FORFEITURE IN DRUG CASES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

H.R. 2646, H.R. 2910, H.R. 4110, and H.R. 5371

FORFEITURE IN DRUG CASES

SEPTEMBER 16, 1981, AND MARCH 9, 1982

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FORFEITURE IN DRUG CASES

WEDNESDAY, SEPTEMBER 16, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, at 1:20 p.m., in room 2237 of the Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes, Kastenmeier, Conyers, and Sawyer.

Staff present: Hayden W. Gregory, chief counsel; David Beier, assistant counsel; and Deborah K. Owen, associate counsel.

Mr. HUGHES. The Subcommittee on Crime will come to order.

This afternoon, the Subcommittee on Crime opens a series of hearings on the question of forfeiture of assets in criminal cases.

Forfeiture has long been an important and potentially effective crime-fighting tool in the minds of law enforcement officials. Our criminal laws have long permitted the forfeiture of contraband and of the instrumentalities of crime. In addition, more recent legislation, including the Omnibus Crime Control Act of 1970, has created statutory authority for the forfeiture of assets involved in racketeering cases.

In addition, Congress in 1970, through the passage of the Comprehensive Drug Abuse and Prevention Act of 1970, authorized the forfeiture of profits and proceeds obtained in drug trafficking.

Unfortunately, until very recently, these statutes were severely underutilized. As indicated in hearings held last Congress by Senator Biden, the Department of Justice has failed to devote sufficient resources and executive direction to the problems of forfeiture. These problems, as well as certain alleged statutory deficiencies, have also been the subject of an exhaustive study of forfeiture by the General Accounting Office.

Pending before the subcommittee are three specific bills: H.R. 2646, 2910, and 4110, which address problems with respect to forfeiture. These bills represent important initiatives in our fight against crime. While each of the bills takes a slightly different tack in attacking the perceived problems with forfeiture, the subcommittee intends to give serious and detailed attention to all the suggestions made in these bills.

In addition, we'll give careful consideration to the suggestions made in this area by other witnesses, including the Department of Justice and the GAO.

In addressing the alleged problems with forfeiture, certain fundamental principles need to be kept in mind, in my judgment. First, the profits or proceeds which flow directly from criminal conduct should not continue to be available for criminal enterprises. Second, the Federal Government must demonstrate a greater commitment to the use of forfeiture before we can hope to eradicate the taint on our economy of proceeds obtained through criminal activity.

There are a substantial number of legal and constitutional issues posed by the legislation before us. The subcommittee intends to give each of these arguments careful consideration and develop a piece of legislation which embodies the best of each, without doing violence to the due process or other constitutional rights of defendants or innocent third parties.

[Copies of H.R. 2646, H.R. 2910, and H.R. 4110 follow:]

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97TH CONGRESS
1ST SESSION

H. R. 2646

To amend section 1963 of title 18 of the United States Code to create a rebuttable presumption about the forfeiture of property of persons convicted of racketeering offenses involving violation of drug laws, to provide that the property forfeited in connection with such racketeering offenses, and the proceeds from such property, be used for local, State, and Federal drug law enforcement, and to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture.

IN THE HOUSE OF REPRESENTATIVES

MARCH 19, 1981

Mr. SAWYER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend section 1963 of title 18 of the United States Code to create a rebuttable presumption about the forfeiture of property of persons convicted of racketeering offenses involving violation of drug laws, to provide that the property forfeited in connection with such racketeering offenses, and the proceeds from such property, be used for local, State, and Federal drug law enforcement, and to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1963 of title 18 of the United States Code is amended—

(1) in subsection (a)—

(A) by striking out "and" immediately before "(2)"; and

(B) by striking out the period at the end and inserting in lieu thereof the following: ", and (3) in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, any proceeds or profits derived from any interest, security, claim, or property or contractual right, described in clause (1) or (2) of this subsection.";

(2) in subsection (c), by striking out the period at the end and inserting in lieu thereof the following: ", except that the Attorney General, may in his discretion, provide for the use of any such property forfeited in cases in which the racketeering activity consisted of

any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, for Federal drug law enforcement or the improvement of State and local drug law enforcement. There is hereby appropriated, to remain available until expended, for each fiscal year beginning after the date of the enactment of this sentence a sum equal to the proceeds from the disposition during the immediately preceding fiscal year of all such property forfeited in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, to be used in the discretion of the Attorney General for Federal drug law enforcement and the improvement of State and local drug law enforcement."; and

(3) by adding at the end the following new subsection:

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"(d) If the racketeering activity consists of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, it shall be presumed that all assets or other property of the convicted person are subject to forfeiture under this section, unless such convicted person proves otherwise by the preponderance of the evidence.".

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97TH CONGRESS
1ST SESSION

H. R. 2910

To amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 to permit the Attorney General to use certain proceeds from forfeited property for the purchase of evidence and other information.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 1981

Mr. GILMAN introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and the Judiciary

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A BILL

To amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 to permit the Attorney General to use certain proceeds from forfeited property for the purchase of evidence and other information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 511(e) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(e)) is amended—

(1) by inserting after the second sentence the following new sentence: "Of such moneys and proceeds

remaining after payment of such expenses, there are authorized to be appropriated (in addition to such amounts as are otherwise authorized to be appropriated for such purpose) to the Attorney General, for the purchase of evidence and other information in connection with investigations of violations of this title or title III, not to exceed $5,000,000 for fiscal year 1982 and, for each succeeding fiscal year, not to exceed the greater of $10,000,000 or 5 percent of the amount authorized for the Drug Enforcement Administration for its activities for that fiscal year.", and

(2) by striking out the period at the end of the third sentence and inserting in lieu thereof the following: "and for such evidence and other information in accordance with this subsection. The Attorney General shall transmit to the Congress, not later than four months after the end of each fiscal year, a report on the purchase of evidence and other information during the fiscal year (whether under this subsection or otherwise) in connection with investigations of violations of this title or title III.".

(b) The amendments made by subsection (a) shall apply to fiscal years beginning with fiscal year 1982.

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97TH CONGRESS
1ST SESSION

H. R. 4110

To improve the effectiveness of criminal forfeiture, and for other purposes

IN THE HOUSE OF REPRESENTATIVES

JULY 9, 1981

Mr. ZEFERETTI introduced the following bill; which was referred jointly to the Committees on the Judiciary and Energy and Commerce

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".

SEC. 2. Section 1963 of title 18, United States Code, is amended—

(1) by redesignating subsections (b) and (c) as subsections (e) and (f); and

(2) by inserting after 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 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 au-

thorize redemption of assets forefeited 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.".

SEC. 3. (a) Section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91–513, 21 U.S.C. 848) is amended—

(1) in subsection (a)(1) by striking "in paragraph (2)" and inserting in lieu thereof the following: "by this section";

(2) in subsection (a)(2)(A) by adding after the phrase "the profits obtained by him in such enterprise" 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 (1)"; and

(3) by adding the following new subsection after subsection (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

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"(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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Mr. HUGHES. Our witnesses for today's hearing include Senator Joe Biden of Delaware, Congressmen Leo Zeferetti of New York, and Ben Gilman of New York, sponsors of bills before the subcommittee.

In addition, the subcommittee will hear from a representative of the Justice Department and the General Accounting Office. Finally, the subcommittee will hear from a leading defense attorney and a professor of evidence.

I might note that the Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, still photography, or by other similar methods. In accordance with committee rule 5(a), permission will be granted, unless there is objection.

Is there objection?

[No response.]

Mr. HUGHES. Hearing no objection, such coverage is permitted.

The Chair recognizes the gentleman from Michigan.

Mr. SAWYER. Thank you, Mr. Chairman. As the report issued by the General Accounting Office points out, asset forfeitures have been modest compared to the quantities of funds involved in national drug trafficking. The last figures I saw and, of course, they obviously are estimates only, indicate that drug trafficking is a $65 billion business which would put it at the top of virtually any of our business fields or enterprises. In the State of Florida alone, it is estimated at somewhere over $5 billion.

As I say, taken in that context, the amount of forfeitures seems to me to leave room for substantial improvement.

I introduced H.R. 2646, which is one of the bills under consideration. After a hearing with our subcommittee held last March, the then-DEA Administrator, Peter Bensinger, with whom I discussed it, thought the improvements made in the bill would be very helpful. Essentially, it would provide for the forfeiture of profits and proceeds under RICO and would establish a presumption that all of the assets owned by a person after conviction, were acquired through, and were fruits of, the dealing and trafficking in illegal narcotics or controlled substances. It would put the burden of proof on the party to establish if they came from some other source.

This would follow conviction and is really no different than a net worth approach to the assets of an alleged evader of income taxes. If the items are not explained by the tax return, the burden shifts to the party to show—and that's for actual conviction as opposed to forfeiture—that he had other nontaxable sources from which those assets flowed. Under the bill I introduced, the forfeiture proceeds would be used to implement and carry out further drug enforcement.

It is my firm belief that the drug business is not a business of passion or anything else. It is strictly a money business. It seems to me that the ideal method for fighting drug trafficking is anything that will attack the funds or the profits flowing from that business, which are horrendous.

Taking the class 1 or class 2 dealer off the street may be fine, but someone else just succeeds to the huge amount of assets essential to the running of that kind of business and takes off from there. Whereas, in addition to removing the dealer, if we remove the

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assets, it would let the drug dealers finance their own demise instead of the taxpayer.

I am looking forward to the hearings, too. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Sawyer. It is with profound pleasure that I am able to introduce as our first witness for these hearings on forfeiture our distinguished colleague from Delaware, Joe Biden, who happens to be the ranking member of the Senate Judiciary Committee.

Joe Biden, perhaps more than any other current Member of Congress, has pressed for the increased use of forfeiture statutes in drug and other criminal cases. The last Congress, as chairman of the Senate Judiciary Committee Subcommittee on Criminal Justice, he chaired an impressive set of hearings on the use of forfeiture in criminal cases. These hearings clearly form the base from which this subcommittee is proceeding here today.

In addition to the substantial debt that this committee owes to Senator Biden for his legislative initiatives in the area of forfeiture, I wish to also commend him for his recent efforts at attempting to fashion a comprehensive crime package. I hope that by working with him and his distinguished colleagues in the Senate during this Congress, we can achieve a consensus on a series of important anticrime initiatives.

Senator Biden, we have received a copy of your written statement which, without objection, will be made a part of the record and you may proceed as you see fit.

It's good to have you with us today.

[The statement of Senator Biden follows:]

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. Chairman, I appreciate your invitation to testify before the Subcommittee on Crime. As the ranking minority member of the Senate Judiciary Committee, I am certainly aware of the responsibility Congress has to ensure that the criminal justice system functions efficiently. During my tenure as Chairman of the Senate Subcommittee on Criminal Justice, the extent of international drug trafficking impressed me as a grave domestic problem. As I learned more about the subject, it became clear that the federal government has not used effectively all the tools available for the elimination of major drug trafficking.

At my request, the General Accounting Office studied major narcotics cases prosecuted during the past ten years. Although drug traffickers generate billions of dollars a year in profits, the federal agencies charged with the prosecution of these networks did not even have a list of the major drug cases in this country. The General Accounting Office compiled a list of cases and studied them to ascertain the amount of money placed in the United States Treasury through enforcement of the forfeiture statutes. These laws had been on the books since 1970. The preliminary results of the GAO Study were startling. They were explored in hearings which I chaired in the Subcommittee on Criminal Justice in July of 1980. The report itself was published in April 1981 and is entitled: "Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking."

As you know, the General Accounting Office in the report gives several reasons for the nonuse of the forfeiture statutes. The most significant reason is the failure of the Department of Justice to exercise leadership in the prosecution of major narcotics cases. This failure is demonstrated by the Department's inability to maintain data on major narcotics cases and by the forfeiture of a mere $2 million from drug traffickers over the ten-year period when annual drug revenues were estimated at $60 billion.

More forfeiture will not eliminate domestic drug trafficking. However, the statutes should be applied more often. To do this, agency personnel need more training. Since initiation of the GAO study, the Department of Justice has indeed taken the problem more seriously. For example, the Drug Enforcement Administration released this summer a publication entitled "Drug Agents' Guide to Forfeiture of Assets." It is over 300 pages long, and it is the best explanation of the complicated aspects of forfeiture that I have seen. I recommend it to anyone interested in the issue.

The prosecution and investigations of forfeiture counts in an indictment are very complex. In its report, the General Accounting Office suggested amendments to the forfeiture statutes to clarify them and eliminate the disparities in federal court interpretations of the laws. In May of 1981, I introduced Senate bill S. 1126. The bill results from suggetions for improvements of the statutes contained in the Report. On July 9, 1981, Mr Zeferetti introduced H.R. 4110. H.R. 4110 is identical to S. 1126.

H.R. 4110 should be supported by every member who wants to improve the effectiveness of federal narcotics prosecutions. The legislation will allow prosecutors to get more money from traffickers by broadening the kind of property that can be forfeited; by making it easier to prove that the money came from illegal narcotics activities; and by ensuring that when a defendant puts illegally-generated property in someone else's name or transports it out of the United States, the Government can get substitute money from him.

TESTIMONY OF HON. JOSEPH BIDEN, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you very much, Mr. Chairman, Congressman Sawyer, Congressman Kastenmeier. It's good to see you all. Thank you for allowing me to be here today and thank you for those very flattering comments.

I, have done no more than any of you three gentlemen, nor your colleagues and mine in the House who are about to testify. We've all been sort of foundering, I believe in trying to get a handle on the dimensions of the problem. As Congressman Sawyer just pointed out, whether it's $60, $59, even if it were $30 billion, it is a staggering amount of money. And one of the most insidious aspects of the entire drug problem is that much of this money is finding its way into legitimate businesses.

I was just speaking to my colleague from New York prior to taking the stand here and he's about to hold hearings in Florida. One of the things he already knows and will find reinforced is that a good deal of information leads one to conclude that legitimate businesses, from banks to automobile dealerships to hotels are having drug money funneled from Florida back out through the offshore banks, cleaned, laundered, as the phrase became known in the late 1960's and early 1970's, and brought back into the State as legitimate dollars and legitimate business.

And as a member of the Intelligence Committee on the Senate side since its inception, I have been trying my best to follow our efforts to follow those dollars.

And the reason I bother to bring up this point, which is not contained in my statement, is that we tend as a Nation only to focus on the effects of the drug problem as it relates to our children, which is terrible. There's no question about that. But the effects go far, far beyond that and they go right to the heart of our entire system. As members of your own body have recently discovered, they go to having very serious effects on the operative ability of our military. They go to international relations. It speaks to legitimate business in America. It is across the board. Gentlemen, as you know, somewhere, depending on whose estimates or what city or State you happen to be in, from 50 to 65 percent of all the violent crime in the States is directly drug-related.

And so what we have is a monumental problem. The proceeds, the net profits of the drug industry estimated in the United States would make it the eighth largest corporation in America, bigger than IBM. If, in fact, the A&P supermarket chain were going to legally distribute the quantity of drugs that are, in fact, distributed through organized crime organizations and entrepreneurial organizations that have flourished, especially in the cocaine and marihuana markets, they would have to increase the number of stores tenfold and increase the number of employees fourfold and keep open 24 hours a day just to physically get the material out to their customers.

That's how big the problem is.

I have, to the chagrin of my friends at DEA and the Justice Department for the past 4 years at least, probably 5½, been somewhat critical—first sympathetic, then slightly critical, and then very angry—about the fact that we have two statutes on the books right now, the continuing criminal enterprise statutes and the RICO statutes, which allow, as you pointed out, Mr. Chairman, for the forfeiture mechanism to be engaged; that is, to not only get the drug that happens to be peddled at the time, but to go after the total assets of that organization.

As Congressman Sawyer pointed out in his opening comments, we may get the one, two, or three class level distributor and put him or her in jail, but the organization continues to flourish. The reason it continues to flourish is that we may replace the person who heads the organization, but, in fact, we don't do anything about the dollars and cents, the monetary value of the organization. As long as that exists, they'll be able to employ as many people as they want.

You and I both know from our combined investigations that organized drug rings are flourishing from behind prison walls. They're literally being run by people sitting in a prison cell. That doesn't get in the way very much. And we have had an appalling record with regard to the ability to go after the organizational assets.

Tied in with this, and I'll cease in just a moment, we all watched at the various stages of our careers, when back in the 1950's the famous Kefauver hearings on the Senate side, and McClellan, and witnesses listed on large marked-up boards the names of identified 24 or 25 organized crime families and pointed to them and let the American public know where they were and who they were, and it was a major breakthrough.

I'm here to tell you what you already know: Every one of those organized crime families is alive and well and doing business today. Not a single, solitary organized crime family has been infiltrated or broken up. Not one since we've identified them. We know where they are. We know who they are. Not one has been penetrated of any consequence. And the problem is that we have refused to fight this very organized business, by and large.

And I'm not suggesting that it's not an entrepreneurial effort, especially in marihuana and cocaine these days, and it's a multibillion dollar entrepreneurial business, becoming organized by, not just the classic Italian-based, accused to be Italian-based, Mafioso organization crime families. We have Black-organized crime families, Hispanic-organized crime families, Greek-organized crime families—they're all in the business because there's plenty to go around. And there's been very little attention paid on directing massive resources of the Federal Government in a coordinated effort against them and also, in turn, against the product which they are distributing.

Now, the one specific relevant issue before this subcommittee at this point in the legislation that you have relating to forfeiture——

About a year ago, I asked the General Accounting Office to do this report, to which you all referred. They were very straightforward, very blunt about the state of the art of getting forfeited assets. Let me just read from one page, which you already have, but I think it sets it out well, and then I will stop and answer any questions you have about the legislation that you would like me to comment on.

It says, why more forfeitures have not been realized. I'm quoting from the report:

> The reason why the forfeiture statutes have not been used more extended across the legal, investigative, and prosecutorial areas. One, emerging case law indicates that the forfeiture statutes are ambiguous in some areas, incomplete and deficient in others. Two, investigators and prosecutors were not given the guidance and incentive to pursue forfeiture. And three, access to financial information may be limited. But the primary reason has been the lack of leadership by the Department of Justice.

I emphasize—Democratic Departments of Justice, Republican Departments of Justice, the Department of Justice, period, regardless of whose hands it's been in.

> Nearly ten years after the forfeiture statutes were enacted, the government lacked the most rudimentary information needed to manage forfeiture efforts. No one knew how many narcotics cases had been attempted using the racketeer influence and corrupt organization or continuing criminal enterprise statutes, the disposition of all the cases, how many cases were involved in forfeiture attempts, and why those attempts either failed or succeeded.

In short, gentlemen, we have not trained our prosecutors. It has not been a priority. It is a more difficult case to make. The DEA folks don't like doing it. The Justice Department doesn't like doing it. The FBI doesn't like doing it. It's simple.

We all have our scorecards, a little bit like we persons of Congress who make sure that our voting record is kept up. The voting record implies something about quality. It's how many times we walk to the floor and put that card in the machine or say yea or nay on the Senate side.

We have our own standard by which we are judged. It is a scorecard. Well, the scorecard for prosecutors is convictions. The scorecard for people who are making the arrests is getting the arrest and getting it into court. The forfeiture statutes are difficult. You focused on it, Mr. Chairman. You've tried to remedy it and some of the legislation before you attempts to remedy those difficulties where they exist. But by and large, most prosecutors don't know how to use it. They've never been trained in using it. The DEA people don't know how to use it. They have not made the commitment, although they've made a greater commitment in the last year than in the past.

So let me conclude by saying, gentlemen, that I firmly believe that one of the few substantive tools that we have available to use

on the books now to do something about the momentous increase in the profits derived from drug trafficking is to get the assets.

And I don't mean by the assets merely the stash that is picked up. We pick up the paper and we say, well, there's been a billion-dollar bust. The street value of this bust is x amount of dollars.

They're not the assets I'm talking about. The assets I'm talking about are their homes, their bank accounts, their legitimate businesses, their Swiss bank accounts, their Caribbean bank accounts. They're the things that we have the legislative power to get some of now. The legislation before you helps us go further in attempting to get at them, and the only things that are going to end up having a decisive impact on these folks.

Let me conclude with one last example. When I first started looking at this thing, as all of you have, and I don't pretend to suggest that I looked at it any longer, harder before or after you all did. But as it became apparent that these statutes weren't being used, we're at a stage or juncture in the drug trafficking business where we would count as contraband the abandoned automobile that was left as it crossed the border, or the abandoned twin-engine Cessna that was left on the runway, or the abandoned outboard motor boat that made it into some bayou in Louisiana or in the everglades.

Well, to give you an idea of how big it's gotten and how much is at stake here, these folks are leaving Lear jets on runways. They're not even trying to keep them. They're navigating cabin cruisers that they know they're going to leave.

The vehicles which they are moving the drugs into the country with have values of hundreds and hundreds of thousands of dollars. And they don't care a whole lot about it. That's how big it has become. They're able to become that sophisticated.

If you speak to the intelligence and the military people, they will tell you that the radar that is used on some of these privately owned boats or ships that bring in the drugs is sophisticated equipment. That type of equipment can't be picked up at a hobby shop.

And folks are running these organizations in ways that are very sophisticated. It's no longer some guy sitting back in some place in Long Island behind the Marlon Brando as the godfather with the green eyeshade and a sharp pencil figuring out how much they made this week. They have computer terminals on the 90th floor of buildings in Chicago and the 30th floor in Philadelphia and the 60th floor in New York City. And they have computer terminals that are hooked up across the Nation.

They are extremely sophisticated. And we in the Federal Government sit and we're cutting budgets. We're cutting DEA. We're cutting law enforcement. We're cutting the mechanisms by which we go after these folks. And we're cutting our chances of being able to do something substantive.

I've talked longer than I should have, but I suppose you are used to that. It's a senatorial liability. I guess you knew that when you invited me. [Laughter.]

I would be delighted to answer questions on specific legislation that you have before you or anything else that you would like to ask me, if you dare run the risk of my speaking again.

Thank you very much, Mr. Chairman.

Mr. HUGHES. Thank you, Senator, for a very fine, incisive statement. We congratulate you on your knowledge of this whole area and your recommendations. You did us a great service, first of all, by focusing attention upon forfeiture. It is an area that's been neglected. The General Accounting Office study that was conducted at your request and insistence will be very helpful to this subcommittee.

Let me just pick up on some of your last comments. You were responsible, I think, for restoring roughly $6.2 million on the Senate side, and this subcommittee was able to persuade the full committee, as well as the Appropriations Committee, to increase the DEA budget by something like $2.3 million on this side, and that's still bare bones.

Senator BIDEN. You're right.

Mr. HUGHES. We've lost ground since 1978. When you look at the inflationary pressures we've experienced, each and every year in real dollars, the DEA budget has been cut, like most law enforcement budgets.

How can we possibly provide the kind of investigative tools and carry out the indepth investigations that we both share as the desired goal without increasing the resources for the law enforcement agencies?

Senator BIDEN. Mr. Chairman, I think it is physically impossible to be able to do so. And I think that we need not reinvent the wheel in order to be able to spend money wisely. I think we would all agree, that we must do it and we all represent very different constituencies.

The fact of the matter is that I doubt whether in any of our constituencies we would find much opposition if we appropriated more dollars, more money, to fight the war on drugs or whether or not we were going to engage in spending the money for law enforcement.

The interesting phenomenon to me is that we have Democrats and Republicans, a President of the United States and the last President of the United States, in varying degrees heralding the need for major new expenditures on defense. And this is as much a threat to our national security, and I'm really not exaggerating. I truly give you my word, believe it with all my heart, that the international drug problem, of which we are the recipient of the negative aspects, is as much a threat to the national security of the United States of America as anything that the Soviets are doing in Angola or in El Salvador or anything else.

And yet, we have refused to fight the mechanisms by which these drugs are dispersed and the means by which they are put forward with anything approaching the amount of dollars these folks, in fact, are expending for their infrastructure.

I mean, if you just forget the question of whether or not we're spending enough to have enough prosecutors, which we aren't, in my opinion, if we're expending enough money for FBI agents and DEA agents and their tools of the trade, we're not.

But if you separate all that out and just focused on one thing, if we could get it, which we can't, we have to estimate, and just say dollar for dollar, we sit down and we say the Russians have 47 tanks, we have 32 tanks. They spent more money than we spent.

We have to spend more money so we can compete with the Russians. If you just took the organized crime families and figured their cost of doing business, what they build in, how much they pay their employees, how much technical infrastructure they have paid for, how many computers they have at their disposal, how many planes, et cetera, I would bet you, if there were any way that we could do that, you'll find, just like the Russians have more tanks, the bad guys have more guns. The bad guys have more tools. The bad guys have more computers. The bad guys have more at their disposal. And we wonder why we're getting whipped.

And so I see no way that we can have an impact without spending more dollars.

Mr. HUGHES. A good example of the utter frustration that I feel, and I share your feeling on the subject, happened just this past week on the floor of the House, when we had the Department of Transportation appropriation involving resources for the Coast Guard, which is our first line of defense. We were defeated overwhelmingly on the floor trying to get a bare bones minimum of $80 million for the Coast Guard.

We were lucky to have $6 million restored at a time when the Coast Guard has cut back 90 percent of its drug interdiction effort on the Pacific coast because we ran out of fuel money. We don't have enough fuel for the Coast Guard.

Senator BIDEN. The gentleman sitting behind me is from New York City—I'm not sure exactly whether you are still in the city. You are part of New York right?

Mr. ZEFERETTI. I've got the city. Brooklyn.

Senator BIDEN. You've got a gentleman from Brooklyn here. That gentleman from Brooklyn has a little problem: An awful lot of this drug traffic is coming in through his streets.

You know what we just did? We're cutting back on the number of customs officials who—forget the Coast Guard—who just stand there and look at the bags. We're cutting them back. And they're saying, "Why?" We're cutting back in Florida. We're cutting back on these agents, and we acknowledge that the overwhelming portion of the problem stems from these drugs crossing our borders.

I think it is preposterous and I think it's only because we, Republicans and Democrats in the U.S. Congress, have not joined hands and said, "American public, here it is. This is the problem, and we're going to spend more money."

In point of fact, I put out a newsletter on this issue.

And at the bottom, I said to my constituents statewide, I think it's important we spend a lot more money on this issue. What do you think? If you don't want me spending more money, call me. Nobody has called me. Not a whole lot have gone the other way. One hundred twenty or one hundred fifty people have said, yes, spend more money. But I'll tell you what——

Mr. HUGHES. Was it a local call, Joe? [Laughter.]

Senator BIDEN. I'll tell you what. If, in fact, I had sent out a newsletter on food stamps and said, we've got to spend more money on food stamps. Anyone who disagrees, call me or write me. You wouldn't find me. I mean, the avalanche of papers would be over my head.

So the point is they're willing to spend it and we have reasonable places to do it. We can start with the agencies which have the responsibility that we beat up on when they don't do it, and then we cut their budgets. And these poor guys have to march up here—we've seen them in every administration. They have to march up here and they sit before you, Mr. Chairman, from DEA or any place else and you say, well, don't you need more money? And they go like this [indicating], well, no, we really don't need any more money, and he's bleeding. There's a pool of blood down there in his sox. [Laughter.]

But he has to tell you that he doesn't need any more money or he's going to be in real need of money because he's not going to have a job. [Laughter.]

Mr. HUGHES. Well, thank you. The structural changes, the gaps in our statutes that need bolstering, we can address. The new authority, we can address. What gives me greater concern is the commitment that has been lacking on the part of law enforcement officials to pursue these very complicated investigations. And that's something that I look forward to working with you on.

The gentleman from Michigan.

Mr. SAWYER. Senator, I have to say that I enjoy listening to a real pro, who knows what he is talking about.

Senator BIDEN. I think, thank you. [Laughter.]

Mr. SAWYER. I had to chuckle while you were talking. We have our scorecards. That's absolutely true. But also, so do the police for arrests. Felony arrests per man-hour is a big criterion. For prosecutorial staffs, it is percentages of conviction. That is why the very areas you are talking about go without adequate attention.

In the biggest city in my district, Grand Rapids, Mich., we have a city police force of about 400. We have one detective assigned to organized crime. The reason for this, of course, is that that is the hardest case to solve. It is much easier to nail college kids with marihuana, and we've got three colleges around there. If enough marihuana is involved, there is a felony plea under Michigan law. By contrast countless man-hours go into organized crime investigations against highly sophisticated people, dummy corporations, and legally guided maneuvers that produce no arrests. They are just not about to wreck their record by assigning people to it. I spent some time as a prosecutor there, so I am well aware of that.

I also agree thoroughly with your statement that it is about as big a problem and maybe far more dangerous internally than the external threat.

The chairman here is wanting to say once in a while when he waxes poetic that they have yet to lose any citizens from Atlantic City in his district to the Russians, but they're losing them to the drug traffickers all the time. That's probably true all over the country.

I think it's absolutely true. Anybody who has ever sat in on these hearings will realize how totally accurate the statement is. Those who say, "we don't need any more money and we wouldn't know what to do with it if we got it and, really, the reduction is just part of a reduction of a planned increase," would lose their job if they said anything else.

Mr. HUGHES. They have.

Mr. SAWYER. Maybe they already have. [Laughter.]

So it's really true. I agree with you that the country, I think, is strongly supportive of spending more money for law enforcement. I think that this crime problem really hasn't even crested yet. It's still building rapidly, I think, in the public mind.

The problem is, where are we going to get additional funds from? The only possible places are some of the social programs that have been created over the many years. You hear a big scream when you take it from there. Or you can add it to the deficit, where you hear another big scream.

So I do not think that anybody has any hesitancy about adding money. It's a question of where we can get the money from. That's where you get the counter-screams and the problems.

I think both the chairman here and myself, as ranking members of the subcommittee, have been in total agreement on this and have supported the addition of funds to the extent that we've felt we could.

It just seems to me that we ought to provide all the tools that we can provide within constitutional limits to attack the funds and the assets of these operations, but then, as you've indicated, there's probably more to it than that, too. In some way or another, we provide either a stick or a carrot to the Department of Justice to persuade them to take on these tough time-consuming and much more complicated problems.

Senator BIDEN. If I may make two points in response to your statement. With regard to how you get the Justice Department or the Grand Rapids police force to take on the more difficult portions of the problem—and I might note, parenthetically, that I wish you wouldn't talk about how small Grand Rapids is. If I'm not mistaken, it's approximately the same size as the biggest city in my State. So we think it's big.

But the way you get it changed is for us to provide a little bit of leadership. And I'm using "us" in an editorial sense. It seems to me that we, in large part, institutionally, are part of the reason why the scorecard is kept the way it is kept. When we run against somebody else, and you were a prosecutor running against a former prosecutor, the first thing he'd say is, well, you know, when Sawyer was a prosecutor, he only had 47 convictions and so on. We politicians have done a lot—not you, sir, but I mean all of us.

And I think if we were to focus for the public and the press and everyone else in a consistent way that we see that the ground rules have changed and should be changed without assessing blame on the Justice Department or the police departments anywhere around, we would see things beginning to move.

They are, in fairness to DEA, beginning to move some. They are moving some. They have now instituted a program whereby they teach their agents about this legislation. It's much too little; it's only 3 days. But the point is, they acknowledge it.

The second point I would like to make is that money is available. The person who has worked closest with me on this kind of effort in the Senate for the last 4 years is a fellow whom most would characterize as a good old boy Southern hawk, leader in the military field, and no one questions the length and breadth of his hawkish wings. That's Sam Nunn from Georgia.

Sam Nunn has commented publicly and without a ripple that if in fact we can move in this direction, he thinks we should be taking money and he will take money from the defense budget. And the defense people will be willing to go along with it because much of what we're doing here dovetails directly with what, in fact, the Defense Department is doing.

Now if we are going to take money from defense and put it into a food stamp program, we'd hear a scream. If we take it from defense and put it into the Coast Guard, which is defense, it's a little bit different.

We have to start to look at defense in terms of the total defense. We have a domestic defense force and a foreign defense force, if you will. And we have to incorporate them in our thinking. They are part and parcel of the same thing.

I think you'll find, at least on the Senate side, men who have had long records of being overwhelmingly supportive of the Defense Department, are willing to acknowledge and take the flak for dealing with some of the money overlap that needs to be done between domestic and foreign defense.

And we're not talking big dollars here. If you leave out prisons for a moment, which you can't leave out long, but I mean in terms of drug enforcement, you could do a great deal for another half-billion dollars. I mean, you could do a tremendous amount. Forty million dollars is the total difference here. Half a billion dollars goes a long way toward our defense.

Mr. SAWYER. Thank you.

Mr. HUGHES. Thank you, Mr. Sawyer. The gentleman from Wisconsin.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I want to compliment you and Senator Biden, you for having these hearings and Senator Biden for stating the urgency of the problem.

I, for one, know very little about forfeiture statutes. I don't think that the committee has, in the recent past, done very much about the forfeiture statutes. I think there's a general attitude that up to the present time it's been sort of an anachronism, something that we had in the past, criminal statutes seldom applied. And only recently, I think we've probably failed in the Crime Control Act, whenever it was, 1970 or thereabouts. We knew that, as far as organized crime was concerned, that property was a very important part of the strength of the organizations.

This year, obviously, the American people, through various means, have learned that drug traffic, in and around Florida alone, just as one focal point, is so pervasive and has effected so much money, sheer capital, that we can no longer ignore that fact.

There ought to be a strategy, new strategy, developed to cope with that, and I guess that's what we're looking to the forfeiture statutes for.

I was going to ask, Senator Biden, have we ever, to your knowledge, developed the strategy or used forfeiture statutes effectively at any particular time or any particular enforcement arm of the Federal or State authority? Does the IRS use them effectively?

Senator BIDEN. Congressman, to the best of my knowledge, we have never effectively used the statutes that exist. We're talking about Federal statutes here.

With regard to your second and very important question, it is a separate issue, but it is not distinct from this issue—have we ever used the IRS in a way? We used to use the IRS somewhat more effectively than we do now, but in what I would characterize as a justifiable, but nonetheless, overreactive state, and I was part of it. I've been here since 1972. We curtailed the ability of the other agencies of the Federal Government to work with and have access to IRS information when we had the whole Watergate affair and the abuse of the IRS and the privacy questions and all the rest.

Part and parcel of the attempt to make an effort and a dent in this area are the efforts to change the legal ability of IRS. We've done this on the Senate side—I know the chairman is aware of it and is working on it himself. The same should be done, I suspect, on the House side. I hope it will be, anyway. We have changed the rules by which the IRS can play in the game, so that they can get back into the game without Presidents being able to abuse the authority of the IRS to intimidate political opposition. And so they do tie in.

The one thing I want to emphasize here is that I don't believe that the forfeiture statutes are the answer. I don't believe the forfeiture statutes are going to "solve our problem." I do believe, though, that the forfeiture statutes, if, in fact, they are enforced and used, will make a significant contribution to what should be an overall attempt to make a difference in this area.

And in fairness to what you'll hear probably from the Justice Department today, I suspect—at least what we heard—was that some of the case law is inconsistent. Although there is no Supreme Court case, some circuit courts raised questions about whether or not the statutes can be used in ways that make sense to prosecutors.

You have three bills before you: Mr. Gilman's bill, the ranking member's bill, and Mr. Zeferetti's bill, all of which are efforts to ways upon which to improve the forfeiture statutes which exist on the books. All of them are in the ball park, in my opinion. On our side of the chamber, we have adopted two of them, in essence. I would say that the only question I have, and I hope that it's resolved the way that the gentleman from Michigan wants it resolved, is the constitutionality of the gentleman from Michigan's bill. But I, for one, am willing to take a chance on that at this point.

But that's the only one that raises constitutional questions because of the difference between in personam and in rem jurisdiction and when the due process clause kicks in, and that is not unimportant. I'm not suggesting that it's a minor problem, but it's something that if this isn't the way to do it, we have to find ways to broaden the ability to get to those additional assets.

But these additions must be coupled with, first and foremost, the commitment on the part of the Justice Department to train their people to understand the complexity of the financial operations of these organizations and the use of the statute. We can pass all the laws we want, but unless they learn how to use the statute, it's not going to be of any consequence. And it's a frightening statute, so it scares prosecutors off. As you know, being a prosecutor, it's much more complicated. It takes longer. And there is a need.

And the reason why I said your comment about the IRS was so important is that, to really make these things work, you've got to get DEA, the prosecutor, and a good accountant in on the case at the outset, right from the beginning in order to make them effective because you must carry them through simultaneously. That has to be a commitment that is made by the Justice Department and that gets us back to—and I apologize for going on so—that gets us back to the fundamental question all three of you have asked, and that is dollars.

You're in a "catch-22" position: Justice will tell you that they're doing all they can, but what they're really saying to you is, look, we're spread thin. It takes time, money, and hours, additional people to have people who know how to use this statute and, in fact, we don't have the money to do that.

We had the field people to come in and testify before us. And we found the folks who are known as some of the best prosecutors in the country, under Democratic and Republican administrations, come in and say, you know, the honest fact of the matter is we don't know how to use the statute. We don't know where to go.

Gentlemen, as luck would have it, I've got to go to vote.

Mr. HUGHES. Thank you, Senator.

Senator BIDEN. There's a cloture vote at 2:15.

Mr. HUGHES. We appreciate your testimony. You've been most helpful.

Senator BIDEN. I appreciate what you gentlemen are doing because you're not going to get a lot of attention for it, but this is important. And so what's new in China? [Laughter.]

They don't know any different. But it is critical and I compliment you on taking the time.

Mr. SAWYER. We would not want to be responsible for hurting your voting record. [Laughter.]

Senator BIDEN. Thank you very much. Thank you very much.

Mr. HUGHES. I am pleased to introduce as the next witness, our distinguished colleague from the 15th District in New York, Leo Zeferetti. Congressman Zeferetti is currently the chairman of the prestigious Select Committee on Narcotics Abuse and Control. He is also the prime sponsor of H.R. 4110, which is before the subcommittee today. The Zeferetti bill represents a comprehensive and intelligent approach to the question of forfeiture. We hope to learn more about this proposal from him and the other witnesses before us today.

Leo, welcome to the subcommittee. We have your statement, which will be made a part of the record in full, and you may proceed in any way that you see fit.

STATEMENT OF HON. LEO C. ZEFERETTI

Good afternoon, Mr. Chairman, I want to thank you and the other members of the Subcommittee on Crime, for the opportunity to testify this afternoon on the issue of criminal forfeiture in drug cases and more specifically on H.R. 4110, the legislation I have introduced in this area. During this session of Congress your subcommittee and the Select Committee on Narcotics Abuse and Control have cooperated on a number of problems in the area of narcotics law enforcement including the very important issues of posse comitatus, bail reform, and the critical needs of State and local narcotics enforcement. We appreciate your cooperation and commend you

for making the control of narcotics trafficking a top priority of your subcommittee's efforts.

In the spirit of this cooperation and with your foresight Mr. Chairman, I am pleased that you have chosen to hold hearings on the various bills introduced to make the forfeiture of a narcotic trafficker's assets a more effective weapon in the arsenal against these merchants of death and human destruction. I do not think it can be understated that the swift and sure seizure and forfeiture of the profits, proceeds, and assets of narcotics traffickers will strike at the heart of what the traffickers are after—cash. This is money which goes untaxed, money which disrupts the Nation's economy especially in some of our southern States, and money which serves as the fuel in an organized crime machine which is so severely undermining our social fabric.

The bill I have introduced, H.R. 4110, which has been co-sponsored by 25 of our colleagues, serves two major objectives. First it will expand the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USC 1961 et seq.) and the continuing criminal enterprise statute (CCE, 21 USC 848). Both of these statutes were passed ten years ago to take the profit out of organized criminal activity, particularly narcotics trafficking. However, since the passage of these two important laws many judicial interpretations have restricted the scope of these statutes. What this Congress must do is address the shortcomings that led to the restrictive judicial interpretations.

For example, the RICO Statute presently speaks in terms of forfeiting the "interests" of a convicted racketeer in a criminal enterprise. However, the determination of one's interest in an enterprise is far from clear. Many courts have held that RICO cannot work a forfeiture of the profits or proceeds of an illegal enterprise because the statute only authorizes the forfeiture of the "interests" in such enterprise. My bill, H.R. 4110, would make clear that forfeiture under the RICO Act Statute reaches all profits and proceeds of illegal activity covered by the RICO statute regardless of the form in which they are held, and whether such assets are held directly or indirectly by the violator.

These amendments to the RICO statute are extremely important. The law must be made unequivocally clear that profits and proceeds, regardless of the form in which they are held are forfeitable under the act. The present concept of forfeiting only a defendant's "interest" in a criminal enterprise under RICO makes little sense when we are prosecuting narcotics traffickers. These individuals are engaged in wholly clandestine activities. The forfeitable interests in these enterprises are small in comparison to the profits and proceeds reaped from these illicit operations. We must insure that RICO reaches the profits and proceeds of illegal activity.

Similarly, the amendment I propose to the CCE statute would make explicit that all "proceeds" of narcotics trafficking would be subject to forfeiture. As presently worded the statute only permits the forfeiture of the "profits" obtained by a trafficker in a narcotics enterprise in addition to his interest in the enterprise. The difficulty with the statute as presently structured is that the concept of "profits" may not include the costs of operating a narcotics enterprise and hence only the net profits instead of the gross proceeds from trafficking may be forfeitable. My bill would make clear that all proceeds of narcotics trafficking would be subject to forfeiture. The salutary effects of this change are two-fold. First, it is easier to prove the proceeds of an illegal activity as opposed to net profits. Second, a convicted trafficker would be denied recovery of his costs of conducting an illegal enterprise. Forfeiture will obviously be more effective when it encompasses all proceeds rather than merely profits.

A further amendment to the RICO statute would make clear that the law applies to wholly illegal enterprises, associations or groups of individuals engaged in drug trafficking. Although the Supreme Court recently clarified this issue by holding that the RICO statute does apply to any type of criminal scheme or organization, this amendment would make the law explicit on this issue.

The second objective of my bill is to permit forfeiture of a narcotics trafficker's assets even if he puts his illegal profits beyond the reach of domestic law enforcement. The laundering of illegal profits and proceeds to foreign depositories and through multiple front corporations was a major complaint of Federal investigators to members of the Narcotics Committee staff who recently were in Florida. My bill would amend both the RICO and CCE statutes to permit the forfeiture of other assets of a trafficker when he puts his illegal gains beyond the reach of forfeiture procedures. At the present time, both RICO and CCE only permit the forfeiture of assets directly related to the offense for which the defendant is convicted. Neither statute speaks to illegal gains that are transferred to third parties or placed in unreachable foreign depositories. My amendments would allow the forfeiture of any

assets a trafficker has in his possession that are not otherwise subject to forfeiture to the extent that illicit assets identified for forfeiture are unreachable.

I would like to make reference at this point to the bill introduced by Mr. Gilman, H.R. 2910. I commend Mr. Gilman, a member of the Select Committee on Narcotics, for introducing this legislation which would permit Federal drug law enforcement officers to use proceeds from the sale of forfeited property under civil forfeiture authority to purchase evidence and other information in connection with their trafficking investigations. I have co-sponsored this legislation and feel it complements my bill. My bill extends the reach of criminal forfeiture statutes making them a more effective tool for law enforcement. Mr. Gilman's bill bolsters the civil forfeiture laws and would enable us to give law enforcement additional resources to fight narcotics violators. I urge the committee to give H.R. 2910 its careful consideration.

I want to emphasize that effective employment of the forfeiture statutes against traffickers cannot come about merely by legislative changes that improve the current laws. The Department of Justice and Federal drug law enforcement agencies must make the forfeiture of traffickers' assets an integral part of any investigation and prosecution. Unfortunately, this has not been the case to date.

In the 98 RICO and CCE narcotics prosecutions that took place over the last ten years, only eight had an investigative plan to identify assets for forfeiture purposes.

As chairman of the Narcotics Committee, I urge the Justice Department to develop the investigative expertise that is necessary to bring about effective forfeiture prosecutions against major traffickers. Only when this commitment is made can we begin to eliminate the financial gain and power illegal drug dealers seek.

In closing, I urge the subcommittee to support H.R. 4110. I would be happy to answer any questions you might have.

TESTIMONY OF HON. LEO C. ZEFERETTI, A REPRESENTATIVE IN CONGRESS FROM THE 15TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Mr. ZEFERETTI. Thank you, very, very much, Mr. Chairman, and the members of the committee for giving me the opportunity to be with you this afternoon, to discuss current forfeiture legislation.

But before I summarize my prepared statement, I would like to endorse what was said by Senator Biden and by the distinguished members of your subcommittee.

I think all too often we look at drug enforcement and the problems with drug-related crime as not getting the priority that's so necessary if we're ever going to have an impact on the overall problem. We find ourselves doing things on an international level that would make the eradication of illegal drug-related crops a possibility in parts of the world that have an impact on our country, but we do very little to give that same kind of monetary priority to domestic law enforcement when it comes to giving them the tools to accomplished the mission.

You know, I'm a great believer that if we were to poll the American people today, I think the most important issue on everybody's mind is crime, violent crime and drug-related violent crime that is becoming a social epidemic.

I think, too, that the American people want solutions. Your task, Mr. Chairman, and the task of your subcommittee and the full committee has been the responsibility of enacting the legislation that's necessary that will impact on the crime problem, whether it be organized or otherwise, out in the streets. But beyond that, I think we need leadership from the executive branch of Government joining with us in a partnership, legislative and executive alike, that could create a strategy, if you will, that's effective in combating crime and drug-related crime.

Until we reach that point where the executive branch recognizes the seriousness of the crime problem, we're not going to have priority in funding that is so necessary for the relevant law enforcement agencies to do their job. And I think, too, that law enforcement agencies by themselves cannot alone combat substance abuse.

And it also goes beyond what we can do legislatively. I think it's going to take a tremendous effort, by executive branch and the legislative branch what we advocating as the select committee, to bring in industry, business, labor, parents, education, religion and all those people that have a stake as to what is out there as to what's going on and what's happening in our communities, such as Grand Rapids as the gentleman from Michigan talked about, or whether it's from my neighborhood in Brooklyn.

And I think it's important to note that if we're talking about spending money, I think we ought to be talking about spending money for the entire criminal justice system because to spend money on just one aspect of the system and not fulfilling our obligation to the rest of it will just not work.

I came today, though, to testify on my particular bill, which H.R. 4110 does what Senator Biden testified to and what the GAO reported. It would make clear that forfeiture under the RICO Act statute reaches all profits and proceeds of the illegal activity covered by the RICO regardless of the form in which they are held and whether such assets are held directly or indirectly by the violator. That is another area that we've got to be concerned with. I think those assets have to be, once forfeited, given back to law enforcement for fighting the overall problem.

In the area of organized crime, I think if we enact this statute then we can make a financial dent into those crime families that Senator Biden was talking about, and also those recent crime entrepreneurs that suddenly found this illicit drug wealth very, very lucrative. I think then, too, we can make an impact on that.

So you have my full statement. I won't burden you with reading it all. Each bill before the subcommittee today represents a different feature, I think, that lends itself to formulating a plan that would give us the ability to hit financially on these people quite hard. The constitutionality problem that Mr. Sawyer's bill presents I hope can be resolved. Mr. Gilman's bill gives us the ability to put forfeited assets back into enforcement.

And to answer your question, Mr. Kastenmeier, in the 98 RICO and CCE narcotics prosecutions that have taken place over the last 10 years, only 8 have had an investigative plan to identify assets for forfeiture purposes. So that tells us that these statutes have not been used and it is an area that must be used. What we have to do, I believe is to shore up the present deficiencies in the laws that would give the Justice Department the tools to undertake prosecutions that would be effective.

I thank you again and I thank your committee for taking on some of the hard problems that face us and doing such an effective job.

Mr. HUGHES. Thank you, Leo. Let me thank you for not only appearing here today and testifying and giving us the benefit of your expertise, but also for the great support that you've offered this subcommittee on matters that relate to law enforcement on the

floor. You and your colleague, Mario Biaggi, who have similar backgrounds in law enforcement, recognize the problem probably more than most Members. You've been extremely supportive and we appreciate it.

My colleague, Hal Sawyer, and I share so many common experiences since we both have backgrounds in law enforcement. His legislation relative to forfeiture is something that I find extremely attractive. I, too, join your hope that we can address some of the constitutional questions that have been raised because I believe that it is important for us to make it easier for law enforcement to be able to trace the fruits of crime.

I've also become very practical about having a separate fund. There was a time when I felt that everything should go through the legislative process, but I'm becoming more and more practical about that. [Laughter.]

I find the idea of using forfeited funds a lot more attractive today than I did last Thursday, for instance. So you're all going to make me a believer of the need for that provision, also.

I also want to assure you that the forfeiture issue is going to receive our immediate attention. We're going to do something legislatively, and we're going to hopefully provide, with your help, the leadership that's needed to see that the law enforcement community gets the resources they need and second of all, that they follow through in providing forfeiture so that we can begin hitting the criminal element where it really hurts—in the pocketbook.

And that's how I view forfeiture. I think that your legislation has a great deal of merit and we're going to give it very, very serious consideration in the course of these hearings.

Mr. ZEFERETTI. Thank you, Mr. Chairman.

Mr. HUGHES. I recognize the gentleman from Michigan.

