1963 to enlarge the de facto concept of enterprise assets should also similarly amend the definitional Section 1961(4).

Finally, GAO's proposed recommendations to amend CCE as stated on page 41 of the report are fully supported by the FBI.

11/ United States v. Anderson, No. 79-1809 (8th Cir., Aug. 7, 1980).

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Recommendations Proposed For GAO's Consideration

The following recommendations to the Congress for legislative change which are not included in the attached GAO report, but are deemed to successfully promote asset forfeitures in combatting drug trafficking, are proposed as follows:

1. Support H.R. 5961, amendments to the Currency and Foreign Transactions Reporting Act (CFTRA) (31, U.S.C. 1101, et seq.), to proscribe as criminal any "attempt to transport" monetary instruments in excess of $5,000 into or out of the United States without filing a report.

CFTRA makes it a crime to transport monetary instruments in excess of $5,000 in or out of the United States without filing a report. Although this is a specific intent offense (United States v. Granda 56 F.2d 992 (Fifth Circuit, 1968)), a violation requires proof of transportation beyond mere attempt. In other words, it must be shown that the monetary instrument in fact left or entered the United States. For law enforcement purposes this leads to the unsatisfactory situation where a subject who is transporting the instrument "out of" the United States cannot be apprehended or prosecuted until he is actually "outside the United States."

In one FBI case, for example, instances occurred where, although subjects were known to be actually transporting the instrument and their departure from the United States was imminent, they could not be apprehended since they were not yet extra-territorial. H.R. 5961 would remedy this anomalous situation, making the attempt to violate Section 1101 a separate, specific intent crime.

In the above example, under H.R. 5961, a subject could be apprehended and successfully prosecuted for the crime of attempt to violate Section 1101 without requiring his physical departure "out of" the United States. This alternative violation would promote more effective law enforcement and potentially allow for substantial seizures of unlawful monetary instruments within United States jurisdiction. This would be of significance where narcotic trafficking is being investigated.

Section 1105 of Title 31, United States Code, now provides the enforcement authority for Section 1101. The former section authorizes the Secretary of the Treasury, upon reasonable belief that monetary instruments are "in the process of transportation" without the proper filing, to apply for a search warrant.

While this enforcement authority is viable, it is more often than not impractical given the exigent circumstances which occasion the usual violation of Section 1101. For example, informant or electronic surveillance information indicating an immediate departure or arrival of a subject in violation of this statute must of necessity be acted upon expeditiously. If resort to the warrant requirements under Section 1105 are therefore impractical, a warrantless search should be permitted. This could be done with the same protections of Fourth Amendment rights as are now provided where a special instrumentality, such as a motor vehicle, is involved. Also, a warrantless search should be permitted in

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such instances since "borders" are always involved in almost all violations of Section 1101 and the constitutionality of border searches has been held broader in scope than in other Fourth Amendment situations.

Finally, authority to compensate informants who provide information in connection with violations of Section 1101 is deemed to promote more effective law enforcement in this important area, especially where narcotics trafficking is the gravamen of the offense.

2. Amend the Federal Rules of Criminal Procedure to provide for a coherent and structured procedure which addresses the identification, temporary restraining, forfeiture and disposition of the expanded classes of "profits" and "proceeds" under both RICO and CCE. As noted on pages 36-38 of the GAO report, current forfeiture procedures which are inappropriately adopted from a civil, customs law context are completely inadequate. Rather than leave the formulation of criminal forfeiture procedures to the Department, amendment of the Federal Rules of Criminal Procedure to encompass both RICO and CCE should be accomplished.

3. Legislate a RICO Civil Forfeiture Provision which is not limited to narcotics trafficking enterprises such as the currently available Title 21, U.S.C. 881, as amended in 1978 by the Psychotropic Substance Act. Such a broad civil forfeiture provision, applicable to a racketeering enterprise, could be more effectively utilized against a readily identifiable but otherwise unprosecutable narcotics enterprise which engages in non-narcotics racketeering.

4. Appropriately revise the Tax Reform Act of 1976 to authorize the Internal Revenue Service to disseminate criminal information to other law enforcement agencies by fully supporting legislation in this regard as introduced in the 96th Congress, specifically, S. 2402 and H.R. 5826.

5. Amend the Financial Privacy Act of 1978 which currently impedes Federal law enforcement efforts to obtain and to utilize certain information only available from financial institutions.

This draft report, as well as GAO's report dated May 29, 1980, entitled "Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978" (GGD-80-54), adequately appreciates the law enforcement problems which were created by the Financial Privacy Act of 1978, particularly in relation to narcotics trafficking investigations. Rather than merely noting this important problem, remedial legislation should be proposed.

EXECUTIVE OFFICE FOR U.S. ATTORNEYS (EOUSA)

The EOUSA agrees with the overall objectives espoused by the draft report, and also agrees that asset forfeiture is an effective weapon whose use should be encouraged against drug traffickers. Further, the EOUSA supports the two recommendations to the Attorney General in the draft report. The full cooperation and assistance of the EOUSA will be given to the Criminal Division in completing its analysis of the extent and the success of the use of forfeiture statutes, as contained in the first recommendation to the Attorney General. In addition, in furtherance of the second recommendation in the GAO draft report, the EOUSA will support the evaluation of the workability of current forfeiture procedures and will render its assistance in making any necessary revisions.

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The EOUSA also agrees with the draft report's four recommendations to the Congress to amend and strengthen the criminal forfeiture statutes. In this vein, DEA has recently produced a Model Forfeiture of Drug Profits Act (January 1981), which has been analyzed by the Narcotic and Dangerous Drug Section of the Criminal Division. This initiative by the Department would serve as a model for States to amend their laws under the Uniform Controlled Substances Act to permit them to seize, civilly forfeit and deposit in their treasuries assets acquired from, or used in connection with, drug trafficking or drug law violations.

The EOUSA also stresses its agreement with the findings in the GAO draft report that investigative and prosecution efforts have been inhibited due to the restrictions imposed by the Tax Reform Act of 1976 and the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.).

The draft report's emphasis on combatting drug trafficking and its recommendations appear to be in keeping with Attorney General William French Smith's recent creation of a task force to combat violent crime, including narcotics violations. This task force was outlined in a March 5, 1981, press release.

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We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,

for William D. Van Stavoren, Acting

Kevin D. Rooney
Assistant Attorney General
for Administration

(186600)

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