Mr. SAWYER. I think this constitutional problem has been a bit overstated. We checked into that in some depth at the time we drafted the bill. But be that as it may, I particularly think that this concept of funneling money back into law enforcement adds a big incentive element to the picture. I know back during my brief stint as prosecutor, we had a problem involving drug purchasing in drug enforcement. You could easily pick up a little street peddler, but when you get up the line, you had to start dropping some really substantial amounts of money. It involved a lot more than a county or so on could really afford.

We hit on the idea of promoting or, really, raising a million dollars from private sources and we got commitments to do it. But we had to then figure out some way, and we had to make a commitment to them, that this would be a self-perpetuating fund. We were never able to get through the State legislature a statute which would allow the forfeiture to go back into such a fund to be used to make the buys. And yet, the idea still appealed to me.

I can see that if we had succeeded, there would have been a 25-lawyer prosecutorial staff in the State that would have been devoting every bit of effort it could devote to forfeiture.

It seems to me if we could, in effect, provide something similar to that on the Federal level, we would encourage an entrepreneurial aspect within the civil service.

So it just strikes me that if there were some way we could preserve that, we could bolster it with some kind of oversight to make sure that those funds were not taken back from them in their budget. I think we could do that through effective oversight.

Mr. HUGHES. Would the gentleman yield to me?

Mr. SAWYER. Surely.

Mr. HUGHES. That sounded like supply side economics there for a minute. [Laughter.]

You were talking about replenishing the fund.

Mr. ZEFERETTI. I can tell you, though, if you talk to anyone in law enforcement they will tell you that if they have a division that's working strictly in narcotics, they need dollars to operate effectively. This is really an avenue that we could go down that could really make a meaningful contribution to the overall problem and one which we should pursue.

And may I just touch on one thing? The Select Committee is having a hearing tomorrow, and is bringing in the Department of Defense and the Armed Services because the drug abuse problem has now permeated all our services. Drug abuse in our military today has become very serious concern to each and every one of us. When we talk about national security, when we talk about the young people that have the responsibility of handling delicate, sensitive and technical equipment, and who are on daily usage of one form of drug or another, we're talking about a crisis situation.

I don't want to sound pessimistic, but I think drug abuse is something that faces us all, whether it's in society, on the streets, or whether it's in our military, and it needs top priority and attention. It's only through a senior effort, the committees of Congress and by the administration that we can have an impact on this problem.

So whether it's forfeiture or whether it's bail reform you have a big responsibility, Mr. Chairman, as does the rest of the full committee, in enacting legislation that is going to help us. We'd like to just join in that effort and share with you whatever we turn over and turn up during our investigations.

Mr. HUGHES. Thank you. We welcome that assistance.

Mr. ZEFERETTI. Thank you.

Mr. HUGHES. The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I have nothing really to add other than to also compliment our friend from New York. He is, indeed, ahead of people in terms of his recommendations generally in the area of crime prevention. We have, in my own subcommittee, a number of initiatives that I know that the gentleman from New York anticipated by a couple of years, at least, the Attorney General's Task Force on Violent Crime, by suggesting that we would have to commit very substantial Federal resources to prisons and jails in this country at a time when it was not popular to say that, I might add.

And so in that and in this regard and a number of other aspects, he has really become a leader in coping with crime. I appreciate his efforts.

Mr. ZEFERETTI. Thank you for those very kind words. Thank you again, Mr. Chairman.

Mr. HUGHES. Thank you, Leo. We appreciate your assistance.

Our next witness has a long and distinguished career in public service. I'm referring to William J. Anderson, who is Director of the General Accounting Office. He has been designated Director of the General Government Division of the General Accounting Office since May 1980. Before he became designated Director, he had a wide variety of assignments within GAO, and has degrees in foreign service and business administration. He has received the GAO meritorious service award, a superior performance award, and the distinguished service award.

Mr. Anderson, we're delighted to have you. We have your statement, which will be admitted in full in the record, and you may proceed in any way that you see fit. Welcome.

[The complete statement follows:]

United States General Accounting Office
Washington, D.C. 20548

STATEMENT SUMMARY

* Billions of dollars are generated through gambling, prostitution, narcotics trafficking, and other illegal activities annually. And, although the Government attempted to take the profit out of crime through asset forfeiture, it has had little success.

* Reversing the Government's efforts involves both improving the management of the forfeiture program and legislative changes.

* The Department of Justice has taken several steps to deal with program management problems and congressional hearings will, hopefully, result in needed legislative changes.

* There are four major legislative problems: (1) the scope of the forfeiture authorizations is too narrow and in many respects does not cover forfeiture of profits; (2) it is not clear whether any ill-gotten gains can be reached when a de facto combination of individuals constitutes the only enterprise through which a defendant engages in racketeering activity; (3) the extent to which assets must be traced to the crime is unclear; and (4) transfers of assets prior to conviction limit the effectiveness of forfeiture.

* Legislative remedies have been proposed for most of these problems and should be enacted.

United States General Accounting Office
Washington, D.C. 20548

FOR RELEASE ON DELIVERY
EXPECTED AT 1:00 p.m.
September 16, 1981

STATEMENT OF

WILLIAM J. ANDERSON, DIRECTOR

GENERAL GOVERNMENT DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIME

HOUSE COMMITTEE ON THE JUDICIARY

ON IMPROVING

THE EFFECTIVENESS OF

CRIMINAL FORFEITURE OF ASSETS

Mr. Chairman and Members of the Subcommittee:

We are pleased to have the opportunity to testify on the Government's overall efforts to obtain the forfeiture of assets obtained through criminal activities and, specifically, on bills H.R. 2646, 2910, and 4110, designed to improve the forfeiture statutes. Last spring we issued a report entitled "Asset Forfeiture--A Seldom Used Tool in Combatting Drug Trafficking" (GGD-81-51, April 10, 1981). Our testimony today is, for the most part, based upon that report.

As the title of our report indicates, the Government's record in attacking crime through the forfeiture of assets is not good. And the Government's failure is not limited to drug trafficking.

Recently, at the request of Senator Max S. Baucus, we completed work on organized crime in which we found that the same problem applies to other types of criminal activities. Our report on this matter will be issued soon.

In our April 1981 report, we recommended that the Attorney General improve forfeiture program management and that the Congress clarify and broaden the scope of the criminal forfeiture statutes--the Racketeer Influenced and Corrupt Organization Act (RICO) and the Continuing Criminal Enterprise provision (CCE) of the Comprehensive Drug Prevention and Control Act. The Department of Justice has taken several actions to improve the Government's ability to pursue forfeiture. And hearings, such as this one, on proposals introduced to amend forfeiture statutes will, we hope, result in needed legislative changes.

The extent to which an improved asset forfeiture program will affect criminal activities such as drug trafficking is uncertain. But a successful forfeiture program could provide an additional dimension in the war on criminal activities by attacking the primary motive for such crimes--monetary gain.

Few assets have been forfeited

Billions of dollars are generated through gambling, prostitution, narcotics trafficking, and other illegal activities, yet very little has been forfeited by the criminals. For example, revenues generated through narcotics trafficking alone are estimated in excess of $70 billion annually, according to the National Narcotics Intelligence Consumers Committee. Yet, as we reported,

the amount of narcotic traffickers' assets forfeited since enactment of authorizing criminal forfeiture legislation in 1970 until March 1980 was only about $2 million. The amounts forfeited under civil forfeiture statutes were equally unimpressive.

Recently, the value of criminal and civil forfeitures resulting from drug cases has increased, but it is still small when compared to the profits generated from drug trafficking. Specifically:

--In our report we noted that from enactment of the statutes in 1970 through March 1980, RICO and CCE forfeitures had totaled only $2 million. Between April 1980 and July 1981, an additional $3.2 million had been forfeited.

--We reported that for fiscal years 1976 through 1979, civil forfeitures under 21 U.S.C. 881 totaled $5 million. In fiscal year 1980, civil forfeitures increased to $5.5 million, and during the first 9 months of fiscal year 1981 forfeitures were $4.8 million.

However, compared to the estimated $70 billion generated annually in drug trafficking, these amounts are miniscule.

Relatively little has been accomplished in the forfeiture area for several reasons. One of the key problems, we believe, has been the lack of leadership by the Department of Justice. Even though attacking criminal finances has been a primary objective of law enforcement for several years, until recently forfeiture has received scant attention.

For example, at the outset of our study in January 1980, no one in the Justice Department knew how many RICO and CCE narcotics cases had been attempted, the disposition of the cases, how many cases involved forfeiture attempts, and why those attempts either failed or succeeded. Similarly, Justice had accumulated only a paucity of data on cases involving the use of the expanded civil forfeiture provisions authorizing forfeiture of property traceable to drug profits. Justice investigators and prosecutors did not have the expertise or incentive to pursue asset forfeiture.

Efforts are being made to improve the Government's forfeiture program. Specifically, the Department of Justice has

--issued guidance to prosecutors on the use of forfeiture statutes,

--started to accumulate forfeiture statistics to analyze the extent forfeiture provisions are used and the reasons for their success or failure,

--made forfeiture a goal in every major drug investigation, and

--issued a 400 page detailed drug agents' guide to forfeiture of assets.

Although the Justice Department has taken some steps to strengthen its forfeiture program, these initial efforts must be continued and implementation monitored if the Government is going to improve its forfeiture effort.

Legislation Needed

In addition to improvements in the management of the forfeiture program, legislative changes to the RICO and CCE forfeiture

authorizations are also needed. Although the case law on these authorizations is not extensive, it has become clear that the Congress needs to strengthen the RICO and CCE statutes if forfeiture is to be a viable remedy. Four major problem areas have been identified. I will discuss them briefly before offering our views on the pending legislation. A more complete description of these problems can be found in chapter 4 of our April report.

First, the scope of the forfeiture authorizations has been narrowly defined. The CCE authorization, for example, speaks in terms of forfeiture of, among other matters, "profits"--a term commonly defined as the proceeds of a transaction less its cost. Under this definition, the costs of narcotics to a dealer are not profits, and a significant legal question exists as to whether proceeds allocable to costs are forfeitable under CCE. RICO, on the other hand, speaks only in terms of forfeiture of interests in an enterprise. Case law seems agreed that the term interests does not cover profits derived from the enterprise. The ramifications of this are obvious and I will not belabor them here.

Second, it is not clear whether RICO can reach any ill-gotten gains when a de facto combination of individuals constitutes the only enterprise through which a defendant engages in racketeering activity. As the Fifth Circuit's recent opinion in U.S. v. Martino indicates, there is often nothing to forfeit in the case of individuals associated "in fact" because one cannot actually own an interest in such an enterprise.

Third, there is considerable confusion under both RICO and CCE about the degree to which assets must be followed to their

illicit origin to be forfeitable. Both statutes require a connection, other than mere ownership, between the offense of conviction and the property to be forfeited. Serious asset identification problems may arise if the property subject to forfeiture has been laundered; that is, if it has changed hands in multiple transfers, changed forms, or both.

A fourth problem area concerns the preconviction transfer of ill-gotten gains. Preconviction transfers raise two fundamental legal questions. The first is whether the Government may seek forfeiture of a defendant's "clean" assets once transfer of the ill-gotten assets occurred. However, neither RICO nor CCE contain language authorizing the substitution of clean assets. The second is whether transferred assets in the hands of a third party are forfeitable, in criminal litigation, but there is almost no case law on this issue.

Two of the three pending bills, H.R. 2646 and 4110, address these problem areas, but in some respects differ in approach. H.R. 4110 and its companion Senate bill, S. 1126, track the proposed legislative package contained in our report, and would amend both the RICO and CCE statutes. H.R. 2646 would amend RICO, but not the CCE statute and apply to only those racketeering activities involving drugs.

Since both RICO and CCE contain similar substantive deficiencies, we recommend that the Congress consider remedial legislation covering both criminal forfeiture statutes. As the Fifth Circuit's recent opinion in U.S. v. Martino indicates, the proceeds of other forms of racketeering, such as an arson ring

defrauding insurance companies, can be substantial. We, therefore, recommend the Committee consider the more comprehensive approach proposed by H.R. 4110.

As far as RICO is concerned, H.R. 4110 and H.R. 2646 clearly and unequivocably cover profits and proceeds. Both of these bills also deal effectively with the de facto association problem, though once again, H.R. 2646 is limited to those associations or enterprises that traffic in drugs. Under the Supreme Court's recent opinion in U.S. v. Turkette, it is now clear that those using a wholly illegitimate enterprise for illegal activities can be convicted under RICO and sent to prison. Under H.R. 2646, drug traffickers, and under H.R. 4110, all organized criminals who use a de facto association would also forfeit their ill-gotten gains.

On the matter of tracing and preconviction transfers of ill-gotten gains, the bills take markedly different approaches. H.R. 4110 would authorize forfeiture of substitute, so-called clean assets, to the extent that the defendant's ill-gotten gains (1) cannot be located; (2) have been transferred to third parties; or (3) have been placed beyond the jurisdiction of the courts. The forfeiture amount, however, would be limited to the value of the illicitly derived assets.

H.R. 2646 does not authorize forfeiture of substitute assets. Instead, the bill creates a presumption that all property of the defendant is illegally derived and hence forfeitable in criminal litigation. But if the defendant can demonstrate, presumably to the jury, that his property is not connected with the offense of

conviction, the assets would not be forfeited. We do not know whether the courts would consider the rebuttable presumption that the defendant's entire estate is connected in some way with illegal activity to be a constitutionally reasonable one, particularly if the defendant had no prior criminal record or had been previously gainfully employed.

To the extent that courts sustain such a presumption, the bill still would not solve the preconviction transfer problem. If the illegal gains have been transferred and the defendant demonstrates that his remaining assets are "clean," the bill contains no specific provision for forfeiture of substitute assets in the amount of the illegal gain. The provision in H.R. 4110 would fill this void.

Mr. Chairman, we should emphasize that neither bill fully resolves the issues surrounding the forfeitable status of assets that the defendant transferred, sold to, or deposited with third parties. Significant questions are involved in this issue, since the defendant--not the third party--is the individual who is accused of and tried for the offense. In one of the U.S. v. Mandel cases the court deferred decision on the rights of third parties in these circumstances but has retained jurisdiction over the case pending exhaustion of administrative remedies. Legislative changes in this area should, in our opinion, await the basic guidance that case law can provide.

H.R. 2646 also has provisions which allow for the proceeds of forfeited property to be used for drug law enforcement. Similar language is contained in H.R. 2910 with regard to civil

forfeiture of drug proceeds. Although we find appealing the idea of using criminal assets, particularly drug dollars, to stop the perpetration of crime, we have some concern about the use, accountability, and congressional oversight of these assets provided by the bills.

H.R. 2646 would, in part, amend the RICO statute to permit the use of forfeiture proceeds for Federal, State, and local law enforcement. This provision would provide an annual blanket authorization of an amount of funds, limited only to the amount forfeited in the preceding year, for drug enforcement without any type of report on fund expenditure. If the use of forfeiture proceeds is desired, we suggest that the Congress amend the legislation to require the Attorney General, as a part of the Justice Department's normal authorization and appropriation oversight process, to estimate the amount of funds that will become available under this authorization and to determine how the funds will be used. In addition, after the end of the fiscal year, the Attorney General should be required to report how the funds were expended.

The other bill, H.R. 2910, amends Section 881 of Title 21, the civil forfeiture authorization for drug assets, to permit the use of the forfeiture proceeds under this provision for purchase of evidence and information in drug investigations. The maximum authorized under this amendment is $10 million, or 5 percent of the Drug Enforcement Administration's budget, whichever is greater. Additionally, the amendment stipulates that the Attorney General should transmit to the Congress a report after the end

of the fiscal year on the use of all funds spent on the purchase of evidence and information. To provide better congressional oversight, we believe the Congress should also include in this legislation a requirement that the Attorney General estimate the amount of funds anticipated to be available under this section and determine how these funds will be spent. With this annual estimate by the Attorney General, the Congress might wish to consider broadening the use of forfeiture funds beyond the purchase of evidence and information.

Mr. Chairman, this concludes my prepared statement. We would be pleased to answer any questions.

TESTIMONY OF WILLIAM J. ANDERSON, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, WASHINGTON, D.C., ACCOMPANIED BY TOM COLAN, ED STEPHENSON, AND KEN MEAD

Mr. ANDERSON. Thank you very much, Mr. Chairman. I'd like to start off by introducing the gentlemen at the table with me here. To my left is Tom Colan. Tom is in charge of all of GAO's work at DEA, FBI, INS, and the Customs Service. To my right is Ken Mead, an attorney who played a very important part in this job because of all the legal aspects of it. And beyond him, Ed Stephenson, who was the audit manager of the report that we prepared at the request of Senator Biden.

As you mentioned, we did have a full statement that we would like to have entered into the record. I have an abbreviated version running around 4 pages that really captures the highlights. I'd like to read that, if I may.

Mr. HUGHES. Thank you. You may.

Mr. ANDERSON. We are pleased to have the opportunity to testify on the Government's overall efforts to obtain the forfeiture of assets obtained through criminal activities and, specifically, on bills H.R. 2646, 2910, and 4110, designed to improve the forfeiture statutes. Last spring, we issued a report entitled, "Asset Forfeiture—A Seldom Used Tool in Combating Drug Trafficking." Our testimony today is, for the most part, based upon that report.

As the title of our report indicates, the Government's report in attacking crime through the forfeiture of assets is not good. And the Government's failure of asset forfeiture is not limited to drug trafficking. Recently, at the request of Senator Max Baucus, we completed work on organized crime, in which we note the same problem applies to other types of criminal activities. The report will be issued shortly.

In our April report, we recommended that the Attorney General improve forfeiture program management and that the Congress clarify and broaden the scope of the criminal forfeiture statutes—

the Racketeer Influenced and Corrupt Organization Act, RICO, and the continuing criminal enterprise provision, CCE, of the Comprehensive Drug Prevention and Control Act.

The Department of Justice has taken several actions to improve the Government's ability to pursue forfeiture. And hearings such as this one, on proposals introduced to amend forfeiture statutes will, we hope, result in needed legislative changes.

Although the case law on the RICO and CCE forfeiture authorizations is not extensive, it has become clear that the Congress needs to strengthen these statutes if forfeiture is to be a viable remedy. Four major problems have been identified. First, the scope of the forfeiture authorizations is too narrow and, in many respects, does not cover forfeiture of profits. Second, it is not clear whether any ill-gotten gains can be reached when a de facto combination of individuals constitutes the only enterprise through which a defendant engages in racketeering activity. Third, the extent to which assets must be traced to the crime is unclear. And finally, transfers of assets prior to conviction limit forfeiture effectiveness.

A more complete description of these problems can be found in chapter 4 of our April report.

The pending bills address these problem areas, but in some respects differ in approach. H.R. 4110 and its companion, Senate bill S. 1126, track the legislative package contained in our report and would amend both the RICO and CCE statutes. H.R. 2646 would amend only RICO and would apply to only those racketeering activities involving drugs.

Since both RICO and CCE contain similar substantive deficiencies, we would recommend that the Congress consider remedial legislation covering both the criminal forfeiture statutes and all types of racketeering.

Both H.R. 4110 and H.R. 2646 clearly and unequivocably cover profits and proceeds and deal effectively with the de facto association problem. Under the Supreme Court's recent opinion in the *United States* v. *Turkette*, it is now clear that those using a wholly illegitimate enterprise for illegal activities can be convicted under RICO and sent to prison. However, the application of the forfeiture provision is still unclear.

Under H.R. 2646, drug traffickers, and under H.R. 4110, all organized criminals who use a de facto association, would also forfeit their ill-gotten gains.

On the matter of tracing and preconviction transfers of ill-gotten gains, the bills take markedly different approaches. H.R. 4110 would authorize forfeiture of substitute, so-called clean assets, to the extent that the defendant's ill-gotten gains, first, cannot be located; second, have been transferred to third parties; or, third, have been placed beyond the jurisdiction of the courts. The forfeiture, however, would be limited in amount to the value of the illicitly derived assets.

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the courts would consider the rebuttable presumption that the defendant's entire estate is connected in some way with illegal activity to be a constitutionally reasonable one, particularly if the defendant had no prior criminal record or had been previously gainfully employed.

I think we share Senator Biden's view that it would be nice if such an interpretation could be made.

To the extent that courts sustain such a presumption, the bill still would not solve the preconviction transfer problem. If the illegal gains have been transferred and the defendant demonstrates that his remaining assets are clean, the bill contains no specific provision for forfeiture of substitute assets in the amount of the illegal gain. The provision in H.R. 4110 would fill this void.

Mr. Chairman, we should emphasize that neither bill fully resolves the issues surrounding the forfeitable status of assets that the defendant transferred, sold to, or deposited with third parties. Significant questions are involved in this issue, since the defendant—not the third party—is the individual who is accused of the offense and receives a trial.

In one of the *United States* v. *Mandel* cases, the court deferred decision on the rights of third parties in these circumstances, but has retained jurisdiction over the case pending exhaustion of administrative remedies. Legislative changes in this area should, in our opinion, await the basic guidance that case law can provide.

H.R. 2646 also has provisions which allow for the proceeds of forfeited property to be used for drug law enforcement. Similar language is contained in H.R. 2910 with regard to civil forfeiture of drug proceeds. Although we find appealing the idea of using criminal assets, particularly drug dollars, to stop the perpetration of crime, we have some concern about the use, accountability, and congressional oversight of these assets provided by the bills.

We suggest that the bills, to the extent that they do not already do so, require the Attorney General, as part of the Justice Department's normal authorization and appropriation oversight process, to estimate the amount of funds that will become available under this authorization and how the funds will be used. In addition, after the end of the fiscal year, the Attorney General should be required to report how the funds were expended.

With these provisions, the Congress might wish to consider broadening H.R. 2910 to include the use of forfeiture funds beyond the purchase of evidence and information.

That concludes my statement, Mr. Chairman. We'll try to respond collectively here to any questions that you and the members may have.

Mr. HUGHES. Thank you very much, Mr. Anderson. First, I found the General Accounting Office report to be extremely incisive and very helpful to the committee and I congratulate you and your staff on a very fine job.

Mr. ANDERSON. Thank you.

Mr. HUGHES. One of the difficulties that we've experienced with forfeiture is that it's extremely complicated. It's not very acceptable. Law enforcement has a lot of other priorities that involve active cases that they're pursuing because their resources are

spread so thin. It's a matter of trying to channel your resources into what you believe to be productive areas.

Mr. ANDERSON. Yes, sir.

Mr. HUGHES. Given those facts, would it make sense for Justice to train a select group, a task force, if you will, that would specialize in just forfeiture cases?

Mr. ANDERSON. I would say that probably somewhere along the way, I guess on the basis of the work that we did in developing the report for Senator Biden, we felt that the usefulness of the 1970 acts had never really been put to the test because we really hadn't had an effectively organized, intelligent drive to apply that legislation.

I'll repeat a figure that Congressman Zeferetti cited of 98 RICO and CCE cases that we examined involving narcotics violations. Forfeitures were obtained in 14 of the 98.

So obviously, even where those particular statutes are being applied, we're not being successful.

We believe that if you could bring the proper talent to bear, and by that we mean, for example, with respect to DEA, DEA's own efforts in this area have suffered because they have not had people with the type of financial and accounting backgrounds that the FBI has at its disposal and that IRS has used successfully in the past.

It was pointed out that DEA is trying to do something about it. They do have a modest training program. They have prepared a very lengthy 400-page manual to instruct their agents on how to go about pursuing these cases.

But, No. 1, the utility of the legislation has to be tested one time. We may find out when we do that that perhaps our resources would be better diverted to the way we've been doing business in the past: Let's put them behind bars because it's just too difficult, too expensive to get to whatever assets they may possess.

I hold that out as one possible outcome.

Mr. HUGHES. Well, it seems to me that you've said, in essence, the same thing—that what we need are trained personnel, people who have accounting backgrounds that can pursue what obviously would be a very complex, perhaps long, drawn out investigation, to effect the forfeiture.

From all the facts and figures I've seen, we've really forfeited very little in funds. Out of the forfeitures that have been reported, apparently, we have only forfeited roughly $6 million, as I see it.

Mr. ANDERSON. Right.

Mr. HUGHES. The U.S. Treasury, under titles XXI and XVIII.

Mr. ANDERSON. That is correct, sir.

Mr. HUGHES. It doesn't represent very much of a successful track record. Although I don't have myself the indepth knowledge, it would seem to me from what information I have available to me, it does require a particular type of expertise which the drug enforcement agent generally does not have.

Mr. ANDERSON. Yes, sir.

Mr. HUGHES. In fact, that doesn't in any way denigrate the DEA and the agents. I have just returned from Southeast Asia, having visited Hong Kong, Thailand, and Burma, in particular, and I came away with a tremendous respect for their professionalism. Their police officers have done an outstanding job, in my judgment, in

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working in host governments in attempting to interdict narcotics traffic and to develop the intelligence information that's helpful to us. However, the bottom line is that we have not developed another particular important area of expertise in the area of accounting. Of course, I suspect that that's part of the suggestion that there should be an increased relationship between FBI and DEA. It's all wrapped up in that recognition that as we develop more of these complex cases, we're going to need that expertise.

But let me just ask you: Can we not do that without having a merger with those two agencies?

Mr. ANDERSON. They've certainly had successful joint task forces in the past, you know, that combine the talents that each brings to bear. IRS, in fact, participates in some of DEA's CENTAC operations, central tactical investigations. And so they are inputting somewhat.

I agree with what I think your position is, that, yes, absent a formal integration and reorganization of the two agencies, it should be possible, just as has been done in the past with IRS and, in fact, with the FBI, to draw on their expertise to assist DEA.

Mr. HUGHES. And with Immigration, where, in fact, it's an immigration matter that should be brought to bear.

Mr. ANDERSON. Correct, sir.

Mr. HUGHES. Task force operations have been inordinately successful and it seems to me that it's going to require that type of an operation—the coordination of perhaps the talents that are existent in several different agencies to pursue what could be a very complex case to prosecute.

Mr. ANDERSON. You know, there was a point made earlier, sir, that I would like to build on because it's also a source of additional resources that aren't currently being applied. Let me throw some figures at you.

Back in 1974, IRS was devoting close to 1,000 man-years annually on drug-related tax cases. In the last couple years, it's down under 200. So their own effort in attacking organized crime people engaged in drug trafficking and other drug dealers has gone down considerably.

That was the purpose of an internal IRS management decision—that they should be more concerned with collecting the taxes than with chasing drug peddlers.

An allusion was made earlier to the problems that the Tax Reform Act of 1976 has created in stifling the flow of useful information that IRS has to the law enforcement agencies. In fact, I testified last year on some legislation that never was enacted that would have amended the Tax Reform Act and made it easier for the law enforcement agencies to draw on this other source of expertise and information on these people we're trying to chase.

Mr. HUGHES. We've talked about investigators. Another component is the area of the U.S. attorney, the Justice Department.

Mr. ANDERSON. Yes, sir.

Mr. HUGHES. I also gather in talking with those in the field that seem to be fairly knowledgeable, that U.S. attorneys find it hopelessly complex. It's not their specialty. They, too, have the scorecards that my colleague from Michigan referred to that they're

concerned about. We often find that some States do have that capability.

I noted that the violent crime task force recommended that we have the cross assignment of prosecutors. If, in fact, that is a problem that we have those at the top of the law enforcement rung who are charged with the prosecution of those offenses, if they're not excited about it, they don't have expertise and feel comfortable enough, you can't expect an investigator to pursue it.

Mr. ANDERSON. Right, sir.

Mr. HUGHES. So it seems to me that we ought to be looking at trying to train prosecutors as well as investigators in pursuing these complex cases. Does that make sense to you?

Mr. ANDERSON. Yes, sir, it certainly does. We spoke to a number of U.S. attorneys in connection with the earlier report and I think we found it was close to three-fourths of them who really didn't feel that they had a good handle on this forfeiture legislation and therefore, were hesitant to introduce it because, in their view, it just made a complicated case more complicated and they had difficulty in applying it.

So it absolutely applies to that level as well.

Mr. HUGHES. Thank you. The gentleman from Michigan.

Mr. SAWYER. I enjoyed listening to the comments just made. I'll yield back.

Mr. HUGHES. The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I'm curious about what's going on during the current practice. What happens in a case alluded to, I think by Senator Biden and others who know about and have dramatized the cases where Lear jets are left on runways and great caches of cash and sometimes drugs are found in Florida and elsewhere and are impounded? Do they become subject to forfeiture, or what happens to property of that sort?

Mr. ANDERSON. Generally, sir, they would be covered by 18 U.S.C.—I'm sorry, 21 U.S.C. 881. In 1978, a piece of legislation was passed amending 881, Psychotropic Substances Act, which provided for civil forfeiture in cases like, for example, DEA makes a nab and, say, a transaction in process and there's $1 million at the table.

Before 1978 and the passage of that legislation, that money, in all likelihood, would have gone back to the criminals involved. But since that time, there have been provisions, well, there have always been provisions for the forfeiture of the contraband and derivative contraband and, say, the vehicles and the Lear jet would be in the category of derivative contraband, being used in the execution of some kind of a crime.

The proceeds, though, couldn't be touched until that 1978 piece of legislation. But now, a large part of the seizures that DEA is making, for example, represents civil forfeitures, the grabbing of the cash right in the middle while the crime is occurring and then that is forfeited without even prior to or without the necessity for a criminal conviction of the parties involved.

Mr. KASTENMEIER. So we're really talking about types of forfeitures, the more difficult being that which derives from a criminal prosecution as opposed to the early civil.

Mr. ANDERSON. Yes, sir, for any number of reasons, including, first, the difficulty frequently of getting a conviction, and then beyond that——

Mr. KASTENMEIER. Obviously, a strategy has to be arrived at by the Department of Justice or others as to particularly the criminal forfeiture case, how to better apply the statutes or, indeed, how we might better write those statutes so that they might be more commonly applied.

Mr. ANDERSON. Yes, sir. I'd say that the bills that the committee is considering here would help the Department of Justice considerably in developing that strategy.

Mr. KASTENMEIER. Thank you.

Mr. HUGHES. Thank you, Mr. Anderson. We appreciate your testimony. It's been most helpful and we thank your colleagues.

Mr. ANDERSON. Thank you very much, Mr. Chairman.

Mr. HUGHES. The next witness is our distinguished colleague from New York, Benjamin Gilman. Congressman Gilman has for the past 9 years represented the 26th Congressional District of New York.

Prior to his service in the Congress, Congressman Gilman spent some 5 years in the New York State Assembly. He comes before this committee with a long and distinguished career as an attorney. He also has developed in his years in the Congress a deserved amount of respect for support of important initiatives to support law enforcement.

Congressman Gilman, I am pleased to have you as a sponsor of H.R. 2910, one of the bills before this committee, to present your views on the important topics of forfeiture and moieties. Let me say that we're also extremely pleased with your tremendous support on the floor for matters that impact on the crime problem. You've been a leader. You and your colleagues, Mario Biaggi and Leo Zeferetti, have taken the lead, I think above others, and we commend you. We're happy to have you today.

We have your statement, which will be received as part of the record, and you may proceed in any way that you see fit.

[The complete statement follows:]

STATEMENT OF HON. BENJAMIN A. GILMAN

Mr. Chairman and members of the Subcommittee on Crime, thank you for the opportunity to present my views on H.R. 2910, "A bill to amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 to permit the Attorney General to use certain proceeds from forfeited property for the purchase of evidence and other information", which I introduced on March 30, 1981. This bill, I am pleased to report, has attracted 24 cosponsors. I am grateful that this Subcommittee has decided to hold hearings on this and related bills and on the general subject of criminal forfeiture.

Section 511(e) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513, 21 U.S.C. 881(e)) currently requires the Attorney General to turn over to the U.S. Treasurer the proceeds of forfeited property, which, after certain expenses have been paid, are deposited in the general fund of the U.S. Treasury. My proposal would permit, as an alternative, the Drug Enforcement Administration (DEA) to use not more than $5 million of the forfeited proceeds to purchase evidence and other information—that is to say, to use it as PE/PI (Purchase of Evidence/Purchase of Information) money or drug buy money—during Fiscal Year 1982. Thereafter, the agency could use $10 million in forfeited proceeds or 5 percent of DEA's appropriation, whichever is greater. These amounts are intended to supplement, not to replace or reduce the appropriations authorized for DEA's

drug trafficking investigations, and are limited to a specific function: the purchase of evidence and other information needed for the arrest and conviction of drug traffickers. The Attorney General would be required to transmit an annual report on the expenditure of these funds.

During prior hearings by the Select Committee on Narcotics Abuse and Control—of which I am a member—Federal, State, and local law enforcement officials have complained that they do not have sufficient "buy money" to conduct their drug investigations. Out of a total budget of approximately $208 million for fiscal year 1981, DEA has about $10 million to purchase evidence and other information. That sum is insufficient to carry on its domestic and foreign operations.

In fiscal year 1980, DEA, working with the Internal Revenue Service, the Customs Service, and State, local, and foreign law enforcement agencies, seized $90.8 million in illicitly obtained drug assets, of which more than $42 million was forfeited to the Federal Government. At a time when federal dollars are scarce, why not permit our drug enforcement officials to utilize these forfeited proceeds of drug-related crime to underwrite drug investigation? Why not use some of these untaxed criminal dollars to help convict drug traffickers?

Mr. Chairman, my proposal would not place any additional burden on the Nation's taxpayers; it would not increase the appropriation for DEA operations. Rather, the additional funds to conduct operations that require drug "buy-money" would come from the drug traffickers themselves—the cash, boats, aircraft, homes, securities and other financial instruments that were used in their sordid drug trafficking operations.

The Comprehensive Drug Abuse Prevention and Control Act of 1970 now permits the seizure and forfeiture of illicitly obtained drug assets. This is a valuable tool that attacks drug traffickers where it hurts the most—in their pocketbooks. My proposal has the three-fold advantage of, first, helping to meet the increased cost of conducting drug investigations, in which the purchase of evidence and other information is a vital ingredient, by permitting drug law enforcement officials to tap a limited amount of forfeited drug assets before they are turned over to the general fund; second, making effective use of an available resource; and third, using untaxed dollars to help convict drug traffickers.

Federal, State, and local law enforcement agencies are faced with shrinking budgets, in real terms, in this time of inflation. These cuts come at a time when:

Narcotics trafficking and drug abuse have reached epidemic proportions both in this country and abroad; heroin from the poppyfields of Iran, Afghanistan, Pakistan, Burma, Laos, and Thailand is flooding into our streets and our schools; hospital emergency rooms and treatment centers are reporting increased numbers of drug injuries and deaths; budgetary restraints have forced the closing of certain DEA operations overseas, the curtailment of a successful DEA task force, and a cutback in personnel; and the cost of purchasing heroin for investigatory purposes has skyrocketed to about $10,000 an ounce.

Sterling Johnson, the special narcotics prosecutor for New York City, has commented:

"How ironic it would be for drug traffickers to share the burden of our taxpayers by being sent to prison from the proceeds of their illicit transactions."

Mr. Chairman, I urge your subcommittee to favorably report out H.R. 2910, so that we can provide our law enforcement officials with these urgently needed funds, at no cost to our taxpayers, to help combat the epidemic in drug traffic that is currently sweeping across our Nation and the world.

TESTIMONY OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE 26TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Mr. GILMAN. Thank you, Mr. Chairman. I thank you for your kind words and I thank the committee for taking up this very important issue at this early part of the session. I would hope that we will see some constructive legislation as a result of these hearings.

I would like to make certain that the statement is submitted in full and I will be brief.

I think the forfeiture provisions utilized as a tool in narcotics enforcement is extremely important. I think that we have not utilized it properly and I would hope that, as a result of the committee's

review of the proposed legislation, we could adopt some measure and hopefully it would be my measure or whatever measure the committee feels is appropriate, to give some teeth to the enforcement agencies to attempt to more effectively combat drug abuse and drug trafficking.

As you know, it's an endless problem. We make a dent here and there, but we really haven't effectively cut back on the tremendous amount of traffic confronting our Nation at the present time, sometimes estimated to exceed $60 billion in illicit trafficking in our country. We know what drug-related crime goes with that and the cost of that drug-related crime. It's been estimated to be over $20 billion in our Nation. We do have a very critical problem and I think that this kind of legislation would provide a tool that would be extremely helpful.

In talking with Sterling Johnson, who is the head of the special prosecutor's office in New York City, one of the biggest problems is the limited budgetary restraints that we have at the present time and the lack of buy money.

As we know, buy money is hard to come by and it's a very important tool for the enforcement officers. I think they spend on the average about $10,000 an ounce today, is their estimate. They have limited funds and as a result of the reduction in budgets, they're not able to do the kind of enforcement job that they could do had they had the proper funds.

What I'm suggesting by this legislation, H.R. 2910, would allow up to $10 million to be used in revolving fund for buy money. I note that the GAO, in commenting on this measure, indicates that they have some concern about some oversight and how that money would be utilized. I think we could probably put a few provisions in the bill to make certain that there would be adequate oversight.

I hope that the committee will find a method for bringing this before our 97th Congress at an early date. I think it's urgently needed. It's an extremely critical problem. We just conducted a hearing in New York City this past week, as the chairman of our Select Committee may have indicated to you. The religious groups, the educational groups, the business groups of every community are concerned with the spreading evils coming out of increased drug abuse.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Gilman. The gentleman from Michigan.

Mr. SAWYER. I just wanted to thank the gentleman for his presentation. I appreciate it.

Mr. GILMAN. I might note that the gentleman from Michigan has a similar bill and I hope that we can work together in bringing about some of this legislation.

Mr. HUGHES. Thank you, Ben. We congratulate you on a very fine legislative initiative and we look forward to working with you.

Mr. GILMAN. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you very much. The subcommittee stands in recess for 10 minutes while we vote.

[Brief recess.]

Mr. HUGHES. The Subcommittee on Crime will come to order.

Our next witness is Stephen Horn. Mr. Horn began his legal career in the Attorney General's honors program in the Department of Justice and from 1973 through 1978 was a trial attorney for the Civil Rights Division in the Justice Department. He entered the private practice of law in 1979, where he specialized in criminal defense and civil litigation. Mr. Horn has published numerous law review and other articles, including two articles on RICO.

He is chairman of the ABA committee on prosecution and defense of RICO cases, although he does not appear here today as a representative of the ABA but rather as a private practitioner with wide experience in the matter before the subcommittee today.

We're just delighted to have you with us today, Mr. Horn.

Statement of Stephen Horn
to the Subcommittee on Crime,
Judiciary Committee of the
House of Representatives

September 16, 1981

In Re H.R. 2646, 2910 and 4110

As I understand the primary purposes of the proposed legislation, they are to enlarge the definition of forfeitable assets and to increase the effectiveness of the forfeiture process itself. As any law-abiding member of society, I would not choose to advocate that criminals be allowed to retain illicit profits or to thwart by cleverness the imposition of sanctions. However, one must be concerned about the implications of these bills for the adversary system, for the accused who is ultimately found not guilty and the innocent third parties who will inevitably be drawn into the legal cross-fire.

It seems to me that these bills have aspects that should be of concern to everyone because we all have an investment in the fair and orderly administration of justice. The complexity and and scope of the trial and forfeiture proceedings required by the

proposed RICO and CCE statutes, as well as the mere potential imposition of sanctions so severe, will exact a terrible economic toll upon accused and unaccused alike, notwithstanding guilt or innocence. Inevitably, the process will become the punishment. And our system of criminal justice will take on a certain abject quality symbolic of systems we would rather not emulate.

Consider for a moment the cost associated with merely defending an indictment charging a violation of the proposed statutes. I noted that the GAO Report on Asset Forfeiture* lamented the fact that a $750,000 forfeiture of two residences was thwarted because the defense counsel had a $559,000 lien to cover his fees. That figure may sound high, but it is by no means unusual. I would venture to say that many, if not most, defenses of complex RICO and CCE cases involving the proposed contests over the scope and identity of forfeitable assets will require six months to a year or more in the preparation and presentation. Consequently, legal

*United States General Accounting Office, Asset Forfeiture--A Seldom Used Tool in Combatting Drug Trafficking. (April 10, 1981).

fees will be well into the six-figure range with the aforementioned half-million dollar fee about the median. Incidentally, the proposal contained in H.R. 2646 to create a presumption that all the assets of the accused are forfeitable, shifting the burden of proof to him to protect each and every asset, is probably worth $100,000 in legal fees just by itself.

In effect, by passage of these bills Congress would be creating a statutory scheme of prosecution the defense of which could be undertaken by only a relative few. Put another way, we are placing an enormous price tag upon the constitutional safeguards that should be available to everyone. (Rarely would any RICO or CCE defendants qualify for appointed counsel.) The implications for the adversary system are serious. It's no answer to suggest that defendants will be paying these fees with their ill-gotten gains. Innocent people, those who are acquitted, do not recover their fees and costs from the government--perhaps they should. Do we truly wish to create a legal labyrinth that can only be negotiated

by the most successful criminals with vast sums of liquid assets?

Setting aside the cost of the defense, we should examine the effect of investigation and/or indictment upon an individual with sound assets, perhaps interests in some businesses and other ventures. Unless the target of the investigation is un-American to the core, his business and personal finances are probably dependent upon his credit--his ability to borrow. When word of the grand jury investigation leaks to the press--as it will--all of his collateral is in jeopardy. Financial institutions could be expected to act accordingly. What creditor would advance funds in the hope that, should forfeiture occur, a court or the Department of Justice will <u>eventually</u> determine to recognize and discharge a lien? Given the six months to two or three years it will take to resolve the situation, the target is sure to suffer irreparable economic harm regardless of whether he is totally innocent. I recognize that most, if not all, of the debate has focused on insuring that the guilty do not profit, and properly so, but we

must also consider the plight of the innocent who inevitably come under investigation. Once again, the clear danger is that the process itself will become the punishment.

Finally, we should examine the plight of the "innocent" third parties. I might say here that, with regard to in personam forfeiture, I always thought that an innocent person was one who had not been adjudged guilty by a court of law. Aside from the virtue of simplicity, I would have thought such an approach was constitutionally mandatory. Unfortunately, the Deputy Director of Economic Crime Enforcement of the Department of Justice disagrees. In a recent article* expressing his own, unofficial point of view, he stated that innocent third parties "include those who do not have knowledge of illegal activity . . . . " I assume by this that the Department of Justice would be glad to grant a request for remission if a partner or lienholder can convince the bureaucracy that he really did not know what was going on.

*Weiner, Crime Must Not Pay: RICO Criminal Forfeiture in Perspective, 1981 Ill. L.Rev. 225.

Regardless of the definition of "innocent third party" employed, in the amount of time it would take to remove the cloud of impending forfeiture from a going concern so that it could be effectively carried on by innocent shareholders, executives or partners, the good will and credit that is the lifeblood of any enterprise will be long since drained away. At the very least, Congress must introduce an element of certainty into the process by declaring that persons who have not been accused and convicted cannot forfeit those property interests traditionally recognized and protected by law.

I submit that the proposed forfeiture schemes simply have too many negative aspects to offset whatever may be gained by their enactment. Not only with they take a terrible toll on innocent persons, but prosecutors will be even more reluctant to employ the forfeiture device because of the committment of resources required to prepare such a case and take it to completion.

A system of fines severe enough to make the punishment fit the crime seems to me to be a much more efficient way to address the concerns of this Subcommittee. Congress could increase the potential fine in appropriate RICO and CCE cases to perhaps $100 million. After receiving all the evidence at trial and in post-trial proceedings, the court can determine just how high the fine should be to deprive the defendant of the fruits of his unlawful labors.

In executing the judgment, the marshals will be seizing the very same assets that the bills propose be forfeited. If the defendant has enough cash to pay the levy without losing an enterprise or a house or other property, he would be able to start a new enterprise and purchase new properties after a forfeiture anyway. The end result is the same. But the process would be tremendously simplified and "end-loaded" to insure that more of the costs incurred by a defendant would be after a guilty verdict and not before.

Furthermore, by introducing an element of judicial discretion, Congress will prevent disproportionate forfeitures which would be a very real problem if the proposed bills were enacted.

TESTIMONY OF STEPHEN HORN, ATTORNEY, WASHINGTON, D.C.

Mr. HORN. Thank you, Mr. Chairman. I certainly appreciate the opportunity to appear here and perhaps introduce some considerations into the mix that have not yet been advanced.

You know, there is an old gypsy curse that says, may you have a lawsuit in which you know you are right. And I suppose that's part of the theme of my presentation.

Mr. HUGHES. I might say that we have your statement, Mr. Horn, and it will be received in the record in full, and you may proceed as you see fit.

Mr. HORN. Thank you. As I understand the primary purposes of the proposed legislation, you wish to enlarge the definition of forfeitable assets and increase the efficiency of the forfeiture process itself. And as any member, law-abiding member of society, I would not choose to come here and advocate that criminals be allowed to retain ill-gotten gains or that they be allowed to defeat the processes of law by some clever chicanery.

But I think as fellow citizens, we all have an investment in the adversary system. And I think we have to be concerned about the accused who is ultimately found to be not guilty and the innocent third-parties who inevitably are going to be drawn into the legal crossfire that you propose to create.

Basically, my message would be this: The complexity of the proposed RICO and CCE statutes, as enforced, will create an imposition, will exact a terrible economic toll upon accused and unaccused alike. Defending a RICO or CCE investigation and prosecution will become a luxury that can be afforded only by the most successful criminal with vast amounts of liquid assets.

I suppose, in brief, my message is that what you may create here is a system, a scheme of prosecution wherein the process becomes the punishment. Just participating in the process will become the punishment.

I read with some interest the GAO report on forfeiture, where it talked about a $750,000 forfeiture and it was lamenting the fact that $559,000 of it was lost to a defense attorney's lien.

That sounds like a lot of money. But I submit to you that in the type of cases that are going to be created under these bills, if they become law, that amount will be about the median of what it would cost.

I would venture to say that many, if not most, defenses of complex RICO and CCE cases, and particularly the contest over what is and what is not forfeitable, will require 6 months to a year or more in the preparation and presentation. Legal fees will be a half million dollars or more.

In effect, you're going to create a statutory scheme of prosecution, the defense of which can only be undertaken by a few people.

Put another way, and more importantly, you're placing an enormous pricetag upon the constitutional safeguards that should be available to everyone. The standard reaction that most people would have is—well, they've gotten all this money from drugs, anyway. Let's make them spend it and, ultimately, no matter what happens, they'll spend a lot of it in their defense.

But think about the implications for the adversary system. It's no answer to suggest that defendants will be paying these fees with ill-gotten gains because innocent people, those who are acquitted, do not recover their fees and costs from the Government and maybe they should.

Do you truly wish to create a legal labyrinth that could only be negotiated by very successful criminals. Innocent people get charged with RICO, too, just like they do any other Federal statute. It happens all the time. The economic toll on these people is devastating.

I've been in the trenches on both sides. I've been a prosecutor; I've been a defense lawyer. I've had an opportunity to see the human toll that the system exacts. When you're talking about forfeiture and making the guilty pay, and who can disagree with that, you have to sit back for a moment and consider what's going to happen to the innocent people and to the innocent third parties who are going to inevitably get dragged into this somewhere, perhaps in these complex forfeiture proceedings.

What's going to happen to a man, for example, who has moderate or substantial assets, some going concerns, who gets accused of a RICO violation? Well, if the bills are passed as structured, all of a sudden, all of his assets become suspect, all of his collateral is potentially forfeitable. Like most American citizens, his businesses, his personal finances are in part dependent on his ability to borrow. He won't be able to borrow. What financial institution is going to advance money to a going concern that may be out of business, in the hope that somehow, the Justice Department or a court may ultimately, years down the pike, honor a lien?

Even if he's acquitted, chances are that he's going to be out of business.

Now I recognize that I am a lone voice here and I understand the considerations that are before the committee and, certainly, I don't disagree with the results that you're trying to achieve. But I submit to you that when you're funding the war on crime, you have to fund it the same way you fund the defense budget. You have to use the same criterion; that is, you want to get bang for your buck.

Now I can tell you how to get bang for your buck, but I really don't think that this is the way to do it. When I was in the Army, we had a simple motto for giving orders and setting up systems. It was called the K.I.S.S. method—keep it simple, stupid—because the system is going to be spread out and interpreted by all kinds of people. You've got sophisticated U.S. attorneys' offices, you have unsophisticated U.S. attorneys' offices. You have judges who have problems applying these statutes. You have jurors that cannot understand RICO jury instructions.

I wrote an article in which I submitted that the ideal RICO juror would be somebody who can define metaphysics or solve Rubik's cube before recess, because those are the only people who can understand them. And you get acquittals in the cases because of that.

You're going to tie up prosecutors, teams, task forces, if you will, for years going after one man and his assets. That's not bang for your buck.

Let me suggest an alternative. Suppose, for example, the penalty for a RICO conviction involving drug offenses as predicate crimes, or the penalty for a CCE conviction, was fine ranging up to, say, put a number, $100 million. No limit—$2 billion. Then, postconviction, based on the evidence that's introduced in the record of the trial and in postconviction proceedings, the judge determines just how much of a fine is necessary to get everything the man got from drug trafficking, and he sets the fine there. Then you have a simpler process, a collection process whereby they're just going to go out and seize all his assets there, based on the amount the judge sets.

You don't have to worry about whether or not this is proceeds. That is a legal labyrinth that you don't want to get involved in. That proceeds controversy is going to drag a trial or a postverdict proceeding out for 6 months.

It doesn't matter how he got it. If it's his assets or if they're traceable, they're under constructive trust theory, the marshals will seize them. If he has enough money to pay the fine in cash and thus keep his enterprise, well, he would have had that money to begin with and if you had seized the enterprise, he'd just be back in business or somebody else would take the cash and be back in business, and the end result would be the same.

But most importantly, what you're doing is you are end-loading the process; that is, the most difficult aspect for the prosecutors, for the defense lawyers, for the courts would all take place after a verdict of guilty. At least the innocent people have gotten out of the system at that point. I submit to you, it's a lot easier to gear up and teach people collection than it is to teach them to apply the forfeiture statutes.

I recognize that there is a great call to expand these statutes. But you have to recognize that there is a real reason why they haven't enjoyed popularity for the past 10 years. There is a sea of criminality out there. There are a finite number of prosecutors. What you have to do is streamline the process, make it easier for them to do it.

I don't think that these are the ways to do it. Like any other citizen, not just a member of the defense bar, I would like to see the war on drug traffic won, but I think that you can go about it an easier way. Making these forfeiture statutes more complex in the sense of what would be involved at trial, and that's the important thing, what would be involved at trial, is not bang for your buck.

And that concludes my statement.

Mr. HUGHES. Thank you, Mr. Horn. Can you tell us a little bit about your own trial experience? You indicate that you were on both sides of the RICO cases, both defense as well as in prosecution.

Mr. HORN. I was not a RICO prosecutor. I was a prosecutor in the criminal section of the civil rights division. Most of the prosecutions I became involved in involved the deprivation of rights under color of law type cases. I was involved in the investigation of the FBI for illegal investigative techniques.

As a defense lawyer, I have been involved in some RICO cases. But when I was a prosecutor, I detected—I was a traveling prosecutor. I'd go to many U.S. attorneys' offices. I was always the carpet-

bagger that would arrive. And I've seen all kinds of offices. I worked in the most sophisticated, the Southern District of New York, for example. And I've worked in relatively unsophisticated offices. People tend to take the path of least resistance. You can legislate all you want; you can't legislate out the human factor. You have to take advantage of the human factor.

Show somebody a straight road to a big carrot and they're going to go after it every time. If they think that they're going to get tied up with accountants and IRS people and for the next 2 years they're going to live and die with one case, it's awfully tough. Besides that, what's happening to all these other people while a 20-man U.S. attorney's office, 5 of which are devoted to drug prosecutions, are tied up on 2 cases for 2 years?

I don't know if you have enough money to hire the number of prosecutors you would need to be effective. I think the fines can do it, fines and a good collection process to get in there and seize everything the judge desires to be seized, plus two other things.

There is a problem with disproportionate forfeiture. It does happen that some people lose too much. The proposal to go after forfeiting enterprises for a RICO violation made an example of mail fraud cases. Sometimes the punishment is way out of proportion with the crime and some courts have talked about this.

The second thing is this: You don't want to discourage people or extort people to the point where they are afraid to participate in the adversary system and take advantage of their constitutional safeguards. When you sit down and you tell a client what's at stake when the prosecutor whispers a RICO as a possibility in plea bargaining, he'll plead to anything. He may feel he's innocent. He may convince the lawyer that he's innocent. But he's not taking any chances.

I submit that we all have a stake in the adversary system in keeping it healthy. We can't scare people out of it and we can't make it unaffordable. I think that that's a problem that you have to address.

Mr. HUGHES. Thank you. Mr. Sawyer.

Mr. SAWYER. Yes; of course, I spent a little time trying lawsuits myself. I never heard of anybody pleading guilty to a felony when they felt they were innocent to avoid expenses. Maybe that's the view from different parts of the country.

Actually, under H.R. 4626, I believe, the forfeiture proceedings occur after a verdict of guilty. You would not have the problem of an innocent party being subjected to this on that basis. The basic charge has to be found first. Then it seems to me that the time involved in the trial would not really be any more difficult than the problem of identifying assets for purposes of levy or seizure or whatever you were going to do to satisfy a client. The burden of, in effect, tracing would lie with the defendant to show that he got them somewhere else, like he would in a net-worth prosecution in an IRS case.

How long were you with the Justice Department, I assume, the Civil Rights Division?

Mr. HORN. Yes, sir.

Mr. SAWYER. How long were you with them?

Mr. HORN. About 5½ years.

Mr. SAWYER. Since then you've been practicing privately?

Mr. HORN. That's correct.

Mr. SAWYER. Here in the District of Columbia?

Mr. HORN. Correct.

Mr. SAWYER. How long have you been practicing privately?

Mr. HORN. Two and one-half years.

Mr. SAWYER. Were you in any private practice before you went with the Justice Department?

Mr. HORN. No, sir.

Mr. SAWYER. So you have been practicing 7½ or 8 years?

Mr. HORN. Eight.

Mr. SAWYER. Thank you. That's all I have. I yield back.

Mr. HUGHES. How do you feel about postconviction, requiring a defendant to come forward with proof as to how he secured assets such as shopping centers, hotels, and motels? How would you feel about shifting the burden of proof?

Mr. HORN. Well, under the bill that would shift it during the trial, I have some problems with that in light of the *United States* v. *Leary*. I think the Supreme Court has talked about presumptions that shift the burden of proof in the context of a drug case, as *Leary* was.

But the problem is the proceeds part, defining what is or is not proceeds of crime. I would propose that if you did it as part of the fine, you wouldn't get caught up in it. Neither side would have the burden of tracing. Tracing is a real problem. You get into the rules of comingling funds, the rules of restitution, and you could take a year-long course on those rules themselves.

If the defendant was convicted and the fine was levied, I would propose that all of his assets, you could even obviate the standard State exemptions under the supremacy clause, and it doesn't matter where he got it from.

Mr. HUGHES. It seems to me that if you're concerned about the rights of the defendant, I would be a little concerned about a judge who happened to have a bad breakfast.

Mr. HORN. Well, I suppose that that is, in fact, something that you would have to address. But I think I'd like to see the element of judicial discretion involved.

Mr. HUGHES. Wouldn't a defendant, after conviction, have more of an opportunity to advance his case insofar as forfeiture and assets to be forfeited if there was a hearing at that posture on the issue of what represents the illicit fruits of his crime?

Mr. HORN. I would think so. That should be where the burden is addressed because you'd have fifth amendment problems if it was preverdict. You may have a situation—as a matter of fact, the RICO committee is proposing——

Mr. HUGHES. What I'm saying is, wouldn't that comport more with due process and be fairer to a defendant if, in fact, at least he had his day in court rather than leave it up to the whims of a judge?

Mr. HORN. Well, I would think that you would have——

Mr. HUGHES [continuing]. To ask what represents the fruits of crime? If you can impose a fine up to $2 billion, obviously there could be a great deal of litigation over what, in fact, would be a fair and reasonable determination by the courts. And no matter

how you cut it, you're going to have to have some postconviction determination.

My question is: Wouldn't it be fairer in the final analysis, once convicted, to shift the burden as we do now with a net-worth process for internal revenue? We should require the defendant to come forward, and, if he inherited his beach home from his mother, who passed on last year, then that's easy for him to prove. If, in fact, the shopping center was secured by legitimate means, why wouldn't it be fair to permit him to come forward and show that, in fact, he earned it legitimately, paid taxes on it? After all, if he's just a law-abiding citizen, he should be able to do that. We all have to do that.

Mr. HORN. I think I detect, though, that there would be some fifth amendment concerns in that process of shifting the burden of proof, even at that stage. There is always the possibility of a successful appeal and a retrial, for example. And any time you require the defendant to step forward and get involved—inevitably, it becomes involved in the merits of the case. Did this shopping center come from this transaction that was brought up at the trial or did it really come from your mother-in-law's estate? And then you start talking about documents and conversations—you're going to get involved in the merits of the case.

Mr. HUGHES. Why is it constitutional to do it in IRS investigations and not constitutional in drug investigations or prosecutions?

Mr. HORN. I'm afraid I can't answer that because I'm not all that familiar with how it works in the IRS cases.

Mr. SAWYER. Would the gentleman yield for a moment?

Mr. HUGHES. I'd be happy to yield.

Mr. SAWYER. Let me just explain to you how it works. The IRS goes back, 5 or 6 years, for instance, and determines what your net worth was at that point through various means. To that, they add all of the amounts that you've reported as earned income. They then compute your current net worth and allow certain fixed amounts for living expenses and things that would be nondeductible.

Finally, they then come out and show that, based on what you had 6 years ago, and what you reported during those 6 years as earned income, you should be worth $100,000 with all of these allowances. Strangely enough, you are worth a million dollars. Therefore, you have unreported income.

The burden then shifts to you. You can show that 6 years ago you had perhaps a big cash horde that you never had in any bank accounts. You always liked to keep $900,000 in your mattress or you inherited it from somebody, so it would be nontaxable. You must show some other nontaxable source of funds or a preexisting source. If you don't, you've had it. You get convicted. But they shift the burden to you.

It just seems to me that this is substantially the same thing. If one of these big assets was a shopping center, you could show that you inherited that from Uncle Joe 2 years ago and produce his will and you would be home free. But if you can't do that, you've got some problems.

So I don't really see the difference there.

Mr. HORN. Well, it seems to me that the IRS process, as you described it, first a prima facie case is made out and then you respond to it. If the Government is going to make a prima facie case asset-by-asset which you're going to respond to, I would have less problem with that than a bill that would shift the burden, create a presumption that everything you own is forfeitable and you come back and start to justify asset-by-asset right down to the watches and rings. I see those conceptually as two different things.

Mr. SAWYER. They can do the same things with your deductions, for example. They may disallow deductions or they might even prosecute you for falsely claiming deductions. You've got the burden. They do not have to prove the negative. You must come in with your canceled checks or whatever other evidence you've got, and prove that those were legitimate items, or that you had reason to believe that they were and you were not deliberately filing a false return.

There is nothing so unusual about shifting a burden to a defendant.

Mr. HORN. Not at all. There are many presumptions in the law, civil and criminal, that incorporate many statutes. I don't have a problem with making out a prima facie case and having the defendant have to respond to it. The presumptions are there to aid the jury as the trier of fact and I have no problem with them conceptually.

A presumption that operates—the point I was making was the presumption that would operate against all of your assets would serve to destroy most people financially before the gavel was ever rapped to commence the trial.

Mr. SAWYER. But first, he has to have been found guilty. That is a prerequisite to forfeiture. He must have been first found guilty of the charge.

Mr. HUGHES. Would you feel better if, after conviction, Justice were then to look at the assets that you have, check your tax returns, as we do in a net-worth, and then show that your assets far exceed what you've reported legitimately in income over a period of time? Do you have any problem with shifting the burden at that point as you do with IRS?

Mr. HORN. No; I have less of a problem with that. The problem that I saw with the forfeiture was at the time of the indictment, or even when the investigation is leaked, by virtue of the operation of the statute, by operation of law, everything that you have becomes "forfeitable."

Mr. HUGHES. Would you have problems if, in fact, instead of just requiring you to go forward with the proof, that we actually create a presumption at that point that those assets are presumed to have been illicitly obtained? Where the assets exceed the income over a period of time, do you have problems establishing at that point, for forfeiture purposes, a presumption that those assets are tainted?

Mr. HORN. I think that's far more reasonable, I do. I would like to give maybe one example. I can't, obviously, name the individual involved. But there are a series of investigations going on now, tax-type investigations, in which there is a presumption underlying the investigations that people who made a lot of money in a certain geographical locale over a period of time may have, or probably have,

reaped the benefits of drug trafficking and we're going to investigate to see if they did.

Well, they cranked up the grand jury and then it leaks. It always leaks. I never participated in a grand jury where somebody didn't find out something that didn't appear in the paper.

As it turns out, I think the Department is on the verge of determining that, in fact, this individual had absolutely no involvement in drug trafficking. It's already cost him $100,000 in legal fees. He relies heavily on borrowing to make his enterprises function and his credit dried up months ago.

So when he gets his clean bill of health, he's already going to have to suffer irreparable harm. I offer that just as an example of something that we have to be concerned about in setting up an apparatus.

These things happen. People get hurt in criminal investigations. It's always going to happen. You can't avoid it. But I think we have to try and mitigate it somewhat.

Mr. HUGHES. I agree and that is a concern. It does happen from time to time. We do have to be vigilant to make sure that we aren't tramping on the rights of innocent individuals. You have been most helpful. You've given us some insight that we had not received before and we appreciate it.

Mr. HORN. Thank you for the opportunity.

Mr. HUGHES. Thank you. Our next witness is Mr. Edward Dennis, Jr., who is chief of the Narcotics and Dangerous Drugs Section of the Criminal Division of the Department of Justice.

Prior to his appointment at Justice, he served as a U.S. attorney for the eastern district of Pennsylvania. He's also a member of the Supreme Court Bar of Pennsylvania, the American Bar Association, and the Pennsylvania Bar Association.

Mr. Dennis, it is again a pleasure for us to welcome you to the subcommittee. We have your statement, which will be received in the record in full, without objection, and you may proceed as you see fit.

[The complete statement follows:]

STATEMENT OF EDWARD S. G. DENNIS, JR.

THANK YOU for the opportunity to speak today about the area of drug forfeitures.

Drug trafficking is an enormously profitable criminal undertaking. When you realize that one ounce of impure cocaine retails at a higher cost than an ounce of .999 fine gold - and that thousands and thousands of pounds of cocaine, as well as enormous quantities of other controlled substances from marihuana to Quaaludes to "angel dust" are sold annually - only then can you appreciate the vast sums of money that are being made from drug trafficking.

Congress addressed this problem with the enactment of two statutes in 1970 providing enhanced penalties for those persons convicted of managing, organizing, or supervising a continuing criminal enterprise dealing in drugs (21 U.S.C. §848), and in certain criminal areas (including drugs) where a person's criminal activities relate to a racketeer influenced or corrupt organization (18 U.S.C. §1961 et seq.). Connected to these statutes are provisions whereby certain of the defendant's assets (including, under the first statute, a defendant's profits from the enterprise) can be forfeited to the federal government. Another statutory provision through which the Government can seek forfeiture of drug-related property is the civil forfeiture provision in Title 21, United States Code, Section 881, which requires a totally separate legal proceeding from any criminal prosecution of the defendant.

Possibly the biggest hindrance to the Government's ability to seek forfeiture of a drug trafficker's ill-gotten gains is the inability to discover the whereabouts of the drug-related assets. Our efforts have been hampered by the actions of the traffickers in removing assets from the United States or laundering the funds - including the use of shell corporations and nominees. Additionally, certain legislation, including the Tax Reform Act of 1976 and the Right to Financial Privacy Act of 1978, have served to lessen our ability to obtain certain necessary investigative information from banking institutions or even to exchange information between executive branch agencies, especially between the Internal Revenue Service and the Drug Enforcement Administration. However, we are making gains. One area in which we are optimistic is that of international cooperation. Treaties presently in force, such as the mutual assistance treaty with the Swiss, have enabled us to get around foreign bank secrecy laws in certain limited instances and have aided our efforts to discover drug-related assets. We expect to negotiate mutual assistance treaties with other countries to assist in this effort. Against this background we are reexamining certain statutes that have limited the success of investigative and enforcement efforts and will propose new legislation to enable us to more effectively investigate and prosecute drug trafficking activities.

It is with the recognition of the critical need to have the tools to remove the financial rewards of drug trafficking that Congress and the Department of Justice have reexamined the statutes which enable the government to seek forfeiture of drug-related assets. Several bills have been introduced in Congress, including H.R. 2646, H.R. 2910, and H.R. 4110. We will comment today on several provisions of these bills. Additionally, the Criminal Division is in the process of drafting legislation which will take a comprehensive approach to forfeiture of assets derived from racketeering and drug trafficking activities, and my statement will address the general principles of the legislation we will propose. The bills which have been introduced in the House of Representatives will be discussed in the context of those principles.

1. Creation of a general criminal drug forfeiture provision

We propose that all drug traffickers face the possibility of forfeiture of drug-related assets. Criminal forfeiture provisions presently are tied to an indictment under the Racketeer Influenced and Corrupt Organization statute or the Continuing Criminal Enterprise Statute of Title 21, United States Code. We will propose an amendment to include a provision enabling post-conviction forfeiture of all of a defendant's property that is acquired or derived through drug trafficking activities.

2. Presumption of Forfeitability

We will propose a limited presumption of forfeitability, rebuttable by the defendant, and applicable to all criminal drug forfeiture statutes. The presumption would be limited to those assets acquired or derived or otherwise obtained during the time period of the defendant's drug-related criminal activity. H.R. 2646 amends the RICO forfeiture provision by adding a presumption "that all assets or other property of the convicted person are subject to forfeiture under this section, unless such convicted person proves otherwise by the preponderance of the evidence." The Department's proposal would limit the property which the Government would seek to forfeit to that which could be shown to have been acquired after the defendant began engaging in the drug-related criminal activity. We believe that a limited presumption would more appropriately focus upon the defendant's drug-related activities, while at the same time would lessen the burden of proof on the Government to seek forfeiture of drug-related assets.

3. Substitution of assets

Our next proposal would amend RICO and Title 21, United States Code, Section 848, to provide for forfeiture of substitute assets of a defendant in circumstances similar to circumstances

described in H.R. 4110.1/ H.R. 4110 provides, in part:

> "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 [18 U.S.C. §1963, or Subsection (a) of 21 U.S.C. §848]."

We support the enactment of this provision. We would recommend, however, the addition of two sections allowing the use of substitute assets where the original assets are diminished in value due to the action or inaction of the defendant, or where the assets have been commingled with other property and cannot be divided without considerable difficulty.

1/ H.R. 4110 is identical to S. 1126, which was introduced by Senator Biden. The substitute assets provisions of both bills are similar to those contained in §2004 of last year's Senate Criminal Code Reform Bill (S. 1722).

If the defendant had had other assets which would have covered the diminution in value of the drug-related asset, our first addition would enable a forfeiture to be imposed on the substitute assets to the extent of the diminution in value. The commingled fund provision would apply to situations where the defendant's interest in an asset is inseparable from another's interest in that asset. One example would be that of a defendant's interest in a jointly held asset, which courts may be reluctant to sever in certain circumstances, even though part of the asset had been purchased with drug proceeds. Access to substitute assets in that case would enable us to seek forfeiture of other assets possessed by the defendant.

In light of the language included in H.R. 4110 allowing substitution of assets if a transfer has been made to a third party, a provision should be included to preserve the Government's ability to proceed against the original property in the hands of third parties. This would allow the Government to seek forfeiture of the property where the Government could show the transfer to have been a sham transaction with the property held by a nominee for the use of the defendant, or where a nominal price was paid for the property and the Government would seek to recover its actual value - especially where a defendant has removed all other assets from the United States or otherwise disguised their true ownership.

4. Restraints on alienation

A very important area to be broadened is the Government's ability to obtain restraining orders to prevent alienation or diminution in value of the property subject to forfeiture. One approach we favor would involve provision in the law for a pre-arrest, pre-indictment ex parte hearing before the court to establish probable cause that the property is subject to a government interest based upon the forfeiture laws. At that time the court could order such action as would protect the Government's ability to later seek forfeiture of that property. Any restraint ordered could be limited in scope and time, and would be renewable upon a showing of the continued existence of probable cause.

5. Profits and Proceeds

Both H.R. 2646 and H.R. 4110 include provisions which would include drug profits and proceeds as forfeitable property under RICO. Based upon the experience of prosecutors who have litigated in this area, we believe a provision should be included to more fully define profits to prevent it from being construed as a "net" figure. Our proposal would include a provision to prevent a construction of profits to allow drug-related expenditures to be deducted from the total sum of assets forfeitable to the Government.

6. Forfeited funds used to purchase evidence

A provision of H.R. 2910 calls for the allocation of $5 million in 1982 and $10 million for each succeeding fiscal year, but not greater than five percent of the DEA's authorized budget, to be taken from funds forfeited to the Government under 21 U.S.C. §§848 and 881, to be used for the purchase of evidence and information in drug cases. We do not support enactment of this legislation, because expenditures for such purposes should be obtained through established budget and appropriations processes.

7. Inclusion of real property in 21 U.S.C. §881

Our final proposal relates to the civil forfeiture provisions in 21 U.S.C. §881, and would modify §881 to include real property in the list of forfeitable items contained in §881(a). This inclusion would enable the Government to forfeit land that is used or intended for use in any manner and in any part to facilitate the transportation, sale, receipt, possession, manufacture, cultivation, or concealment of property described in 21 U.S.C. §881(a)(1) or (2). Also included would be any appurtenances to the property or structures or improvements on or under the property. This would obviate the need to classify certain property and houses as "containers" under 21 U.S.C. §881(a)(3) in order to forfeit houses which are used to store tons of marihuana or large quantities of other controlled substances.

Our proposed legislation, which will follow the principles I have discussed, will serve to ease the burden on the Government to seek drug-related assets, while at the same time protecting

the constitutional rights of the accused. Our comprehensive forfeiture proposal, which will pertain to racketeering violations of all kinds as well as drug trafficking, will be undergoing OMB review shortly. It will be more specific and fully cover all of the considerations which we have raised.

I will be pleased to answer any questions which the Subcommittee may wish to ask.

TESTIMONY OF EDWARD DENNIS, CHIEF OF NARCOTICS SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. HUGHES. I trust you attended Pennsylvania Day here on the Hill yesterday?

Mr. DENNIS. No; I'm afraid I didn't. I was at my office attending to some affairs related to the testimony today, so I wasn't able to do so.

The Department of Justice recognizes that drug trafficking is an enormously profitable enterprise. It's been stated that an ounce of coke is really more valuable on today's market than an ounce of pure gold, and I wouldn't argue with that at all.

The gross sales of illicit narcotics and dangerous drug substances in the United States has been estimated at approximately $60 billion, and some have estimated that it may reach very soon as high as $100 billion annually.

The economic impact of this enormous underground economy on many areas of our country is substantial. It's contributed to inflation. It's been a source of public corruption. It's been a source of individual corruption. I've noticed in cases that I've been involved in, that in certain areas of the country, law-abiding citizens in marginally profitable enterprises have been drawn into the drug traffic because of the enormous profits that can be made there. It's a tremendous temptation for anyone. And it's also a source of great demoralization in some communities. It's no secret that certainly in the State of Florida, there is a substantial problem created by the drug traffic there. Florida homebuyers will testify to the substantial price of real estate there and I'm sure it's been documented that that is, in part, due to drug moneys that are presently circulating in that community. And of course in other communities in our country, there's a sense that the only prosperity in some of our poorer urban communities is in drug traffic, and this has been a great temptation to our youth, to the consternation of parents and civic leaders alike.

Those conditions are still with us. And even though there have been legislative proposals and legislation passed that has been designed to address some of those issues, we feel that at this point in time, it's appropriate for us to look at our history under those statutes, our successes and our failures, and attempt to do what we can to streamline that legislation.

I agree with one of the statements made by Mr. Horn that we do have to streamline the procedures for purposes of making them more workable, for purposes of achieving forfeitures in appropriate cases, and also in making them vehicles that the prosecutors are going to be able to utilize in a practical way.

Of course, the forfeiture provisions that we're speaking of, and which this legislation addresses, are those involved with the continuing criminal enterprise statute, the RICO statute, and the civil forfeiture provisions of title XXI, United States Code, section 881.

There's another provision that I think should be made note of and that's, of course, the Bank Secrecy Act, which was passed in 1970. There are forfeiture provisions as to that statute and they are used quite frequently.

One thing I wanted to comment on that Senator Biden did mention, about a scorecard, that we should be held accountable in the Department for achieving a certain level of forfeiture and that our feet should be held to the fire. I would suggest that we should look very comprehensively, though, in terms of what are forfeitures under the various statutes that have been designed to attack this problem. The Bank Secrecy Act has been used quite frequently in seizures that are clearly drug-related, but they would not appear in any statistical compilation with regard to what would be considered drug-related forfeiture statutes.

There's another aspect as well. The forfeiture provisions which we're dealing with are not exclusively directed toward drug cases. Many racketeering cases involving other offenses would come under the scope of these provisions and, of course, we don't intend to limit the reach of these statutes to drug cases alone.

There have been obstacles over the last 10 years to our successful forfeiture in many cases. We've had difficulty uncovering assets. I speak from experience because I have been involved in RICO cases which are drug-related and non-RICO cases. I've been involved personally in forfeitures. I was a prosecutor for 5 years in Philadelphia and I know the difficulties encountered. There are many cases in which you can discover through a paper chase, if you will, the actual assets that have been under control of a particular individual, but you're unable to reach those assets.

There are occasions in which liquid assets are sent into offshore banking institutions and offshore bank havens and those become unreachable. There are instances in another area where, statistically, it wouldn't show up in terms of forfeiture that might be of benefit to the Treasury, but I think that law enforcement should have credit for it, and those are forfeitures that have occurred under treaties with foreign governments.

We've had forfeitures by the Swiss Government that have been very substantial and they've been based on evidence that has been gathered in investigations in the United States. Those would not show up as being forfeitures necessarily under our statutes. But that does present a problem, where there are no treaties or where there are bank secrecy laws in certain countries that would attract such cash that would prevent us from really reaching any type of arrangement with those governments that would permit us to return them to the United States or even have them forfeited by the government themselves.

Of course, there's a Tax Reform Act and the Right to Financial Privacy, which have been obstacles. I think that those obstacles are being slowly eliminated.

There are also many tactical considerations that go into the pursuit of forfeitable assets in a case. You have prosecutors that have to make a decision on whether or not they are going to expose their case to the defense in an effort to seize assets that they're aware of—in light of the fact that it may produce fugitives, in light of the fact that it may expose their cases to a defendant. I think that these have been some of the considerations that have led prosecutors to be very conservative in the use of these statutes.

We've had a 10-year experience with them and I think that we have learned a great deal from those cases where forfeitures have been diligently pursued, but we have not been as successful as we would like.

We feel at this juncture that a comprehensive approach to forfeiture is absolutely necessary. We need to reconcile some of the inconsistencies among the forfeiture provisions in the various statutes that we have and we think that there are some general principles, or general areas that we should be looking at.

No. 1 is we should be looking to produce out of this consideration of forfeiture legislation a general criminal drug forfeiture provision which could be utilized in the prosecution of the various offenses in which that it would be appropriate to have forfeiture of assets.

We think that the presumption of forfeiture in cases and with the proper conditions is a workable concept. We feel that it would have to be drafted with somewhat more restrictions than are presently in the bills before you, but we think that it can be done in a way that would shift the burden to the defendant with a minimal showing by the Government.

In many of these cases, it's been my experience that it can be shown, the connection between the assets and the drug trafficking. In many instances, the defendant, it's obvious by a look at his financial situation, that even if he has some source of wealth, that it's not sufficient to support the lifestyle that he's been living, it's not sufficient to support the assets that he had control of. And I think that you could convince a jury or a judge that the Government has presented sufficient evidence then to shift the burden to the defendant to prove that, in fact, the assets under scrutiny from a legitimate source and were not tainted by his drug activities.

There should be a provision for substitution of assets. In many cases, we do develop evidence that a defendant has moved substantial wealth overseas and that's not reachable by the prosecutors or by the Department of Justice. If there are assets here that could not be necessarily connected with drug activities, those should be subject to forfeiture, we believe.

Defendants should not be permitted, by playing a shell game, to live off of his wealth here while keeping his drug wealth out of the reach of the Government in some foreign bank account.

We believe that procedures for preindictment restraint on alienation of property are necessary. The dilemma that a prosectuor faces with attempting to freeze property or assets in the middle of a grand jury investigation with all the restrictions on disclosure of information that is being developed in the grand jury and with the

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tactical problems of disclosing evidence in your case prematurely, would probably make it wise that we permit the prosecutor to go to a judge to obtain a restraining order on the alienation of such property, at least for a limited period of time, on the representation that an indictment would be filed within 60 days or 90 days, or during a period that would be fair.

The area of profits and proceeds I don't think I really need to go into. I think the GAO report did make the recommendation that the RICO forfeiture provisions shouldn't be restricted just to the interest that a defendant has in a particular enterprise, but that profits should be included. That would only make sense.

There is one aspect that was not included in my statement, but should be addressed. I've been authorized to make this representation that with regard to rewards that would be paid to individuals who would supply information that would lead to forfeitures and with regard to the use of assets that are forfeited, the net proceeds of those assets in funding certain of DEA's activities, that we support S. 951, the authorization act for our budget for the Department in fiscal year 1982, which provides for a plowing back in of 25 percent of the net proceeds from the forfeitures annually into a fund that would be used for moiety rewards for information leading to the forfeiture of assets under the provisions that I previously mentioned.

Now that's much more limited, of course, than Mr. Sawyer's recommendation, but we believe that it's a step in the right direction. There are substantial controls, budgetary controls, that are placed on that provision and there's a sunset provision of 2 years on that.

But we feel that pending the results of how that might work out, we should be cautious insofar as our approach to creating a revolving fund out of the net proceeds from forfeitures in funding certain aspects of DEA's operations.

The last principle that we would like to look at is an inclusion of real property under the forfeiture provisions to place conditions under which real property can be forfeited.

Section 881 of title 21 does have some very limiting provisions insofar as the construction of that statute is concerned, particularly with regard to the use of real estate as a warehouse for drugs. We've had one forfeiture in Boston of $155,000 piece of property that had been purchased specifically as a warehouse for drugs. We were able to forfeit that under title 21. However, that was unopposed by the defendants and we feel that there would be a substantial judicial challenge to that if it were brought in under another procedural context.

Real estate is a very vital part of any drug operation, particularly in the marihuana trade, because of its bulk. We have frequently encountered cases where farms and rural property, particularly along waterways and in remote areas of the southeastern part of the United States, are utilized and purchased specifically as warehousing or as depots for drug storage and for drug distribution.

We feel that provisions should be drafted that would include those particular assets, very valuable assets.

There are great difficulties, and I don't think we should minimize the difficulties that we are yet to encounter in finding our way in the area of criminal forfeitures. But I think that we are

making progress and I'm optimistic that many of the criticisms that have been leveled at the Department with regard to the inadequacy of our approach are really growing pains. We've had very little history prior to 1970 with regard to these types of forfeitures. They stem from an English concept, legal concepts that had been dormant for hundreds of years and we feel the growing pains with the use of those, but I'm encouraged to believe that we will, as time goes on, gain the necessary expertise to make it a successful tool in our arsenal.

Mr. HUGHES. Thank you, Mr. Dennis. I understand from your testimony that on the subject of moieties, you would limit that fund for the use of advancing forfeiture prosecutions. Is that what you said?

Mr. DENNIS. Yes, the bill.

Mr. HUGHES. You would not permit the use of those funds for instance——

Mr. DENNIS. For purchase of evidence.

Mr. HUGHES. For purchase of evidence?

Mr. DENNIS. No; it would not. It is limited to the information that leads to the forfeiture.

Mr. HUGHES. Why would you want to so limit it?

Mr. DENNIS. Well, I mean, the language of the statute itself or the bill is so limited. The reason for it not including other aspects of DEA's operations I'm not prepared to discuss. I'm not aware of the reason why that's not extended further. I don't know whether it was a case that, since this was a new concept, that perhaps there was a more conservative approach taken.

Mr. HUGHES. So you don't know what the position of the Justice Department would be on moieties generally and revolving funds?

Mr. DENNIS. I do know that—well, to that limited extent, the Department does favor a revolving fund utilizing the net proceeds from forfeiture.

So the concept or the principle of using the revolving fund, I think the Department has certainly demonstrated an acceptance of that principle. It's just that it wants to deal with it in a very limited way, at least for the immediate future.

Mr. HUGHES. Is the moiety language in S. 951 supported by the Department?

Mr. DENNIS. Yes; it is.

Mr. HUGHES. As I understand it, that language would apply to all of title 21 forfeitures.

Mr. DENNIS. Yes; it would. There's no limiting language with regard to the types of forfeitures that might be—there is one limitation and that is, of course, we're not speaking of the seizure of the substance itself.

Mr. HUGHES. I see.

Mr. DENNIS. But in terms of financial assets or other property of value, tangibles and intangibles, it would include those.

Mr. HUGHES. Last year, when then Deputy Assistant Attorney General Nathan was before Senator Biden's subcommittee, he indicated that the Department of Justice had underway at that time a study of the RICO statutes. Has that study been completed?

Mr. DENNIS. That study has been completed. It is presently with the chief of the Criminal Division, the Assistant Attorney General

for the Criminal Division, for his review. But it has been completed and it has been approved by the Drug Enforcement Administration and also, my office has reviewed it. We assisted in the preparation of that.

Mr. HUGHES. Will you make that available to this subcommittee?

Mr. DENNIS. I will relay your request to the Assistant Attorney General for the Criminal Division and I would hope——

Mr. HUGHES. With the recommendation that it be made available.

Mr. DENNIS. With a recommendation that it be made available to you. I don't see any problem with that.

[Information to be found in the appendix.]

Mr. HUGHES. On page 4 of your statement, you recommend a presumption of forfeitability. Could you indicate to the subcommittee how such a presumption would work, particularly in light of *Ulster County, N.Y.* v. *Allen,* decided by the Supreme Court in 1979?

Mr. DENNIS. Mr. Chairman, I have not reviewed that particular case. I did note that there was a discussion of some of the legal aspects regarding the presumption of forfeitability in the analysis of Professor Rothstein.

I can only say that with regard to my general knowledge of forfeiture and some presumptions and the basic principles under which they operate, a problem I see with a blanket statement that the burden shifts to the defendant by virtue of the fact that he or she has engaged in drug trafficking is not sufficiently related to the question of whether or not those assets were acquired as a result of the drug trafficking. And that what you really need to do, and it's been my experience that the Government can usually do this, is by either showing the absence of any source or likely source of legitimate funds to explain the possession of a particular asset or a particular financial position, that usually, that would be enough in my mind, if that burden were put on the Government, to then give the defendant an opportunity then to explain and place the presumption then on his shoulders, that we would probably pass constitutional muster on it.

Mr. HUGHES. I think that the Justice Department could be very helpful if you could develop in greater detail the conditions which you alluded to in light of Ulster County and other decisions that would bear on the question of forfeiture and presumptions and shifting the burden of proof.

Rather than ask you at this posture, since it has been some time since you've read the Ulster decision, I'd ask you if you would submit that to the committee.

Mr. DENNIS. Certainly. I'd be happy to. And I have a copy of Professor Rothstein's statement and we'll be looking at that with regard to the Constitution.

[Information to be furnished follows:]

COUNTY COURT OF ULSTER COUNTY, NEW YORK, ET AL. *v.* ALLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77-1554. Argued February 22, 1979—Decided June 4, 1979

Respondents (three adult males) and a 16-year-old girl (Jane Doe) were jointly tried in a New York state court on charges, *inter alia,* of illegally possessing two loaded handguns found in an automobile in which they were riding when it was stopped for speeding. The guns had been positioned crosswise in Jane Doe's open handbag on either the front floor or front seat on the passenger side where she was sitting. All four defendants objected to the introduction of the guns into evidence, arguing that the State had not adequately demonstrated a connection between the guns and the defendants. The trial court overruled the objection, relying on the presumption of possession created by a New York statute providing that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle, except when, *inter alia,* the firearm is found "upon the person" of one of the occupants. The trial court also denied respondents' motion to dismiss the charges on the alleged ground that such exception applied because the guns were found on Jane Doe's person, the court concluding that the applicability of the exception was a question of fact for the jury. After being instructed that it was entitled to infer possession from the defendants' presence in the car, to consider all circumstances tending to support or contradict such inference, and to decide the matter for itself without regard to how much evidence the defendants introduced, the jury convicted all four defendants of illegal possession of the handguns. Defendants' post-trial motion in which they challenged the constitutionality of the New York statute as applied to them, was denied. Both the intermediate appellate court and the New York Court of Appeals affirmed the convictions, the latter court holding that it was a jury question whether the guns were on Jane Doe's person, treating this question as having been resolved in the prosecution's favor, and concluding that therefore the presumption applied and that there was sufficient evidence to support the convictions. The court also summarily rejected the argument that the presumption was unconstitutional as applied in this case. Respondents then filed a

habeas corpus petition in Federal District Court, contending that they were denied due process of law by the application of the statutory presumption. The District Court issued the writ, holding that respondents had not "deliberately bypassed" their federal claim by their actions at trial and that the mere presence of two guns in a woman's handbag in a car could not reasonably give rise to the inference that they were in the possession of three other persons in the car. The United States Court of Appeals affirmed, holding that the New York Court of Appeals had decided respondents' constitutional claim on its merits rather than on any independent state procedural ground that might have barred collateral relief and, without deciding whether the presumption was constitutional as applied in this case, that the statute is unconstitutional on its face.

Held:

1. The District Court had jurisdiction to entertain respondents' claim that the statutory presumption is unconstitutional. There is no support in New York law or the history of this litigation for an inference that the New York courts decided such claim on an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus. If neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim. Pp. 147–154.

2. The United States Court of Appeals erred in deciding the facial constitutionality issue. In analyzing a mandatory presumption, which the jury must accept even if it is the sole evidence of an element of an offense (as opposed to a purely permissive presumption, which allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant), it is irrelevant that there is ample evidence in the record other than the presumption to support a conviction. Without determining whether the presumption in this case was mandatory, the Court of Appeals analyzed it on its face as if it were, despite the fact that the state trial judge's instructions made it clear that it was not. Pp. 154–163.

3. As applied to the facts of this case, the statutory presumption is constitutional. Under the circumstances, the jury would have been entirely reasonable in rejecting the suggestion that the guns were in Jane Doe's sole possession. Assuming that the jury did reject it, the case is tantamount to one in which the guns were lying on the car's floor or seat in the plain view of respondents, and in such a case it is

surely rational to infer that each of the respondents was fully aware of the guns' presence and had both the ability and the intent to exercise dominion and control over them. The application of the presumption in this case thus comports with the standard, *Leary* v. *United States*, 395 U. S. 6, that there be a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and that the latter is "more likely than not to flow from" the former. Moreover, the presumption should not be judged by a more stringent "reasonable doubt" test, insofar as it is a permissive rather than a mandatory presumption. Pp. 163–167.

568 F. 2d 998, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 167. POWELL, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 168.

Eileen F. Shapiro, Assistant Attorney General of New York, argued the cause for petitioners. With her on the briefs were *Robert Abrams*, Attorney General, *Louis J. Lefkowitz*, former Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Patricia C. Armstrong*, Assistant Attorney General, and *George D. Zuckerman*, Assistant Solicitor General.

Michael Young argued the cause and filed a brief for respondents.

MR. JUSTICE STEVENS delivered the opinion of the Court.

A New York statute provides that, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.[1] The United States Court of Appeals for the

[1] New York Penal Law § 265.15 (3) (McKinney 1967):

"The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such

Second Circuit held that respondents may challenge the constitutionality of this statute in a federal habeas corpus proceeding and that the statute is "unconstitutional on its face." 568 F. 2d 998, 1009. We granted certiorari to review these holdings and also to consider whether the statute is constitutional in its application to respondents. 439 U. S. 815.

Four persons, three adult males (respondents) and a 16-year-old girl (Jane Doe, who is not a respondent here), were jointly tried on charges that they possessed two loaded handguns, a loaded machinegun, and over a pound of heroin found in a Chevrolet in which they were riding when it was stopped for speeding on the New York Thruway shortly after noon on March 28, 1973. The two large-caliber handguns, which together with their ammunition weighed approximately six pounds, were seen through the window of the car by the investigating police officer. They were positioned crosswise in an open handbag on either the front floor or the front seat of the car on the passenger side where Jane Doe was sitting. Jane Doe admitted that the handbag was hers.[2] The machine-

weapon, instrument or appliance is found, except under the following circumstances:

"(a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

In addition to the three exceptions delineated in §§ 265.15 (3) (a)–(c) above as well as the stolen-vehicle and public-omnibus exception in § 265.15 (3) itself, § 265.20 contains various exceptions that apply when weapons are present in an automobile pursuant to certain military, law enforcement, recreational, and commercial endeavors.

[2] The arrest was made by two state troopers. One officer approached the driver, advised him that he was going to issue a ticket for speeding, requested identification, and returned to the patrol car. After a radio check indicated that the driver was wanted in Michigan on a weapons charge, the second officer returned to the vehicle and placed the driver under arrest. Thereafter, he went around to the right side of the car and, in "open view," saw a portion of a .45-caliber automatic pistol protruding from the open purse on the floor or the seat. *People* v. *Lemmons*, 40 N. Y. 2d 505, 508–509, 354 N. E. 2d 836, 838–839 (1976). He opened the car door, removed that gun, and saw a .38-caliber revolver in the same handbag. He testified that the crosswise position of one or both of the guns kept the handbag from closing. After the weapons were secured, the two remaining male passengers, who had been sitting in the rear seat, and Jane Doe were arrested and frisked. A subsequent search at the police station disclosed a pocketknife and marihuana concealed on Jane Doe's person. Tr. 187–192, 208–214, 277–278, 291–297, 408.

gun and the heroin were discovered in the trunk after the police pried it open. The car had been borrowed from the driver's brother earlier that day; the key to the trunk could not be found in the car or on the person of any of its occupants, although there was testimony that two of the occupants had placed something in the trunk before embarking in the borrowed car.[3] The jury convicted all four of possession of the handguns and acquitted them of possession of the contents of the trunk.

Counsel for all four defendants objected to the introduction into evidence of the two handguns, the machinegun, and the drugs, arguing that the State had not adequately demonstrated a connection between their clients and the contraband. The trial court overruled the objection, relying on the pre-

[3] Early that morning, the four defendants had arrived at the Rochester, N. Y., home of the driver's sister in a Cadillac. Using her telephone, the driver called their brother, advised him that "his car ran hot" on the way there from Detroit and asked to borrow the Chevrolet so that the four could continue on to New York City. The brother brought the Chevrolet to the sister's home. He testified that he had recently cleaned out the trunk and had seen no weapons or drugs. The sister also testified, stating that she saw two of the defendants transfer some unidentified item or items from the trunk of one vehicle to the trunk of the other while both cars were parked in her driveway. *Id.*, at 17–19, 69–73, 115–116, 130–131, 193–194.

sumption of possession created by the New York statute. Tr. 474–483. Because that presumption does not apply if a weapon is found "upon the person" of one of the occupants of the car, see n. 1, *supra,* the three male defendants also moved to dismiss the charges relating to the handguns on the ground that the guns were found on the person of Jane Doe. Respondents made this motion both at the close of the prosecution's case and at the close of all evidence. The trial judge twice denied it, concluding that the applicability of the "upon the person" exception was a question of fact for the jury. Tr. 544–557, 589–590.

At the close of the trial, the judge instructed the jurors that they were entitled to infer possession from the defendants' presence in the car. He did not make any reference to the "upon the person" exception in his explanation of the statutory presumption, nor did any of the defendants object to this omission or request alternative or additional instructions on the subject.

Defendants filed a post-trial motion in which they challenged the constitutionality of the New York statute as applied in this case. The challenge was made in support of their argument that the evidence, apart from the presumption, was insufficient to sustain the convictions. The motion was denied, *id.,* at 775–776, and the convictions were affirmed by the Appellate Division without opinion. *People* v. *Lemmons,* 49 App. Div. 2d 639, 370 N. Y. S. 2d 243 (1975).

The New York Court of Appeals also affirmed. *People* v. *Lemmons,* 40 N. Y. 2d 505, 354 N. E. 2d 836 (1976). It rejected the argument that as a matter of law the guns were on Jane Doe's person because they were in her pocketbook. Although the court recognized that in some circumstances the evidence could only lead to the conclusion that the weapons were in one person's sole possession, it held that this record presented a jury question on that issue. Since the defendants had not asked the trial judge to submit the question to the

jury, the Court of Appeals treated the case as though the jury had resolved this fact question in the prosecution's favor. It therefore concluded that the presumption did apply and that there was sufficient evidence to support the convictions. *Id.,* at 509–512, 354 N. E. 2d, at 839–841. It also summarily rejected the argument that the presumption was unconstitutional as applied in this case. See *infra,* at 153–154.

Respondents filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York contending that they were denied due process of law by the application of the statutory presumption of possession. The District Court issued the writ, holding that respondents had not "deliberately bypassed" their federal claim by their actions at trial and that the mere presence of two guns in a woman's handbag in a car could not reasonably give rise to the inference that they were in the possession of three other persons in the car. App. to Pet. for Cert. 33a–36a.

The Court of Appeals for the Second Circuit affirmed, but for different reasons. First, the entire panel concluded that the New York Court of Appeals had decided respondents' constitutional claim on its merits rather than on any independent state procedural ground that might have barred collateral relief. Then, the majority of the court, without deciding whether the presumption was constitutional as applied in this case, concluded that the statute is unconstitutional on its face because the "presumption obviously sweeps within its compass (1) many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but not permitted access to it." [4] Concurring separately, Judge

[4] The majority continued:

"Nothing about a gun, which may be only a few inches in length (e. g., a Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitchhikers or other

Timbers agreed with the District Court that the statute was unconstitutional as applied but considered it improper to reach the issue of the statute's facial constitutionality. 568 F. 2d, at 1011–1012.

The petition for a writ of certiorari presented three questions: (1) whether the District Court had jurisdiction to entertain respondents' claim that the presumption is unconstitutional; (2) whether it was proper for the Court of Appeals to decide the facial constitutionality issue; and (3) whether the application of the presumption in this case is unconstitutional. We answer the first question in the affirmative, the second two in the negative. We accordingly reverse.

I

This is the sixth time that respondents have asked a court to hold that it is unconstitutional for the State to rely on the presumption because the evidence is otherwise insufficient to convict them.[5] No court has refused to hear the claim or

casual passengers, much less that they have any dominion or control over it." 568 F. 2d, at 1007.

[5] Respondents first made the argument in a memorandum of law in support of their unsuccessful post-trial motion to set aside the verdict. App. 36a–38a. That memorandum framed the argument in three parts precisely as respondents would later frame it in their briefs in the Appellate Division and Court of Appeals, see *id.*, at 41a–44a, 50a–52a, and in their petition for a writ of habeas corpus. See *id.*, at 6a–10a: First, "[t]he only evidence" relied upon to convict them was their presence in an automobile in which the two handguns were found. *Id.*, at 35a. Second, but for the presumption of possession, this evidence was "totally insufficient to sustain the conviction." *Id.*, at 38a. And third, that presumption is "unconstitutional as applied" (or, "'arbitrary,' and hence unconstitutional") under *Leary* v. *United States*, 395 U. S. 6, 36, a case in which this Court established standards for determining the validity under the Due Process Clauses of statutory presumptions in criminal cases. App. 36a. This sufficiency-focused argument on the presumption is amply supported in our case law. *E. g.*, *Turner* v. *United States*, 396 U. S. 398, 424 ("[A] conviction resting on [an unconstitutional] presumption cannot be deemed a conviction based on sufficient evidence"). See also *Rossi* v. *United States*, 289 U. S. 89, 90.

Although respondents' memorandum did not cite the provision of the Constitution on which they relied, their citation of our leading case applying that provision, in conjunction with their use of the word "unconstitutional," left no doubt that they were making a federal constitutional argument. Indeed, by its responses to that argument at every step of the way, the State made clear that it, at least, understood the federal basis for the claim. *E. g.*, Respondent's Brief and Appendix in the Court of Appeals of the State of New York, p. 9.

[6] Petitioners contend that, in addition to the timing of respondents' claim and the alleged silence of the New York courts, there is another basis for concluding that those courts rejected respondents' claim on procedural grounds. Petitioners point out that respondents—having unsuccessfully argued to the trial court (as they would unsuccessfully argue on appeal) that the "upon the person" exception applied as a matter of law in their case—failed either to ask the trial court to instruct the jury to consider the exceptions or to object when the court omitted the instruction. They further point out that the majority of the New York Court of Appeals, after concluding that the exception's application was a jury question in this case, refused to review the trial court's omission of an instruction on the issue because of respondents' failure to protest that omission. 40 N. Y. 2d, at 512, 354 N. E. 2d, at 841.

Petitioners argue that we should infer from the Court of Appeals' explicit treatment of this state-law claim—a claim never even pressed on appeal—how that court implicitly treated the federal claim that has been the crux of respondents' litigation strategy from its post-trial motion to the present. There is no basis for the inference. Arguing on appeal that an instruction that was never requested should have been given is far more disruptive to orderly judicial proceedings than arguing in a post-trial motion that the evidence was insufficient to support the verdict. Moreover, that the Court of Appeals felt compelled expressly to reject, on

suggested that it was improperly presented. Nevertheless, because respondents made it for the first time only after the jury had announced its verdict, and because the state courts were less than explicit in their reasons for rejecting it, the question arises whether the New York courts did so on the basis of an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus.[6] See *Wainwright* v. *Sykes*, 433 U. S. 72; *Fay*

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v. *Noia*, 372 U. S. 391, 438. We conclude that there is no support in either the law of New York or the history of this litigation for an inference that the New York courts decided respondents' constitutional claim on a procedural ground, and that the question of the presumption's constitutionality is therefore properly before us. See *Franks* v. *Delaware*, 438 U. S. 154, 161–162; *Mullaney* v. *Wilbur*, 421 U. S. 684, 704–705, and n. (REHNQUIST, J., concurring).[7]

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procedural grounds, an argument never made is hardly proof that they would silently reject on similar grounds an argument that *was* forcefully made. As we discuss, *infra*, at 153–154, it is clear that the court did address the constitutional question and did so on the merits, albeit summarily.

Petitioners also contend that respondents, having failed to seek a jury determination based on state law that the presumption does not apply, may not now argue that the presumption is void as a matter of federal constitutional law. The argument is unpersuasive. Respondents' failure to demand an instruction on the state-law exception is no more and no less than a concession on their part that as a matter of state law the guns were *not* found "upon the person" of any occupant of the car as that phrase is interpreted by the New York courts, and therefore, again as a matter of state law, that the presumption of possession is applicable. The New York Court of Appeals reviewed the case in that posture, and we do the same.

[7] Petitioners advance a second reason why there is no federal jurisdiction in this case. Respondents were convicted on the basis of a statutory presumption they argue is unconstitutional. Following the Court of Appeals' affirmance of their conviction, they could have appealed that decision to this Court under 28 U. S. C. § 1257 (2) and thereby forced a binding federal disposition of the matter. Because respondents failed to do so, petitioners argue that respondents waived any right to federal review of the decision on habeas corpus.

In *Fay* v. *Noia*, 372 U. S. 391, 435–438, we rejected a similar argument that habeas corpus review was unavailable in advance of a petition for certiorari. See also *Stevens* v. *Marks*, 383 U. S. 234, in which the Court entertained a challenge to a state statute in a federal habeas corpus proceeding even though the defendant had not pursued that challenge on appeal to this Court prior to filing his petition for habeas corpus. The analysis of the federal habeas statute that led us to our conclusion in *Fay* is equally applicable in the present situation. That statute gives

New York has no clear contemporaneous-objection policy that applies in this case.[8] No New York court, either in this litigation or in any other case that we have found, has ever expressly refused on contemporaneous-objection grounds to consider a post-trial claim such as the one respondents made. Cf. *Wainwright* v. *Sykes*, *supra*, at 74. Indeed, the rule in New York appears to be that "insufficiency of the evidence" claims may be raised at any time until sentence has been

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federal courts jurisdiction to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" if that custody allegedly violates "the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254 (a). The only statutory exception to this jurisdiction arises when the petitioner has failed to exhaust "the remedies available in the courts of the State." § 2254 (b). As was said in *Fay* with regard to petitions for certiorari under 28 U. S. C. § 1257 (3), direct appeals to this Court under § 1257 (2) are not "'remedies available in the courts of the State.'" 372 U. S., at 436. Accordingly, there is no statutory requirement of an appeal to this Court as a predicate to habeas jurisdiction.

[8] New York's cautious contemporaneous-objection policy is embodied in N. Y. Crim. Proc. Law § 470.05 (2) (McKinney 1971):

"For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction *or at any subsequent time when the court had an opportunity of effectively changing the same*" (emphasis added).

That policy is carefully limited by several statutory qualifications in addition to the one italicized above. First, the form of the "protest" is not controlling so long as its substance is clear. *Ibid.* Second, such protests may be made "expressly or impliedly." *Ibid.* Third, once a protest is made, it need not be repeated at each subsequent disposition of the matter. *Ibid.* And finally, the Appellate Division of the New York Supreme Court is authorized in its discretion to "consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant," even if not previously objected to. § 470.15 (1). See, *e. g.*, *People* v. *Fragale*, 60 App. Div. 2d 972, 401 N. Y. S. 2d 629 (1978); *People* v. *Travison*, 59 App. Div. 2d 404, 408, 400 N. Y. S. 2d 188, 191 (1977).

imposed.[9] Moreover, even if New York's contemporaneous-objection rule did generally bar the type of postverdict insufficiency claim that respondents made, there are at least two judicially created exceptions to that rule that might nonetheless apply in this case.[10]

[9] *E. g., People* v. *Ramos,* 33 App. Div. 2d 344, 308 N. Y. S. 2d 195 (1970); *People* v. *Walker,* 26 Misc. 2d 940, 206 N. Y. S. 2d 377 (1960). Cf. Fed. Rule Crim. Proc. 29 (c) ("It shall not be necessary to the making of [a motion for judgment of acquittal] that a similar motion has been made prior to the submission of the case to the jury"); *Burks* v. *United States,* 437 U. S. 1, 17–18 (under federal law a post-trial motion for a new trial based on insufficiency of the evidence is not a waiver of the right to acquittal at that point if the evidence is found to be insufficient).

[10] First, the New York Court of Appeals has developed an exception to the State's contemporaneous-objection policy that allows review of unobjected-to errors that affect "a fundamental constitutional right." *People* v. *McLucas,* 15 N. Y. 2d 167, 172, 204 N. E. 2d 846, 848 (1965). Accord, *People* v. *Arthur,* 22 N. Y. 2d 325, 239 N. E. 2d 537 (1968); *People* v. *DeRenzzio,* 19 N. Y. 2d 45, 224 N. E. 2d 97 (1966). Indeed, this Court recognized that exception in concluding that an ambiguously presented federal claim had been properly raised in New York trial and appellate courts and was therefore cognizable by this Court on appeal. *Street* v. *New York,* 394 U. S. 576, 583–584. Although this exception has been narrowed more recently, *e. g., People* v. *Robinson,* 36 N. Y. 2d 224, 326 N. E. 2d 784 (1975), it continues to have currency within the State where there has been a denial of a "fair trial." *E. g., La Rocca* v. *Lane,* 37 N. Y. 2d 575, 584, 338 N. E. 2d 606, 613 (1975); *People* v. *Bennett,* 29 N. Y. 2d 462, 467, 280 N. E. 2d 637, 639 (1972); *People* v. *White,* 86 Misc. 2d 803, 809, 383 N. Y. S. 2d 800, 804 (1976). The relevance of this exception is apparent from the Second Circuit opinion in this case which held that respondents "were denied a fair trial when the jury was charged that they could rely on the presumption . . . ." 568 F. 2d, at 1011.

Second, the New York courts will also entertain a federal constitutional claim on appeal even though it was not expressly raised at trial if a similar claim seeking similar relief *was* clearly raised. *E. g., People* v. *De Bour,* 40 N. Y. 2d 210, 214–215, 352 N. E. 2d 562, 565–566 (1976); *People* v. *Robbins,* 38 N. Y. 2d 913, 346 N. E. 2d 815 (1976); *People* v. *Arthur, supra.* Cf. *United States* v. *Mauro,* 436 U. S. 340, 364–365 (failure to invoke Interstate Agreement on Detainers time limit in a speedy trial motion is not a waiver of the former argument). In this case, respondents made two arguments based on the unavailability of the presumption and the consequent total absence, in their view, of proof of the crime. The first, that the statutory "upon the person" exception to the presumption should apply in this case, was made in the middle of trial at the close of the prosecutor's case and then repeated at the close of the defendants' case. Tr. 554–590; App. 12a–17a. Indeed, respondents arguably made this claim even earlier, during the middle of the government's case, when they unsuccessfully objected to the introduction of the handguns in evidence on the ground that there was "nothing [in the record up to that point] to connect this weapon with the . . . defendants." Tr. 474–502. Although the constitutional counterpart to this argument was not made until just after the verdict was announced, the earlier objection to the State's reliance on the presumption might suffice under these cases as an adequate contemporaneous objection. See N. Y. Crim. Proc. Law § 470.05 (2) (McKinney 1971); n. 8, *supra.* The logical linkage between the two objections is suggested by legislative history and case law in New York indicating that the "upon the person" exception was included in the presumption statute to avoid constitutional problems. See *People* v. *Logan,* 94 N. Y. S. 2d 681, 684 (Sup. Ct., 1949); Report of the New York State Joint Legislative Committee on Firearms and Ammunition, N. Y. Leg. Doc. No. 29, p. 21 (1962).

The conclusion that the New York courts did not rely on a state procedural ground in rejecting respondents' constitutional claim is supported, not only by the probable unavailability in New York law of any such ground, but also by three aspects of this record. First, the prosecution never argued to any state court that a procedural default had occurred. This omission surely suggests that the New York courts were not thinking in procedural terms when they decided the issue. Indeed, the parties did not even apprise the appellate courts of the timing of respondents' objection to the presumption; a procedural default would not have been discovered, therefore, unless those courts combed the transcript themselves. If they did so without any prompting from the parties and based their decision on what they found, they surely would have said so.

Second, the trial court ruled on the merits when it denied respondents' motion to set aside the verdict. Tr. 775–776. Because it was not authorized to do so unless the issue was preserved for appeal, the trial court implicitly decided that

there was no procedural default.[11] The most logical inference to be drawn from the Appellate Division's unexplained affirmance is that that court accepted not only the judgment but also the reasoning of the trial court.

Third, it is apparent on careful examination that the New York Court of Appeals did not ignore respondents' constitutional claim in its opinion. Instead, it summarily rejected the claim on its merits. That court had been faced with the issue in several prior cases and had always held the presumption constitutional. Indeed, the State confined its brief on the subject in the Court of Appeals to a string citation of some of those cases. Respondent's Brief in the Court of Appeals, p. 9. It is not surprising, therefore, that the Court of Appeals confined *its* discussion of the issue to a reprise of the explanation that its prior cases have traditionally given for the statute in holding it constitutional and a citation of two of those cases. 40 N. Y. 2d, at 509–511, 354 N. E. 2d, at 839–840, citing *People* v. *McCaleb,* 25 N. Y. 2d 394, 255 N. E. 2d 136 (1969); *People* v. *Leyva,* 38 N. Y. 2d 160, 341 N. E. 2d 546 (1975). Although it omits the word "constitutional," the most logical interpretation of this discussion is that it was intended as a passing and summary disposition of an issue that had already been decided on numerous occasions. This interpretation is borne out by the fact that the dissenting members of the Court of Appeals unequivocally addressed the merits of the constitutional claim[12] and by the fact that three Second Circuit Judges, whose experience with New York

[11] Section 330.30 (1) of the N. Y. Crim. Proc. Law (McKinney 1971) authorizes a trial court to grant a motion to set aside the verdict "[a]t any time after rendition of a verdict of guilty and before sentence" on "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."

[12] 40 N. Y. 2d, at 514–515, 354 N. E. 2d, at 842–843 (Wachtler, J., concurring and dissenting); *id.,* at 516, 354 N. E. 2d, at 843–844 (Fuchsberg, J., concurring and dissenting).

practice is entitled to respect, concluded that the State's highest court had decided the issue on its merits. 568 F. 2d, at 1000. See *Bishop* v. *Wood,* 426 U. S. 341, 345–346; *Huddleston* v. *Dwyer,* 322 U. S. 232, 237.

Our conclusion that it was proper for the federal courts to address respondents' claim is confirmed by the policies informing the "adequate state ground" exception to habeas corpus jurisdiction. The purpose of that exception is to accord appropriate respect to the sovereignty of the States in our federal system. *Wainwright* v. *Sykes,* 433 U. S., at 88. But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.[13]

II

Although 28 U. S. C. § 2254 authorizes the federal courts to entertain respondents' claim that they are being held in custody in violation of the Constitution, it is not a grant of power to decide constitutional questions not necessarily subsumed within that claim. Federal courts are courts of limited jurisdiction. They have the authority to adjudicate specific controversies between adverse litigants over which and over whom they have jurisdiction. In the exercise of that authority, they have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration. *E. g., New York Transit Authority* v. *Beazer,* 440 U. S. 568, 582–583.

A party has standing to challenge the constitutionality of

[13] Moreover, looking beyond its position as an adversary in this litigation, it is arguable that the State of New York will benefit from an authoritative resolution of the conflict between its own courts and the federal courts sitting in New York concerning the constitutionality of one of its statutes.

a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (and cases cited). A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. *Id.*, at 611–616. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. *E. g.*, *Gooding* v. *Wilson*, 405 U. S. 518, 520; *Dombrowski* v. *Pfister*, 380 U. S. 479, 486. That justification, of course, has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons.

In this case, the Court of Appeals undertook the task of deciding the constitutionality of the New York statute "on its face." Its conclusion that the statutory presumption was arbitrary rested entirely on its view of the fairness of applying the presumption in hypothetical situations—situations, indeed, in which it is improbable that a jury would return a conviction,[14] or that a prosecution would ever be insti-

[14] Indeed, in this very case the permissive presumptions in § 265.15 (3) and its companion drug statute, N. Y. Penal Law § 220.25 (1) (McKinney Supp. 1978), were insufficient to persuade the jury to convict the defendants of possession of the loaded machinegun and heroin in the trunk of the car notwithstanding the supporting testimony that at least two of them had been seen transferring something into the trunk that morning. See n. 3, *supra*.

The hypothetical, even implausible, nature of the situations relied upon by the Court of Appeals is illustrated by the fact that there are no reported cases in which the presumption led to convictions in circumstances even remotely similar to the posited situations. In those occasional cases in which a jury has reached a guilty verdict on the basis of evidence insufficient to justify an inference of possession from presence, the New York appellate courts have not hesitated to reverse. *E. g.*, *People* v. *Scott*, 53 App. Div. 2d 703, 384 N. Y. S. 2d 878 (1976); *People* v. *Garcia*, 41 App. Div. 2d 560, 340 N. Y. S. 2d 35 (1973).

In light of the improbable character of the situations hypothesized by the Court of Appeals, its facial analysis would still be unconvincing even were that type of analysis appropriate. This Court has never required that a presumption be accurate in every imaginable case. See *Leary* v. *United States*, 395 U. S., at 53.

tuted.[15] We must accordingly inquire whether these respondents had standing to advance the arguments that the Court of Appeals considered decisive. An analysis of our prior cases indicates that the answer to this inquiry depends on the type of presumption that is involved in the case.

Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts. *E. g.*, *Barnes* v. *United States*, 412 U. S. 837, 843–844; *Tot* v. *United States*, 319 U. S. 463, 467; *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 42. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 364; *Mullaney* v. *Wilbur*, 421 U. S., at 702–703, n. 31.

[15] See n. 4, *supra*, and accompanying text. Thus, the assumption that it would be unconstitutional to apply the statutory presumption to a hitchhiker in a car containing a concealed weapon does not necessarily advance the constitutional claim of the driver of a car in which a gun was found on the front seat, or of other defendants in entirely different situations.

The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. See, *e. g., Barnes* v. *United States, supra,* at 840 n. 3. In that situation the basic fact may constitute prima facie evidence of the elemental fact. See, *e. g., Turner* v. *United States,* 396 U. S. 398, 402 n. 2. When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. *E. g., Barnes* v. *United States, supra,* at 845; *Turner* v. *United States, supra,* at 419–424. See also *United States* v. *Gainey,* 380 U. S. 63, 67–68, 69–70. Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. *E. g., Turner* v. *United States, supra,* at 401–402, and n. 1; *Leary* v. *United States,* 395 U. S. 6, 30; *United States* v. *Romano,* 382 U. S. 136, 137, and n. 4, 138, 143; *Tot* v. *United States, supra,* at 469.[16] In this situation, the Court

[16] This class of more or less mandatory presumptions can be subdivided into two parts: presumptions that merely shift the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution; and presumptions that entirely shift the burden of proof to the defendant. The mandatory presumptions examined by our cases have almost uniformly fit into the former subclass, in that they never totally removed the ultimate burden of proof beyond a reasonable doubt from the prosecution. *E. g., Tot* v. *United States,* 319 U. S., at 469. See *Roviaro* v. *United States,* 353 U. S. 53, 63, describing the operation of the presumption involved in *Turner, Leary,* and *Romano.*

To the extent that a presumption imposes an extremely low burden of production—*e. g.,* being satisfied by "any" evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such. See generally *Mullaney* v. *Wilbur,* 421 U. S. 684, 703 n. 31.

In deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it. *Turner* v. *United States* provides a useful illustration of the different types of presumptions. It analyzes the constitutionality of two different presumption statutes (one mandatory and one permissive) as they apply to the basic fact of possession of both heroin and cocaine, and the presumed facts of importation and distribution of narcotic drugs. The jury was charged essentially in the terms of the two statutes.

The importance of focusing attention on the precise presentation of the presumption to the jury and the scope of that presumption is illustrated by a comparison of *United States* v. *Gainey,* 380 U. S. 63, with *United States* v. *Romano.* Both cases involved statutory presumptions based on proof that the defendant was present at the site of an illegal still. In *Gainey* the Court sustained a conviction "for carrying on" the business of the distillery in violation of 26 U. S. C. § 5601 (a)(4), whereas in *Romano,* the Court set aside a conviction for being in "possession, or custody, or . . . control" of such a distillery in violation of § 5601 (a)(1). The difference in outcome was attributable to two important differences between the cases. Because the statute involved in *Gainey* was a sweeping prohibition of almost any activity associated with the still, whereas the *Romano* statute involved only one narrow aspect of the total

has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. *E. g., Turner* v. *United States, supra,* at 408–418; *Leary* v.

United States, supra, at 45–52; *United States* v. *Romano, supra,* at 140–141; *Tot* v. *United States,* 319 U. S., at 468. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases.[17] It is for this reason that the

undertaking, there was a much higher probability that mere presence could support an inference of guilt in the former case than in the latter.

Of perhaps greater importance, however, was the difference between the trial judge's instructions to the jury in the two cases. In *Gainey,* the judge had explained that the presumption was permissive; it did not require the jury to convict the defendant even if it was convinced that he was present at the site. On the contrary, the instructions made it clear that presence was only "'a circumstance to be considered along with all the other circumstances in the case.'" As we emphasized, the "jury was thus specifically told that the statutory inference was not conclusive." 380 U. S., at 69–70. In *Romano,* the trial judge told the jury that the defendant's presence at the still "'shall be deemed sufficient evidence to authorize conviction.'" 382 U. S., at 138. Although there was other evidence of guilt, that instruction authorized conviction even if the jury disbelieved all of the testimony except the proof of presence at the site. This Court's holding that the statutory presumption could not support the *Romano* conviction was thus dependent, in part, on the specific instructions given by the trial judge. Under those instructions it was necessary to decide whether, regardless of the specific circumstances of the particular case, the statutory presumption adequately supported the guilty verdict.

[17] In addition to the discussion of *Romano* in n. 16, *supra,* this point is illustrated by *Leary* v. *United States.* In that case, Dr. Timothy Leary, a professor at Harvard University, was stopped by customs inspectors in Laredo, Tex., as he was returning from the Mexican side of the international border. Marihuana seeds and a silver snuffbox filled with semirefined marihuana and three partially smoked marihuana cigarettes were discovered in his car. He was convicted of having knowingly transported marihuana which he knew had been illegally imported into this country in violation of 21 U. S. C. § 176a (1964 ed.). That statute included a mandatory presumption: "possession shall be deemed sufficient evidence to authorize conviction [for importation] unless the defend-

Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction. *E. g., Turner* v. *United States,* 396 U. S., at 407; *Leary* v. *United States,* 395 U. S., at 31–32; *United States* v. *Romano,* 382 U. S., at 138–139.

Without determining whether the presumption in this case was mandatory,[18] the Court of Appeals analyzed it on its face as if it were. In fact, it was not, as the New York Court of Appeals had earlier pointed out. 40 N. Y. 2d, at 510–511, 354 N. E. 2d, at 840.

The trial judge's instructions make it clear that the presumption was merely a part of the prosecution's case,[19] that

ant explains his possession to the satisfaction of the jury." Leary admitted possession of the marihuana and claimed that he had carried it from New York to Mexico and then back.

Mr. Justice Harlan for the Court noted that under one theory of the case, the jury could have found direct proof of all of the necessary elements of the offense without recourse to the presumption. But he deemed that insufficient reason to affirm the conviction because under another theory the jury might have found knowledge of importation on the basis of either direct evidence or the presumption, and there was accordingly no certainty that the jury had not relied on the presumption. 395 U. S., at 31–32. The Court therefore found it necessary to test the presumption against the Due Process Clause. Its analysis was facial. Despite the fact that the defendant was well educated and had recently traveled to a country that is a major exporter of marihuana to this country, the Court found the presumption of knowledge of importation from possession irrational. It did so, not because Dr. Leary was unlikely to know the source of the marihuana, but instead because "a majority of possessors" were unlikely to have such knowledge. *Id.,* at 53. Because the jury had been instructed to rely on the presumption even if it did not believe the Government's direct evidence of knowledge of importation (unless, of course, the defendant met his burden of "satisfying" the jury to the contrary), the Court reversed the conviction.

[18] Indeed, the court never even discussed the jury instructions.

[19] "It is your duty to consider all the testimony in this case, to weigh it carefully and to test the credit to be given to a witness by his apparent intention to speak the truth and by the accuracy of his memory to recon-

it gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal.[20] The judge explained that possession could be actual or constructive, but that constructive possession could not exist without the intent and ability to exercise control or dominion over the weapons.[21] He also carefully instructed the jury that

cile, if possible, conflicting statements as to material facts and in such ways to try and get at the truth and to reach a verdict upon the evidence." Tr. 739–740.

"To establish the unlawful possession of the weapons, again the People relied upon the presumption and, in addition thereto, the testimony of Anderson and Lemmons who testified in their case in chief." *Id.*, at 744.

"Accordingly, you would be warranted in returning a verdict of guilt against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you." *Id.*, at 746.

[20] "Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

"In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced." *Id.*, at 743.

"The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case." *Id.*, at 760.

[21] "As so defined, possession means actual physical possession, just as having the drugs or weapons in one's hand, in one's home or other place under one's exclusive control, or constructive possession which may exist

there is a mandatory presumption of innocence in favor of the defendants that controls unless it, as the exclusive trier of fact, is satisfied beyond a reasonable doubt that the defendants possessed the handguns in the manner described by the judge.[22] In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference that all four occupants of the car had possession of the two loaded handguns and to decide the matter for itself without regard to how much evidence the defendants introduced.[23]

Our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on

without personal dominion over the drugs or weapons but with the intent and ability to retain such control or dominion." *Id.*, at 742.

[22] "[Y]ou are the exclusive judges of all the questions of fact in this case. That means that you are the sole judges as to the weight to be given to the evidence and to the weight and probative value to be given to the testimony of each particular witness and to the credibility of any witness." *Id.*, at 730.

"Under our law, every defendant in a criminal trial starts the trial with the presumption in his favor that he is innocent, and this presumption follows him throughout the entire trial and remains with him until such time as you, by your verdict, find him or her guilty beyond a reasonable doubt or innocent of the charge. If you find him or her not guilty, then, of course, this presumption ripens into an established fact. On the other hand, if you find him or her guilty, then this presumption has been overcome and is destroyed." *Id.*, at 734.

"Now, in order to find any of the defendants guilty of the unlawful possession of the weapons, the machine gun, the .45 and the .38, you must be satisfied beyond a reasonable doubt that the defendants possessed the machine gun and the .45 and the .38, possessed it as I defined it to you before." *Id.*, at 745.

[23] The verdict announced by the jury clearly indicates that it understood its duty to evaluate the presumption independently and to reject it if it was not supported in the record. Despite receiving almost identical instructions on the applicability of the presumption of possession to the contraband found in the front seat and in the trunk, the jury convicted all four defendants of possession of the former but acquitted all of them of possession of the latter. See n. 14, *supra*.

an evaluation of the presumption as applied to the record before the Court. None suggests that a court should pass on the constitutionality of this kind of statute "on its face." It was error for the Court of Appeals to make such a determination in this case.

III

As applied to the facts of this case, the presumption of possession is entirely rational. Notwithstanding the Court of Appeals' analysis, respondents were not "hitchhikers or other casual passengers," and the guns were neither "a few inches in length" nor "out of [respondents'] sight." See n. 4, *supra*, and accompanying text. The argument against possession by any of the respondents was predicated solely on the fact that the guns were in Jane Doe's pocketbook. But several circumstances—which, not surprisingly, her counsel repeatedly emphasized in his questions and his argument, *e. g.*, Tr. 282–283, 294–297, 306—made it highly improbable that she was the sole custodian of those weapons.

Even if it was reasonable to conclude that she had placed the guns in her purse before the car was stopped by police, the facts strongly suggest that Jane Doe was not the only person able to exercise dominion over them. The two guns were too large to be concealed in her handbag.[24] The bag was consequently open, and part of one of the guns was in plain view, within easy access of the driver of the car and even, perhaps, of the other two respondents who were riding in the rear seat.[25]

Moreover, it is highly improbable that the loaded guns belonged to Jane Doe or that she was solely responsible for their being in her purse. As a 16-year-old girl in the company of three adult men she was the least likely of the four

[24] Jane Doe's counsel referred to the .45-caliber automatic pistol as a "cannon." Tr. 306.

[25] The evidence would have allowed the jury to conclude either that the handbag was on the front floor or front seat.

to be carrying one, let alone two, heavy handguns. It is far more probable that she relied on the pocketknife found in her brassiere for any necessary self-protection. Under these circumstances, it was not unreasonable for her counsel to argue and for the jury to infer that when the car was halted for speeding, the other passengers in the car anticipated the risk of a search and attempted to conceal their weapons in a pocketbook in the front seat. The inference is surely more likely than the notion that these weapons were the sole property of the 16-year-old girl.

Under these circumstances, the jury would have been entirely reasonable in rejecting the suggestion—which, incidentally, defense counsel did not even advance in their closing arguments to the jury [26]—that the handguns were in the sole possession of Jane Doe. Assuming that the jury did reject it, the case is tantamount to one in which the guns were lying on the floor or the seat of the car in the plain view of the three other occupants of the automobile. In such a case, it is surely rational to infer that each of the respondents was fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over

[26] Indeed, counsel for two of the respondents virtually invited the jury to find to the contrary:

"One more thing. You know, different people live in different cultures and different societies. You may think that the way [respondent] Hardrick has his hair done up is unusual; it may seem strange to you. People live differently. . . . For example, if you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, *it is not unusual for people to carry guns, small arms to protect themselves, is it?* There are places in New York City policemen fear to go. But you have got to understand; you are sitting here as jurors. These are people, live flesh and blood, the same as you, different motives, different objectives." *Id.*, at 653–654 (emphasis added). See also *id.*, at 634.

It is also important in this regard that respondents passed up the opportunity to have the jury instructed not to apply the presumption if it determined that the handguns were "upon the person" of Jane Doe.

the weapons. The application of the statutory presumption in this case therefore comports with the standard laid down in *Tot* v. *United States,* 319 U. S., at 467, and restated in *Leary* v. *United States,* 395 U. S., at 36. For there is a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former.[27]

[27] The New York Court of Appeals first upheld the constitutionality of the presumption involved in this case in *People* v. *Russo,* 303 N. Y. 673, 102 N. E. 2d 834 (1951). That decision relied upon the earlier case of *People* v. *Terra,* 303 N. Y. 332, 102 N. E. 2d 576 (1951), which upheld the constitutionality of another New York statute that allowed a jury to presume that the occupants of a room in which a firearm was located possessed the weapon. The analysis in *Terra,* the appeal in which this Court dismissed for want of a substantial federal question, 342 U. S. 938, is persuasive:

"[T]here can be no doubt about the 'sinister significance' of proof of a machine gun in a room occupied by an accused or about the reasonableness of the connection between its illegal possession and occupancy of the room where it is kept. Persons who occupy a room, who either reside in it or use it in the conduct and operation of a business or other venture—and that is what in its present context the statutory term 'occupying' signifies . . .—normally know what is in it; and, certainly, when the object is as large and uncommon as a machine gun, it is neither unreasonable nor unfair to presume that the room's occupants are aware of its presence. That being so, the legislature may not be considered arbitrary if it acts upon the presumption and erects it into evidence of a possession that is 'conscious' and 'knowing.'" 303 N. Y., at 335–336, 102 N. E. 2d, at 578–579.

See also Interim Report of Temporary State Commission to Evaluate the Drug Laws, N. Y. Leg. Doc. No. 10, p. 69 (1972), in which the drafters of the analogous automobile/narcotics presumption in N. Y. Penal Law § 220.25 (McKinney Supp. 1978), explained the basis for that presumption:

"We believe, and find, that it is rational and logical to presume that all occupants of a vehicle are aware of, and culpably involved in, possession of dangerous drugs found abandoned or secreted in a vehicle when the quantity of the drug is such that it would be extremely unlikely for an occupant to be unaware of its presence. . . .

"We do not believe that persons transporting dealership quantities of contraband are likely to go driving about with innocent friends or that

Respondents argue, however, that the validity of the New York presumption must be judged by a "reasonable doubt" test rather than the "more likely than not" standard employed in *Leary.*[28] Under the more stringent test, it is argued that a statutory presumption must be rejected unless the evidence necessary to invoke the inference is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt. See *Barnes* v. *United States,* 412 U. S., at 842–843. Respondents' argument again overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.[29]

they are likely to pick up strangers. We do not doubt that this can and does in fact occasionally happen, but because we find it more reasonable to believe that the bare presence in the vehicle is culpable, we think it reasonable to presume culpability in the direction which the proven facts already point. Since the presumption is an evidentiary one, it may be offset by any evidence, including the testimony of the defendant, which would negate the defendant's culpable involvement."

Legislative judgments such as this one deserve respect in assessing the constitutionality of evidentiary presumptions. *E. g., Leary* v. *United States,* 395 U. S., at 39; *United States* v. *Gainey,* 380 U. S., at 67.

[28] "The upshot of *Tot, Gainey,* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36.

[29] The dissenting argument rests on the assumption that "the jury [may have] rejected all of the prosecution's evidence concerning the location and origin of the guns." *Post,* at 175–176. Even if that assumption were plausible, the jury was plainly told that it was free to disregard the presumption. But the dissent's assumption is not plausible; for if the jury rejected the testimony describing where the guns were found, it would necessarily also have rejected the only evidence in the record proving that the guns were found in the car. The conclusion that the jury attached significance to the particular location of the handguns follows inexorably from the acquittal on the charge of possession of the machinegun and heroin in the trunk.

In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. But in the former situation, the prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.

The permissive presumption, as used in this case, satisfied the *Leary* test. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt.

The judgment is reversed.

So ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join fully in the Court's opinion reversing the judgment under review. In the necessarily detailed step-by-step analysis of the legal issues, the central and controlling facts of a case often can become lost. The "underbrush" of finely tuned legal analysis of complex issues tends to bury the facts.

On this record, the jury could readily have reached the same result without benefit of the challenged statutory presumption; here it reached what was rather obviously a compromise verdict. Even without relying on evidence that two people had been seen placing something in the car trunk shortly before respondents occupied it, and that a machinegun and a package of heroin were soon after found in that trunk, the jury apparently decided that it was enough to hold the passengers to knowledge of the two handguns which were in

such plain view that the officer could see them from outside the car. Reasonable jurors could reasonably find that what the officer could see from outside, the passengers within the car could hardly miss seeing. Courts have long held that in the practical business of deciding cases the factfinders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

I agree with the Court that there is no procedural bar to our considering the underlying constitutional question presented by this case. I am not in agreement, however, with the Court's conclusion that the presumption as charged to the jury in this case meets the constitutional requirements of due process as set forth in our prior decisions. On the contrary, an individual's mere presence in an automobile where there is a handgun does not even make it "more likely than not" that the individual possesses the weapon.

I

In the criminal law, presumptions are used to encourage the jury to find certain facts, with respect to which no direct evidence is presented, solely because other facts have been proved.[1] See, *e. g.*, *Barnes* v. *United States*, 412 U. S. 837, 840 n. 3 (1973); *United States* v. *Romano*, 382 U. S. 136, 138 (1965). The purpose of such presumptions is plain: Like certain other jury instructions, they provide guidance for jurors' thinking in considering the evidence laid before them.

[1] Such encouragement can be provided either by statutory presumptions, see, *e. g.*, 18 U. S. C. § 1201 (b), or by presumptions created in the common law. See, *e. g.*, *Barnes* v. *United States*, 412 U. S. 837 (1973). Unless otherwise specified, "presumption" will be used herein to refer to "permissible inferences," as well as to "true" presumptions. See F. James, Civil Procedure § 7.9 (1965).

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Once in the juryroom, jurors necessarily draw inferences from the evidence—both direct and circumstantial. Through the use of presumptions, certain inferences are commended to the attention of jurors by legislatures or courts.

Legitimate guidance of a jury's deliberations is an indispensable part of our criminal justice system. Nonetheless, the use of presumptions in criminal cases poses at least two distinct perils for defendants' constitutional rights. The Court accurately identifies the first of these as being the danger of interference with "the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ante,* at 156. If the jury is instructed that it must infer some ultimate fact (that is, some element of the offense) from proof of other facts unless the defendant disproves the ultimate fact by a preponderance of the evidence, then the presumption shifts the burden of proof to the defendant concerning the element thus inferred.[2]

But I do not agree with the Court's conclusion that the only constitutional difficulty with presumptions lies in the danger of lessening the burden of proof the prosecution must bear. As the Court notes, the presumptions thus far reviewed by the Court have not shifted the burden of persuasion, see *ante,* at 157–159, n. 16; instead, they either have required only that the defendant produce some evidence to rebut the inference suggested by the prosecution's evidence, see *Tot* v. *United States,* 319 U. S. 463 (1943), or merely have been suggestions to the

[2] The Court suggests that presumptions that shift the burden of persuasion to the defendant in this way can be upheld provided that "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Ante,* at 167. As the present case involves no shifting of the burden of persuasion, the constitutional restrictions on such presumptions are not before us, and I express no views on them.

It may well be that even those presumptions that do not shift the burden of persuasion cannot be used to prove an element of the offense, if the facts proved would not permit a reasonable mind to find the presumed fact beyond a reasonable doubt. My conclusion in Part II, *infra,* makes it unnecessary for me to address this concern here.

jury that it would be sensible to draw certain conclusions on the basis of the evidence presented.[3] See *Barnes* v. *United States, supra,* at 840 n. 3. Evolving from our decisions, therefore, is a second standard for judging the constitutionality of criminal presumptions which is based—not on the constitutional requirement that the State be put to its proof—but rather on the due process rule that when the jury is encouraged to make factual inferences, those inferences must reflect some valid general observation about the natural connection between events as they occur in our society.

This due process rule was first articulated by the Court in *Tot* v. *United States, supra,* in which the Court reviewed the constitutionality of § 2 (f) of the Federal Firearms Act. That statute provided in part that "possession of a firearm or ammunition by any . . . person [who has been convicted of a crime of violence] shall be presumptive evidence that such firearm or ammunition was shipped or transported [in interstate or foreign commerce]." As the Court interpreted the presumption, it placed upon a defendant only the obligation of presenting some exculpatory evidence concerning the origins of a firearm or ammunition, once the Government proved that the defendant had possessed the weapon and had been convicted of a crime of violence. Noting that juries must be permitted to infer from one fact the existence of another essential to guilt, "if reason and experience support the inference," 319 U. S., at 467, the Court concluded that under some circumstances juries may be guided in making these inferences by legislative or common-law presumptions, even though they

[3] The Court suggests as the touchstone for its analysis a distinction between "mandatory" and "permissive" presumptions. See *ante,* at 157. For general discussions of the various forms of presumptions, see Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325 (1979); F. James, Civil Procedure § 7.9 (1965). I have found no recognition in the Court's prior decisions that this distinction is important in analyzing presumptions used in criminal cases. Cf. *ibid.* (distinguishing true "presumptions" from "permissible inferences").

may be based "upon a view of relation broader than that a jury might take in a specific case," *id.*, at 468. To provide due process, however, there must be at least a "rational connection between the fact proved and the ultimate fact presumed"—a connection grounded in "common experience." *Id.*, at 467–468. In *Tot*, the Court found that connection to be lacking.[4]

Subsequently, in *Leary* v. *United States*, 395 U. S. 6 (1969), the Court reaffirmed and refined the due process requirement of *Tot* that inferences specifically commended to the attention of jurors must reflect generally accepted connections between related events. At issue in *Leary* was the constitutionality of a federal statute making it a crime to receive, conceal, buy, or sell marihuana illegally brought into the United States, knowing it to have been illegally imported. The statute provided that mere possession of marihuana "shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." After reviewing the Court's decisions in *Tot* v. *United States*, *supra*, and other criminal presumption cases, Mr. Justice Harlan, writing for the Court, concluded "that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36 (footnote omitted). The Court invalidated the statute, finding there to be insufficient basis in fact for the conclusion that those who possess marihuana are more likely than not to know that it was imported illegally.[5]

[4] The analysis of *Tot* v. *United States* was used by the Court in *United States* v. *Gainey*, 380 U. S. 63 (1965), and *United States* v. *Romano*, 382 U. S. 136 (1965).

[5] Because the statute in *Leary* v. *United States* was found to be unconstitutional under the "more likely than not" standard, the Court explicitly declined to consider whether criminal presumptions also must follow "beyond a reasonable doubt" from their premises, if an essential element of the crime depends upon the presumption's use. 395 U. S., at 36 n. 64. See n. 2, *supra*. The Court similarly avoided this question in *Turner* v. *United States*, 396 U. S. 398, 416 (1970).

Most recently, in *Barnes* v. *United States*, we considered the constitutionality of a quite different sort of presumption—one that suggested to the jury that "'[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference . . . that the person in possession knew the property had been stolen.'" 412 U. S., at 840 n. 3. After reviewing the various formulations used by the Court to articulate the constitutionally required basis for a criminal presumption, we once again found it unnecessary to choose among them. As for the presumption suggested to the jury in *Barnes*, we found that it was well founded in history, common sense, and experience, and therefore upheld it as being "clearly sufficient to enable the jury to find beyond a reasonable doubt" that those in the unexplained possession of recently stolen property know it to have been stolen. *Id.*, at 845.

In sum, our decisions uniformly have recognized that due process requires more than merely that the prosecution be put to its proof.[6] In addition, the Constitution restricts the court in its charge to the jury by requiring that, when particular factual inferences are recommended to the jury, those factual inferences be accurate reflections of what history, common sense, and experience tell us about the relations between events in our society. Generally, this due process rule has been articulated as requiring that the truth of the inferred fact be more likely than not whenever the premise for the inference is true. Thus, to be constitutional a presumption must be at least more likely than not true.

[6] The Court apparently disagrees, contending that "the factfinder's responsibility . . . to find the ultimate facts beyond a reasonable doubt" is the only constitutional restraint upon the use of criminal presumptions at trial. See *ante*, at 156.

II

In the present case, the jury was told:

> "Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession. In other words, [under] these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced."

Undeniably, the presumption charged in this case encouraged the jury to draw a particular factual inference regardless of any other evidence presented: to infer that respondents possessed the weapons found in the automobile "upon proof of the presence of the machine gun and the hand weapon" and proof that respondents "occupied the automobile at the time such instruments were found." I believe that the presumption thus charged was unconstitutional because it did not fairly reflect what common sense and experience tell us about passengers in automobiles and the possession of handguns. People present in automobiles where there are weapons simply are not "more likely than not" the possessors of those weapons.

Under New York law, "to possess" is "to have physical possession or otherwise to exercise dominion or control over tangible property." N. Y. Penal Law § 10.00 (8) (McKinney 1975). Plainly, the mere presence of an individual in an automobile—without more—does not indicate that he exercises "dominion or control over" everything within it. As the

Court of Appeals noted, there are countless situations in which individuals are invited as guests into vehicles the contents of which they know nothing about, much less have control over. Similarly, those who invite others into their automobile do not generally search them to determine what they may have on their person; nor do they insist that any handguns be identified and placed within reach of the occupants of the automobile. Indeed, handguns are particularly susceptible to concealment and therefore are less likely than are other objects to be observed by those in an automobile.

In another context, this Court has been particularly hesitant to infer possession from mere presence in a location, noting that "[p]resence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the [illegal] still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary . . .' *Tot v. United States*, 319 U. S. 463, 467." *United States* v. *Romano*, 382 U. S., at 141. We should be even more hesitant to uphold the inference of possession of a handgun from mere presence in an automobile, in light of common experience concerning automobiles and handguns. Because the specific factual inference recommended to the jury in this case is not one that is supported by the general experience of our society. I cannot say that the presumption charged is "more likely than not" to be true. Accordingly, respondents' due process rights were violated by the presumption's use.

As I understand it, the Court today does not contend that in general those who are present in automobiles are more likely than not to possess any gun contained within their vehicles. It argues, however, that the nature of the presumption here involved requires that we look, not only to the immediate facts upon which the jury was encouraged to base its inference, but to the other facts "proved" by the prosecution

as well. The Court suggests that this is the proper approach when reviewing what it calls "permissive" presumptions because the jury was urged "to consider all the circumstances tending to support or contradict the inference." *Ante*, at 162.

It seems to me that the Court mischaracterizes the function of the presumption charged in this case. As it acknowledges was the case in *Romano*, *supra*, the "instruction authorized conviction even if the jury disbelieved all of the testimony except the proof of presence" in the automobile.[7] *Ante*, at 159 n. 16. The Court nevertheless relies on all of the evidence introduced by the prosecution and argues that the "permissive" presumption could not have prejudiced defendants. The possibility that the jury disbelieved all of this evidence, and relied on the presumption, is simply ignored.

I agree that the circumstances relied upon by the Court in determining the plausibility of the presumption charged in this case would have made it reasonable for the jury to "infer that each of the respondents was fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over the weapons." But the jury was told that it could conclude that respondents possessed the weapons found therein from proof of the mere fact of respondents' presence in the automobile. For all we know, the jury rejected all of the prosecution's evidence

[7] In commending the presumption to the jury, the court gave no instruction that would have required a finding of possession to be based on anything more than mere presence in the automobile. Thus, the jury was not instructed that it should infer that respondents possessed the handguns only if it found that the guns were too large to be concealed in Jane Doe's handbag, *ante*, at 163; that the guns accordingly were in the plain view of respondents, *ibid;* that the weapons were within "easy access of the driver of the car and even, perhaps, of the other two respondents who were riding in the rear seat," *ibid.;* that it was unlikely that Jane Doe was solely responsible for the placement of the weapons in her purse, *ibid.;* or that the case was "tantamount to one in which the guns were lying on the floor or the seat of the car in the plain view of the three other occupants of the automobile." *Ante*, at 164.

concerning the location and origin of the guns, and based its conclusion that respondents possessed the weapons solely upon its belief that respondents had been present in the automobile.[8] For purposes of reviewing the constitutionality of the presumption at issue here, we must assume that this was the case. See *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946); cf. *Leary* v. *United States*, 395 U. S., at 31.

The Court's novel approach in this case appears to contradict prior decisions of this Court reviewing such presumptions. Under the Court's analysis, whenever it is determined that an inference is "permissive," the only question is whether, in light of all of the evidence adduced at trial, the inference recommended to the jury is a reasonable one. The Court has never suggested that the inquiry into the rational basis of a permissible inference may be circumvented in this manner. Quite the contrary, the Court has required that the "evidence *necessary to invoke the inference* [be] sufficient for a rational juror to find the inferred fact . . . ." *Barnes* v. *United States*, 412 U. S., at 843 (emphasis supplied). See *Turner* v. *United States*, 396 U. S. 398, 407 (1970). Under the presumption charged in this case, the only evidence necessary to invoke the inference was the presence of the weapons in the automobile with respondents—an inference that is plainly irrational.

[8] The Court is therefore mistaken in its conclusion that, because "respondents were not 'hitchhikers or other casual passengers,' and the guns were neither 'a few inches in length' nor 'out of [respondents'] sight,'" reference to these possibilities is inappropriate in considering the constitutionality of the presumption as charged in this case. *Ante*, at 163. To be sure, respondents' challenge is to the presumption as charged to the jury in this case. But in assessing its application here, we are not free, as the Court apparently believes, to disregard the possibility that the jury may have disbelieved all other evidence supporting an inference of possession. The jury may have concluded that respondents—like hitchhikers—had only an incidental relationship to the auto in which they were traveling, or that, contrary to some of the testimony at trial, the weapons were indeed out of respondents' sight.

In sum, it seems to me that the Court today ignores the teaching of our prior decisions. By speculating about what the jury may have done with the factual inference thrust upon it, the Court in effect assumes away the inference altogether, constructing a rule that permits the use of any inference—no matter how irrational in itself—provided that otherwise there is sufficient evidence in the record to support a finding of guilt. Applying this novel analysis to the present case, the Court upholds the use of a presumption that it makes no effort to defend in isolation. In substance, the Court—applying an unarticulated harmless-error standard—simply finds that the respondents were guilty as charged. They may well have been, but rather than acknowledging this rationale, the Court seems to have made new law with respect to presumptions that could seriously jeopardize a defendant's right to a fair trial. Accordingly, I dissent.

Mr. HUGHES. I'm encouraged by your suggestion that the Justice Department is endeavoring to step up their efforts in this whole area of forfeiture, given the complexity of these matters, and I'm sure that you heard the comments earlier.

Mr. DENNIS. Yes.

Mr. HUGHES. I trust you do not disagree that it's a specialty that we have tried to develop in, not just investigators, but also in our prosecutors.

Mr. DENNIS. There's no question about that.

Mr. HUGHES. And even judges, who are blazing new trails. I wonder if there exists any communications to the U.S. attorneys relative to forfeiture that bear on the subject? Has Justice made any statements to the U.S. attorneys' offices furnishing them with guidelines?

Mr. DENNIS. We feel that that is a continuing obligation. My experience as an assistant U.S. attorney, particularly concerning the turnover in U.S. attorneys' offices year by year, is that you have to continually keep before them the priorities. The 300-page forfeiture manual that was developed by Harry Meyers of the Drug Enforcement Administration, their chief counsel's office, is excellent work. We just distributed copies to each and every U.S. attorney's office only a month ago under individual letter under my signature, urging them to have their assistants who are working narcotics cases, particularly, but any cases involving forfeiture, to refer to those.

We have our narcotics newsletter, which is published monthly. Any breakthroughs with regard to forfeitures, usually the editor of our newsletter, in consultation with me, will be brought to the attention of the prosecutors through the newsletter. We urge that they contact us in the Narcotics and Dangerous Drugs Section to assist them on any cases that they have.

So we feel that this is not going to happen overnight, but rather through a constant effort of education and keeping it before the prosecutors, as well as sending attorneys from Washington, which we do, out into the field to assist in cases where—the situation that Mr. Horn mentioned, you have a U.S. attorney's office that perhaps has not had a great deal of experience and they want some help. My office sends prosecutors that have had that experience out to work on those cases and we're expanding that program.

So I would say that a good 70 percent of my resources are really committed to trying to uplift the quality of the prosecutorial expertise in this area across the country.

Mr. HUGHES. Does that include also training investigators, DEA and others?

Mr. DENNIS. We attend and lecture at the training course of DEA on forfeitures of assets. We have a joint conference at least once every year and forfeitures are a main topic of discussion. We have representatives from the Internal Revenue Service who attend those conferences and who lecture, and from the U.S. Customs Bureau who lecture on the Bank Secrecy Act. We presented to them outlines with regard to the use of currency transaction records and currency and monetary instrument records, which are a computerized source of information in the Treasury Department that can be used.

We've had prosecutions that have been brought against banking institutions and other financial institutions based on those types of investigations.

So although I think, statistically, you will see an increase gradually year by year in the number of cases that may involve forfeitures, that is not often always reflected immediately when those successes occur, primarily because either of grand jury secrecy or because we're not able to really get into details of investigations due to pretrial publicity restraints and those types of considerations.

Mr. HUGHES. Of course, when you talk about 70 percent of your personnel, you're talking about a limited number of personnel.

Mr. DENNIS. Well, yes, in the Narcotics and Dangerous Drugs Section. We have 26 lawyers.

Mr. HUGHES. So you're talking about 17?

Mr. DENNIS. Yes; who are committed to that, but I mean, they've committed a very substantial portion of their time. Their time is not generally diluted with other concerns. The cases are very time-consuming and they do demand a great deal of intensive effort. We find that perhaps one or two cases per prosecutor out of my office is a pretty heavy load.

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. Again, I am curious with your proposal, why you would want to specifically limit the use of this 25 percent of forfeited assets to paying moieties in connection with forfeited property. Why wouldn't you use it for buys and other evidence purchases?

Mr. DENNIS. I don't want to speculate on—I was not involved, since it was a budget matter, particularly; I was not privy to the discussions within the Department with regard to that. But in my talks with the Office of Legislative Affairs on this particular point, it appeared to be the view of the Office of Management and Budget and the Department that we should try to at least get the principle established of using the revolving fund under a situation in which it could be tightly controlled and tightly scrutinized and that we should review annually—there's a requirement for an annual report to Congress on that in particular—the funds that are brought into those provisions and how they are spent. Pending the successful application of that principle in that context, perhaps we could then be persuaded or might come to the conclusion that it should be broadened to include other aspects of DEA's operation.

I don't think that the principle that you can introduce an entrepreneurial aspect of this is being rejected and I think that an entrepreneurial incentive would be operating under the legislation that the Department is supporting on this.

Mr. SAWYER. I guess that is all I have. I yield back.

Mr. HUGHES. Thank you very much, Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. HUGHES. We hope that you can furnish that study on RICO. That would be helpful to us.

Mr. DENNIS. I will speak with the Assistant Attorney General today.

Mr. HUGHES. Thank you. Our next witness, and final witness for the day, is Prof. Paul Rothstein. Professor Rothstein has testified on many occasions before congressional committees. He has a

unique background for such testimony, having been a special counsel to the House Judiciary Subcommittee on Criminal Justice and to the Criminal Laws and Procedures Subcommittee of the Senate Judiciary Committee. He is a distinguished professor of evidence at Georgetown Law Center and has published many highly respected works on the law of evidence.

We're glad to have you and we apologize for keeping you around here all day.

Mr. ROTHSTEIN. That's perfectly all right.

Mr. HUGHES. We have your statement, Professor, which will be made a part of the record, and you may proceed as you see fit.

[The complete statement follows:]

Testimony of Paul F. Rothstein

A perceived deficiency in the law of forfeiture in drug cases has led the subcommittee to consider several remedies to strengthen that law.

I appear today only to address one of those remedies--that portion of H.R. 2646 that would establish a presumption that all assets of a person guilty of dealing in drugs are attributable to those dealings. The presumption is directed at relieving the government of the rather difficult proof problem it often faces in proving that assets the government wishes to take (through forfeiture) are connected with the crime, such nexus being required for forfeiture under current law. I do not address the subject of whether or not present forfeiture law is weak or deficient, or whether other mechanisms for strengthening it are in order. I address only this particular proposal for strengthening it, and I address it only from the standpoint of whether the presumption attempted to be established would pass muster under the constitutional decisions relating to presumptions.

My conclusion is that it would not pass muster. I reach that conclusion with some regret, because I, too, have no sympathy with drug dealing offenders, and I regard as laudible the effort made in this bill to "throw the book at them," if it can be done within the law and without setting a precedent which might sometime in the future threaten rights of the innocent.

The Supreme Court has established, as the constitutional test of the validity of criminal presumptions against the accused, that there must be a "rational connection" between the fact presumed, and the fact from which it is presumed. By rational connection is meant that the one must flow from the other. Most recently, this "test" of the validity of a presumption has been confirmed in Ulster County Court of N.Y. v. Allen, 442 U.S. 140 (1979), following a line of civil and criminal cases in which the Supreme Court has hammered out this test, such as Mobile & J.K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910); Tot v. U.S. 319 U.S. 463 (1943); U.S. v.

Gainey, 380 U.S. 63 (1965); U.S. v. Romano, 382 U.S. 136 (1965); and Leary v. U.S., 395 U.S. 6 (1969). While the court in Allen draws a relatively new distinction (insofar as the "test" goes) between "mandatory" and "permissive" presumptions (mandatory and permissive referring to the presumption's strength in the instructions to the jury), this distinction would not benefit the presumption that is before us here. Allen requires a greater "rational connection," depending upon the strength the presumption is given in the jury instructions. But even the weakest presumption must have a "rational connection." The presumption we are dealing with is stronger than even the "mandatory" presumptions discussed in Allen. The one before us does not leave the burden of persuasion on the government, and ask the jurors to consider the presumption in deciding whether they are persuaded. It rather places a burden to persuade by a preponderance of the evidence on the defendant. We may believe this is a good idea, but it does not comport with the Supreme Court's test.

It does not comport with the test because there is not the requisite rational connection. As to particular assets of a defendant who has dealt in drugs in the ways covered by the law, it does not follow (at least absent some special findings of Congress), that the particular asset (home, car, clothes, etc.) was more likely purchased with the proceeds of the drug violation, than proceeds from some other job he may have or some other source. At the very minimum, this is the rational connection that would be needed. In each of the cases where presumptions were upheld by the Supreme Court, there is more of a rational connection than here. Ones have been stricken down that have more of a rational connection than here. While on some particular facts, it might make sense to assume that all asets are attributable to proceeds from the drug dealing (e.g., where it is shown there is no alternative source or the drug dealing is so extensive that it is unlikely the offender was engaged in other remunerative endeavors), the presumption established here is much broader in sweep, and would be unconstitutional in application in a large number of cases. In those cases where it might apply, it is likely that an instruction on the permissible inference would be given anyway, by the judge, without this legislation. Perhaps more acceptable legislation of narrower scope could be drawn to provide for such an instruction in cases that would warrant it.

# # #

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Constitutionality of H.R. 2646:

Extract from Rothstein, EVIDENCE: STATE AND FEDERAL RULES, 2d Ed., West Publ. Co. 1981, Chapter 2, Presumptions, subsection on Criminal Presumptions relating to Ulster County Court v. Allen and Mullaney v. Wilbur:

We now turn to two U.S. Supreme Court decisions in the area of criminal presumptions.

The first deals with the matter of the test to be applied to determine whether particular presumptions (or prima facie inferences) against the accused are constitutional under the due process clause of the federal constitution. This area has not been a model of clarity. Usually the matter comes up in connection with particular *statutory* presumptions (or prima facie inferences) that provide, in varying language, that proof of fact A (for example, proof of defendant's presence at an unlicensed distillery; or his possession of

narcotics; or his presence at a place where an unlawful gun is found) gives rise (with varying degrees of strength) to an inference of the existence of fact B (for example, the fact that he had a part in the ownership or operation of the distillery; or knew the narcotics were imported; or had possession of—i. e., a right to dominion or control over—the gun). The latter fact (fact B) is usually the one essential for conviction. Conceptually, the provision could play a role at either or both of two stages of the trial: the directed acquittal stage or the stage of the instructions to and deliberations of the jury. By-and-large the constitutional cases have involved only the latter stage. And they have generally lumped prima facie and presumption provisions together under the term "presumption."

Owing to a long line of decisions including, among others, Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943), United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754 (1965), United States v. Romano, 382 U.S. 136, 86 S.Ct. 279 (1965), Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969), Turner v. United States, 396 U.S. 398, 90 S.Ct. 642 (1970), and Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357 (1973), it had generally been thought that the test of the constitutional validity of these provisions (be they state or federal) under the federal due process clause, is whether there is a "rational connection" (common-sense connection) between fact A and fact B. There was some suggestion in the cases that even if no factual background showing a rational connection appeared in the case itself, it would be sufficient if a factual background justifying the linking of fact A to fact B appeared in the legislative history of findings or in research on the part of the appellate judges. What is and is not a "rational connection" seemed to depend upon some instinctual feel of the Supreme Court—"I know it when I see it."

The court in such cases repeatedly avoided deciding whether "rational connection" meant that a reasonable person must be able to find fact B to exist *beyond a reasonable doubt* from fact A, or merely *by a preponderance of the probabilities* (i. e., more probable than not). This avoidance was accomplished by holding, when a particular presumption was believed to pass constitutional muster, that the presumption would pass *whichever* test was applied. When one did *not* pass constitutional muster, it was said that it did not pass either test. In addition, the court seemed to indicate that if a presumption *viewed in the abstract divorced of the facts in the particular case* did not meet the test, it could not be saved by facts making the presumption sensible and sound in the particular case. Thus, for example, in the *Leary* case, the facts that Timothy Leary was a learned professor who studied marijuana, and who had recently traveled in a country that was the world's major exporter of marijuana, and who thus would have known that his marijuana was probably of foreign origin and imported, could not be considered. They could not save the presumption that people who possess marijuana are presumed to know it is imported, since that presumption or proposition must be viewed in the abstract. So viewed, even taking into account facts outside the record that were found or studied by Congress or uncovered by the Supreme Court's own research (which facts were argued to support the presumption), the Court concluded that a majority of people possessing marijuana are generally *not* so aware. Thus, the presumption was held constitutionally invalid. The reason for viewing the proposition in the abstract, divorced of the particular facts about Leary himself, is that the jury possibly may not find that Leary is a learned professor who ought to know. Yet they might still use the presumption. So the presumption must be supportable independent of those facts.

Thus, the court had *apparently* delineated a relatively tidy theory testing all these statutory provisions by a single test, without drawing nice distinctions based upon what the jury was actually *told* about the presumption and their freedom to depart from it.

Then along came the Supreme Court case to be discussed here, Ulster County Court of New York v. Allen, 442 U.S. 140, 99 S.Ct. 2213 (1979), not only addressing some of the questions left ambiguous by the previous decisions; but also holding that much of the previous law applies only where the presumption is a "mandatory," rather than a "permissive," presumption. By these quoted terms, the court means something quite different from what evidence scholars have traditionally meant by the terms "mandatory" and "permissive" presumptions, and thus different from what we have meant by those terms in our discussion of presumptions in this book. (We will discuss later what the court means by those terms.) The court also makes clear that, as to its so-called mandatory presumptions, the "rational connection" that must be lived up to is the "beyond a reasonable doubt" rational connection. In such cases the presumption must be tested independently of the facts in the particular case—that is, it must be considered in the general or abstract, as described above in connection with *Leary*.

As respects what the *Ulster County* decision calls *permissive* presumptions (i. e., the kind of presumption actually involved in *Ulster County*), the rational connection that must be lived up to is merely a "preponderance of probabilities." In addition, with respect to permissive presumptions, the *facts of the particular case* are to be taken into account in deciding whether this standard is met. Thus, in *Ulster County* itself, the defendants were passengers in a car where a gun was found. The applicable N. Y. State pre-

sumption was that, from their presence on the premises (i. e., in the car), possession (a right to dominion and control) of the weapon on the part of each passenger could be inferred. Viewed in general, it does not follow that guns found on premises or in cars are possessed by (subject to the dominion and control of) all persons on the premises or all passengers. What about hitch-hikers? Or guns hidden in trunks, glove compartments, under seats, in drawers, or otherwise concealed? Nevertheless, in *this* particular case, the gun was very large, and sticking out of the bag of the only minor passenger, a 16-year-old girl; the bag was in the front seat; and the gun looked as though it was stashed there at the last minute. On such facts, it would be reasonable to assume possession on the part of the other adult passengers, unless shown otherwise (of course, in all cases, the presumed fact is always rebuttable, whether we class the presumption as mandatory or permissive in either our terminology or the court's). Thus, the presumption was constitutional. The problem, of course, is this: What if the jury disbelieves that the gun was in open view? They may still feel the presumption may be used—yet on such facts it makes no sense. Much depends upon what freedom the words of the instructions convey to the jury to disregard the presumption, and perhaps also on whether there is any genuine dispute as to where within the car the gun was found (i. e., as to whether it was in open view). One of the bones of contention between majority and dissent in *Ulster* seems to be that the dissent feels that this freedom to disregard was *not* sufficiently conveyed in the instructions. It is interesting to note, however, that as to another gun, hidden in the trunk, the jury did not bring in a conviction of the passengers.

What the decision in *Ulster* means by "mandatory" and "permissive" seems to be this:

The presumption is "permissive" if the jury is instructed clearly that the presumption is advisory, not very strong, and dependent upon what facts the jury finds. The jury must understand, for example, that if the jury believes the gun was hidden and believes that therefore no common sense inference of passenger possession arises, they should disregard the presumption concerning the passengers. The decision in some of its language seems to phrase the test of "permissive" or "mandatory" in terms of whether the jury is given to understand that the law declares that proof of fact A (presence in car with the gun) can be *sufficient*, standing *alone*, by itself, regardless of anything else or of anything the jury might believe about the other facts, to bring in a finding of possession (dominion and control) on the part of the passengers. This comes to the same thing.

Most of the cases, including this one, avoid any discussion of the kind of presumption that might more properly be called "mandatory": a presumption where the jurors are told that fact B (possession) *must* be found if fact A (presence in car with weapon) is found and they credit no evidence of non-B (e. g., that the weapon was hidden). In the presumptions *Ulster* calls "mandatory," the jury is still given to understand that while they *can* find proof of A sufficient alone to establish B in such a situation, they do not necessarily have to so find. (Presumptions that might more properly be called mandatory and presumptions this court calls mandatory are to be distinguished from "irrebuttable" presumptions—ones that could not be rebutted once A is proven, even by powerful evidence of non-B. It is questionable whether mandatory presumptions in the more proper senses, and irrebuttable presumptions, are constitutionally permissible in criminal cases. Another kind of presumption—one that shifts a burden to persuade beyond a reasonable doubt or by a preponderance of evidence, to the defendant, is also not involved in the cases, and may not be

constitutional—at least not if they affect certain protected "elements" of the crime. See discussion of the *Mullaney* and *Patterson* cases, infra. Perhaps the "elements" distinction needs to be drawn for these other presumptions as well.)

The approach of the court in *Ulster County* is basically sound. After all, the really important thing to look at is what the jury was told—how far were the jurors constrained from their natural evaluation of the facts? Only to this extent does the defendant have any complaint that jury consideration of his case was infringed. It makes sense, then, to say there is a stricter test or standard for instructions that constrain more. The important questions are: What was the jury told? Is there justification for it? Could it be harmful on *any* picture of the facts the jury may piece together by selectively believing and disbelieving certain facts? It makes no sense to apply the same test to whatever the jury is told. It is important to determine whether they are told, in effect, that they practically *must* find; or that it is up to them, with some advice that certain inferences sometimes follow. Putting aside the role of presumptions at the directed acquittal stage (not involved in these cases), the constitutional question of presumptions is merely, was the jury told something misleading or unsupportable that could be harmful. Suppose the judge had told the jury about a possible inference of B from A, in his power to comment on the weight of evidence, allowed in many jurisdictions. The constitutional question would be the same: how strongly did he phrase it; did the jurors understand they had freedom to disregard it and appraise it on the facts as they have found them; was the advice supportable and justified. Indeed, this case amounts to nothing more than a comment case. (What I would quarrel with, however, is the continued vitality of the doctine that facts uncovered by Congress or the Supreme Court and not in the record

before the trier-of-fact, can sustain an otherwise invalid presumption. That does seem to me to deprive the defendant of full jury consideration of factual inferences. It is least objectionable [and perhaps no worse than putting before them an expert conclusion to choose to believe or not believe] where the jury is plainly given to understand that they may reject the inference [although an expert's basis for his conclusion or inference is usually revealed].)

There are no required forms of jury instructions to give under particular statutory presumptions. Yet the question of whether a particular presumption is "mandatory" or "permissive" and thus what test of validity applies, depends, under the court's analysis, upon exactly what the judge told the jury. Thus, the selfsame statutory presumption will be mandatory or permissive, valid or invalid, depending upon what form of words the judge accidentally chooses (and it usually is somewhat accidental). This is as it should be. The Supreme Court is ruling not on the statutory presumption, but on particular instructions. And that is a very practical approach. For we should be concerned with whether there was a harmful influence on a particular jury, not with some abstraction called a "presumption." The court has shifted the emphasis to practical reality rather than the reification.

The court, to support its decision, and to be consistent with earlier law, declares that some previous Supreme Court authority that applied the test now applicable to "mandatory" presumptions, actually did involve "mandatory" rather than "permissive" presumptions. Very little of what the jury was told appears in that authority; nor, it would seem, does the present court go back to the record there to find out. Yet what the jury was told is all important, under this court's analysis, in determining whether a presumption is "mandatory." How does the court know that such a presumption was "mandatory" without the instructions? The

court seems to assume, at least at one point, that the precise language of the particular statute was used, without any amplification or qualification, by the trial judge in his instructions. But since the practice of trial judges varies in this respect, this is not necessarily a valid assumption, except in the few instances where the particular decision tells us this was done. Nor can the determination be made from looking at a part of the instructions without scrutinizing the whole.

The decision has certain implications for proposed Rule 25.1 of the Federal Rules of Criminal Procedure, reproduced above. (This draft rule has been continually re-proposed over the years.) The proposed rule, you will remember, provides a uniform effect for all criminal presumptions found in statutes, and a uniform effect for all criminal statutory provisions purporting to set up "prima facie inferences" (some attempted codifications you will remember have lumped these two together). The effect given is somewhat more forceful than in some of the other efforts (reproduced above) to prescribe effects. Since statutory prima facie provisions and presumptions are usually against the accused, proposed Rule 25.1 may be said to have issued out of pro-law-enforcement sentiments. But, in the light of *Ulster*, that pro-law-enforcement effort may have backfired. For, in providing a quite forceful effect (in the form of an instruction that fact A is "strong evidence" and "sufficient evidence" of fact B) for all statutory presumptions, proposed Rule 25.1 probably insures that all statutory presumptions will be considered "mandatory" under *Ulster*, with the result that the stricter test for constitutional validity will apply to them and more of them will fail to pass muster. Previously at least some judges were giving at least some of them the "permissive" effect. The same seems also to be true under proposed Rule 25.1 for prima facie inferences, since they are given only slightly less forceful effect under that rule.

Proposed Rule 25.1 cannot be said to be either constitutional or unconstitutional—it depends upon what particular statutory presumption or inference it is applied to, and whether that presumption or inference can meet the strict version of the rational connection test that applies to "mandatory" provisions.

The other Supreme Court decision we will discuss in connection with criminal presumptions is Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975). Unlike *Ulster County*, it involved a presumption that *shifted the persuasion burden onto the accused* (in the jury instruction), on a matter (malice aforethought) arguably as central or more central than that in *Ulster*. Thus, the jury-effect of this presumption was stronger than any of those just discussed. The court struck the presumption down without regard to whether any "rational connection" test could be met.

The inter-relationship of the subject of burdens and the subject of presumptions (an inter-relationship raised more by *Mullaney* than *Ulster*, though both deal with, and only with, the persuasion burden) presents some interesting questions. For example, it is quite clear that all three burdens may be directly placed on the accused on the issue directly placed on the accused on the issue of insanity (by making insanity an affirmative defense); and/or there may be a presumption of sanity. Is the same effect achieved by the presumption as by placing the burdens on the accused? (Consider, among others, the effect if no evidence of insanity is introduced.) Can we do both in the same case? (On the other side of the coin, cf. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930 (1978) and Kentucky v. Whorton, 441 U.S. 786, 99 S.Ct. 2088 (1979), dealing in part with when an instruction on the presumption of innocence is unnecessary in view of the instruction that it is the state's burden to prove beyond a reasonable doubt.) The burdens on the issue of killing by the accused may not be constitutionally placed on the ac-

cused in an ordinary homicide prosecution. But the cases discussed just above may indicate that there may be a presumption of such killing where the presumption is very strongly based on common sense ("rational connection"), assuming it is not understood as being "conclusive" or as changing the burden of persuasion. Cf. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) (presumption of intent from acts suggesting intent). A number of cases have come up concerning illegal distilleries ("stills"). Assume (as is in fact the case), under any version of the rational connection test, that a presumption, whether "mandatory" or "permissive" under *Ulster*, of ownership of a "still" (a crime where the "still" is unlicensed) might constitutionally arise from the accused's unexplained presence at the still *plus* certain specified circumstances suggesting that he was an owner; but not merely from the unexplained presence alone. It is usually assumed that the state could make mere presence at the unlicensed "still" a crime, without the additional circumstances, if it chose to. So why should the presumption based on mere presence alone, without the circumstances, be forbidden?

Could the state make it a crime to be present at an unlicensed still under the specified circumstances? And make it an affirmative defense that defendant was not an owner? Could the state make a crime of merely being present at such a still, without the additional circumstances, with or without the defense mentioned? If it can be done without the defense, isn't the defense just a matter of added grace, or would that be just another way of creating the impermissible presumption? If it is just a matter of added grace and therefore permissible, why can't the law presume ownership from mere unexplained presence? Can the jury *infer* ownership from mere unexplained presence?

Is the presumption route (crime is ownership; ownership is rebuttably presumed from mere presence) for achieving

the same result that would be achieved by rephrasing the crime and providing a defense (crime is presence; affirmative defense is "defendant was not owner") inferior as respects confusion of the jury and as respects advance notice to citizens of exactly what behavior *is* criminal? Does a statutory presumption usurp a judicial or jury role? Assuming you answered yes to these questions in this case, do these same problems (confusion of jury; lack of notice; usurpation) inhere in presumptions the Supreme Court clearly upholds (particularly where the rational connection appears only on the evidence before Congress and not the trial court)? Would they inhere, for example, in the presumption mentioned above, of ownership of a "still" from presence *plus* specified circumstances, where the significance of the circumstances in indicating ownership was known only to Congress?

Mullaney v. Wilbur attempts to answer only some of our questions. It raises others.

Wilbur was convicted of murder by a Maine jury. He claimed he struck deceased in the heat of passion provoked by an indecent homosexual overture. The jury was instructed that "malice aforethought" (necessary for a murder conviction) is presumed and that the defendant must prove *absence* of "malice aforethought" by a preponderance of the evidence, in order not to be guilty of murder but to be guilty of manslaughter instead, a lower and less severely punished offense that did not require malice aforethought. Wilbur appealed on the grounds that this instruction violated his right to due process, including the presumption of innocence until the state proves guilt (every element of the crime) beyond a reasonable doubt; and cited in support the case that most clearly elevated the "beyond a reasonable doubt" notion into a constitutional requirement, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970) (holding that, under the constitution, the burden of proof on the state in a juvenile proceeding must be to prove the elements of the

offense "beyond a reasonable doubt" as in a criminal proceeding, and not a lesser standard such as preponderance of the evidence or clear and convincing evidence). The Maine Supreme Court affirmed Wilbur's conviction on the grounds that under Maine judicial law, murder and manslaughter were but degrees of one crime, felonious homicide, notwithstanding they are two separate statutory provisions; and that *Winship* did not apply to a factor such as "malice aforethought" that merely reduced the degree of the crime. Wilbur then petitioned the U.S. District Court (habeas corpus). The District Court overturned the conviction on the grounds that Maine law was *not* to the effect that there was but one crime. Maine appealed to the U.S. Court of Appeals which affirmed the District Court on the same grounds. Maine petitioned the U.S. Supreme Court for a Writ of Certiorari which was granted, and the U.S. Supreme Court remanded the case to the Court of Appeals for reconsideration in the light of an intervening Maine decision in another case seemingly confirming Maine's view that murder and manslaughter are one crime under Maine law. The Court of Appeals this time accepted Maine's view of its own law, but persisted in overturning Wilbur's conviction, saying that whether there is one or two crimes, in substance the burden imposed on the defendant by the state judge's instruction is the same and flouts the reasons for the requirement of proof beyond a reasonable doubt.

Maine thereupon petitioned the U.S. Supreme Court again for a Writ of Certiorari, which was granted and which ultimately led to the U.S. Supreme Court decision on the merits that we are reporting here.

Under the trial judge's instructions to the jury in *Mullaney*, a killing (not justified by war, police powers, etc.) that was intentional, had to be shown by the state before the presumption of "malice aforethought" and the defendant's burden to disprove it arose. ("Malice aforethought" and

intention may be distinguished in that a person may have intention, in the sense that it is known or obvious death will result; yet "malice aforethought" is absent because the intention arose suddenly in the heat of passion upon adequate provocation. Thus, the burden cast on defendant by the trial judge's instructions in the present case was to prove sudden heat of passion on adequate provocation).

It was argued by the state that, under the trial judge's instructions, the state was required to prove beyond a reasonable doubt every element necessary to make the defendant a *criminal*—the only thing left to the defendant to show was whether he was a murderer or a manslaughterer ("malice aforethought" being the dividing line between the two). Maine law in essence views the two (murder and manslaughter) as one crime, felonious homicide, with the difference being one of degree—degree of punishment (sentence). Proof beyond a reasonable doubt by the state had never been required in sentence-setting. Against this it was argued that if the state could do this, it could also consider *involuntary* manslaughter (which does not require intent—just criminal negligence) to be an even lower degree of the same crime, felonious homicide, and make the defendant guilty of murder unless he proves lack of intention by a preponderance of the evidence. (There was some grounds for reading Maine law in such a fashion.) If this could be done, a state could phrase a whole variety of separate crimes as degrees of one (e. g., assault with intent to kill, assault with intent to rob, and simple assault), and make all assaulters guilty of the highest unless they proved the lack of the requisite intent. To be guilty of the lowest they would have to disprove the requisite intent for the two higher.

It was argued by defendant that *Winship* itself had required proof beyond a reasonable doubt by the state where all that was at stake was a relatively short sentence (as a

juvenile offender). Here much more was at stake—the difference between murder and manslaughter could in Maine be the difference between a life sentence and a very minor or no sentence, not to mention the difference in stigma. Furthermore, in *Winship* the state had not tried to impose the persuasion burden on defendant—merely to reduce its own burden to a showing by a preponderance of the evidence. But even that was held bad.

Could the state make an intentional killing punishable as murder regardless of malice aforethought and heat of passion? If so, isn't it doing the defense a *favor* to allow a defense of lack of malice aforethought or a defense of heat of passion, even if defendant has to prove it by a preponderance of the evidence? If so, were defendant's rights violated here?

The problem in *Mullaney* arose, in a sense, out of the need to harmonize a number of rules, previously sanctioned by the U.S. Supreme Court, that seemed, at least in spirit, to conflict with the requirement that the state must prove the facts of the crime beyond a reasonable doubt. The Supreme Court had relieved the state of some or all of that burden a number of times. It had held (see our earlier discussion) that certain facts against the accused may be *presumed*—even, it might be added, if the presumed facts were the ultimate constituents of the crime. (But in such cases the jurors were always given to understand that if a reasonable doubt existed in their minds as to whether the presumed fact exists, the presumption is overcome and they must acquit; thus this principle casts a lighter burden on defendant—to raise a reasonable doubt—than the presumption in *Mullaney*). More importantly, the Supreme Court had always made it clear that a state can impose (by means of the device of creating "affirmative defenses") on criminal defendants the burden of proving certain facts like lack of sanity, lack of capacity, or self defense, in order to be

excused, or can create other such "affirmative defenses." On at least one of these, the burden had been that defendant must prove "beyond a reasonable doubt." Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002 (1952) (insanity). On most others, it was "preponderance of the evidence." The Court also seemed in a number of previous decisions to sanction the common practice that juries are not instructed about certain legal excuses unless defendant meets a burden of producing some evidence on them. (If that is met, the jury is instructed that the prosecution has the burden to negate the excuse "beyond a reasonable doubt," except for the above "affirmative defenses.") If one thinks about it, it becomes apparent that under this last principle, the issue becomes conclusively resolved against defendant if he produces no evidence on it. For example, if the issue of sanity is treated this way, as it is in some jurisdictions, and the defendant has no evidence of insanity, the jury would not be told that they can acquit on grounds of insanity, and indeed, may even be instructed that he cannot be acquitted on grounds of insanity (i. e., that he must be taken to be sane—is this the same thing as a directed finding of fact against accused, or even a mandatory presumption of sanity?).

Thus, apparently the constitution allowed some burdens, of some kind, on some factual issues, to be placed on the accused. What were to be the limits? Apparently, when a burden on defendant was considered by the Court to be *too* onerous, central, important, or counter to widespread national practice or current tradition, it would be considered to run afoul of the notion that it is up to the state to prove guilt, not the defendant to prove innocence—and up to the state to prove it beyond a reasonable doubt.

The question, then, in *Mullaney*, seems to have come down to the question of whether making the defendant negate "malice aforethought" by a preponderance of the

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evidence, is too onerous, central, important, or counter to widespread national practice or current tradition, to comport with the constitution.

While placing this burden on the defendant on this issue was originally the rule at common law in both England and the U.S., in the 50 years preceding *Mullaney* the tradition in both England and the large majority of American states had reversed itself.

The Supreme Court's decision on the merits in *Mullaney* is that malice aforethought must be proved by the state beyond a reasonable doubt, because of the importance of malice aforethought (in terms of the consequences, among other things) and because modern tradition places that burden on that issue on the state (notwithstanding the relative difficulty to the state of proving such a subjective factor—indeed, proving a negative—and notwithstanding the fact that the defense is likely to have more information on it). Such an important, now traditionally prosecution-allocated issue like malice-aforethought might be called an "element" of the crime (be wary of different uses of the word "element").

The holding would seem to apply *however* the burden of persuading by a preponderance[12] is placed on the defendant as respects such an element—whether via a presumption, as in this case (thus, our "View (5)," supra, of the effect of a presumption, that is, the view that imposes the burden of persuasion, would be illegal if applied in a criminal case against the accused as respects such an element, although other of the views, that do not affect persuasion burden, may be all right, and even "View (5)" may be all

[12] *A fortiori*, the placing of the burden to persuade *beyond a reasonable doubt* on the defendant as respects an important, traditionally prosecution-allocated element such as malice aforethought or heat of passion, would be bad. Query: How do you distinguish (if at all), the issue of sanity in *Leland v. Oregon*, several paragraphs above?

right as respects things that are not "elements" in the sense used here[13]); or via the mechanism of making "lack of malice aforethought" ("presence of heat of passion on sudden and adequate provocation") an affirmative defense in the statute itself. The decision thus has implications for the recodification-of-criminal-law efforts that have been going on in the states and in Congress for the last several decades. Under these efforts, great use is made of the device of affirmative defenses that place on the defendant the burden to persuade by a preponderance as respects the facts that make out the defense.[14]

[13] Among the non-elements, is there a distinction to be drawn between, on the one hand, those that are *almost* elements, and, on the other hand, those that are not like elements at all? As to the former, we could allow only a *preponderance* burden to be placed on the defendant, rather than a *beyond a reasonable doubt* burden.

[14] For example, under Senate Bill S. 1722 (cited several paragraphs above), it is an affirmative defense (sometimes called a "bar to prosecution" rather than "affirmative defense," for reasons that need not now concern us) to sexual abuse of a minor, that the actor reasonably believed the other person to be over age 16; to arson and property destruction, that the act was consented to or was reasonably so believed; to receiving stolen property, that it was with intent to return or report it; to theft, that the property was intangible government property obtained to disseminate it to the public and not obtained by means of eavesdropping, interception, burglary, or criminal entry or trespass; to obscenity, that the material was disseminated only to someone engaged in teaching at an educational institution or authorized by a licensed physician or psychologist or psychiatrist; to restraint of a child by an unauthorized parent, that the child was returned unharmed within 30 days; to certain crimes of inflicting, risking, or threatening bodily harm (such as assault, menacing, reckless endangerment, and terrorizing), that the conduct was consented to or the hazard was a reasonably foreseeable hazard of a joint undertaking, medical treatment, or an occupation; to murder in consequence of a felony, that death was not a reasonably foreseeable consequence; to pressuring a public servant in various ways, that it was done to compel legal action or compliance with duty and the means used was lawful; to certain false statement offenses, that the false statement was timely retracted; to offenses of failure to obey judicial or other process, that the process was invalid or unconstitutional, that reasonably available, timely means were taken to challenge it, that the process or order constituted a prior restraint on news, that there

was a privilege, and/or that the failure was due to circumstances beyond the actor's control; to attempt, conspiracy, and solicitation, that there was abandonment, renunciation, and prevention of the crime; etc. In each case, it would have been possible, instead, to include the issue that is the subject of the affirmative defense, in the definition of the crime itself (i. e., the reverse of the fact that constitutes the defense would become part of the definition of the crime —that is, part of the facts necessary to constitute the crime), with the usual (though not inevitable) result that the prosecution would have had the burden to persuade beyond a reasonable doubt, on it. However, the fact that conceptually it *could have been* made part of the definition does not necessarily make it an "element" in the *Mullaney* sense—that is, an element that may not be allocated to the defendant to prove by a preponderance. (If it *is* made part of the definition of the crime in the statute, rather than an affirmative defense, is it *necessarily* an "element" in the *Mullaney* sense?) To be such an element, the opinion seems to suggest that the issue must be considered to be at least as important and traditionally allocated to the prosecution, as the malice aforethought issue. The Supreme Court has not said, in *Mullaney*, that there are *no* issues upon which the burden to persuade by a preponderance, may be placed upon the accused. The court appears to have merely prohibited it as to *some* issues—those that are so important and so frequently prosecution-allocated in the states in this country in recent history, that to go against this trend would be unconscionable. A decision has to be made concerning the *particular factual issue* that has been assigned to the accused. (In *Mullaney* itself, the recent history and the importance of the issue both pointed in the same direction. A more difficult case may arise in the future where they do not.) See also Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) (intent is such an element).

Do you think *Mullaney* has implications for "affirmative defenses" such as self-defense, insanity, intoxication, immaturity, defense of property, defense of others, or necessity?

Although we will not mention them, it should be noted that the bill (S.1722) also provides "defenses" that are not "*affirmative* defenses." As to these, it is provided that the prosecution still has the burden of persuasion beyond a reasonable doubt. But that burden arises—that is, an instruction will be given that the state must prove it beyond a reasonable doubt—only if *some evidence* to substantiate the defense is introduced. Such defenses (and possibly presumptions having a similar effect, although such criminal presumptions—"mandatory," in the parlance of evidence scholars—may or may not be valid) are known in traditional law, as well. *Mullaney* probably would not affect them. What may be novel under the bill, however, and possibly subject to constitutional challenge, is the quantum of evidence that will qualify

Such would seem to be what the Supreme Court was saying in *Mullaney*—until we read Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977), which came along two years later. In *Patterson*, the state imposed on the accused the identical burden (to persuade the jury by a preponderance) on an issue ("extreme emotional disturbance") that is hard to distinguish from (and served essentially the same mitigating function as) the "provocation-heat-of-passion" issue in *Mullaney*. But this time the state did it by means of making the issue an *affirmative defense*, rather than using the device of a presumption. The Supreme Court this time upheld the state. Can this be squared with *Mullaney*? Is the Supreme Court elevating form over substance, by holding that it matters whether the result is accomplished by use of an affirmative defense or a presumption? The court does indicate in *Patterson* that there are some matters related to culpability that could not be assigned to the defendant (to persuade the jury by a preponderance) *regardless* of which of the two devices is used. What are they? Are we going to have a heirarchy—i. e., matters which cannot be assigned to the defendant (to persuade by a preponderance) by either device; matters which can be so assigned to him by means of an affirmative defense but not by means of a presumption (i. e., the matter in *Mullaney* and *Patterson*); and matters which can be so assigned to him by either device? (What will be the scheme with respect to assigning him the burden to persuade beyond a reasonable doubt?) We have seen that presumptions against the accused like those involved and

as *some evidence* for these purposes. It is defined as *such evidence as will justify a reasonable belief* in the *existence* of the fact, rather than such evidence as would justify a reasonable doubt about its existence. The constitutional challenge might be most serious where the defense consisted of a fact that is in some sense considered central to the concept of culpability or an "element" as we have been using that term.

discussed in *Ulster*, that have some lesser effect on the jury than putting the persuasion burden on the defendant, must meet one version or another of the rational connection test (depending upon the strength of that effect) in order to be valid. What test must a presumption that imposes the burden to persuade by a preponderance on defendant meet, where the heirarchy indicates such a presumption could be allowed? If there are issues which can be assigned (by means of a presumption) to the defendant to prove beyond a reasonable doubt (cf. Leland v. Oregon, supra), what test of validity must such a presumption meet?[15]

It must be borne in mind, that any device that imposes the persuasion burden on the criminal defendant allows a conviction even when the jury has a reasonable doubt on that particular issue, for the jury may feel the defendant has succeeded in raising a reasonable doubt but not in showing that the fact is *most probably* as he contends. Consider the issues of killing, of duress, of insanity, of intention, etc. Upon which (if any) should the jury be allowed to have a reasonable doubt and yet convict?

[15] In reading *Patterson* one cannot help but get the feeling that the real distinction from *Mullaney* the court had in mind (perhaps only hinted at in the decision), was that in *Patterson* the imposing of the burden on the defendant was done by the *legislature* rather than by *common-law-process court decision.* Aside from implying some conception of the relative roles of the judicial and political processes, the Supreme Court was mindful that the legislature might choose to punish the crime as murder without regard to extreme emotional disturbance (or heat of passion) if the Supreme Court made it too difficult for the state to recognize liberalizing or mitigating factors such as extreme emotional disturbance or heat of passion. The Supreme Court was worried about the effect on the codification movement generally, of a rule that mitigating or excusing factors can only be enacted if the legislature is willing to put the burden on the state. In addition, legislative imposing of the burden in an affirmative defense communicates in advance much more clearly. Would you say after *Patterson* that if the legislature has constitutional power to make acts criminal, it may provide for conviction based on those acts alone and relegate all mitigating facts to the status of affirmative defenses to be proved by a preponderance?

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TESTIMONY OF PAUL ROTHSTEIN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Mr. ROTHSTEIN. Thank you. It's been no imposition at all to listen to such enlightening testimony and before a subcommittee of this stature, which is to be complimented for the forward-looking nature of these proposals and the strong stance against crime, particularly narcotics crime, which is a plague on the entire country.

I might say that in addition to the very distinguished work of the chairman, I'm familiar with the excellent continuing work and efforts in this vein of Mr. Sawyer, both on this committee and other committees where I've seen his work. I share with Mr. Sawyer and this subcommittee the notion that everything possible should be done to stem this rising tide of narcotics crime. These proposals deserve serious consideration.

The main thrust of my comments today is that the proposals in 2646 for a presumption concerning forfeiture, about which there has been some discussion today, are, as drawn, too broad, but that the idea embodied by them is feasible and, if narrowed, they probably would meet constitutional muster. As drawn, it is probably too broad. But I realize that the purpose of the subcommittee study, of course, is to refine and perfect things that are drafted.

Some of the suggestions that were made today might provide a direction for narrowing the provision in a way that would allow it to pass constitutional muster. For example, the Department of Justice has proposed a narrowing that the presumption apply only to assets acquired after the crime for which there has been a conviction.

I believe that alone might not entirely do the trick, but if it were narrowed just a tiny bit further, that might. The narrowing that I would add to the Justice Department's narrowing would be that the activity for which the person has been convicted must have been an activity which provides very substantial amounts of income. Under RICO, it is possible to be convicted of some activities that provide not substantial amounts of income as compared with other possible sources that a person might have.

In that circumstance, it would not be rational to assume or presume that his house, his car, and everything that he has comes from the criminal activity when it is a small income producer in comparison with some of his other activities.

Another addition that I would put on it, and this would make it more analogous to the net worth situation, would be that the presumption only applies where the Government has introduced some evidence showing that other sources for these assets are unlikely; that it's unlikely that there are other sources.

I did some studying up on net worth prosecutions; what the Government does in those cases is to introduce evidence eliminating other sources of income. Then it does become logical to assume that if a person has lots of unreported income and other possible nontaxable sources for that income are eliminated, then it's reasonable to assume that these amounts are from unreported taxable sources of income.

So the main problem with which we're grappling here and the reason why I say that the provision is too broad as drafted, is that

the Supreme Court has required that it be a rational or logical inference that you are drawing in your presumption. It seems to me that it does not follow that because a person is engaging in narcotics activity that produces some income, it is not logical to presume that each and every asset that he has is attributable to that criminal activity. That violates the rational connection test of the Supreme Court.

But it does become logical to make the same assumption if you narrow the provision in the ways that I have suggested—that is, eliminate other sources, put in a requirement that the criminal activity be a substantial income producer, put in a requirement that this applies only to assets acquired after the date of the criminal activity—in those situations then, it seems to me that we might well have a valid presumption.

There is one other modification that could be made that would substantially strengthen it in the eyes of the Supreme Court; and that would be this business of shifting the burden of proof. If the presumption merely said that it is still the Government's burden to prove by a preponderance of probability that the asset is attributable to the criminal activity, but that the factfinder may consider the presumption that assets are attributable to the criminal activity, the presumption, as I have narrowed, that, I think, would in the eyes of the Supreme Court pass constitutional muster.

That is all I have to say for now. What I have said, Congressman, basically, just summarizing, is that I think the presumption provision would pass constitutional muster if it were narrowed in many of the ways that were suggested today: First, to apply only to assets acquired after the criminal activity; second, to require that the criminal activity be a substantial income producer for the person, as compared to his other activities, because otherwise, it isn't logical to assume that his assets come from the criminal activity. They might, more logically, have come from his other activities. And third, that the Government be required to introduce some evidence eliminating other possible sources for these assets.

Those three, I think, would considerably strengthen the presumption constitutionally. And one final thing that I think the Supreme Court might require, but I cannot be sure because the law is not that clear, and that is that instead of shifting the burden to the defendant, that the presumption provide that the burden to prove by a preponderance of probabilities is still on the Government, but that the factfinder can consider this presumption as evidence on that score and can consider this presumption in the Government discharging that burden.

I think some approach to get at the narcotics problem of this sort is feasible and workable, but that some careful work, more work has to be done. In addition to the commendable work already done by the subcommittee, more work has to be done to make sure that we don't run into constitutional problems, or pass provisions that will threaten the innocent people among the population, as well as the guilty.

One final note. The suggested solution of a tremendous fine the judge could mete out in accord with whether the judge was convinced that this fellow had made a lot of money from the narcotics transaction, that that would present all the same problems as the

presumption, as respects sweeping too broadly though it would not involve presumption law. If you went down the list of Mr. Horn's problems, I think the solution he suggests presents all the same problems.

Thank you very much for inviting me and hearing me today.

Mr. HUGHES. Thank you. In fact, I share your concern in reference to that last point. It might be a far simpler approach to give the judge discretion to forfeit $2 billion, but I'm not so sure that that in itself would comport with due process.

Mr. ROTHSTEIN. And the evidence that he hears in the sentencing is a lot less rigorous. He can hear hearsay and things like that. Whereas, in regular factfinding, it's quite a more rigorous procedure.

Mr. HUGHES. I understand the first three conditions. I think I understand the fourth condition, dealing with the presumption. What you're saying is the presumption would only be evidence—the burden of proving by a preponderance of the evidence that they are forfeitable assets still remains with the Government; is that correct?

Mr. ROTHSTEIN. That's right. But this carries them a long way in proving it.

Mr. HUGHES. The factfinders can still take that into account.

Mr. ROTHSTEIN. That's right. My conditions that I attach to the presumption are an attempt to bring the presumption more in line with what is done in the net worth prosecution cases.

Mr. HUGHES. So that we create some nexus for the assets to be forfeited.

Mr. ROTHSTEIN. That's right, some reason to believe.

Mr. HUGHES. Illicit activity and the assets themselves.

Mr. ROTHSTEIN. That's correct.

Mr. HUGHES. Yes, I understand. The gentleman from Michigan.

Mr. SAWYER. In the criminal code provision, which is still somewhere in the process of consideration for purposes of revision, as I recall it, we raised the fine on narcotics up to $1 million. And I do not really now remember whether we just debated the possibility of including in the measurement an amount of the gain, so that it could go well beyond the maximum time, or whether we included it.

Mr. HUGHES. We have debated everything else, so we must have debated that.

Mr. SAWYER. I am sure. Maybe Dave recalls. He sat in on it.

Mr. BEIER. We didn't include the provision for double the loss or double the gain for the reasons that Professor Rothstein outlined. There were objections to the procedural requirements that you would have to go through to establish the amount of the gain.

Mr. SAWYER. Of course, while it might visit us with the vagaries of the judge's disposition at the time, at least it would remove the constitutional problems.

Mr. ROTHSTEIN. Well, I wonder whether it would. You mean Mr. Horn's solution or this solution, which is along the same lines?

Mr. SAWYER. Fines up to $1 million, which would depend on how the judge felt after breakfast. [Laughter.]

Mr. ROTHSTEIN. It might also have constitutional problems as being without standards and excessive punishment, cruel and un-

usual punishment. If some determination had to be made by the judge to link it to the amount of profits from the narcotics activity, you know, if it would only give the higher reaches if it was analogous to the profits the fellow had made, then I think you have all the same problems that you have with the forfeiture unless there was a legitimate finding on it.

Mr. SAWYER. Yes; but if you were just going to include $1 million fine or up to a $1 million fine or $1 million or 10 years in prison or both, or within those limits, it's pretty much the judge's unfettered discretion, at least as the law now stands. You couldn't find anything unconstitutional about that.

It would seem to me that if you're going to authorize imprisonment, it would be pretty hard to say that the dollar amount of a fine would be cruel and unusual punishment. It can be arbitrary, as long as it's within the statutory limits.

Mr. ROTHSTEIN. Well, you're right, that we can't say definitely on the state of the law that there would be constitutional problems with that. But there certainly are severe policy problems wherever you make the punishment grossly disproportionate to the crime. Incentive to settle, as Mr. Horn suggested. "Well, I'll plead guilty to anything to avoid that." In some cases, that would seem to be an appropriate fine, but in the case of the smallest narcotics violation, to put such a fine on would seem excessive to me. And then judges avoid and juries avoid punishing and finding people guilty if there's a risk of too great a punishment. It's a counterproductive effort, then, because they won't convict. When every theft of bread was a capital offense and you lost your head for it, no one ever got convicted of stealing bread except Jean Valjean.

Mr. SAWYER. But that's only if it's a well known situation. You can't argue in the case what the penalty might be. If Nelson Rockefeller says we're going to have a law with 20 years mandatory imprisonment for dealing in drugs or something and it becomes generally known, then I agree. It could have that effect and did have that effect. But here, as I recall, we didn't make the fine a mandatory million dollars. We merely authorized like you might up to $10,000, bigger amounts.

Anyway, I just was curious about that.

Mr. ROTHSTEIN. Well, you're pitting me against myself in a way because I, too, would like to see absolutely the severest penalties for drug dealing, because it's dealing, not just an isolated instance of use. It's an attempt to spread one's filthy habit or the thing one is making money out of to other people, and I agree.

So, I'm not going to be in a position of saying high fines are bad.

Mr. SAWYER. Our philosophy in general was not really aimed at narcotics in particular in the criminal code. It was particularly in crimes, where the motivation is economic, whether they be other types of white-collar crime or drug dealing, that we sought to allow as an alternative or in conjunction with a prison sentence, a really substantial economic penalty that would be suited to the crime. In many cases, particularly in some types of white-collar crime, incarceration is really of questionable suitability in that you are not dealing with someone who is dangerous. If the fine were big enough, so that it was really a penalty of equal severity and did

nothing but profit the public rather than costing them like incarceration would, it could provide an attractive alternative, in effect.

So, the whole scheme of fines was greatly increased in the criminal code, particularly on those things that were to economics or drug-related.

Mr. ROTHSTEIN. I'm in sympathy with that goal and do support the draft criminal code in that respect. And indeed, in many of its respects. I think it's a fine piece of work.

Mr. SAWYER. We are doing our best to do something with it. I yield back.

Mr. HUGHES. I don't think that those proposals are necessarily mutually exclusive.

Mr. SAWYER. No; I do not.

Mr. HUGHES. I can't see why we can't have both, as a matter of fact, to give us some flexibility.

Let me just ask you another question about the presumption and the constitutionality of the idea of shifting the burden. If, in fact, we created a nexus, if we can determine, for instance, that subsequent to the criminal activity we can establish a pattern of economic activity for a defendant, and we determine, for instance, that during that period of time he acquired shopping centers and hotels, income producing, and there is a nexus—we can show that during that period of time that moneys were going through a particular bank account, so we can determine that there is a link between the economic activity and assets.

Now at that posture, why do you feel it's unconstitutional to shift the burden at that point, as we do with net worth, at that posture shift the burden to the defendant?

Mr. ROTHSTEIN. At that point it would not be. At that point it would be constitutional. But notice what the Government has done in the case you posited. They have introduced proof of a nexus, whereas under H.R. 2646, as drafted, there is a presumption that there is a nexus without any proof.

Mr. HUGHES. I have some concern over the way it's drafted myself. But I'm saying that it seems to me, if you do establish a nexus, then it would comport with the constitutional muster at that posture because you've got a link. And if, in fact, the Government can also pull tax returns and show that for instance, during that period of time, there's just no way that you can account for those types of assets, it even strengthens the case that much further.

So, it would just be a matter for the U.S. attorney and the Justice Department to determine as to that posture, which way to go, whether if, in fact, the criminal penalties are of sufficient magnitude. If you're dealing with a class 1 trafficker with a lot of assets, you want to select the right case and make it the symbolic one to send a good signal, it seems to me that under those circumstances, a lot of good could be done by having that type of flexibility.

Mr. ROTHSTEIN. I agree, Congressman. If the proof of a nexus is strong enough, you can shift the burden of proof. But I was looking for a mechanism whereby you could let the Government get away with slightly less proof of nexus and presume nexus. And in order to do that, I think if you shift the burden of proof in that circumstance, you're pushing the constitutional limits a little far.

Mr. HUGHES. I understand. The other alternative is just to create a burden, but that burden is only evidential, as opposed to one that, in effect, is the one of ultimate persuasion, which would remain with the Government under that hypothesis.

Mr. ROTHSTEIN. That's right, the old dispute of evidence scholars, but I think it has real practical significance in a case like this. That's right.

Mr. HUGHES. Well, you've made my day because it brings back all my evidence courses and that's a good note to end on.

Mr. ROTHSTEIN. Thank you.

Mr. HUGHES. Thank you very much. You've been most helpful, Professor, and we appreciate it.

Mr. ROTHSTEIN. Thank you.

Mr. HUGHES. That concludes our testimony today. The subcommittee stands adjourned.

[Whereupon, at 4:25 p.m., the hearing was adjourned, to reconvene subject to the call of the Chair.]

FORFEITURE IN DRUG CASES

TUESDAY, MARCH 9, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 1:30 p.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hall and Sawyer.

Staff present: Hayden W. Gregory, chief counsel; David Beier, assistant counsel; and Deborah K. Owen, associate counsel.

Mr. HUGHES. The Subcommittee on Crime of the House Judiciary Committee will come to order.

Today's hearing on H.R 5371 continues the subcommittee's work on fashioning a comprehensive reform of the forfeiture laws. The bill I have developed is the result of a thorough examination of the problems confronted by prosecutors in their attempts to take the profits out of drug dealing.

One of the single most important crime problems confronting this country is the phenomenal increase in drug trafficking in recent years. We are now faced with a situation where drug dealers have been able to amass huge fortunes as a result of their illegal activities. The sad truth is that the financial penalties for drug dealing are frequently only seen by dealers as a cost of doing business. Under current law the maximum fine for many serious drug offenses is only $25,000. Moreover, the Government's ability to obtain civil or criminal forfeiture of the profits or proceeds of drug dealing has been hampered by statutory deficiencies. This bill attempts to address these problems in a manner that will encourage the immediate and effective utilization of these new tools by law enforcement.

At the outset I must acknowledge the material assistance I have received in this undertaking from my congressional colleagues on both sides of the aisle. Senators Joseph Biden and Sam Nunn both have diligently pursued investigations of the problems with drug prosecutions. As a result of work done in the Senate Judiciary Committee and the Permanent Subcommittee on Investigations of the Senate Committee on Government Affairs, the area of forfeiture has emerged as a primary concern of the Federal law enforcement community.

At the suggestion of Senator Biden, the General Accounting Office did a ground breaking study of the problems in disgorging the profits of drug dealers. The Subcommittee on Crime followed

up on the GAO report with a hearing on forfeiture during the first session of this Congress. At our first hearing we were able to review the bills of my colleagues Hal Sawyer, Leo Zeferetti, and Ben Gilman, H.R. 2646, H.R. 4110, and H.R. 2910, respectively. Each of these gentlemen presented the subcommittee with innovative options on the reform of our forfeiture laws. The bill before us today is the direct descendant of the bill they introduced earlier in this Congress.

An overview of the problems with the current forfeiture statutes by Government officials produces a clear consensus as to the need for change. What is less clear is the path to achieve that reform. Most observers agree that prosecutors face three major problems: ambiguous statutes, problems in tracing the proceeds of drug trafficking, and difficulties in proof. The solutions to these dilemmas are numerous and pursuit of them can often create a divergence of views. For example, while it may be desirable to ease Government seizure of property involving drug trafficking, one must also be careful to protect the rights of innocent third parties. Frequently, it is these conflicting values that produce different opinions about the wisdom of particular legislative reforms.

In the legislation before us I have attempted to balance the strong societal interest in eradicating trafficking in illegal drugs with the constitutional rights of our citizens. I am satisfied that a proper balance has been struck, and I look forward to hearing the assessments of interested parties on this bill.

The witnesses before the subcommittee will be Jeffrey Harris, representing the Department of Justice, William Taylor, a defense attorney and Irvin Nathan, an attorney in private practice here in Washington.

I also believe that Senator Claude Pepper of Florida will be joining us later on this afternoon. We look forward to hearing their views on this important topic.

Our first witness is Jeffrey Harris, Deputy Associate Attorney General. Prior to his current position as Deputy to Associate Attorney General Rudolph Giuliani, Mr. Harris served as the Executive Director of the Attorney General's Task Force on Violent Crime. Mr. Harris also brings to bear his previous experience as an assistant to former Attorney General Levy, and as a senior attorney in the Federal Trade Commission during the Carter administration.

Mr. Harris, we have received a copy of your prepared statement which, without objection, will be made a part of the hearing record. Please proceed as you see fit.

TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. HARRIS. First let me introduce my colleagues from the Department of Justice. On my right is Mary Ellen Warlow, and on my left Roger Pauley, both with the Department.

I would like to thank you for this opportunity to present the Department's views on enhancing the effective use of forfeiture as a law enforcement tool in combating two of the most serious crime problems facing the country: drug trafficking and racketeering.

As the Attorney General indicated in his November testimony before the subcommittee, the Department has undertaken the development of comprehensive legislation to facilitate the use of criminal forfeiture in narcotics and racketeering cases. This legislative proposal has now been completed and sent to the Congress, and I will outline its major elements in my testimony today. I will also comment briefly on certain aspects of H.R. 5371, the forfeiture bill which you, Mr. Chairman, recently introduced. I understand that this bill incorporates several elements of other forfeiture bills that have been referred to the subcommittee.

My prepared statement is rather lengthy. If it is acceptable to the subcommittee, I will submit it for the record and simply highlight some of the major points made in my statement.

Mr. HUGHES. It has been made a part of the record, without objection.

Mr. HARRIS. As you noted in your remarks upon introducing H.R. 5371, Mr. Chairman, it seems clear that there is a consensus concerning the need for legislation to improve current forfeiture statutes. We cannot adequately deter and punish the crimes of drug trafficking and racketeering unless we have the ability to separate racketeers and drug traffickers from their ill-gotten profits and the economic power bases through which they operate. Forfeiture, and in particular, the sanction of criminal forfeiture, holds great potential as a means for achieving this goal. But to fully realize this potential, current forfeiture laws need to be amended. This subcommittee's clear commitment to this change is one that the Department shares.

There are now two types of forfeiture statutes applicable in narcotics and racketeering cases. For the most part, forfeiture of drug related assets is now accomplished through the civil forfeiture provisions of title 21 United States Code, section 881. The utility of title 21's civil forfeiture provision was greatly enhanced in 1978 when it was amended by the Congress to provide for the forfeiture of the proceeds of drug transactions. This provision would be further improved if it were amended to permit the forfeiture of real property used in major violations of the narcotics laws. Both the Department's proposed forfeiture legislation and H.R. 5371 would include a provision to accomplish this, although the provisions of the two bills vary somewhat.

The second type of forfeiture is criminal forfeiture, a sanction imposed upon conviction. Presently, this sanction is available for only two offenses, both enacted in 1970.

These are the RICO statute and the continuing criminal enterprise statute, which punishes those who control groups that are involved in a pattern of drug trafficking offenses. We are convinced that criminal forfeiture can be an extremely effective tool in combating racketeering and drug trafficking. Indeed, we have concluded that this sanction should have broad application to drug trafficking offenses, an application that is not now possible because only a very small number of the thousands of major drug offenses prosecuted each year may be brought under the RICO and CCE statutes. Thus, the forfeiture of most drug related assets, including the enormous profits produced through drug trafficking, must be accomplished through civil forfeiture, an often cumbersome and in-

efficient procedure that requires the filing of separate civil suits in each district in which forfeitable property may be located. In our view a far more effective way of achieving the forfeiture of substantial assets of drug traffickers would be to give prosecutors the option of consolidating prosecution of the criminal case and the forfeiture of a defendant's drug-related assets by providing a criminal forfeiture statute that would be applicable in all major narcotics prosecutions. The creation of such a general applicable criminal forfeiture statute for all major drug crimes is a primary feature of the Department's legislative proposal.

Basically, the Department's forfeiture legislation is made up of three parts. The first sets out an amended version of the RICO criminal forfeiture statute. The second contains amendments to the Comprehensive Drug Abuse Prevention and Control Act, and its core provision is the new generally applicable criminal forfeiture statute for drug offenses. The third part establishes a 2-year trial program for using a part of the proceeds of forfeitures of drug-related assets for the payment of rewards to persons who have provided assistance that has led to such forfeitures.

The major changes in RICO forfeiture provisions that are incorporated in our proposal address two problem areas. The first is our present inability to obtain the forfeiture of proceeds of racketeering because of court decisions that have held that such proceeds do not constitute a forfeitable interest under the RICO statute since they are not interests in an enterprise. These decisions have severely inhibited realization of the intended purpose of the RICO criminal forfeiture provisions, which was to separate racketeers from their sources of economic power. To address this problem, our proposal amends the RICO statute to provide specifically for the criminal forfeiture of the proceeds of racketeering activity. H.R. 5371 has a similar provision, although we have some reservations about the way in which it is drafted.

The second significant deficiency of the current RICO criminal forfeiture provisions, and this is true of the analogous provisions of the continuing criminal enterprise statute as well, is that they fail to provide adequate mechanisms for dealing with the problem of defendants defeating forfeiture by transferring, removing, and concealing their forfeitable property so that it may no longer be reached by the Government at the time of conviction. Amendments in our proposal that are designed to address this problem include the following measures:

First, a provision codifying the recognized principle that the U.S. interest in property relates back to the time of the acts which give rise to the sanction of forfeiture, and that thus, subsequent transfers of the property are considered void in the context of a criminal forfeiture action. H.R. 5371 has a similar provision.

Second, we include a provision that would expand the current authority of the court to enter protective orders with respect to forfeitable property to the period during which the filing of formal charges against the defendant is still pending. The protective order authority of the courts may now be invoked only after the time when the defendant has been formally charged. However many defendants become aware of the Government's development of a case against them at an early stage, and are able to move or conceal

their assets before the Government can file formal charges and obtain an appropriate restraining order. H.R. 5371 would also permit the Government to seek a restraining order in the preindictment period. However, we are concerned that its adoption of the civil preliminary injunction standard for the issuance of these orders may be unworkable. Primarily because of the concept of irreparable injury used in this test it would be difficult to apply where the moving party is the United States seeking to preserve the ability to enforce a criminal sanction.

Third, we have included a provision that would permit the court to order the defendant to forfeit substitute assets when particular property subject to forfeiture is no longer available at the time of conviction because it has been transferred, concealed, placed beyond the jurisdiction of the court, or commingled with other property.

We view these three measures as essential if a criminal forfeiture statute is to be effective. Thus, they have also been incorporated in the new criminal forfeiture statute for all major drug offenses that is set out in the second part of our proposal. This new statute would permit the criminal forfeiture of the proceeds of drug transactions and of other property the defendant has used in the commission of the offense. In order to facilitate the criminal forfeiture of the huge profits generated by drug trafficking, our proposal contains a permissive presumption whereby assets of a drug defendant could be considered property subject to criminal forfeiture if it were established that the defendant acquired the asset at, or soon after, the time he committed the offense and that he had no legitimate source of income to explain his acquisition of the property. H.R. 5371 contains a similar presumption, but it, like the majority of the other forfeiture amendments in the bill, is limited to those drug cases which are prosecuted as RICO violations. As I noted earlier, very few—indeed only a handful—of drug cases can be prosecuted under the RICO statute. Although H.R. 5371 apparently shares the goal of facilitating the use of forfeiture as a means of attacking drug trafficking, we doubt that this goal can be achieved to any significant degree simply by amending the RICO statute.

This limitation is one of our primary concerns about H.R. 5371. We also have some serious reservations about other aspects of this bill, and as I have noted in my statement, the Department would be pleased to submit a detailed written comment on H.R. 5371 if the subcommittee desires. Our proposal attempts a more comprehensive reform of our forfeiture laws, and our approach to some of the problems posed in utilizing the criminal forfeiture provisions of current laws differs in certain respects. However, H.R. 5371 does evidence a recognition of these problems and a commitment to finding a solution to them. I would also note that the Department strongly supports the dramatic increase in fine levels for drug offenses proposed in H.R. 5371.

In sum, the Department believes that with appropriate changes, such as those we have developed in our proposal, our forfeiture laws can become an effective means for depriving racketeers and drug traffickers of the profits of crime and the economic power through which they continue to victimize society. I believe the crucial elements for achieving this goal are now present: A consensus

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that our forfeiture laws must be made more effective and a commitment to accomplish this change.

Mr. Chairman, that concludes my remarks, and I would be pleased to try to answer any questions that you or other members of the subcommittee may have.

[The statement of Jeffrey Harris follows:]

STATEMENT OF JEFFREY HARRIS

Mr. Chairman and Members of the Subcommittee:

I would like to thank you for this opportunity to present the views of the Department of Justice on the subject of criminal forfeiture.

In his testimony before this Subcommittee in November of last year, the Attorney General discussed the contours of the Administration's legislative program for improving the ability of federal law enforcement to fight the growing problems of crime and corruption that are plaguing our country. Criminal forfeiture was among the subjects cited by Attorney General Smith as being in need of major statutory modifications and as to which the Department would undertake the development of a comprehensive legislative proposal to facilitate the use of forfeiture in narcotics and racketeering cases and thereby deprive criminals in their highly lucrative pursuits of their ill-gotten gains. I would like to present to the Subcommittee today the major elements of our proposal, which is being completed to be submitted to the Congress.

At the outset I shall first describe briefly why we view forfeiture as an important and necessary tool in the fight against drug trafficking and racketeering. I will then turn to a discussion of the primary aspects of our proposal, which is designed to make forfeiture the powerful weapon that we believe it can and should be in government's efforts to combat such criminal activity. The last part of my statement briefly addresses H.R. 5371, the forfeiture bill recently introduced by Chairman Hughes.

The concept of the civil forfeiture of crime-related property through an in rem proceeding is one that has long been a part of federal law. Criminal forfeiture differs in that it is a sanction directly imposed upon a defendant following his conviction. Criminal forfeiture, although having its origins in ancient English common law, is relatively new to federal criminal law. Congress first acted to provide for criminal forfeiture in 1970, when it passed the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. 1961 et seq.) and the Continuing Criminal Enterprise (CCE) statute (21 U.S.C. 848). These statutes address, respectively, the conduct, acquisition, and control of enterprises through patterns of racketeering activity, and the operation of groups involved in patterns of serious drug offenses. Congress's inclusion of the penalty of criminal forfeiture in both these statutes reflected an understanding of the importance of the economic aspects of these crimes and the valid conclusion that with respect to these types of offenses, the traditional penalties of fine and imprisonment were not sufficient to fulfill the goals of deterrence and punishment, but that effective tools to remove the wealth generated by, and used to maintain, racketeering and drug trafficking were also necessary. The Department shares this view that forfeiture can be a powerful tool in separating racketeers and drug traffickers from their sources of economic power.

In the extensive hearings that preceded the enactment of the RICO and Continuing Criminal Enterprise statutes, the Congress focused on the economics of organized group criminal activity. As was made clear in those hearings, not only does this type of crime generate considerable economic gain, but the wealth so generated is used, in turn, to finance continued patterns of crime and to obtain and corrupt other organizations and enterprises. Hence the focus of the RICO statute included criminal forfeiture as a measure to deprive racketeers of the property they acquired and controlled through patterns of serious criminal activity.

In more recent years, both the Congress and the law enforcement community have given similar attention to the economic aspects of drug trafficking. Quite simply, drug trafficking is enormously profitable. While it is difficult to measure the extent of illicit income produced by illegal distribution and importation of controlled substances, it is clear that these profits run in the billions, or more likely tens of billions, of dollars annually. These huge profits are a compelling index of extraordinary growth in drug trafficking, and many believe that the influx of these illicit funds has reached such a level in certain parts of the country that the stability of the legitimate economies of these regions is being seriously disrupted.

The tremendously lucrative nature of drug trafficking makes it all the more difficult a problem for federal law enforcement officers to address. First, only the naive would fail to recognize

that the punitive and deterrent effects of conviction are often outweighed by the prospect of huge profits to be reaped through the importation and distribution of dangerous drugs. Second, these huge profits are used to finance ever larger and more sophisticated drug trafficking rings complete with fleets of ships and airplanes, secluded stash pads, and ample funds to bribe public officials, pay hit men and enforcers, and to acquire, corrupt, and influence legitimate businesses and organizations. In sum, the huge profits produced through drug trafficking provide criminals with an attractive incentive for engaging in such crime and an economic power base through which drug trafficking operations can flourish and grow.

Although we do not suggest that forfeiture of drug related assets alone is a sufficient mechanism to eradicate drug trafficking, we believe that if the government were able to deprive narcotics dealers of significant portions of the illegal gain they realize, this would have an important deterrent effect and would stem the growth of drug trafficking. Furthermore, it is the Department's view, and a view which I believe is shared by the members of this Subcommittee, that it is only appropriate that persons convicted of serious drug crimes and racketeering bear the penalty of forfeiting to the United States the property they have amassed through, or used to facilitate, the commission of these crimes.

Both the criminal forfeiture provisions of RICO and the Continuing Criminal Enterprise statute and section 881 of Title 21, which provides for the civil forfeiture of the proceeds of, and property used in, drug crimes, give the government the authority to seek forfeiture of assets related to drug trafficking and racketeering. However, both the limitations of current law, and its failure to address some major practical problems have kept forfeiture from being as effective a law enforcement tool as it can be. The introduction of several bills in both the House and Senate including Chairman Hughes' recently introduced bill, H.R. 5371, which I will discuss briefly at this hearing, reflect a welcome interest in the Congress to cure some of the deficiencies of current forfeiture statutes. In the development of the legislative proposal which I would like to outline for you now, the Administration has drawn on the experience and expertise of those who have dealt with forfeitures in drug and racketeering cases to identify the problems posed by current law, and to formulate some workable solutions to these problems.

The primary problems we have encountered in achieving substantial forfeitures in RICO and narcotics cases fall into three categories. First, we have had difficulty in obtaining the forfeiture of two important types of property: (1) the proceeds of racketeering activity punishable under the RICO statute and (2) real property used in drug crimes, for example, as stash pads or to cultivate marihuana for distribution. (The domestic cultivation of large amounts of marijuana is a relatively recent problem.)

Second, our ability to use the criminal forfeiture provisions of the RICO and CCE statutes has been hampered by those statutes' failure to address the practical problems that have arisen in actually reaching property that is subject to forfeiture. These problems arise most frequently when defendants are successful in concealing, transferring, or removing from the jurisdiction of the courts, forfeitable assets. Third, we have in many instances found proceedings under the civil forfeiture provisions of Title 21 -- presently the only means of achieving forfeiture in the vast majority of drug prosecutions -- to be cumbersome and inefficient adjuncts to criminal prosecutions of drug offenses.

The comprehensive legislative proposal that the Department has developed to facilitate forfeitures in RICO and narcotics cases is designed to address these and other problems we have met in obtaining forfeitures. The first part of the proposal is an amendment of 18 U.S.C. 1963, the provision of current law that governs criminal forfeitures in RICO cases. The second part amends the Comprehensive Drug Abuse Prevention and Control Act of 1970, creating a new criminal forfeiture statute that would be applicable in all major drug prosecutions and improving some of the provisions of 21 U.S.C. 881, which governs civil forfeitures and certain matters arising in both civil and criminal forfeitures of drug related assets. The final part establishes, for a two-year trial period, a program under which twenty-five percent of the amounts realized from drug related forfeitures would be set aside and made available to pay awards to persons providing information or other assistance that lead to forfeitures.

The first substantial amendment to the RICO criminal forfeiture statute we propose is to specifically provide that the proceeds of racketeering activity are subject to an order of forfeiture. While the government has consistently argued that such profits can constitute a forfeitable "interest" in a RICO enterprise, several appellate courts have held the opposite. This problem is well illustrated in the case of United States v. Martino. 1/ Martino involved the prosecution of a number of defendants for violations of mail fraud and RICO statutes arising out of an arson for profit ring. Three of the defendants, including Martino, were ordered to forfeit the insurance proceeds they had obtained from the burning of their properties, and Martino was also ordered to forfeit his interest in two companies through which funds were provided for the arson and fraud scheme. While a panel of the Fifth Circuit affirmed the order of forfeiture of Martino's interest in his two companies, it reversed the order of forfeiture of the insurance proceeds, determining that these profits of the arson scheme did not constitute an "interest in an enterprise." The Fifth Circuit has on its own motion ordered an en banc rehearing on this issue, and we are now awaiting its decision. Regardless of the outcome of this case, it is our view that the purpose of the RICO forfeiture statute -- to deprive racketeers of their

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1/ 648 F.2d 367 (5th Cir. 1981)(vacated in part, rehearing en banc pending).

sources of economic power -- cannot be fully realized if the profits gained through racketeering activity are beyond the reach of the statute. Therefore, it is essential that this provision be amended to remove any ambiguity about the forfeitability of such assets, and we have so provided in our proposal.

In addition to including the proceeds of racketeering activity among the property subject to criminal forfeiture, we have also attempted to provide a fuller description of the types of property that are now clearly within the scope of 18 U.S.C. 1963. But no matter how thoroughly or how expansively we may define property forfeitable under the RICO statute, it will avail us little if we are unable in fact to reach this property. It is with a view towards this problem that the majority of our other amendments to the RICO forfeiture provisions were designed. These amendments are also to be included in the portion of our proposal concerning forfeitures in narcotics cases.

It is not uncommon for sophisticated criminals routinely to take measures to conceal their ownership and transfers of property, for financial transactions often provide important evidence of criminal activity, not the least of which are banking and tax law violations. Understandably, this practice makes the tracing of forfeitable assets all the more difficult. In addition, however, we increasingly encounter instances in which transfers of assets out of the country or to other persons (often with no apparent consideration) appear to be made not as a matter of routine, but

rather as a criminal's specific reaction to the prospect of forfeiture. To the extent that forfeitable assets are easily transferred or removed from the country or are highly liquid, this phenomenon becomes more problematic. Thus, it presents particular difficulties when we seek the forfeiture of the assets of drug traffickers, who often deal in large amounts of cash, precious metals and gems.

Three of the substantive amendments to the RICO statute that we propose were designed to address these difficulties. First, the proposal would codify the concept that the United States' interest in forfeitable property vests at the time of the commission of the criminal acts giving rise to the forfeiture, and that thus a subsequent transfer will not bar a forfeiture order. This is in essence the same "taint" theory that has long been recognized in civil forfeiture proceedings and which has more recently been applied in the context of criminal forfeiture as well. 2/ This provision should discourage the practice of defendants engineering sham transfers of their property to associates and relatives in an attempt to defeat forfeiture.

2/ See United States Long, 654 F.2d 911 (3rd Cir. 1981), in which it was held that property derived from proceeds of a violation of 21 U.S.C. 848 could be subject to forfeiture although transferred to the defendant's attorneys more than six months prior to indictment, and that an order restraining the attorneys from transferring or selling the property was properly entered.

Another way in which the government can prevent transfers of forfeitable property and other actions designed to defeat forfeitures, is by obtaining appropriate protective orders from the courts. Both the RICO and CCE statute now give the courts the authority to enter restraining orders, require the execution of performance bonds, or take other actions to preserve property subject to forfeiture pending resolution of the criminal case. However, under current law, this authority may be invoked only after the filing of an indictment or information. Prior to indictment, the government is now unable to obtain such protective orders. This limitation ignores the fact that defendants in such cases are often aware of the government's investigation prior to the filing of formal charges. Indeed, it is the Department's policy generally to inform the subjects or targets of a grand jury investigation so that they may have an opportunity to appear before the grand jury. Obviously, such knowledge will often motivate these persons to move quickly to shield their assets from forfeiture, and the government is powerless to prevent them from doing so.

To address this problem, our proposal would amend 18 U.S.C. 1963 to expand current protective order authority to give the courts the discretion to enter such orders in the pre-indictment stage, if the government can present sufficient evidence to establish probable cause to believe that a RICO violation has been committed and that the property for which the order is sought is subject to forfeiture as a result. The term of such an order would be limited to ninety days, unless extended for good

cause by the court. Further, the court would be required to deny the government's request for the pre-indictment order if it determined that it would work an irreparable harm to the affected parties that is not outweighed by the need to preserve the availability of the property in question.

A further aspect of our amended protective order provision would be to specify the circumstances in which the initial entry of such an order may be made pursuant to an ex parte proceeding. Where forfeitable property is in a form that makes it easily concealed, removed, or transferred, notice to the defendant of the government's intent to seek a restraining order or other protective measure may provide an opportunity for him to dispose of the property, and thus preclude any opportunity for the government to obtain a forfeiture order. Such ex parte orders now are obtained, although more frequently in CCE cases which involve cash or other easily movable assets than in RICO cases which often involve assets such as interests in businesses. Under our proposal, a protective order granted without notice to defendant or other adverse parties (for example, a bank in which the defendant's funds are deposited) would be limited to a term of only ten days, and could be granted only upon a showing of probable cause and a determination that the nature of the property was such that it could be concealed or moved before an adversary hearing could be held. After the entry of the initial order, the affected parties would then be given notice and an opportunity to contest the order in the context of an adversary hearing.

While this improved restraining order provision that we propose as an amendment to the RICO forfeiture provisions should increase our ability to preserve forfeitable property pending a defendant's conviction and the entry of the order of forfeiture, there will continue to be instances where a defendant will be successful in concealing, removing, or transferring forfeitable property either by acting before the government can obtain a protective order, or, where the financial incentive is great, by defying a protective order. To address this problem, our proposal would provide for the forfeiture of substitute assets of the defendant where property which has been found during trial to be subject to criminal forfeiture is no longer available at the time of conviction. Thus, this proposal would prevent a defendant from escaping the economic impact of a forfeiture order by disposing of his property prior to conviction.

No such provision exists in present law, but it is, in our view, a necessary component of an effective criminal forfeiture statute. Without a substitute assets provision, defendants will continue to have a strong incentive to conceal their assets, or move them out of the country, so as to defeat the possibility of their forfeiture. Therefore, our amendments to 18 U.S.C. 1963 would include authority for the court to order the defendant to forfeit substitute assets up to the value of forfeitable property that can no longer be located, has been transferred to or deposited with third parties, has been placed beyond the jurisdiction of the trial court, has been substantially diminished in value by the acts

of the defendant or has been commingled with other property that cannot be divided without difficulty.

Under current 18 U.S.C. 1963 the disposition of property ordered forfeited is governed by provisions of the customs laws. It has been our experience, however, that the customs laws often do not adequately provide for the more complex issues that arise with respect to RICO forfeitures, particularly where the forfeited property is an interest in an ongoing business. Therefore, our proposal would require the development of regulations by the Attorney General to govern these matters. However, our proposal would continue to emphasize, as does current law, the responsibility of the Attorney General to protect the rights of innocent persons and to grant, in appropriate cases, petitions of innocent parties for remission or mitigation of forfeiture, and to provide for the return of forfeited property that was obtained from victims of a RICO offense.

These and other amendments to the RICO forfeiture statute would substantially improve our ability to achieve the criminal forfeiture of significant amounts of property used in, and obtained as a result of, the racketeering offenses punishable under the RICO statute.

As noted above, the second part of our proposal is designed to facilitate forfeitures in narcotics cases. The most important element of this portion of the proposal is the creation of a new criminal forfeiture statute that could be applied in all major drug trafficking prosecutions. While drug prosecutions now

comprise nearly a quarter of all cases on the federal criminal docket, only an extremely small portion of these cases may be prosecuted as violations of the Continuing Criminal Enterprise statute, and an even smaller portion are crimes prosecutable as RICO violations. As a result, the forfeiture of the vast majority of drug related property must be sought in the context of civil forfeiture proceedings under 21 U.S.C. 881.

In many respects, the civil forfeiture provision of Title 21 is an extremely useful law enforcement tool, particularly since 1978 when Congress amended this statute to provide for the forfeiture of the proceeds of illicit drug transactions. The standard of proof for a civil forfeiture is lower than that for an order of criminal forfeiture, and because civil forfeiture is an in rem proceeding against the property itself and does not depend on the criminal conviction of the person owning or using the property, it may be used when a defendant is a fugitive, which is a not uncommon occurrence in narcotics cases.

However, there are also drawbacks to civil forfeiture which become apparent when the acts giving rise to civil forfeiture are also the basis for prosecution of a drug offense. Forfeiture under 21 U.S.C. 881 must be pursued as a civil suit entirely separate from any criminal prosecution, even though the evidence on which the forfeiture action is based is the very same evidence which will be at issue in the criminal trial. In addition, civil forfeiture is an in rem proceeding. As such, the government must

file suit in the district in which the property is located. Therefore, if the property is located in a district different from that in which the criminal trial is held, the case must be handled by a different U.S. Attorney's Office. Furthermore, it not unusual for property relating to a single drug case to be located in a number of districts, thus necessitating the filing of separate forfeiture suits in each of these districts.

Where the issues relating to civil forfeiture are the same as or closely related to those that will arise in a prosecution of a narcotics offense, it is a waste of valuable judicial and prosecutive resources to require an entirely separate consideration of forfeiture in each district in which the property may be located. We also anticipate that the forfeiture of significant amounts of drug related property will more likely be achieved when the judge and jury hearing the criminal case also consider whether property of the defendant is to be forfeited to the United States, and when the prosecutor and investigative agents who prepared the criminal case can apply their enthusiasm and expertise to an aggressive pursuit of forfeiture as well.

In addition to being cumbersome and clearly inefficient, parallel criminal prosecutions and civil forfeiture actions often create such problems that we find it necessary to stay the forfeiture proceeding pending resolution of the criminal case. This step is necessary because continuing the civil forfeiture action may result in the premature disclosure of evidence in the government's criminal case, including the identity of confidential informants.

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Thus, while it is clear that there will continue to be a need for civil forfeitures, the United States' ability to seek forfeiture of drug profits and other property used in drug trafficking cases would be improved if prosecutors had the opportunity in all felony drug prosecutions of seeking forfeiture of such property of the defendants in the single context of the criminal trial. For these reasons, we propose an amendment to the Comprehensive Drug Abuse Prevention and Control Act to create a new criminal forfeiture statute that could be applied in all felony prosecutions under the Act. In addition to property now subject to forfeiture under the Continuing Criminal Enterprise statute, this provision would permit the criminal forfeiture of the proceeds of all such felony violations as well as property that was used in the commission of these crimes.

The new criminal forfeiture statute for drug felonies would include the amendments we have proposed in relation to the RICO forfeiture statute, including a provision for voiding third party transfers of forfeitable property, expanded authority to obtain appropriate restraining orders, and a provision for the forfeiture of substitute assets of the defendant. We also propose to include two elements that are not to be incorporated in the RICO proposal. The first is a permissive presumption, or more correctly an inference, that property acquired during, or within a reasonable time after, the defendant's commission of the drug offense may be considered by the trier of fact to be property subject to forfeiture, if it is also found that the defendant had

no legitimate sources of income to explain his acquisition of the property. Because of the considerable evidence of the profits produced through drug trafficking crimes and the fact that this provision is phrased as a permissive presumption or inference, we believe that it will clearly withstand constitutional scrutiny under the Supreme Court's decision in Ulster County Court v. Allen. 3/

The second of the provisions unique to our Title 21 criminal forfeiture statute would be a provision for the issuance of a warrant of seizure upon a probable cause showing and a finding by the court that a restraining order would not suffice to preserve the availability of property subject to forfeiture. Because the proceeds of drug transactions are often in the form of highly liquid or easily movable assets, a protective order may not be sufficient to safeguard the property, and it may be necessary to remove it from the custody of the defendant pending the disposition of the criminal case.

In addition to creating a new criminal forfeiture statute of general applicability in felony drug cases, our proposal would also make two substantive amendments to 21 U.S.C. 881, the provision of current law that governs the civil forfeiture of drug related property. First, as mentioned earlier, this provision does not authorize the civil forfeiture of real property, although

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3/ 422 U.S. 140 (1979).

real property is often used to a significant degree to facilitate the commission of drug trafficking crimes. Such real property includes "stash pads" or warehouses for controlled substances and equipment and vehicles in these crimes, and also agricultural lands on which illicit drugs are cultivated. Therefore, we propose to include real property used in felony drug offenses among the types of property subject to civil forfeiture, with an "innocent owner" exception similar to that now included in the provision authorizing the forfeiture of drug proceeds.

The second substantive amendment to 21 U.S.C. 881 is the inclusion of language spelling out the authority to obtain a stay of civil forfeiture proceedings pending disposition of a criminal case involving the same matters. This stay could be obtained once an indictment or information in the criminal case has been filed. Currently, our prosecutors have, for the most part, been successful in obtaining such stays, but it would be preferable if there were direct statutory authority (rather than only the courts' inherent authority) to support our motions.

The final part of the proposal would establish a two-year trial program under which a portion of the proceeds of forfeitures of drug-related property would be available for the payment of awards to those who provide information or other assistance that lead to such forfeitures. Under section 301 of our proposal, the Drug Enforcement Administration would be authorized to set aside twenty-five percent of the amounts realized by the United States in such forfeiture actions to create a fund to be used solely for

the purpose of paying these awards. Payment of these awards would be discretionary, but the total amount of awards for a particular case could not exceed the lesser of $50,000 or twenty-five percent of the net amount realized by the government. We believe that the reward authority established under this trial program would, in certain cases, give us important leverage in obtaining information that would lead to the forfeiture of significant amounts of drug related assets. It also seems particularly appropriate that the funding for these awards come directly from a portion of forfeiture proceeds.

Formerly, a somewhat similar reward authority existed in 21 U.S.C. 881, which incorporated by reference the "moiety" provisions of the customs laws. However, certain aspects of the moiety provisions were so problematic that they could not be utilized as an effective rewards system in forfeiture cases, and in 1979 the reference to them was removed from section 881. The award program set out in section 301 would, in our view, represent a workable and effective system. But as a trial program with a detailed audit requirement, it will be possible to assess the utility of the program and any problems it may present before determining whether it should be extended on a permanent basis.

These, then, are the basic elements of the forfeiture legislation that we recommend be enacted by the Congress. We firmly believe that their enactment will bring us closer to realizing the intended goals of our forfeiture laws: depriving

racketeers and drug traffickers of the profits of crime and the economic power through which they continue to victimize our society.

H.R. 5371, recently introduced by Chairman Hughes, addresses, in part, some of the same problems that we have addressed in our forfeiture proposal. It provides a mechanism for the forfeiture of certain proceeds in RICO cases; codifies the principle that transfers of forfeitable property are considered void in criminal forfeiture proceedings; describes circumstances that would give rise to a presumption that certain property of drug traffickers is subject to criminal forfeiture; provides for the stay of civil forfeiture proceedings when a parallel prosecution involving criminal forfeiture is commenced; and creates new authority for the civil forfeiture of real property that is used in drug trafficking crimes. The Department supports the goals of these elements of H.R. 5371, although we would strongly suggest certain revisions, and would be pleased to submit detailed written comments on this bill if the Subcommittee so desires.

There are, however, in our view some significant drawbacks to certain aspects of the forfeiture amendments set out in H.R. 5371. Our first concern is the limited scope of the criminal forfeiture amendments of the bill. Almost without exception, these amendments are confined to the RICO statute. It seems clear from the comments in the Congressional Record made upon introduction of this legislation that its purpose is improve our forfeiture laws so that they

might be of greater utility in combatting what you, Mr. Chairman, accurately described as the "phenomenal increase in drug trafficking in recent years."

The Department shares your view that criminal forfeiture holds great potential as an effective law enforcement tool in attacking the extremely serious problem of drug trafficking. However, simply amending the criminal forfeiture provisions of the RICO statute will do little to bring us closer to achieving that goal. Presently, drug offenses comprise nearly a quarter of all cases on the federal criminal docket. Few of these crimes, however, present the elements necessary for a RICO prosecution, and as a result, only a handful of drug crimes are prosecuted under the RICO statute each year. If the sanction of criminal forfeiture is to have any significant impact on drug trafficking, we believe it is necessary, as we have done in our proposal, to provide for its application in all major narcotics prosecutions.

The Department also has serious reservations about other aspects of H.R. 5371. We are particularly concerned about the provision in section four of the bill that appears to restrict application of the RICO criminal forfeiture sanction to situations in which the government has, prior to conviction, already taken custody of the property. No such limitation exists in current law, and we fail to see any rational connection between whether the government has taken possession of the property and whether the sanction of criminal forfeiture may property be imposed following a defendant's conviction. Furthermore, property subject

to criminal forfeiture in RICO cases often includes interests in ongoing businesses, and the government generally has neither the ability nor the desire to take custody, and be responsible for the maintenance, of such businesses pending disposition of a criminal case. In sum, this formula is, in our view, an irrational, burdensome, and unworkable limitation on the use of the criminal forfeiture sanction.

Another concern is that section three of the bill would create a right for "innocent" third parties with alleged interests in property that has been ordered forfeited to obtain "appropriate relief" from the court. It appears that this process would supplant the current practice in which such third parties are first to petition the Attorney General for remission or mitigation of forfeiture. In our view, it is preferable to resolve these matters, whenever possible, in the context of the present mechanism for administrative relief, than to permit in the first instance further litigation in our already overburdened courts. I note that in the analysis which accompanied H.R. 5371, avoidance of delay such as that which occurred in United States v. Mandel, 505 F. Supp. 189 (D. Md. 1981) was cited as the purpose of this provision. But as was noted in that analysis, the delay was one in obtaining judicial review occasioned by the court's unwillingness to consider the third party's claim while the criminal case was still under appeal. It is likely that under this provision of the bill, as under current practice, the courts would continue

to refrain from granting the sort of equitable relief contemplated until the criminal appeal process was completed.

In sum, while the Department strongly supports some of the goals of the forfeiture amendments set out in H.R. 5371, we believe that certain elements of these amendments are problematic and that a more comprehensive reform and expansion of forfeiture laws in the areas of narcotics trafficking and racketeering, such as the legislation the Department has developed, is necessary.

In closing, I would like to mention one signficant aspect of H.R. 5371 that does not concern forfeiture, and that is its elevation of the fine levels for the major drug offenses in title 21. These higher fine levels correspond to those provided for such offenses in the comprehensive criminal code reform legislation that has been introduced in the House and Senate. The Department strongly endorses these dramatic increases in available fines for such drug trafficking offenses. While it is true that throughout our criminal code present fine levels for the most part are inadequate, in no case is this truer than in the instance of drug offenses which are among the most profitable of crimes.

Mr. Chairman, that concludes my prepared statement, and I would be pleased to answer any questions which the Subcommittee may have.

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Mr. HUGHES. Thank you, Mr. Harris.

Mr. Sawyer.

Mr. SAWYER. Does the presumption that assets are the fruits of drug trafficking only apply to items acquired at or shortly after the commission of the offense for which he is convicted?

Mr. HARRIS. Yes; it would be tied to the conviction, and the presumption is a permissive presumption, more like an inference which we think is important, so that it withstands some constitutional tests concerning due process. The answer to the question is, yes, it would apply only to the offenses for which the person is convicted.

Mr. SAWYER. You couldn't take it back to the point where he started getting involved in the drug deal?

Mr. HARRIS. If it is a conspiracy case, you could probably apply it through the period of the conspiracy but, for example, if it was a specific allegation of the sale of a particular amount of narcotics on a particular occasion, your timeframe for the presumption would be that surrounding that particular offense.

Mr. SAWYER. When you use the term "permissive presumption," are you saying a rebuttable presumption?

I have never heard that term before. Is that a legal presumption?

Mr. HARRIS. Well, it is the equivalent of a rebuttable presumption. What it is, it is a presumption that a court in instructing a jury would be free to either instruct that there is a presumption, or if the court felt that evidence didn't warrant it, the court would not be required to instruct the jury that as a matter of law, there is a presumption that the property was acquired with the proceeds of drug trafficking funds.

Mr. SAWYER. But, is there a conclusive presumption or a rebuttable presumption? It is unclear what we are talking about.

When we use the term "permissive," are we saying rebuttable presumption?

Mr. HARRIS. Yes; where the court chooses to instruct on the presumption, it is a rebuttable presumption; yes.

Mr. SAWYER. I just have never heard that expression used before. As long as we know we are talking about the same thing, I yield back, Mr. Chairman.

Mr. HUGHES. The gentleman from Texas.

Mr. HALL. On page 2 of the bill, it says "Property subject to criminal forfeiture under this section included real property including things grown on, affixed to, and found in land."

Is it your interpretation that that would cover an oil and gas enterprise that was producing, or an oil and gas lease that is not productive, but——

Mr. HARRIS. It would include whatever rights run with the land, so the answer is yes, except in a State, for example, like Alaska where mineral rights don't run with the land.

Mr. HALL. I am looking at a rough comparison here that has been given to me on the features between these bills.

It says, both bills provide for the issuance of a restraining order to prevent the transfer of property to avoid forfeiture. Suppose a person became involved in this purchase as innocent purchaser for value from an individual who might be on the verge of being indicted, and be free and clear of any relationship of family and that

sort of thing, would that innocent purchaser for value be protected in the title to his or her property?

Mr. HARRIS. The answer is yes, and it would work this way, and it depends whether you are looking at our bill or Congressman Hughes' bill, but there is a procedure by which such a person could petition either the Attorney General administratively and then the courts or the courts directly, and it depends on what version you are looking at, to have the forfeiture set aside.

It is our intention at the Department, and I believe that all the bills which incorporate such a provision, it is the clear intention that an innocent purchaser for value, a bona fide purchaser, a holder in due course would be protected and not suffer the consequences of the forfeiture.

That is one of the reasons why our bill has a provision in it for substitute assets.

In that case in which an asset was transferred to a bona fide purchaser, we believe the Government ought to have the right to go after other assets of an equivalent value. Under the law as it presently is, the Government cannot do that.

Mr. HALL. Are you saying that the Government would have the right to go against property that has been purchased or acquired with legal assets prior to the commission of any offense?

Mr. HARRIS. If the asset which was involved in the drug traffic, and let's assume it was an airplane, was sold to a holder in due course, a bona fide purchaser, and the Government was not able to realize the forfeiture of that piece, the Government would have the right to go against other assets that the defendant acquired, even though those other assets may have been acquired legally, with the proceeds of legitimate business transactions.

Mr. HALL. Would there be any time limit upon which you would have a presumption that property had been conveyed in due course to a purchaser for value?

Mr. HARRIS. No; it depends on each case.

Mr. HALL. Would these provisions also attach a home instead?

Mr. HARRIS. Yes; they would, if the homeowner, homesteader was using the homestead as a part of a plant to traffic in narcotics, that would be forfeitable to the United States.

Mr. HALL. You don't have that right now, do you?

Mr. SAWYER. Sure, you do.

Ms. WARLOW. It would depend on the circumstances. If you took the proceeds of a drug transaction and purchase the land, you could reach that as property purchased with proceeds of an illegal transaction. If you had a situation in which an already acquired piece of land was used to conceal large amounts of drugs and were the basis of the forfeiture, the property being used is to facilitate the commission of the crime, that is not now directly forfeitable except under certain circumstances which you might be able to get it under the continuing criminal enterprise statute.

Mr. HALL. Do you have the authority to forfeit proceedings against a homestead?

Mr. HARRIS. Yes; in a civil forfeiture proceeding or in a forfeiture proceeding on a continuing criminal enterprise.

Mr. HALL. Now, I am not questioning the motive of what we are trying to do, but I am trying to get some things cleared up in my mind, because I think I support both of these measures.

Getting back to an innocent purchaser for value, do I understand if a person purchased this airplane that you mentioned earlier, and paid a valuable consideration, and the seller of that airplane was subsequently indicted and convicted, is that innocent purchaser for value going to be placed with the burden of recouping what the Government is trying to forfeit?

Mr. HARRIS. Under our bill that person would have to petition the Attorney General administratively to have the forfeiture set aside.

If that person was not satisfied under our bill with the Attorney General's determination, he or she would have to go to court. Under some other schemes, and I think the chairman's bill, you would go directly to court and bypass the administrative portion of the proceeding, but the innocent purchaser would have the burden of petitioning, either in a court or administratively, to have the forfeiture set aside.

Mr. HUGHES. As I understand it, under present remission and mitigation practices, there is no appeal from the Attorney General's decision?

Ms. WARLOW. There are certain circumstances, at least the courts have suggested there is such an appeal.

In the *Mandel* case, the court suggested that after the petitioner had gone through the administrative process, he could then, if he was not satisfied with the disposition of his petition, seek declaratory or injunctive relief in court.

Mr. HUGHES. At best it is limited. Why would the Justice Department not want the court to review the rights of innocent third parties? Why would the Attorney General want to take on that responsibility?

Mr. HARRIS. In the first instance, we are concerned with creating a whole new class of cases in the courts.

If we were to have forfeiture applicable in a large number of cases, we would expect to see drug traffickers create sham transactions to protect the property. We estimate that there would be a large number of such claims. We think that it is far more efficient to administratively adjudicate as many of them as possible, and then go to the courts with those where a controversy remains.

For example, it is our clear intention that the standard that the Department would use would be to try and determine if the purchaser is in fact a good faith purchaser for value or whether he is part of a sham transaction to protect the property. If the Attorney General were to be convinced it was a good faith purchaser for value, the forfeiture would be set aside.

We think the vast majority of those claims will be fairly clear, and we ought not clog the courts with them at least until we have a cut at it administratively.

Mr. HALL. One particular case that has just recently been tried, and I am sure you are familiar with it, is the *Rex Cauble* case in the eastern district of Texas in which Cauble was found guilty of certain offenses dealing with narcotics and the like. If I am not mistaken, the court, in the sentencing of cobalt, entered a tempo-

rary restraining order restraining many from disposing of any of the Cutter Bill stores that he has in the Southwest, and from disposing of any property that he owned, pending the outcome of the South which is on appeal to the first circuit.

Also, I think in that order, there was a temporary restraining order entered by the court restraining the Federal Government from taking possession of any of his assets pending the outcome of this suit, that he could still operate in the normal course of business.

Do either one of these things alter substantially that procedure that has been used within the past 30 days?

Mr. HARRIS. No; they do not. There are certain parts of the bill which would allow the Government to get such a restraining order restraining the defendant from alienating the property at an earlier stage in the proceedings, but the answer is, there is nothing that would change the second part, the ability of the court to stay the Government's taking possession until the appeals court decided the case.

Mr. HALL. Do I understand you to say that the Government at this time has the same power—well, let me rephrase that.

Under these bills are you gaining any substantial rights that you do not now possess when you look at the new statutes in light of what you have already done in the *Cauble* case?

Mr. HARRIS. Yes; the Government now has the right to get criminal forfeiture in only two instances, RICO prosecutions and continuing criminal enterprise.

Those cases, each account for less than 50 cases in a year.

The bill that we propose would allow us to get criminal forfeiture in any narcotics case, not just the two limited specialized statutes, so it would allow criminal forfeiture of the type that was gotten in the *Cauble* case to be gotten in any narcotics case.

Right now, continuing criminal enterprise cases account for about 1 percent nationally of all drug prosecutions at the Federal level.

This would open it up to those other 99 percent of the cases that we bring.

Mr. HALL. I yield back.

Mr. HUGHES. Mr. Harris, I am not going to get into even an attempt to compare H.R. 5371 with the Justice Department's proposal, because I have just received it.

I have not even had a chance to look at it, so it wouldn't be fair to you, and I certainly don't know enough about it to be able to suggest the differences but as I understand it from your testimony, there are a number of similar provisions and basically the major difference in the scope of the two proposals is that we would limit it to certain major traffickers in drugs, and your proposal, as I understand it, would extend to all traffickers, all felony violations that are title 21?

Mr. HARRIS. Mr. Chairman, that is correct. There is one other instance that I would cite if we are trying to make the major cuts here, and that is that our bill has a substitute asset provision enabling us to go after substitute assets if the forfeitable assets are not available.

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Mr. HUGHES. I take it that it is not the standard by a preponderance of the evidence that gives you any concern.

Mr. HARRIS. That is correct.

Mr. HUGHES. You have addressed your concern over the forfeiture of real estate.

Both bills contain provisions for the forfeiture of real estate under certain circumstances.

Mr. HARRIS. Correct.

Mr. HUGHES. What is your specific criticism of the legislation with regard to those provisions dealing with the forfeiture of real estate in the pending bill, H.R. 5371?

Ms. WARLOW. I believe that in 5371 there is a limitation of particular types of offenses, and in ours it was applicable to all fellow offenses, and the concern here was that there is certain registrant crimes that are serious ones. They are not simply regulatory offenses that don't fall into the category of distribution of manufacture.

I believe that is the limitation on the provision in 5371.

Mr. HUGHES. I understand you are comparing it with your bill. I have not read your bill.

Give me the specifics that you can point to by way of criticism of the pending legislation, that would be helpful to me.

I want to know what you view the problem to be in these particular provisions.

Mr. HARRIS. With regard to the one you just mentioned, I think it is that we feel that there are some egregious violations of the law which would be excluded from forfeiture of real estate.

We would opt to have the scope a little broader.

Mr. HUGHES. I see, so it is a matter of scope again?

Mr. HARRIS. That is correct.

Mr. HUGHES. As I understand it, your criticism with regard to the bill is that we only cover, class 1 and class 2 violations under title 21.

Now, what is your criticism of that? Why would you want to reach anything but the major traffickers with this legislation?

Mr. HARRIS. The answer is that very often you have a major trafficker who you may only catch up on a relatively minor instance of drug trafficking as opposed to being able to indict such person on the full scope of their activities.

We think that looking back on the last decade or two decades of narcotics enforcement, that the way to go in narcotics enforcement is to be able to remove assets and to attack assets, and we think that we ought to have the authority across the board in any felony prosecution for narcotics, and that if it were limited to class 1 and class 2 cases, that there would be occasional large traffickers who would get picked up on a class 3 case, and we wouldn't be able to apply it.

Mr. HUGHES. Obviously, we are not replacing civil forfeiture. What types of violators escape the net?

Which ones would be missed by criminal forfeiture that would not be picked up by civil forfeiture provision?

Mr. HARRIS. You probably could proceed in a civil suit against lower than class 2 violators under your scheme.

Mr. SAWYER. OMB has not had very much experience in criminal law enforcement, have they?

Mr. HUGHES. It is almost embarrassing, isn't it.

Mr. SAWYER. There may be a few doctor of divinity degrees floating around down there, but there are no legal ones.

Mr. HARRIS. When you are talking about the potential for multimillion dollar forfeitures and the risk to life and limb that enforcements sometimes takes you have to understand that these people generally do not act out of altruistic motives and they engage in the same kind of cost-benefit analysis that the——

Mr. SAWYER. That the OMB does?

Mr. HARRIS. That is correct. That is a point well taken.

Mr. HUGHES. One of the major features of the legislation, H.R. 5371, is a burden of going forward with evidence on the part of the testimony.

Do you have any specific criticisms of the provisions of the bill dealing with that so-called presumption?

Mr. HARRIS. No; we do not.

Mr. HUGHES. I took some of my completion-time in talking about innocent third party's rights, and aside from the arguments that we are going to save time and it will speed up the processes, what other arguments can you advance not to give the courts the opportunity in the first instance to review an innocent third party's claim?

Mr. HARRIS. The most persuasive argument in my view is the one you just alluded to, for saving court time and efficiency.

Mr. HUGHES. Would you give them the right to appeal in every instance?

Mr. HARRIS. Yes, we would not have a problem with going to the courts, because we feel that the Attorney General can dispose on a satisfactory basis of a good number of the bona fide claims.

We do not have a problem with the underlying concept, and I take it none of the bills that I have seen on this failed to take the position that the bonfidied purchaser ought to be protected. A bona fide purchaser is not intended to be caught up in the dragnet.

Simply we suggest a different procedure for allowing that determination to go forward. Frankly, it is a matter which we think is best in the hands of the Attorney General for reasons of court efficiency and not clogging calendars, but basically it is an approach we could live with either way.

Mr. HUGHES. Any further questions?

Mr. SAWYER. When you mentioned that you had trouble putting the government in a position of showing irreparable damage, couldn't it be irreparable damage to their ability to seize the property?

Mr. HARRIS. It could be, but what you would have to build into that standard is, either in the legislative history or in the legislation itself, a different twist on how a court should look at the irreprehensive harm question, because courts have been looking at it in terms of private litigants for years, and it would, if they looked at the precedents now on the books and applied them, they would not find irreprehensible harm to the United States. Therefore, you would have to either legislatively or through the history of the statute, to make it clear that, for example, if the asset was unavail-

able to litigate, the Government would suffer irreprehensible harm. You could then fashion an irreprehensible harm standard which you could live with. Now most courts looking at such a situation would probably conclude that the Government can do with one less 42-foot speedboat, that is the approach we are afraid of.

Mr. SAWYER. It would be their ability to obtain the forfeiture of the property. That is what you are talking about even in civil cases, like cutting down somebody's shade tree. They can live without a shade tree, but they can't replace it. If we relate this to the forfeiture, it seems to me the Government could easily meet that standard.

Mr. HARRIS. If the statute or the legislative history was so tailored to the irreprehensive harm standard and made it clear how it was to be interpreted in these cases, yes, we could meet the standard.

Mr. HUGHES. Mr. Hall.

Mr. HALL. One question. I have heard, and I do not know this to be a fact, that in the Miami area where this whole problem is running rampant, that some of the banks down there are involved in this drug trafficking to some extent.

Would either of these bills provide that the Federal Government could go against the capital and surplus of a bank, if you could determine that that bank was laundering funds knowingly for some third person?

Mr. HARRIS. Yes; the answer is that the Government could go against the assets of the bank.

Obviously, we are not talking about a teller or some low-level branch manager, but if it could be established that the bank, however you define that legal entity, whether it be officers of the corporation, if it be in the corporate form, the answer is yes, you could go against assets of the bank.

Mr. HALL. How would you draw a line on diluting the interest of a stockholder who may be innocent in the transaction, but who maybe holds a controlling interest in the bank, and say the president or vice president or some high-level management officer had been laundering this for a percentage or some sort of a rake-off, I don't know how they do it, how would you protect the interests of those stockholders?

Mr. HARRIS. Those stockholders would have to, if in fact all of the assets were forfreited, come forward and petition the court or the Attorney General, depending on which scheme you follow for remission of the forfeiture.

In this case in Texas, you said there was a chain of stores involved, but let's assume that those stores do business in the corporate form and there is a minority stockholder other than the defendant who owns an interest in that. Under the present law, and what we are proposing would not change it, that person would come forward and petition for setting aside that portion of the forfeiture which represented his or her interest.

Mr. HALL. Of course, you could cause a run on a bank. I can see a little bit different result from a Cutter Bill western store in Fort Worth to a national bank in Miami that might cause some depositors to withdraw funds.

I know what you are trying to do, but isn't there some better way you could protect a stockholder rather than putting that stockholder to the burden of having to go file a suit to keep his bank open.

Mr. HARRIS. Two things, one, the bill does not contemplate touching a depositor's interst.

That is a fiduciary interest, not an asset of the bank. The bank holds it in trust for the depositor.

Mr. SAWYER. We would then have to pay the depositor bank under FDIC.

Mr. HARRIS. Yes; it is not contemplated that any depositor would have 1 cent of his or her deposits touched.

We are talking about those assets that the bank owns as a corporation, or which they have an interest in but not the money that they held as a fiduciary for depositors.

Mr. HALL. Would it affect a stockholder who had an interest in that bank?

Mr. HARRIS. Yes; it would and that stockholder would have to petition either the Attorney General or the court, and I might say that some of the stockholders in south Florida banks and other financial institutions engaged in this sort of business might take a little more interest in the way that their board of directors conduct their banking business than they now do.

In south Florida, without the ability to launder money and to have financial institutions providing some measure of protection, the narcotics traffic as presently constituted could not go on. It is one of the most serious problems in law enforcement.

Mr. HALL. Am I talking about a bizarre situation or is this something that is ongoing in Florida with reference to these banks being involved in the drug trafficking out of Colombia and other areas?

Mr. HARRIS. In terms of forfeiture, you are looking at a situation which would occur with a great deal of infrequency.

I don't mean to suggest that reputable banks in the State of Florida or in the country are laundering money for drug dealers, but I am suggesting that there are substantial laundering operations going on. Some by bank personnel, not necessarily the bank as an institution, and some by private people and also with the protection and use of offshore banks with the secrecy that they provide depositors.

Mr. HALL. Would your bill put any burden on a bank teller who accepted a deposit of some enormous sum to report that to anyone with the Government?

Mr. HARRIS. Not this bill. There are other laws which required the reporting of large cash transactions, but let me say one other thing.

However, I want to make it clear that in order for such a forfeiture to take place, the bank would have to be a defendant, No. 1. This is all predicated on a jury returning a verdict of guilty along with a verdict that certain properties be forfeited. So unless the bank as an institution were a defendant in a criminal action, unless the jury convicted the bank, forfeiture could not occur.

Mr. HALL. I can understand that. I yield back the balance of my time.

Mr. HUGHES. Thank you, Mr. Harris.

We think that forfeiture is probably going to be one of the more important things that this subcommittee takes up, as a number of nuances, and we have just scratched the surface today.

I realize that you came in and testified today having perhaps just seen the proposal, in the past couple of days, but I would invite the Justice Department to come in and sit down with our staff and try to work out some of the concepts and differences that we have so that we are all on the same wavelengths.

It would save a great deal of time.

I didn't have an opportunity to review your proposal before I came here today and, frankly, I had hoped to have had it before the hearing so that I could have gotten into it a little more deeply, but I would invite your staff to do just that, sit down with our staff and try to work out some of these differences to see if we don't agree on more than we disagree on.

Mr. HARRIS. I am certain we do and I certainly think what you suggest is the way to go, Mr. Chairman.

Mr. HUGHES. Thank you very much.

Our next witness is the Honorable Claude Pepper.

Congressman Claude Pepper served more than 14 years in the U.S. Congress during the Depression, World War II, and the beginning of the cold war. In 1962 Congressman Pepper was elected to the 88th Congress to represent the 14th District of Florida.

Congressman Pepper was chairman of the famous Select Committee on Crime in the 91st, 92d, and 93d Congresses. That committee conducted some of the key hearings on organized crime and the problem of drug abuse in the early 1970's.

Congressman Pepper also heads up the Select Committee on Aging on which I serve, and no group of people enjoy leadership like the senior citizens do in Congressman Claude Pepper. He is their champion.

I do not know of an issue that comes before the Congress out of any of the committees where Claude Pepper is not involved making sure that the interests of the senior citizens indeed are protected.

Congressman Pepper, if the committee is able to achieve half of the things that you achieved as chairman of the Select Committee on Crime, then our efforts will have been successful.

We are just delighted to have you with us today. Please proceed as you see fit.

TESTIMONY OF HON. CLAUDE PEPPER, REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. PEPPER. Thank you very much for the privilege of being here before you and your distinguished committee, and especially for the very kind words of introduction which you favored me with this afternoon.

What I want to do is just a little bit more maybe than has been proposed, especially by you, in the field of the seizure of property, goods, assets that are related to the importation of drugs and the application of those assets to trying to prevent and to taking advantage of the proceeds by which you can alleviate as best you can the ill effects of those drugs.

My information is that, as I have set out in my statement, that about 90 percent of all of our illegal drugs come from abroad, and about 75 percent of those imported drugs come through my State of Florida, as you and your distinguished committee is very much aware.

I am told in the decade of the 1970's only about $34 million of assets was seized in connection with drug trafficking.

I have introduced a bill to try to make more assets available for seizure, that is, try to seize more assets engaged in this terrible trade than we have been doing in the past.

Your own bill, Mr. Chairman, is an excellent bill and the only change that I have ventured to make in my bill patterned after yours is to mandate the application of 50 percent of the proceeds seized from illegal drug traffic back to the area where the seizure occurred.

You realize that Florida would profit particularly by that but, at the same time, that is where the primary problem is, because that is where most of the drugs come in.

The figures I have, the seizures, for example, that have occurred up to date, $40 million in Florida, $19 million in California, and $8 million in New York, so we are where the action is in the drug traffic.

I was down there recently when the Vice President was there, and he was named as head of a task force which is going to attempt to coordinate Federal efforts for the prevention of the drug traffic coming into Florida and into our country.

I was there the other afternoon with a distinguished committee, and Mr. Mazzoli and Senator Simpson, and one of the members from Florida, and we went and had a meeting with the Coast Guard and the Coast Guard pointed out to us, as I am sure they have to your committee, they pointed out where they were then tracking a vessel down in the Caribbean to go through one of the straits, and then I saw in the paper they finally caught that vessel, and it was quite a large quantity of illicit drugs on that vessel.

Well, now, I am hoping that the President is going to make a meaningful incident out of that action.

I notice that all the additional personnel that are going to be brought down there are transferred from other parts of the country, Coast Guard, DEA, and FBI, the various agencies that would be working against the drug smuggling in that area.

I hope we don't find a shortage of services like rescue people lost at sea and the like and other services that are being rendered in the places where they were.

Of course, few of our agencies, it seems to me, in the crime enforcement field have too many personnel, but, anyway, if we need more I hope the Government will provide more, and that is the reason I have been painfully affected by the action of the administration in cutting the budgets of the Coast Guard.

They say they are not going to cut the budget of the Coast Guard in that area. I am delighted to hear that. They need more help, far more equipment than they have there now.

I hope that the armed services are going to provide at least maximum intelligence assistance to the law enforcement authorities

and I see no reason why they couldn't even do more, and we are dealing with an emergency.

When you take all these billions of dollars of drugs that are being brought into our country, not only costing a lot of additional money to the Federal, the State, and local governments trying to meet this traffic, but in addition to that so many of our people are falling victims to it, especially the young, so it is like an enemy in keeping our shores from without, and I don't think it would divert improperly the armed services to try to squelch it for the time being, if they put on a comprehensive drive, to try to stop it as best they can with the cooperation of all of the units and factors that we have within our reach.

Mr. Chairman, just one other subject that is close to my heart in the crime field, and I would hope sometime or another to see it effectively implemented.

I learned while I was chairman of the Crime Committee in the House that about half of all the arrests for crime are of people under 18 years of age. That means, of course, that juveniles are responsible for probably half of the crime.

At home it is a sordid story revealed in almost every day's paper where young people have snatched ladies' purses, where they have invaded their homes, raped and robbed them and killed them and where they have engaged in other offenses.

Well, now, I know we will never be able to put enough policemen on the streets to catch all of them because the figures used to be—I don't know whether they have changed lately or not—only 1 percent of all the arrests, even arrests were made for the commission of a crime, let alone convictions and sent to prison, only 1 percent were ever arrested, so it shows how far this gap is between the punishment and the commission of a crime, so what I would like to suggest is this: that you try to make available in connection maybe with drug treatment programs or otherwise a program to try to stop school dropouts.

Nine out of 10 of the young criminals are school dropouts. You can check the figures on it. I think you will find that is about true.

Well, now, they are just waiting there as it were.

What I would like to see done, don't let the buses go home until nearly dark, because lots of them don't go home to a mother or father. Both of the parents ordinarily are working, and there is no playground available to most of them who go home. They get into a bad crowd and the first thing you know they want money that they don't have and they will go down and stick up a service station and rob a lady, elderly lady or somebody trying to pick up a little money.

I would keep those children on the schoolgrounds as long as possible during the day with the best possible kind of supervised play to induce their activity in some wholesome endeavor and, in addition to that, I would try to provide jobs for them after school, in the summers and I would let them come back to the schoolgrounds on Saturday and Sunday as well. Let them have meals on the schoolgrounds and let them play games. Most children like to play games if they are well directed. And then you could turn the energies and efforts and activities of a lot of those would-be criminals into wholesome behavior.

We were holding a hearing in Philadelphia one time in a bad area and I said—I got somebody to check up for me, there was not a playground anywhere within 2 or 3 miles, some distance away from that community. There were no facilities to offer an opportunity for a wholesome endeavor for boys and girls.

I would give them jobs in the afternoon, if they don't want to play, and I would give them CCC jobs or some other kind of jobs.

It would be the cheapest money we could spend and we would not only save the victim, we might be saving the criminal himself from a life of criminality.

Well, in your many deliberations, Mr. Chairman, I would be pleased if you would consider the preventive aspects of the matter, as well as the enforcement problem.

Thank you very much.

[The statement of Congressman Pepper follows:]

TESTIMONY OF THE HON. CLAUDE PEPPER AT A HEARING ON MARCH 9, 1982, OF THE SUBCOMMITTEE ON CRIME

Mr. Chairman, Members of the Committee, Ladies and Gentlemen:

Thank you for giving me the opportunity to come before you today, to express my appreciation and praise of your efforts, Mr. Chairman, and the efforts of this distinguished Subcommittee in identifying and proposing practical remedies for the wave of crime, especially narcotics-related profiteering and violence which has invaded our country.

In recent years, this insidious, illegal trade in dangerous drugs has ballooned to the point that the estimate of total revenues from the trade of cocaine and marihuana in fiscal '81 is in the neighborhood of $60 BILLION. It is this kind of incentive that drives people to kill, to steal, to jump bail set even as high as $1 million and to take otherwise unacceptable personal risks at a very young age in many cases.

The Attorney General of the United States, in his Final Report of the Attorney General's Task Force on Violent Crime reported on August 17, 1981, that in his estimation about 90% of all illegal drugs consumed in our country arrive here from abroad. According to the Drug Enforcement Administration about 75% of all imported cocaine and marihuana come to the United States through the vast isolated stretches of the State of Florida. Great quantities of money and property change hands daily in this abhorrent trade.

Yet under civil and criminal forfeiture provisions of law, including the Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise Acts, the 1978 Psychotropic Substances Act amendments and various civil forfeiture authorizations of the DEA and the U.S. Customs Service, only about $34 million of cash and property had been forfeited between 1970 and March, 1980, as was made clear in a recent General Accounting Office report (GGD 81-51) entitled "Asset Forfeiture - A Seldom Used Tool in Combating Drug Trafficking".

I am a co-sponsor of bills introduced by the Hon. Leo C. Zeferetti (D., N.Y.) and the Hon. Benjamin Gilman (R., N.Y.) which would expand the authority to seize various kinds of property and cash involved in narcotics crimes and make them available to the DEA for use against criminals involved in this activity.

A bill introduced by you, Mr. Chairman, following your prior hearings on these bills, is a big step in augmenting our increased efforts to fight the narcotics trade and I wish to take this opportunity to thank you for your concern and your constructive initiative. I am very much in support of your bill and am glad to see that this Committee is taking an active interest in this great problem affecting my area.

I have introduced a bill modelled closely after your own, today, with one minor exception: my bill would mandate expenditure of the improved proceeds from forfeiture by the Attorney General of at least 50% of available funds. Moreover, these funds expended by Federal narcotics law enforcement agencies under the Attorney General's direction, would be targeted at the territory of the state from which these funds were originally seized and forfeited. This would ensure that the money could be used primarily in the area where the traffic and the violence actually occur, rather than perhaps being used to help balance the Federal deficit, or in states where the Administration would like to send some extra money.
The Drug Enforcement Agency has data indicating that total seizures by that agency in the three most significant states are as follows:

Florida - $40,576,555
California - $19,906,136
New York - $ 8,681,092;

In other words, Florida, California and New York are the entry points experiencing the most difficulty and needing more help in this case. An additional feature of my proposal would mandate the expenditure of another 25% of the forfeited funds collected each year without geographic limitation, giving the Attorney General enough flexibility to support any related operations he chooses, whereever they may take place. The last 25% of the money and assets in the revolving fund would not have to be expended, although it is hoped that enough activity could be funded to find good use for that remainder.

Above all, I would urge this distinguished Committee to report favorably a suitable proposal and recommend it to Congress for its adoption. After that let us begin to make forfeiture of criminal assets used in the illegal drug trade a real weapon in the war against drugs and related violent crime.

* * * * * *

Mr. Taylor has written extensively on the topic of forfeiture, especially with respect to the subject of criminal forfeiture in the context of the rackteering statute. He has been involved in forfeiture litigation including a recent appearance before the fifth circuit on behalf of the National Criminal Attorneys Association in a RICO forfeiture case.

Mr. Taylor, we are pleased to have you with us today. We have received a copy of your written statement and, without objection, it will be made a part of the record.

Please proceed as you see fit.

TESTIMONY OF WILLIAM W. TAYLOR III, ATTORNEY, ZUCKERMAN, SPAEDER, TAYLOR & KOLKER, WASHINGTON, D.C.

Mr. TAYLOR. Thank you very much, Mr. Chairman. I do appreciate the opportunity to appear before you today.

I certainly will not read my prepared statement, but I have a few remarks to make to supplement it, if that is appropriate.

I am an attorney in private practice, and I hasten to state at the outset that I trust that I do not appear here for the body of criminals in this country.

My interest in the forfeiture of assets in criminal cases has become somewhat of an academic and intellectual interest for me, although I have participated in litigation on behalf of criminal defendants and have not, of course, participated on behalf of the Department of Justice.

I support the sensitivity with which this subcommittee is approaching the potential expansion of forfeiture in the criminal area.

It is obviously a matter which requires care, concern, and analysis, and I am here today to add some thoughts along the lines that I suggested in my prepared statement.

My experience is not even primarily in the narcotics defense area. My own practice has been with regard to forfeiture in the RICO context, and that is what I know most about and I would propose to talk about that and the point which I would like to make is that although what the witnesses here have been concerned about and have expressed their views upon primarily has been narcotics prosecutions, underworld activity, murder for hire, arson and those kinds of prosecutions, you are writing with regard to a statute which is being broadly applied in a number of different contexts.

It is being applied to prosecutions of business and economic crime with increasing frequency.

I am thinking particularly of the *Marubeni* case, of the prosecution in New York, *United States* v. *Weiss,* involving Warner Pictures, the prosecutions which involved oil companies in the Southwest, *United States* v. *Uni Oil* in Texas, a case in the Eastern District of Virginia called *United States* v. *Computer Science Corporation* and *United States* v. *Mandel,* the prosecution of the Governor of Maryland.

What I have to say is a note of caution. Although the forfeiture of narcotics and narcotics-related property does not to me pose the difficult due process issues which you are going to have to deal with. In my judgment most of that can be forfeited in rem anyway;

but when you begin to write broad forfeiture provisions which will apply to property which is being transferred and used in the commercial life of this country I have substantial concerns which I want to raise with you.

The provisions which are before the subcommittee, both your bill and the Department of Justice bill, refer to a concept called taint, and they make provisions for the rights of third parties under circumstances which I want to discuss in a minute.

What the concept of taint means, as I understand it, is that a person who is ultimately convicted of a RICO offense cannot pass good title to property which he transfers prior to indictment; he cannot sell it on the open market; he can't engage in purchases and sales for value without later being called upon to undertake a burden to prove that his purchase was legitimate. And let me suggest some situations in which I think you should give some thought to.

Consider the effect on stockholders of a company, the management of which purchases an asset, and the purchase of that asset is not innocent.

If management is not able to prove that its state of mind comports with either your version of innocence or the Department of Justice version, that piece of property, a share of stock, or an automobile, or piece of real estate, will be forfeited.

Mr. SAWYER. Let me interject a question here. How would you distinguish this from the situation where a corporation incurs a very large fine by virtue of the acts of its management?

Why would it be any different?

Mr. TAYLOR. Conceivably there is no difference in the ultimate impact on the company.

Of course, the stockholders would then have rights of action against the officers and presumably that would also be the case in the RICO area.

I suppose that the size of the fine would make a difference.

Under my suggestion, of course, the fine should be the way to go about this, but there, again, I confess that I would like an opportunity to think about that.

There are some, or there is something in what you say but it does seem to me that the stockholders who elect management they take a risk that when they buy the stock, that management will commit a crime and the company will be fined, but I am not sure that they take the same risk that the company will be forced to digorge an asset.

That perhaps is the relevant distinction.

That also applies to smaller companies which are not publicly held, but there are other stockholders.

Mr. SAWYER. The only reason I asked the question was that it seems to me that corporate stockholders are exposed to all kinds of risks at the hands of the management that they elect. Management may subject their investment in the company to fines, reckless business decisions, dishonesty, gross negligence, or any number of things.

I just don't see where you can single out forfeitures with respect to the threat to stockholders.

Mr. TAYLOR. I do think that the risk that stockholders can be said to run when they purchase stock might extend to fines. I doubt that the foreseeable risk ought to include the disgorgement of substantial assets which would conceivably throw the company into bankruptcy.

Suppose someone purchases an entire company after it or its officers engage in racketeering activities; in other words, suppose company A is involved in a RICO violation through the acts of its officers, and it is then sold, and the purchaser of the company then is to take the risk——

Mr. SAWYER. But that is where the purchaser would be making a careless error. That is why you buy assets and not stock, because you inherit various liabilities, including income tax liabilities when you buy stock. You avoid that by buying assets.

The point I am making is that we do not have to concern ourselves with this so-called stockholder situation to the extent you are indicating.

Mr. TAYLOR. You can forfeit both assets and stocks.

In the *Thevis* case, the Government sought to forfeit an entire company.

Mr. SAWYER. If the purchasers opt to buy the stock, they buy with it all the liabilities that company has, including fines, income tax liabilities and everything else. If they go the other route, form a corporation of their own and buy the assets, then they can protect themselves from some of those risks.

They do become innocent purchasers.

Mr. TAYLOR. Presumably the assets themselves are at risk as well. I would suggest that in either case the purchaser of the stock of the company or of the assets of a company——

Mr. SAWYER. Then they would be innocent purchasers. That is the point I am making.

Mr. HUGHES. Go ahead and finish your point.

Mr. TAYLOR. Assume an executive owned stock in a company that he manages and he, therefore, has an interest in the enterprise and he commits two mail frauds, subjecting himself to a potential RICO case, and then he sells his stock; is his purchaser as well to be deprived of the stock which he has purchased from the executive who is subsequently indicted and convicted of RICO?

You say, and I understand that there is the provision for the purchaser to demonstrate that his purchase is innocent, but I am concerned, Mr. Chairman, that the definition of innocence needs some specificity at the very least.

Does it mean that he did not know that the asset was potentially subject to forfeiture, or that he didn't participate in a transaction which itself was illegal?

I am not suggesting that in every case the parade of horribles which I suggest would occur but once you provide, or once you apply the notion that a criminal violation imposes a taint on a piece of property prior to indictment or prior to any public announcement of that, then you have placed a burden on commerce and in the RICO prosecutions that I mentioned you are talking about large-scale assets which travel in legitimate commerce.

I make the distinction between those kinds of cases and the narcotics, arson for hire and murder cases because the consequences are different.

There are a far larger number of innocent, if you will, people who are likely to come into contact with that commercially transferable asset or with that interest than in the case of organized crime.

I also am very concerned about the provisions in the Department of Justice bill which, as Congressman Hall asked about, are shoot first and ask questions later kind of provisions.

The property is seized and then the third party comes in and bears the burden that he is "reasonably without cause to believe that property was of the type described in subsection (a)(2)."

What is property of that type, and subsection (a)(2) goes on for about a page.

What is the extent of knowledge that the purchaser is supposed to prove a negative of?

It is difficult enough to prove a negative in any event, but to prove a complete absence of knowledge of any of the multitude of sins that might be encompassed appears to me to reverse the appropriate due process principles, at least those that I am familiar with.

It always seemed to me that a person who had title to property couldn't be deprived of the property unless the Government sustained a burden of depriving him of it, and the impacts, certainly, of the Department of Justice bill and of your bill to a lesser extent, is to provide that that individual is deprived of the right to possession, even if not of the right to ownership, and that deprivation is a significant, a significant interference with a property right. It extends not just to the property rights of the defendant but also to property rights of any third party, because, as both bills provide, there is this taint concept which attaches at the time that the crime occurs and not at the time of indictment and not at the time of conviction.

As I pointed out in my statement, historically criminal forfeiture does not arise until after conviction.

The government's right, the king's right to the property did not arise, did not attach until the conviction.

It seems to me that what is being suggested is that in rem concepts are being introduced into the in personam or criminal forfeiture area.

If in rem forfeiture is appropriate, if a taint is appropriate, a taint theory as to any asset, then why do you need to do it in the criminal area?

If that principle is a good principle of law, and I express no opinion on that at this point, but if the United States can assert a right to a property at the time a crime is committed, then it does not really need the criminal forfeiture provision. I am particularly concerned about the Department of Justice bill which provides no right to judicial review prior to the Attorney General's determination as to whether or not the third party's ownership is innocent.

That seems to me to be beyond the pale, if you will, of notions, which I certainly support, that deprivation of property, even of criminals, should not occur without judicial intervention.

To turn to the substantive areas in which suggestions are being made, that is, the proceeds question, as I said, this language will cover all types of cases, not just the oil company executive who commits a fraud and miscertifies oil, not just the Government contractor who commits a violation of the False Statements Act, but also the narcotics dealer, the arson for hire scheme.

You are legislating in an area in which the same language of this statute is going to be applied to widely different types of criminal conduct.

It is easy to see how cash, cars, guns, or even real estate used in narcotics cases should be forfeited, no matter who owns it, but it is another thing to say that in business and commercial areas this property becomes tainted and that thereafter the title is impaired.

Tainting interests in this way will, if the present trend continues of using the RICO statute in complex prosecutions of white collar and economic crime, disrupt commerce, I believe.

In short, Mr. Chairman, these measures may make it easier to prosecute cases like *Martino* or *Marubeni* which involved highly visible and relatively stable criminal defendants, people who are not going anywhere. The defendants in *Marubeni* were prominent corporate executives, in *Martino* they were long-time residents of the city of Tampa, and in *Mandel* and *Uni Oil*, it was easy to locate them, and it was relatively easy to get at their assets and get at the prosecution.

But organized crime, narcotics figures, and murderers for hire are still going to be secreting their property.

Therein, it seems to me, a substantial difference, and on the assumption that the violent crime in narcotics traffic is as much of a threat to the fiber of our society than commercial bribery and mail fraud, what you really need is the ability of a judge to order payment of large sums of money and place the burden on the defendant of coming up with those large sums of money.

Forfeiture, it seems to me, is a greater threat to the white collar criminal than it is to the underworld figure. In the underworld there is always going to be secrecy, money going out of the country and coming back into the country.

In the white collar area it is not nearly so difficult to get at.

I am certainly not apologizing for white collar crime, but I suggest that this effort to expand the definition of the type of property that is subject to forfeiture and the procedures by which title and possession will be deprived without some sort of judicial intervention is going to make a lot of work for lawyers like me but it is not going to provide a simple means of taking the profit out of serious crime and that is what I think that you want to do.

Mr. HUGHES. Thank you, Mr. Taylor.

[The statement of Mr. Taylor follows:]

STATEMENT OF WILLIAM W. TAYLOR, III

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to present my views on legislation which would modify the forfeiture penalty provisions in the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1963, and the Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. § 848. I appear in my individual capacity and the views I express are not necessarily those of professional organizations of which I am a member.

The amendments you are considering would expand criminal forfeiture measures both substantively and procedurally. They would increase the number and types of properties subject to forfeiture and they would alter procedures now in existence for implementing forfeitures prior to and after indictment and conviction.

My remarks will, primarily, urge caution and careful analysis. No one opposes an effort to take the profit out of crime, especially out of the narcotics industry. My concern is that law enforcement's excitement with the idea of forfeiture as a new weapon will produce legislation which is duplicative of existing remedies, which is too complex to administer and which, in some instances, threatens to produce greater mischief than it remedies.

My concerns arise primarily from proposed amendments to 18 U.S.C. § 1963. For reasons I discuss below, I believe that forfeiture raises substantially fewer problems in the area of narcotics enforcement than it does in RICO prosecutions.

As you know, Sections 1963 and 848 both impose forfeiture in personam, often referred to as "criminal" forfeiture. This is to be distinguished from in rem forfeitures in important respects. Some reference to our legal history is instructive background to the measures you are considering.

The concept of forfeiture of estate as punishment for crime arose in medieval England. As noted in Mr. Justice Brennan's opinion for the court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974), forfeiture "resulted in common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the crown and his lands escheated to his lords; the convicted traitor forfeited all of his property, real and personal, to the crown." See 3 Holdsworth, A History of English Law, 68-71 (3d Edition 1972). The basis for forfeiture as penalty for crime was the notion that a breach of the common law was an offense to the king's peace, deemed sufficient to justify denial of the right to own property.

In 1215, criminal forfeitures were significantly circumscribed. Whatever may have been the wishes of the crown on the theory of forfeiture, the will of the great landowners of England was decisively expressed in the thirty-second clause of the Magna Carta. The crown renounced any claim to forfeiture on the ground of felony. Holdsworth, supra at 69. From that ancient day until now, there has been no forfeiture of estate in England as a punishment for conviction of a felony. Forfeiture upon conviction for treason was abolished in England in 1870 by the same statute that abolished escheat for felony. Id. at 71.

By 1787, England had long abolished forfeiture of estate as punishment for conviction of a felony; forfeiture was permitted then only as a punishment for a convicted traitor, and that punishment was to be short-lived. Drawing upon the English experience, the framers of the Constitution wrote into Article III one limited forfeiture -- the property of a convicted traitor during his lifetime.

Article III, Section 3, Clause 2 of the Constitution provides:

> The Congress shall have power to declare the punishment of treason but no attainter of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

In 1790, Congress moved quickly to spell out the negative implication of the Article III provision. That Congress affirmed that no forfeiture of estate shall be decreed for any other form of conviction under the federal criminal code. Section 24 of the Act of April 30, 1790, 1 Stat. 112, 117, the first federal criminal code, stated:

> Provided always and be it enacted, that no conviction or judgment for any of the offenses aforesaid shall work corruption of blood, or any forfeiture of estate.

That statute is still with us as 18 U.S.C. § 3563.

What Congress outlawed in 1790 reflected a constitutional mistrust of "forfeiture of estate" that had existed since the enactment of the Magna Carta some 575 years earlier and that was to remain an axiom of federal criminal law for the ensuing 180 years.

The same prohibition never applied to in rem or civil forfeitures. In in rem forfeiture proceedings, the government proceeds against the thing itself. Its ownership is not an issue, and conviction of the defendant is not a prerequisite for the forfeiture. The distinction between in rem and in personam forfeitures is perhaps best stated in The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) where Mr. Justice Story said:

> . . . It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum or malum in se.

Thus, when Congress enacted Sections 1963 and 848 it recognized it was reviving a remedy which had not found favor with the framers of the Constitution and the first Congress. It chose to move carefully. Revival of in personam forfeitures was limited to and justified by the need to remove the racketeer from the legitimate enterprise which he corrupted with racketeering

money and methods. Although the Department of Justice has argued in a number of circumstances that the language of Section 1963(a)(1) provides for the forfeiture of profits and proceeds, no court has accepted that view. United States v. Martino, 648 F.2d 367 (5th Cir. 1981)(vacated in part, rehearing en banc pending); United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979).

The decisions in Marubeni, Martino and Thevis have no doubt prompted concerns that racketeers are continuing to get away with ill-gotten gains and were not being hit in the pocketbook as hard as if they were compelled to disgorge profits or proceeds. Some provisions of the bills you are considering are directed to altering the results in those cases, but the legislation goes well beyond that goal. I submit, respectfully, that in too many instances they proceed by blurring the distinction between in rem and in personam forfeitures, forcing the criminal process to deal with forfeitures which could be handled civilly. They will, in many instances, make forfeiture more difficult and cumbersome than is necessary and, finally, in a significant number of situations, they will work fundamental deprivations of property in ways that directly implicate the due process clause on the Constitution.

There is no doubt that the new provisions, especially as contained in the Department of Justice bill, will plunge the federal courts into lengthy and time-consuming litigation over property rights as an adjunct to criminal prosecutions. Pretrial

restraining orders, post-trial hearings, especially when third parties are involved, and forfeiture litigation before juries all will expand the work of an already overloaded federal judiciary. Particularly in RICO cases involving legitimate businesses, profits are the joint product of legitimate and illegitimate activity. Unravelling the trail of dollars can well be as complex and difficult as in some antitrust and securities matters. Where illegitimate enterprises are involved, litigation over ownership will pose equally difficult problems. In United States v. Martino, for example, the defendant used the proceeds of his insurance policies to rebuild buildings which had been destroyed by an arson ring. The insurance company filed a civil RICO action for treble damages. An order of forfeiture would have had substantial impact on the insurance company's ability to recover. Even if the Attorney General ultimately returned the cash or the property to the insurance company, his role in the process would make the litigation that much slower.

All of this suggests to me that the goal of taking the profit out of crime is most directly and simply accomplished by increasing the maximum fines permitted and, under appropriate circumstances, making the fines mandatory. A sentencing proceeding, which is always conducted without a jury, is a far simpler method of assessing a defendant's ability to disgorge ill-gotten gains. Sham transfers could be dealt with by putting the burden on the defendant to recover the funds and pay his fine.

In addition, there may be room for expanding in rem forfeitures. Especially in narcotics prosecution, where both the contraband and the instrumentalities of crime are forfeitable regardless of their owner, and where Congress has already made profits subject to civil forfeiture, see 21 U.S.C. § 841, in rem forfeitures are effective and pose fewer of the constitutional and interpretive problems I have touched on. Indeed, the Department of Justice's bill which would subject property subject to forfeiture to a "taint" from the moment the crime is committed, is in reality an effort to introduce in rem concepts into the criminal proceeding. They do not belong there and they do not need to be there. The government's concern about venue in in rem forfeitures deserves consideration. I can think of no serious objection to conducting all in rem forfeitures arising out of narcotics activity in one court.

Time and space do not permit me to discuss each of the provisions of the bills which the Committee is considering. I would like, however, to refer you to certain provisions of the discussion draft dated December 22, 1981, which I received under cover of a letter from Chairman Rodino, and of the bill proposed by the Department of Justice, which illustrate my general concerns.

In the discussion draft, Secton 2 would amend Section 1963(a) by providing forfeiture of proceeds or profits derived from any interest, security, claim or right referred to in subdivision 1 or 2, when racketeering activity consists of a narcotic or dangerous drug offense or when an interest "relates

to" an enterprise engaged in illegal activities. The section-by-section description suggests that "the net result of this amendment would be to accommodate results sought in proposed Section 1963(c) of H.R. 4110, without overturning the result in Marubeni America Corp. with respect to legitimate businesses."

I question why racketeers who corrupt legitimate businesses are entitled to keep their profits when those who band together for wholly illegal activity may not. Furthermore, the language does not guarantee the result. When is an enterprise engaged in illegal activity? Arguably, a legitimate enterprise is engaged in illegal activity when its officers use bribery or extortion to obtain a contract.

Finally, the proposed amendment does not deal with the interpretive problem confronted in Marubeni and in Martino, i.e., how can you have an interest, security, claim or right in an enterprise which consists of an association in fact?

Likewise, relating the profit concept to the interest concept does not solve the problem of how one "acquires or maintains" an interest in violation of Section 1962, if the indictment does not charge an acquiring or maintaining offense.

Section 3 provides that the courts shall enter an order of forfeiture of property seized or otherwise in custody of the United States if the court determines that the United States has established by a preponderance of the evidence that such property is the property found to be subject to forfeiture by the trier of fact. The section-by-section anaylsis states that

this provision alters the obligation of the government to establish its forfeiture claim beyond a reasonable doubt. I confess to be confused as to the purpose of the language. Even under the proposed bill, as under the statute as written, forfeiture only occurs upon a special verdict of forfeiture and the indictment must specify the interest for which forfeiture is sought. When does the "preponderance" standard come into play?

Section 3 also provides for judicial review of the claims for relief by innocent third parties. This is an important provision and is far superior to the concept contained in the Department of Justice's bill. I am troubled, however, by forcing the third party to bear the burden of proof, by a preponderance of the evidence, that his interest was innocent. In the first place, placing the burden of proving his right to property upon a party who has legal title to it is inconsistent with due process. In the second place, the statute provides no guidance as to the substance of "innocent" ownership. Does it mean that the person did not participate in crime or that he had no knowledge that it was afoot?

Section 3 also would void preindictment transfers of property with respect to the transferee who, at the time of the transfer, knew or had reson to know that such property was subject to forfeiture. This provision should not be adopted. It poses an unacceptable potential for unfairness. First, how much is the transferee required to know about the law of forfeiture to know "that such property was subject to forfeiture?" Second, is it necessary or desirable to deprive a third party

of an asset for which he gave valuable consideration even if he knew some or all of the circumstances of its acquisition? Finally, what is the effect of this provision upon testamentary or intestate transfers of property to children?

As noted above, in personam forfeitures attach only at the moment of conviction. It is unfair to subject third parties to the duty to guess correctly whether or not their seller will be indicted in order for them to acquire good title.

I note, finally, that in the Department's bill a provision is made for the forfeiture of substitute assets if the assets subject to forfeiture cannot be found. Upon this, I rest my case that enlarging potential fines is the most sensible way to take the profit out of crime. It is judicially ordered disgorgement of ill-gotten gains, a policy which makes good sense. I suggest, however, that the policy can be implemented by fines more effectively and simply than if it is done under the rubric of "forfeiture," with the myriad of new concepts and procedures which prosecutors and defense attorneys will be litigating over for years to come.

Thank you very much.

Mr. HUGHES. I take it, among other things, you would not extend this forfeiture to nondrug cases; that is, you would not permit the forfeiture of proceeds of crime in nondrug areas?

Mr. TAYLOR. There are a lot of areas beyond narcotics in which forfeiture can and should occur.

I am suggesting, however, that when you write legislation to deal with those areas you must recognize the difficulty in implementing the legislation.

The hearings which are going to occur to trace and unravel profits from a complex commercial venture, when part of the proceeds are legitimate and part are illegitimate, are going to provide a fertile field for litigation and tie up prosecutors, agents, judges, and defense attorneys in a way which a simple sentencing proceeding would never do.

In a sentencing proceeding there is no jury. It is a wide open proceeding and it seems to me that if you give a judge the authority to impose big enough fines that you can accomplish exactly what you are after.

Mr. HUGHES. OK. Thank you.

The gentleman from Michigan.

Mr. SAWYER. I have nothing further. Thank you.

Mr. HUGHES. Mr. Taylor, thank you very much. We are indebted to you.

Our next and final witness is an attorney, Irvin Nathan.

Mr. Nathan is currently an attorney in the private practice of law with Arnold and Porter here in Washington, D.C.

Prior to returning to private practice Mr. Nathan served as a Deputy Assistant Attorney General in the criminal division of the U.S. Department of Justice.

During the previous administration he appeared frequently before various congressional committees with respect to the issues that arise with attempts to obtain the forfeiture of assets in drug cases.

In addition, he was responsible for the management of both the organized crime section and narcotics sections of the Criminal Divison of the Department of Justice.

We hope that as a result of his previous experience Mr. Nathan will be able to shed additional light on this important but complex topic.

We have received a copy of your prepared statement and, without objection, it will be made a part of the record. Please proceed as you see fit. We hope you could perhaps summarize for us.

TESTIMONY OF IRVIN B. NATHAN, ATTORNEY, ARNOLD AND PORTER, FORMER DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. NATHAN. I would be delighted to, Mr. Chairman.

I appreciate the opportunity to come before you today as a private citizen and give the subcommittee some views that I have developed in a variety of capacities, both with the Department of Justice and in private practice representing both corporate and individual victims of crime as well as individuals and companies accused of serious crime.

I think that the perspective that I have had in all of those positions have enabled me to develop views on the question of forfeiture which I would like to share with your subcommittee.

I very much support the thrust of the bill which the chairman has introduced. I believe that forfeiture is one remedy that should be in the Department of Justice's arsenal to deal with serious criminal problems in our country and I believe that there are improvements in the statutes which could enhance the ability of the Government to secure forfeitures.

I particularly support the concept that profits and proceeds from certain types of crimes should be forfeitable as well as interests in the enterpriser as provided by the law today.

I think that the Government's burden should be eased in terms of linking the proceeds and assets derived from criminal activities. I also believe that the the law should provide for the forfeiture of substitute property in certain situations.

I also think it is important that the Government be able to get restraining orders with court approval in appropriate circumstances. Finally, I do think it would be a good incentive for the investigators and prosecutors to have the funds available from forfeiture to do their tasks, and to utilize in future law enforcement efforts.

With those principal parts of the bill I am in considerable sympathy. However, I do have some concerns with the bill, which in my judgment goes too far in some respects, and not far enough in other. I think there needs to be more attention paid with respect to certain procedural rights. Particularly with respect to innocent third parties, I think the bill does not have sufficient protections. It is considerably better in that respect than the Department of Justice's bill, in that respect, which I have only briefly examined and about which I heard Mr. Harris testify on today. I would like to amplify on these points.

Forfeiture is not a panacea and it is not an easy task and legislation is not going to make it so.

Sometimes forfeiture is oversold by public officials and by the Department of Justice, and I think that should not be the case.

Forfeiture is not going to be dispositive in many cases, and it will not be very frequently utilized for various practical reasons which I describe in detail in my statement.

Investigators do not have the time and resources to make the detailed asset analysis which are required to secure a successful forfeiture. Agents are required first and foremost to identify the culprits. Once they have established sufficient evidence to prove the guilt of these individuals, their instinct is to take the matter to court and put the culprit out of business, which means convicting him and seeking imprisonment or fines. It is not often that they are going to have the opportunity, the time and the access to data to make the financial investigation which would be necessary to secure forfeiture.

Now, there are circumstances where that can be done and the necessary tools should be available to them. However, the GAO report is not surprising to me in terms of the paucity of assets that have been forfeited. Improvements would help increase that number, but the subcommittee should not delude itself to believe

that this is the answer to the crime problem nor should it believe that forfeiture will do away with the substantial assets controlled by the criminal elements.

Second, I am concerned about limiting forfeiture to narcotics or drug-related offenses. The present RICO statute provides for forfeiture of an interest in the enterprise with respect to the whole gamut of racketeering activities. In my view, that is appropriate and there need to be improvements across the board.

The proposed bill would limit the forfeiture of profits, and proceeds to either narcotics or drug-related offenses or activities where there is an illegal enterprise such as a gang or a syndicate of some type.

That is too narrow a situation. In my judgment, we should not so limit forfeiture.

This remedy should be available not only in drug cases, but also in other serious criminal cases.

Drugs have gotten a lot of attention, and it is a serious problem. However, there are a lot of other serious Federal criminal problems such as white collar crime and racketeering, I see no reason why the profits and proceeds of those kinds of activities should not also be forfeited.

Third, when the focus is on drugs and the prototypes of drug dealers, concerns with due process may become less than if we were dealing with white collar crime and what may be considered more reputable types of criminals I think that it is important that you bear in mind the rights that apply to all citizens and all criminal defendants, including the presumption of innocence. If the focus is kept on all racketeering activities, all serious Federal crimes, then more concern will be paid to due process considerations than is paid, for example, in the Department of Justice's proposed bill.

That brings me to the next point with respect to the rights of innocent third parties who may have some relationship to assets that have seen seized.

In my judgment you have to be very cautious in this area not to deprive innocent people and even defendants who are presumed innocent, of their property or their reasonable expectations concerning their property.

For example, the Department of Justice bill, as I understand it, would allow seizure of assets even before indictment. I think there is really no legitimate justification for that. I believe that you have to await both an indictment and conviction before forfeiture is appropriate. Once a person has been convicted beyond a reasonable doubt, then it seems appropriate to me to forfeit the proceeds of that criminal activity. I don't think it is appropriate to take action before then except in limited circumstances when there is a serious problem of concealment or dissipation of assets.

It is obvious that that is one of the principal problems in getting forfeiture. After indictment, after a grand jury has made a charge, then it is appropriate for a court to enter an order restraining a defendant from transferring that property. It is also appropriate, if there is a sham transaction in which someone takes the property knowing that it is only done to avoid the forfeiture, that that transaction be rescinded. This too, it seems to me, should be after indict-

ment and after a court has ordered that the property not be transferred.

There are times when a restraining order will have to be sought ex parte because you don't want to give notice and, therefore, lose the opportunity to secure the property. But it seems to me you can either indict and keep the indictment under seal and then seek an ex parte order, or seek a restraining order after indictment without notice, I believe, however, that you have to provide opportunities immediately thereafter for the defendant and for other parties to come before the court to state a claim in the property and have the court adjudicate the question of which has the superior right and whether irreparable injury is going to be caused and whether there are less drastic means available to preserve the assets for later use.

Your bill goes in that direction, and it is superior to the Department of Justice's in that respect, but it needs to be further enhanced with respect to the rights of parties to go to court and present their claims and be sure that they have not been injured.

Last, I would like to talk briefly about the fund.

This is one of the areas where there is an advantage of not being shackled by the institutional views of the Department of Justice or an administration so that one can express one's own views and speak candidly on this question. There need to be considerable incentives to both investigators and prosecutors to use forfeiture. Presently there is very little incentive in the system to seek forfeitures. Investigators are rewarded by the statistics of their arrests, perhaps by the statistics of contraband which is seized, but not by the amount of property which is forfeited.

Prosecutors, too, are looking for convictions, as is appropriate. That in some measure determines their status and rewards. They then necessarily need to move on to the next case.

It seems to me that the Congress has an obligation to provide some incentives, both to the investigators and prosecutors so that there will be funds for their important work. Obviously in this budget crunch there is always a problem with sufficient funds to address massive criminal problems.

I think that if amounts forfeited were available for the investigators and prosecutors, it would provide additional incentives and you would see an increase in the amount of forfeitures.

My point, however, is that this applies across the board to a number of priority areas including organized crime and racketeering as well as drug cases.

I would provide that the forfeitures from all those activities could go into a fund and that the Attorney General could then allocate them as he sees fit in accordance with the Department's priorities. Of course, he would also presumably take into account, as Congressman Pepper suggested, the areas which have the most severe problems, and the agencies which have done the most in securing the forfeitures so that they could be rewarded for their efforts.

Finally, that as an individual who is now in private practice, and as I mentioned, is representing victims of crime from time to time, I would suggest that there need to be some improvements in the civil provisions of the racketeering statute.

The statute provides that innocent third parties who are victimized by crime have a right to sue for treble damages for their injuries to business and property. It is very important to have that supplemental remedy available. It is a remedy which has not frequently been utilized, and I think it could be more frequently utilized if the Congress would reexamine the statute and make some improvements with respect to the rights of victims to sue for their damages and for injunctive relief.

That is beyond the scope of this hearing, but I did want to mention it. At some point, it will be appropriate to have a complete overhaul of the racketeering statute. When that comes, I think that the civil provisions should be examined as well.

Thank you, Mr. Chairman.

[The statement of Mr. Nathan follows:]

STATEMENT

OF

IRVIN B. NATHAN

Mr. Chairman:

I appreciate the opportunity to testify today on the imaginative bill that you have introduced to enhance the prospects of obtaining forfeiture of assets in certain types of criminal cases.

From 1979 through January, 1981, I served as Deputy Assistant Attorney General for Enforcement in the Criminal Division of the Department of Justice. During that period, I supervised the Division's units which specialized in prosecuting organized crime and narcotics cases, and devoted considerable thought and attention in an effort to improve the Department's performance in the area of forfeiture. Since that time, I have returned to private practice at the Washington law firm of Arnold & Porter, where a substantial part of my practice has been to counsel and litigate on behalf of individual and corporate victims of crime.

Theoretically, forfeiture of assets is a powerful weapon in the fight against sophisticated crime. The arguments in favor of forfeiture are familiar and legitimate. Depriving a criminal or a criminal organization of its

ill-gotten gains serves, along with imprisonment and fines, to disrupt or cripple the criminal enterprise, to impair its financial viability and to reduce the incentives others may perceive in conducting such criminal ventures. Practically, however, as the GAO report reveals, forfeiture has not been a significant factor in law enforcement efforts over the last twelve years during which forfeiture remedies have been on the books. The reason for forfeiture's lack of overwhelming success lies not in the absence of interest or determination by the government, the dedication of its investigators or prosecutors or even in the flawed, existing provisions of federal law. As I pointed out in my testimony a year and a half ago to the Senate Judiciary Committee, there are a number of inherent investigative and prosecutorial difficulties with forfeiture which renders it less useful in practice than in theory.

I cite these difficulties, not to discourage efforts aimed at improving the forfeiture statutes and mechanisms, but to put the matter in its proper context. Forfeiture is not a panacea, and, in my judgment, is not a device which

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will be used frequently or decisively in a large number of cases. Its potential should not be exaggerated, and efforts by the Congress to prod the executive agencies should be tempered by a realization of what is feasible in the real world. Further, it is only by considering the problems that Congress can fully appreciate why help is needed and where the assistance can be most beneficial to law enforcement.

Consider the matter from the investigator's perspective. First and foremost, of course, it is his responsibility to try and discover the identity of the individuals who are committing sophisticated crimes which reap large proceeds. Once he has been able to identify the culprits, he must then be able to develop enough evidence to prove their guilt beyond a reasonable doubt and to give the court sufficient basis to impose a substantial prison sentence. Further, as soon as the requisite evidence has been developed, both investigators and prosecutors generally desire to bring the matter promptly to court to terminate the individuals' criminal activities.

This usual scenario does not often leave time or opportunity for an extensive assets investigation leading to forfeiture. Of course, some investigations of assets can be conducted simultaneously and synergistically with investigations of criminal activity. Financial investigations may in fact be a potent source of evidence of guilt or for sentencing.

Even when there is time and opportunity for a forfeiture investigation, there still remain serious problems. Discovering the defendant's assets, securing them, proving their relationship to his crimes and seizing them after judgment are extremely difficult, time-consuming tasks which most federal investigators and prosecutors are not particularly well equipped to handle. Sophisticated criminals, with access to top-flight lawyers and accountants, can readily conceal their assets. The assets can be kept in the names of nominees, in secret bank accounts overseas, in shell corporations or run through money-laundering operations. Even when the assets are uncovered, and title is proven, there are evidentiary problems in attempting to link the assets to

criminal activities. Finally, prosecutors are concerned that introducing detailed evidence relating to forfeitable assets may prolong and make more complex the criminal trial.

These difficulties and the ones spelled out in my earlier testimony help explain the relatively small amount of forfeitures obtained thus far by the Department. They also, I believe, explain why Congress should enact legislation which will enhance the ability of federal investigators and prosecutors to obtain forfeiture in any type of large-scale criminal enterprise where there are substantial proceeds.

The proposed bill has a number of features which should significantly enhance the government's ability to obtain forfeiture in appropriate cases. I particularly endorse the amendments which (1) make it clear that profits and proceeds are forfeitable along with the interest in an enterprise; (2) ease the government's burden of linking specific property to criminal activities; (3) improve the mechanisms by which courts may restrain transfer of assets pending trial; and (4) establish a fund so that forfeited

assets may be utilized to buttress the government's efforts to crack down on large-scale crime and racketeering. There are, however, certain provisions of the bill which I believe are misguided and which are not in the public interest.

Section 2 of the bill provides in essence that proceeds or profits are forfeitable if the racketeering activity involves narcotics or dangerous-drug offenses or if the enterprise itself is engaged in illegal activities. I believe it is quite appropriate that income or proceeds derived from violations of the RICO statute should be forfeited. Indeed, it is the essence of forfeiture to deprive the criminal of the benefit of his illegal actions; in a very literal sense, forfeiture was designed to ensure that crime does not pay. However, I see no logical or legitimate reason for limiting this provision to narcotics transactions or for attempting to draw fine distinctions in this connection between licit and illicit enterprises. In my view, all proceeds from RICO violations should be forfeitable.

Proceeds from narcotics transactions are no more tainted than proceeds from arson-for-profit schemes in which innocent people may have died, than proceeds from extortion in which there may have been physical threats or actual violence, or proceeds of bribes paid to public officials to avoid health and safety regulations. In none of these cases should the defendant or the criminal enterprise be permitted to keep the proceeds of its racketeering activities.

Nor should it matter, in my judgment, whether the enterprise is essentially a legitimate or an illegitimate one. In the first place, the distinction is often hard to discern or prove. For example, a duly chartered corporation may simply be a front for wholly illegal activities. Conversely, a company which engages in a variety of legitimate activities may as one sideline engage in racketeering activities, such as selling stolen property or issuing worthless securities. Second, the Supreme Court has recently made clear in the Turkette case (U.S. v. Turkette, 101 S.Ct.. 2524 (1981)) that the RICO statute is designed to cover "any" enterprise, whether lawful or unlawful.

Since there is no reason under the existing statute to draw distinctions between legal and illegal enterprises, Congress should not engender further litigation on this fine distinction for purposes of forfeiture.

The legislative history prepared by the staff suggests that this proposed distinction was designed to preserve the result in the Marubeni case (U.S. v. Marubeni American Corp., 611 F.2d 763 (9th Cir. 1981)) with respect to "legitimate businesses." Thus, as I understand the bill, if an American company pays a series of bribes to public officials for government contracts and thereby reaps substantial profits, there could be no forfeiture. I see no reason why the results of the Marubeni case need to be preserved. There is no conceivable justification for permitting the so-called "legitimate" enterprise to keep the fruits of its violations of RICO, which may be in the millions of dollars, while limiting its possible exposure to a fine of only $25,000.

In my view, the criminal justice system, if it is to preserve the public's confidence and respect, requires even-handed treatment of all types of offenders. Law enforcement techniques and remedies, where they can be used effectively,

should be available for all types of serious crimes. Thus, informants, undercover operations and court-authorized wiretaps should be employed just as vigorously and as fairly in combatting white collar crime and public corruption as in dealing with drug offenses and property crimes. Similarly, the remedies available to the courts ought not to be limited to one class of offender. If we are willing, as I think we should be, to impose the drastic remedy of forfeiture on drug pushers, we should be just as willing to impose forfeiture on other types of serious offenders, whether they be arsonists for hire, extortionists, fraud artists or corrupt public officials. I suggest that we are headed for considerable confusion and potential disrespect for the law if we skew the criminal justice system for a certain kind of offense and not for other equally serious types of offenses which may have even more devastating long-term effects on our society.

Similarly, I applaud the concept of Section 4 of the bill, which reduces the government's burden of tracing assets to particular criminal acts, but I see no reason why the

provision should be limited to drug cases. The RICO statute, as presently constituted, covers a multitude of serious criminal offenses and, in fact, narcotics or drug offenses constitute only a small percentage of the RICO cases brought nationwide. In my view, the same procedures should be available to all types of RICO offenses.

I suggest that the forfeiture provisions of RICO should be amended to provide that if, following a conviction of a defendant for RICO violations, the government can demonstrate that (1) the defendant acquired substantial assets during the period of racketeering activity, and (2) there is no apparent source for such assets other than the racketeering activity, then the trier of facts may properly infer that the assets were acquired as a result of the racketeering activity and may conclude that they should be forfeited. I believe that such a permissive inference in a proceeding, designed not to determine guilt or innocence beyond a reasonable doubt but only to decide an appropriate remedy, is fully constitutional and satisfies all applicable Supreme Court cases.

Sections 3 and 5 of the bill, which are applicable to all forfeitable property from any type of RICO violation, appropriately address a very real problem which hinders the government's ability to obtain substantial forfeitures. Concealment, disposition and/or dissipation of the property by the defendant during the course of the criminal proceedings are serious risks and serve as obvious impediments to effective forfeiture. I agree that in appropriate cases courts should be empowered to restrain a defendant from transferring his property pending the outcome of the litigation. However, seizure and temporary restraining orders are drastic remedies before a person has been convicted of a crime, and the potential for injuring the rights of innocent third parties is considerable. Accordingly, I believe that much greater procedural protections must be afforded to defendants and third parties than is proposed by the present bill.

As I understand it, Section 3 would allow a court to direct the seizure of a defendant's property solely on the basis of an ex parte affidavit indicating probable cause to believe that the property to be seized is "subject to forfeiture." Thus, an extraordinarily drastic result is permitted with only the most minimal showing.

This may be one of the areas where limiting the imagined prototype to a drug dealer may have affected the thinking of the proponents of the bill. If the property in question is a boat by which a marijuana supplier plies his trade, one may be more willing to authorize seizure upon the minimal showing that the property is subject to forfeiture. However, if the seized property is the home of a corporate executive purchased with the proceeds of a series of commercial bribes or if it is a thriving legitimate commercial establishment, employing scores of innocent persons, purchased by an organized crime figure as a result of loan-sharking or other racketeering activities, one may not be as quick to permit the seizure of the property if all that is shown is that someday such property may be subject to forfeiture.

In my view, before seizure should be authorized the government should be required to show (1) an overwhelming likelihood of succeeding on the RICO prosecution, (2) strong probability that the property to be seized will be forfeited after conviction, (3) a likelihood that there will be no irreparable injury to innocent third parties, and

(4) an absence of less drastic remedies to preserve the property during the trial. Further, I would establish a procedure by which, once a seizure has been effected, any affected party could secure a hearing to litigate the foregoing issues and to obtain relief from any seizure as warranted under all of the circumstances.

I endorse the provision in Section 3 which provides an opportunity to affected third parties with an interest in the forfeited property to seek equitable relief prior to disposition of the forfeited property. However, I believe it is appropriate that the same kind of opportunity be provided to such persons prior to, or immediately after, seizure because the consequences of seizure can be just as devastating to their interests.

I also agree that a temporary restraining order should be obtainable by the government after indictment. I believe that the standards set out in Section 5 of the bill are essentially reasonable and appropriate. However, I believe the bill should address the question of prior notice to the defendant and to other affected parties. In my view, the bill should provide for actual notice prior to the hearing

on a motion for a restraining order to all known affected parties, unless the government can demonstrate to the court by ex parte affidavits that notice is likely to cause the concealment, disposition or dissipation of the property in question. In the event a temporary restraining order is granted without notice, there should be a prompt opportunity thereafter for the defendant or other third parties to obtain a hearing to set aside or modify the order for good cause shown.

In short, considerably more attention should be paid to procedural due process requirements when authorizing such drastic remedies as pre-judgment seizure, attachment or temporary restraining orders.

The final provision of the bill which I should like to address is the one which creates a fund from the proceeds of forfeited property. Under the proposed bill, forfeited funds could be expended by the Attorney General for any drug law enforcement purpose. I believe the basic concept of the fund is sound. It is designed to serve as an incentive for investigators and prosecutors to pursue the remedy of forfeiture. I believe that such an incentive is needed,

As I indicated earlier, there are presently a number of disincentives which lead investigators to forego making financial investigations which are a necessary predicate to a forfeiture case. A provision which would ensure that any funds forfeited could be used by the investigative agency to carry out its mission might well be the incentive needed to improve the agency's ability to conduct such investigations and to undertake the necessary efforts to secure forfeitures.

However, once again I do not believe that such a fund should be limited to drug matters. The budget crunch has hit federal, as well as state and local, law enforcement, and there are many priority enforcement programs which do not presently have adequate funding. Many of these areas, such as the federal government's efforts against organized crime, could benefit by the use of forfeited funds. Accordingly, I propose that all forfeited funds, up to a certain reasonable limit, be made available to the Attorney General for any priority law enforcement program, as he deems appropriate. Presumably, in exercising his discretion, the Attorney General will allocate the forfeited funds among

the law enforcement agencies roughly in proportion to the results they have achieved in producing forfeitures.

Since the forfeiture fund proposal is antithetical to the usual budgetary process, since it is not certain whether the fund will prove successful as an incentive, and since there are certain risks of an overzealous use of the forfeiture remedy, I suggest that the proposed fund be attempted on an experimental basis for a three-year period. This will provide ample opportunity for the various agencies to develop forfeiture capability and to begin the necessary types of investigations. It will also provide adequate time for court cases to come to fruition and for the Congress to take a hard look at the results to determine if the fund has been successful and if the forfeiture remedy has been used appropriately.

Finally, as a private practitioner often engaged in representing victims of crime, I want to urge the Committee to reexamine the civil remedy provisions of RICO. In a time of reduced governmental law enforcement budgets, it seems to me all the more imperative to have sufficient

supplementary civil remedies, whereby private citizens injured by racketeering activities have an ability and an incentive to recover their damages. While this may not be the appropriate occasion to discuss detailed improvements in civil remedies, I think it is important for the Committee to understand that there are serious deficiencies in certain of the civil remedies provided by RICO and that there have been a number of recent judicial decisions tending to undermine the original intent of Congress in creating such civil remedies. I believe that, at an appropriate time, there should be a comprehensive review and refinement of the RICO statute and that in that process, close attention should be paid to improving the present civil remedies.

In conclusion, I want to commend the committee for focusing attention on needed improvements in the area of criminal forfeitures and for its imaginative approaches to the problems. I have offered my comments as constructive suggestions for improvements, and I wish you every success in amending the forfeiture provisions so that they begin to live up to their promise as an effective remedy against the serious problem of organized crime, racketeering and drug-trafficking which our society faces today.

Thank you.

Mr. HUGHES. Thank you very much.

I had never heard the term "reputable criminal" before.

Mr. NATHAN. It was on a comparative basis.

Mr. HUGHES. Yes. one of the previous witnesses testified, Mr. Taylor, that we should try to define with a little more precision what we mean by innocent third party.

Do you find that that is something that gives you concern, too, and that that is something we should be doing in the statute?

Mr. NATHAN. I agree with Mr. Taylor, that almost by definition defendants and all third parties are innocent because they are presumed innocent. I think that anyone whose property is taken pursuant to a pretrial seizure provision should be presumed innocent and should be able to come into court and make a claim as to the property. It ought to be the burden of the Government to demonstrate that this property is tainted, that it was secured through the defendant's illegal actions and that the third party had knowledge of it when it acquired title to it or took an interest in it.

Let me say with respect to Mr. Sawyer's question and the shareholders of companies, I quite agree with the thrust of his question. In that report, I don't see that there is a difference between the fine and the forfeiture.

Shareholders elect management, and if there are illegal actions taken in their names and for their benefit and there are proceeds from that, I don't think that these shareholders should benefit from that.

There is no reason to retain the result in the *Marubeni* case. If a corporation engages in bribes in order to secure large profits, the shareholders should bear the burden for that. They elected that management and there is no reason that they should reap a windfall and receive the benefits from the bribes.

They should be deprived of those profits so that they will elect a management in the future which will be lawful.

Mr. HUGHES. Would you make a distinction between those efforts that result in some benefit to the equity shareholders as opposed to those activities that might benefit the management?

Mr. NATHAN. If the benefits are limited to the management——

Mr. HUGHES. Suppose the president of a company is engaged in illegal activity, but the proceeds are going into his own pockets?

Mr. NATHAN. The only defendant would be the individual and the proceeds that he has received would be all that would be forfeited and nothing of the corporate assets would be forfeitable under that circumstance.

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. I have no questions. I enjoyed your testimony.

Mr. HUGHES. That concludes the hearing for today, and the subcommittee stands adjourned.

[Whereupon, at 3:35 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

99-995 O—83——16

Additional Material

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STATEMENT BY

HONORABLE LEO C. ZEFERETTI

CHAIRMAN

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL

ON

H.R. 5371

COMPREHENSIVE DRUG PENALTY ACT

BEFORE THE

SUBCOMMITTEE ON CRIME

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

MARCH 9, 1982

GOOD AFTERNOON, MR. CHAIRMAN. IT IS A PLEASURE TO AGAIN GIVE TESTIMONY TO THIS SUBCOMMITTEE ON THE ISSUE OF FORFEITING ASSETS OF NARCOTICS TRAFFICKERS. SINCE THE TIME OF MY LAST APPEARANCE BEFORE YOU ON THIS SUBJECT THE SELECT COMMITTEE ON NARCOTICS, WHICH I CHAIR, HELD HEARINGS ON FINANCIAL INVESTIGATIONS OF DRUG TRAFFICKING IN SOUTH FLORIDA. THE SELECT COMMITTEE'S INVESTIGATION AND HEARINGS INTO THE FINANCIAL BASE OF DRUG TRAFFICKING HAS CONVINCED ME MORE THAN EVER THAT THERE IS A CRITICAL NEED FOR STRONG FORFEITURE LAWS. WE WILL ONLY BE SUCCESSFUL IN THE FIGHT AGAINST NARCOTICS TRAFFICKERS BY SEIZING AND FORFEITING THE VAST PROFITS AND ASSETS THAT SUSTAIN TRAFFICKING ORGANIZATIONS. IN THIS VEIN, I GIVE MY WHOLEHEARTED SUPPORT TO H.R. 5371, THE BILL YOU HAVE INTRODUCED MR. CHAIRMAN, WHICH INCORPORATES A NUMBER OF THE CONCEPTS ON FORFEITURE REFORM THAT HAVE BEEN PUT FORWARD IN THIS CONGRESS BY CONGRESSMAN GILMAN, CONGRESSMAN SAWYER AND ME.

SECTIONS 2 AND 6 OF H.R. 5371 ACCOMPLISH THE MAIN OBJECTIVE OF H.R. 4110, WHICH I INTRODUCED IN THE LAST SESSION. MY PROPOSAL WAS TO MAKE EXPLICIT THAT ALL THE PROFITS AND PROCEEDS GAINED AS THE RESULT OF NARCOTICS TRAFFICKING ARE SUBJECT TO FORFEITURE UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO, 18 USC 1961 ET SEQ) AND THE CONTINUING CRIMINAL ENTERPRISE STATUTE (CCE, 21 USC 848). COURT DECISIONS HAVE LIMITED THE REACH OF BOTH RICO AND CCE. H.R. 5371, LIKE H.R. 4110, WOULD AMEND BOTH CCE AND RICO TO MAKE CLEAR THAT NARCOTICS PROFITS AND PROCEEDS ARE IN FACT FORFEITABLE.

IN H.R. 4110, I PROPOSED A SUBSTITUTE FORFEITURE PROCEDURE WHICH WOULD AMEND CCE AND RICO TO PERMIT THE FORFEITURE OF OTHER

ASSETS OF A NARCOTICS TRAFFICKER WHEN HE PUTS HIS ILLEGAL GAINS BEYOND THE REACH OF FORFEITURE PROCEDURES. THIS AMENDMENT WOULD HAVE PERMITTED THE FORFEITURE OF ANY ASSETS A TRAFFICKER HAS IN HIS POSSESSION, THAT WOULD NOT OTHERWISE BE SUBJECT TO FORFEITURE, TO THE EXTENT THAT ILLICIT ASSETS IDENTIFIED FOR FORFEITURE ARE UNREACHABLE. YOUR BILL, MR. CHAIRMAN, DOES NOT INCLUDE THIS PROVISION BUT INSTEAD INCREASES THE FINES THAT CAN BE IMPOSED ON DRUG TRAFFICKERS AS A MECHANISM TO SEIZE THEIR VAST ASSETS. WHILE I SUPPORT THE CONCEPT OF INCREASED FINES, I URGE THE SUBCOMMITTEE TO AGAIN EXAMINE THE SUBSTITUTE FORFEITURE PROPOSAL CONTAINED IN H.R. 4110 AS AN ADDITIONAL TOOL THAT CAN BE EMPLOYED TO REMOVE THE FINANCIAL BASE OF THE DRUG TRADE.

SECTION 4 OF YOUR BILL, MR. CHAIRMAN, WOULD AMEND THE RICO STATUTE AND CREATE A PRESUMPTION THAT ASSETS POSSESSED BY LARGE SCALE NARCOTICS TRAFFICKERS WERE OBTAINED THROUGH ILLEGAL ACTIVITY. FOR THE PRESUMPTION TO COME INTO OPERATION THE GOVERNMENT WOULD HAVE TO PROVE THAT THE DEFENDANT ACQUIRED THE PROPERTY AFTER THE RACKETEERING ACTIVITY BEGAN, A CLASS I OR II DRUG VIOLATION IS INVOLVED, AND THERE IS NO LIKELY SOURCE FOR THE PROPERTY OTHER THAN THE RACKETEERING ACTIVITY. THIS PROVISION WAS PROMPTED BY MR. SAWYER'S PROPOSAL, H.R. 2646. MR. SAWYER IS TO BE COMMENDED FOR HIS LEADERSHIP ON THIS ISSUE, AND I SUPPORT THE PRESUMPTION AS CONTAINED IN H.R. 5371, TO FACILITATE THE IDENTIFICATION AND FORFEITURE OF DRUG TRAFFICKING PROFITS.

SECTION 9 OF THE BILL WOULD PROVIDE A MECHANISM TO HELP FUND FEDERAL DRUG LAW ENFORCEMENT EFFORTS OUT OF THE ILLICIT PROCEEDS OF DRUG TRAFFICKING. THE BILL WOULD ESTABLISH A DRUG ENFORCEMENT FUND IN THE TREASURY CONSISTING OF AMOUNTS EQUAL TO PROFITS AND PROCEEDS FORFEITED TO THE GOVERNMENT BY DRUG OFFENDERS UNDER THE CRIMINAL AND CIVIL FORFEITURE PROVISIONS OF THE CONTROLLED SUBSTANCES ACT (CSA) AND RICO. AMOUNTS IN THE FUND WOULD BE AVAILABLE TO THE ATTORNEY GENERAL, TO THE EXTENT PROVIDED IN APPROPRIATION ACTS, FOR DRUG LAW ENFORCEMENT PURPOSES. FOR FISCAL YEARS 1983 AND 1984, THE FIRST TWO YEARS OF THE FUND'S OPERATION, THE BILL PLACES A CEILING OF $10 MILLION PER YEAR ON AMOUNTS WHICH MAY BE USED FROM THE FUND.

MR. CHAIRMAN, I STRONGLY SUPPORT SECTION 9 OF THE BILL. THE LURE OF VAST PROFITS IS AT THE HEART OF THE ILLICIT DRUG TRADE. THE CREATION OF THE DRUG ENFORCEMENT FUND WILL PROVIDE AN INCENTIVE FOR OUR DRUG ENFORCEMENT OFFICIALS TO USE THE TOOLS OF FORFEITURE AGGRESSIVELY. MOREOVER, NOTHING COULD MAKE MORE SENSE THAN TO FORCE THE TRAFFICKERS THEMSELVES TO SHARE IN THE COST OF PUTTING THEM OUT OF BUSINESS, ESPECIALLY AT A TIME WHEN FEDERAL BUDGETARY RESOURCES ARE SHRINKING. THE BILL ALSO ASSURES CONTINUING CONGRESSIONAL OVERSIGHT OF THE USE OF THE FUND THROUGH THE AUTHORIZATION AND APPROPRIATION PROCESS AND BY REQUIRING ANNUAL REPORTS TO CONGRESS ON FUND DEPOSITS AND EXPENDITURES.

THE PROVISION IN H.R. 5371 ESTABLISHING THE DRUG ENFORCEMENT FUND IS DERIVED IN PART FROM LEGISLATION INTRODUCED EARLIER THIS YEAR BY MY COLLEAGUE ON THE SELECT COMMITTEE ON NARCOTICS, MR. GILMAN,

AND ALSO FROM A BILL INTRODUCED BY MR. SAWYER, THE RANKING MINORITY MEMBER OF THIS SUBCOMMITTEE . I COMMEND BOTH MR. GILMAN AND MR. SAWYER FOR THEIR LEADING ROLES IN OFFERING PROPOSALS TO MAKE FORFEITURE PROCEEDS AVAILABLE FOR DRUG LAW ENFORCEMENT.

SECTIONS 10 AND 11 OF H.R. 5371 WOULD AMEND MANY OF THE PENALTY PROVISIONS OF THE CSA AND THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT BY SUBSTANTIALLY INCREASING THE MAXIMUM CRIMINAL FINES THAT MAY BE LEVIED FOR DRUG TRAFFICKING AND RELATED OFFENSES. IN LIEU OF A SPECIFIC FINE, THE BILL ALSO WOULD AUTHORIZE THE IMPOSITION OF AN ALTERNATIVE FINE OF UP TO TWICE THE AMOUNT OF ANY GROSS PECUNIARY GAIN A DEFENDANT DERIVES FROM A DRUG OFFENSE. FINALLY, THE BILL WOULD ESTABLISH FACTORS THAT COURTS MUST CONSIDER IN DETERMINING WHETHER TO IMPOSE A FINE, THE AMOUNT OF A FINE AND THE SCHEDULE AND METHOD OF PAYMENT.

THE SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL RECENTLY APPROVED A SERIES OF RECOMMENDATIONS FOR A COMPREHENSIVE PROGRAM TO CONTROL THE WORLDWIDE PROBLEM OF DRUG ABUSE. THESE RECOMMENDATIONS ARE BEING INCLUDED IN OUR ANNUAL REPORT TO THE HOUSE AS REQUIRED BY OUR AUTHORIZING RESOLUTION. ONE OF OUR RECOMMENDATIONS CALLS FOR INCREASING EXISTING FINES THAT MAY BE IMPOSED AGAINST DRUG OFFENDERS. ACCORDINGLY, I FULLY SUPPORT THE PURPOSE OF H.R. 5371 WITH RESPECT TO INCREASED FINES. RAISING THE FINES FOR DRUG OFFENSES WILL PROVIDE YET ANOTHER TOOL TO DETER DRUG TRAFFICKING AND TAKE THE PROFIT OUT OF DRUG DEALING.

IT IS MY UNDERSTANDING THAT THE FINE LEVELS PROPOSED IN H.R. 5371 ARE DERIVED IN LARGE PART FROM THE SCALE USED IN THE

REVISED CRIMINAL CODE APPROVED BY THE JUDICIARY COMMITTEE IN THE LAST CONGRESS (H.R. 6915). I ALSO UNDERSTAND THAT THE AMENDMENTS PROPOSED IN H.R. 5371 ARE INTENDED TO MAINTAIN THE STRUCTURE OF CURRENT LAW WHEREBY THE MAXIMUM FINES AUTHORIZED FOR SECOND OR SUBSEQUENT OFFENSES ARE GENERALLY DOUBLED. AS PRESENTLY DRAFTED, HOWEVER, H.R. 5371 WOULD ESTABLISH A NUMBER OF NEW MAXIMUM FINES THAT WOULD BE INCONSISTENT WITH THESE GOALS AND ALSO INCONSISTENT WITH CERTAIN OTHER PRINCIPLES THAT A SOUND DRUG PENALTY STRUCTURE SHOULD INCORPORATE. I WOULD LIKE TO DISCUSS BRIEFLY SOME OF THESE ANOMALIES AND SUGGEST SOME ALTERNATIVES FOR THE SUBCOMMITTEE'S CONSIDERATION.

FIRST, UNDER H.R. 5371, CERTAIN OFFENSES THAT ARE SUBSTANTIALLY SIMILAR WOULD BE PUNISHABLE BY FINES THAT ARE QUITE DIFFERENT. FOR EXAMPLE, AN INDIVIDUAL CONVICTED OF UNLAWFUL HEROIN DISTRIBUTION UNDER SECTION 401 OF THE CSA WOULD BE SUBJECT TO A MAXIMUM FINE OF $250,000 FOR A FIRST-TIME VIOLATION. HOWEVER, IF THE SAME PERSON WERE CONVICTED OF THE CORRESPONDING OFFENSE OF UNLAWFULLY IMPORTING HEROIN UNDER SECTION 1010 OF THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT, THE MAXIMUM AUTHORIZED FINE WOULD BE $500,000. THE FINES THAT COULD BE IMPOSED UPON AN ORGANIZATION FOR THESE SIMILAR CRIMES ARE THE SAME -- $1,000,000. I SUGGEST THAT H.R. 5371 BE AMENDED TO AUTHORIZE A MAXIMUM FINE OF $250,000 FOR ALL FIRST-TIME OFFENSES INVOLVING THE UNLAWFUL IMPORTATION OF CONTROLLED SUBSTANCES BY INDIVIDUALS. THIS WOULD BE CONSISTENT WITH THE PENALTIES PROPOSED IN H.R. 5371 FOR UNLAWFUL DOMESTIC DISTRIBUTION OF THE MOST DANGEROUS CONTROLLED SUBSTANCES BY INDIVIDUALS AND ALSO CONSISTENT WITH THE PENALTY STRUCTURE OF H.R. 6915, 96TH CONGRESS.

SECOND, IN THE SAME VEIN AS ABOVE, H.R. 5371 WOULD PERPETUATE, AND EVEN EXACERBATE, THE DISPARATE PENALTY SCHEME THAT CURRENTLY APPLIES TO SUBSTANTIALLY SIMILIAR OFFENSES INVOLVING LARGE-SCALE MARIHUANA TRAFFICKING. AT PRESENT, THE UNLAWFUL DOMESTIC DISTRIBUTION OF MARIHUANA IN EXCESS OF 1,000 POUNDS IS PUNISHABLE BY A MAXIMUM SENTENCE OF 15 YEARS, A MAXIMUM FINE OF $125,000, OR BOTH, FOR A FIRST-TIME VIOLATOR. THE MAXIMUM PENALTIES FOR LARGE-SCALE MARIHUANA SMUGGLING, HOWEVER, ARE 5 YEARS, $15,000, OR BOTH. THIS DISCREPANCY WAS CREATED BY THE INFANT FORMULA ACT OF 1980 (P.L. 96-359) IN WHICH CONGRESS INCREASED THE PENALTIES FOR TRAFFICKING IN LARGE AMOUNTS OF MARIHUANA UNDER THE CSA BUT INADVERTENTLY FAILED TO INCLUDE COMPARABLE INCREASES UNDER CORRESPONDING PROVISIONS OF THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.

BECAUSE H.R. 5371 WOULD NOT CHANGE ANY OF THE MAXIMUM PRISON TERMS UNDER EXISTING LAW, THE BILL WOULD CONTINUE THE CURRENT DISCREPANCY IN PRISON SENTENCES THAT CAN BE IMPOSED FOR LARGE-SCALE MARIHUANA TRAFFICKING. THE BILL ALSO WOULD ESTABLISH A $500,000 FINE FOR INDIVIDUALS WHO SMUGGLE LARGE AMOUNTS OF MARIHUANA INTO THE UNITED STATES WHILE IMPOSING A LOWER FINE OF $250,000 ON INDIVIDUALS CONVICTED OF UNLAWFUL DOMESTIC DISTRIBUTION OF LARGE QUANTITIES OF MARIHUANA. THIS WOULD LEAD TO THE WHOLLY ILLOGICAL RESULT OF 15 YEAR/$250,000 MAXIMUM PENALTIES FOR THE DOMESTIC OFFENSE AND 5 YEAR/$500,000 MAXIMUMS FOR SMUGGLING, EVEN THOUGH THE CRIMES ARE ESSENTIALLY SIMILAR IN NATURE.

MR. CHAIRMAN, IN THE FIRST SESSION OF THIS CONGRESS, I INTRODUCED A BILL, H.R. 4413, TO RAISE THE PENALTIES FOR LARGE-SCALE MARIHUANA SMUGGLING TO THOSE THAT NOW APPLY TO LARGE-SCALE DOMESTIC

DISTRIBUTION. I URGE YOUR SUBCOMMITTEE TO AMEND H.R. 5371 TO INCREASE THE MAXIMUM PRISON TERM FOR SUCH MARIHUANA SMUGGLING BY INDIVIDUALS TO THAT PROVIDED UNDER CURRENT LAW FOR LARGE-SCALE DOMESTIC MARIHUANA DISTRIBUTION AND TO ESTABLISH THE SAME FINE OF $250,000 FOR BOTH OFFENSES. I REALIZE THAT H.R. 5371 FOCUSES ON REMOVING THE PROFITS FROM DRUG TRAFFICKING AND CONSEQUENTLY DOES NOT ALTER PRISON TERMS UNDER EXISTING LAW. THE CHANGE I AM PROPOSING, HOWEVER, WOULD MERELY CLOSE A LOOPHOLE CONGRESS INADVERTENTLY CREATED TWO YEARS AGO WHEN IT PASSED THE INFANT FORMULA ACT. RECOGNIZING THAT OVER 90 PERCENT OF THE ILLICIT MARIHUANA AVAILABLE ON THE U.S. MARKET IS SMUGGLED INTO THE COUNTRY, IT MAKES LITTLE SENSE TO PERPETUATE A STATUTORY SCHEME THAT ALLOWS LARGE-SCALE MARIHUANA SMUGGLERS TO ESCAPE WITH SUBSTANTIALLY LIGHTER PRISON SENTENCES THAN THEY WOULD BE SUBJECT TO IF APPREHENDED WITHIN THE UNITED STATES.

THIRD, ALTHOUGH H.R. 5371 FOLLOWS THE PATTERN OF CURRENT LAW BY DOUBLING THE FINES THAT MAY BE IMPOSED FOR SUBSEQUENT CONVICTIONS ON SOME MAJOR TRAFFICKING CHARGES (SUCH AS THOSE INVOLVING HEROIN, COCAINE, OR PCP), FINES FOR OTHER MAJOR TRAFFICKING OFFENSES (SUCH AS THOSE INVOLVING MARIHUANA AND METHAQUALONE) ARE NOT DOUBLED. I SUGGEST THE SUBCOMMITTEE CONSIDER MAINTAINING THE CURRENT STATUTORY SCHEME OF DOUBLING PENALTIES FOR SUBSEQUENT CONVICTIONS THROUGHOUT H.R. 5371.

FOURTH, SOME OF THE FINES PROPOSED UNDER H.R. 5371 ARE UNRELATED TO THE SEVERITY OF THE OFFENSE. FOR EXAMPLE, AN INDIVIDUAL CONVICTED OF UNLAWFULLY MANUFACTURING PCP IS SUBJECT TO A FINE OF $250,000, BUT AN INDIVIDUAL WHO COMMITS THE SEEMINGLY LESS SEVERE OFFENSE OF UNLAWFULLY POSSESSING PIPERIDINE, A PCP PRECURSOR, WITH

INTENT TO MANUFACTURE PCP FACES A $500,000 FINE. SIMILARLY, H.R. 5371 WOULD IMPOSE A $500,000 FINE UPON A REGISTRANT WHO VIOLATES THE DISTRIBUTION RESTRICTIONS OF HIS REGISTRATION OR OTHER REQUIREMENTS PERTAINING TO REGISTRATION, REPORTING, RECORDKEEPING, LABELING, PACKAGING, INSPECTION AND QUOTAS. THIS AMOUNT SEEMS DISPROPORTIONATELY HIGH CONSIDERING THE SEVERITY OF THE OFFENSE. THE SAME OFFENSE UNDER EXISTING LAW AND AS PROPOSED UNDER H.R. 6915, 96TH CONGRESS, IS PUNISHABLE BY A MAXIMUM FINE OF $25,000. EVEN MAJOR TRAFFICKING OFFENSES BY INDIVIDUALS UNDER H.R. 5371 ARE PUNISHABLE BY THE LOWER AMOUNT OF $250,000. I URGE THE SUBCOMMITTEE TO RECONSIDER THESE PROVISIONS OF H.R. 5371.

MR. CHAIRMAN, I THANK YOU AND THE MEMBERS OF YOUR SUBCOMMITTEE FOR THE OPPORTUNITY TO PRESENT MY VIEWS ON H.R. 5371. THIS BILL IS A SIGNIFICANT STEP IN OUR EFFORTS TO ATTACK THE FINANCIAL FOUNDATION OF THE DRUG TRADE, AND I COMMEND THE SUBCOMMITTEE FOR ITS ACTIONS ON THESE ISSUES.

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

March 12, 1982

Mr. Jeffrey Harris
Deputy Associate Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Harris:

In order to complete the hearing record on H.R. 5371, the Subcommittee would appreciate receiving responses to the questions on the enclosed sheet. In addition, we look forward to receiving the detailed comments on H.R. 5371 you promised us during the hearing.

Thank you in advance for your cooperation.

Sincerely,

William J. Hughes
Chairman
Subcommittee on Crime

WJH:dbc

Enclosure

QUESTIONS FOR FORFEITURE HEARING/DEPARTMENT OF JUSTICE

1. THE DOJ BILL AMENDS 18 U.S.C. 1963 TO REACH THE PROCEEDS OF RACKETEERING OR UNLAWFUL DEBT COLLECTION.
   (A) PLEASE INDICATE WHETHER THE PROCEEDS OF DRUG LAW VIOLATIONS ARE FORFEITABLE UNDER TITLE 21?
   (B) PLEASE INDICATE WHY IT IS NECESSARY TO AMEND CURRENT LAW TO OVERRIDE ANY CONTRARY STATE LAW PROVISIONS?
   (C) PLEASE DESCRIBE WHY IT IS NECESSARY TO DEFINE PROPERTY?
   (D) WHAT CASES IF ANY, HAS THE GOVERNMENT LOST AS A RESULT OF THE ABSENCE OF A DEFINITION OF PROPERTY IN CURRENT LAW?
   (E) DOES THE DEFINITION OF "PROPERTY" THAT IS SUBJECT TO FORFEITURE UNDER 18 U.S.C. 1963, AS AMENDED, INCLUDE A POSITION AS AN UNION OFFICER, A MEMBER OF A CORPORATE BOARD OF DIRECTORS, PARTNERSHIP STATUS, ELECTIVE OFFICE (IN STATE, LOCAL OR FEDERAL GOVERNMENT), AND ANY GOVERNMENT EMPLOYMENT?
   (F) DOES THE DEFINITION OF "PROPERTY" INCLUDE ANY MONEY OBTAINED REGARDLESS OF WHETHER THE CONTRACT OBTAINED THROUGH RACKETEERING ACTIVITIY WAS SATISFACTORILY PERFORMED?
2. THE DOJ BILL VESTS TITLE TO THE UNITED STATES AT THE TIME OF THE OFFENSE. THIS APPROACH APPEARS TO RESEMBLE IN REM FORFEITURE WHICH IS PREMISED ON THE GUILTY STATUS OF THE PROPERTY. IN LIGHT OF THE FACT THAT 18 U.S.C. 1963 (CRIMINAL FORFEITURE) IS IN PERSONEM IN NATURE WHAT IS THE JUSTIFICATION FOR APPLYING THIS CONCEPT OF CIVIL FORFEITURE TO THIS AREA OF CRIMINAL LAW?
   WHY IS THE VOIDING OF TRANSFERS MADE TO AVOID FORFEITURE (AS FOUND IN H.R. 5371) INADEQUATE TO PREVENT FRAUDULENT DISPOSITIONS OF PROPERTY?

QUESTIONS FOR FORFEITURE HEARING/DEPARTMENT OF JUSTICE CONT'D

3. THE DOJ BILL DOES NOT VEST ANY DISCRETION WITH THE JUDICIARY WITH RESPECT TO THE ADJUDICATION OF THE RIGHTS OF THIRD PARTIES. WHY NOT?
4. DO INNOCENT THIRD PARTIES HAVE A SEVENTH AMENDMENT RIGHT TO A JURY TRIAL WITH RESPECT TO THEIR PROPERTY CLAIMS ARISING OUT OF FORFEITURE PROCEEDINGS? IF SO, HOW IS THIS RESULT POSSIBLE UNDER THE DOJ BILL?
5. UNDER THE DOJ BILL IN ORDER TO OBTAIN RELIEF FROM A FORFEITURE ORDER A THIRD PARTY MUST PROVE BOTH INNOCENCE AND THAT THEY WERE A BONA FIDE PURCHASER FOR VALUE. WHAT STANDARDS WILL BE USED BY THE ATTORNEY GENERAL IN MAKING THESE DETERMINATIONS? WHAT PROCEDURES WILL BE CREATED TO HANDLE THESE CLAIMS?
6. THE DOJ BILL AUTHORIZES THE SEIZURE OF "SUBSTITUTE ASSETS". WHY IS THIS ALTERNATIVE PREFERABLE TO A DRAMATIC INCREASE IN THE MAXIMUM FINE LEVELS?
7. WHY IS THE BURDEN OF PROOF ON THE ADVERSE PARTY WHEN THE GOVERNMENT SEEKS A PRE-INDICTMENT RESTRAINING ORDERS? HOW DO YOU DISTINGUISH PRE-INDICTMENT RESTRAINING ORDERS AND TEMPORARY RESTRAINING ORDERS IN THE FORFEITURE CONTEXT FROM THE PROCEDURE REQUIRED UNDER RULE 65 OF TE FEDERAL RULES OF CRIMINAL PROCEDURE WITH RESPECT TO ALL OTHER "CIVIL" ACTIONS? IF THE CLAIM IS THAT THIS IS NOT A CIVIL ACTION, THEN HOW ARE THESE CASES DISTINGUISHABLE?
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September 25, 1981

Mr. Edward Dennis
Chief, Narcotics Section and
Dangerous Drugs
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Dennis:

During your appearance before the Subcommittee on Crime you indicated to the Committee that certain documents would be made available. First, you indicated in your testimony that the Department of Justice was in the process of developing forfeiture legislation. We would very much appreciate receiving your specific legislative proposals as soon as possible.

Second, in response to a question about the Department's suggestions concerning the establishment of a presumption in forfeiture cases you indicated a lack of knowledge concerning the possible impact of the Supreme Court's decision in the Ulster County Court, New York, vs. Allen on such a suggestion. At that time you promised to provide to the Subcommittee a legal analysis of the law of prosumptions which would reconcile the Department's position with the current constitutional requirements.

Finally, in response to a question during the hearing you acknowledged the existence of a study of forfeiture practices by the Department. You indicated that the study had been approved by the Drug Enforcement Administration and your section. You also indicated that you saw no problems with disclosure of this report. You also assured the Subcommittee that you would endeavor to obtain the report for the Subcommittee. We look forward to receiving this document in the near future.

Thank you again for your testimony on the important topic of forfeiture. I am looking forward to your prompt delivery of the promised documents.

Sincerely,

William J. Hughes
Chairman
Subcommittee on Crime

WJH:dbh

NOV 1 7 1981

U.S. Department of Justice
Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

13 NOV 1981

Honorable William J. Hughes
Chairman, Subcommittee on Crime
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of September 25, 1981, to Edward Dennis, Chief of the Narcotic and Dangerous Drug Section of the Criminal Division. In your letter, you requested the Department of Justice's legislative proposals concerning criminal forfeiture and a copy of a report detailing the Drug Enforcement Administration's efforts with regard to use of already existing drug forfeiture statutes. You also requested the Department's views on the constitutionality of the proposed "presumption of forfeitability" which had been presented for consideration by Mr. Dennis during his appearance before the Subcommittee.

Your request for a copy of the DEA study concerning the use of the continuing criminal enterprise statute (21 U.S.C. §848) and racketeer influenced and corrupt organizations statute (18 U.S.C. §1961, et seq.) was addressed in an earlier letter. A copy of the report will be forwarded to you as requested.

With regard to the Department's criminal forfeiture legislative proposals, attorneys in the Criminal Division are now refining a comprehensive legislative package to facilitate criminal forfeiture in both RICO and narcotics trafficking cases. The major contours of this proposal have been submitted to and approved by the Attorney General. Indeed, as you may be aware, the Attorney General, in his recent testimony before the Senate Judiciary Committee's Subcommittee on Crime, included this proposal among his major recommendations for legislation to improve our ability to fight serious crime. A copy of the Attorney General's testimony, which outlines the improvements in current law which we intend to include in the Department's criminal forfeiture proposal, is attached for your reference. As soon as the proposal has been reviewed by all affected components of the Department and has been cleared by the Office of Management and Budget, we will transmit a copy of the proposal to the Subcommittee.

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Regarding your question about the constitutional issues that may be posed by a "presumption of forfeitability," we have focused on this question in the course of developing our criminal forfeiture proposal. As Mr. Dennis noted in his testimony before the Subcommittee, some sort of statutory presumption of forfeitability of assets in narcotics trafficking cases would be very useful to us, and in drafting our criminal forfeiture proposal we considered the issue of including such a presumption in light of such cases as Ulster County Court v. Allen, 442 U.S. 140 (1978), Leary v. United States, 395 U.S. 6 (1968), and Tot v. United States, 319 U.S. 463 (1943).

These and other cases clearly indicate the vulnerability of criminal statutory presumptions to constitutional attack. However, it may be that this line of cases, which dealt with presumptions going to proof of an element of an offense, would not be directly applicable to the presumption of forfeitability we are considering since the issue of criminal forfeiture, although treated in some respects as though it were an element of an offense, is not an issue determinative of guilt or innocence. Instead, the question of criminal forfeiture, and thus any application of a presumption of forfeitability, arises only after there has been a determination of the defendant's guilt and is, both procedurally and substantively, akin to a sentencing determination. Therefore, it may well be that a less stringent test would be applicable to a presumption used in a criminal forfeiture proceeding than that articulated by the Court in the cases noted above where the constitutional validity of the presumption at issue had to be gauged in relation to its effect on the requirement that the government bear the burden of proving, beyond a reasonable doubt, all the elements of an offense.

Nonetheless, in our efforts to draft a presumption of forfeitability of assets, we have proceeded cautiously and attempted to develop a provision that would meet the requirements set out by the Court with respect to criminal statutory presumptions. Assuming that the cases noted above would be applicable to a presumption of forfeitability, may be that the presumption discussed during the course of Mr. Dennis' testimony would be considered a "mandatory presumption" under the Court's decision in Ulster County Court v. Allen, supra. Because of the constitutional difficulties posed by "mandatory" presumptions (at least when applied to proof of an element of an offense), we are now considering framing a presumption of forfeitability that would fall into the category of a "permissive" presumption as delineated in the Allen case.

In Allen, the Court held that a permissive presumption, i.e., one that permits, but does not require, the trier of fact to find the elemental fact upon proof of the basic fact, is constitutionally valid if there is a "rational connection" between the ultimate fact presumed and the basic fact proven, and if the presumed fact is "more likely than not" to flow from the proven fact. In the case of a "mandatory" presumption, however, the rational connection must meet a "beyond a reasonable doubt" test. Furthermore, under Allen, the constitutional validity of a mandatory presumption must be assessed by analyzing the statute "on its face," while the constitutionality of a permissive presumption is to be assessed as it is applied to the facts of a particular case. Thus, a permissive presumption has the advantage of not only being subject to a less stringent constitutional test, but also of being tested as applied.

While we have not yet reached a final decision on the specific form of a presumption of forfeitability that we may include in our criminal forfeiture proposal, we believe, for example, that language which provided that assets of a defendant could be presumed to be subject to forfeiture if the government established that the assets were acquired during the period the defendant engaged in the offense giving rise to the sanction of forfeiture and that the acquisition of the assets was beyond the legal means of the defendant would more than meet the Allen test for a permissive presumption. Such a presumption might be applied as follows: in a case in which the defendant was convicted of importing large amounts of cocaine, the government would establish that the assets in question were acquired by the defendant during the period he engaged in the importation and that the defendant had no legitimate source of income during that period whereby he could have acquired the assets; the jury would then be permitted to conclude that the assets were subject to forfeiture. Viewed in light of the facts presented in the case, the presumption (or, more accurately, the inference) that the assets constituted, or were derived from, the proceeds of the defendant's drug trafficking and thus subject to forfeiture, would not only be rationally based, it would also be "more likely than not" accurate, and thus meet the constitutional test set out in Allen.

An important element in assessing the constitutional validity of a presumption of forfeitability would be the existence of appropriate Congressional findings indicating the rationality of the presumption. As the Court noted in United States v. Gainey, 380 U.S. 63, 67 (1965):

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant

> weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it....[I]t is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress' resolution is appropriate.

Testimony given before the October 9, 1981, hearings by the House Select Committee on Narcotics Abuse and Control in Ft. Lauderdale, Florida, succinctly demonstrated the enormous amounts of money generated by drug-related activity and flowing into the hands of drug traffickers, while law-abiding citizens pay the resultant costs of higher crime and exacerbated inflation. Based upon such hearings, the Congress could make legislative findings that would make explicit the fact that drug trafficking is enormously profitable, as demonstrated daily by large asset seizures, defendants fleeing prosecution notwithstanding the forfeiture of substantial cash bonds, abandonment of boats and airplanes used in drug smuggling, and other acts evidencing the existence of substantial assets acquired from illegal drug activities. Similar findings could stress evidence of drug traffickers' efforts to mask the extent of their enormous wealth and to shelter their illegal assets in order to avoid the close scrutiny of their affairs by the Internal Revenue Service, as was also described to the Select Committee earlier this year. Such legislative findings would illustrate the "rational connection between [drugs and substantial assets]...in common experience," and also demonstrate that a presumption of forfeitability would bear a "rational relation to the circumstances of life as we know them." See Tot v. United States, supra at 467-8, whose "rational connection" test was cited with approval by the Court in Allen.

As stated above, our comprehensive legislative proposal relating to criminal forfeiture will soon be submitted to the Congress. When it is, I trust that it will be received favorably by the Subcommittee.

Sincerely,

D. Lowell Jensen
Assistant Attorney General
Criminal Division

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal to facilitate the forfeiture of property which is utilized in, and obtained as a result of, recketeering and major drug related crimes.

Organized group criminal activity and narcotics trafficking are among the gravest of our national crimes problems, and accordingly, the Department of Justice has given the highest priority to the enforcement of our racketeering and narcotics laws. In no small part, the persistence and pervasiveness of racketeering and drug trafficking is due to the economic power which is generated by and which maintains such criminal activity. Thus the effectiveness of society's efforts to punish and deter the commission of these offenses depends to a significant degree on our ability to deprive those engaged in organized crime and illicit drug trafficking of their sources of this economic power.

In 1970, in recognition of the importance of attacking the economic aspects of organized criminal activity and large scale drug trafficking, the Congress provided for the sanction of criminal forfeiture, in addition to the traditional penalties of fine and imprisonment, for violations of the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. 1961 et seq., hereinafter referred to as RICO) and the Continuing Criminal Enterprise statute (21 U.S.C. 848). More recently, Congress amended the civil forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C. 881) to provide for the forfeiture of all moneys used in illegal drug transactions and proceeds traceable to such exchanges. In enacting these provisions, Congress has provided us with important tools to combat racketeering and drug trafficking. However, the ability to achieve forfeiture of significant amounts of property used in, or produced by, racketeering activity and drug trafficking has been hampered by ambiguities in and limitations of current law with respect to the types of property subject to forfeiture and by the failure of current law to address some of the practical problems faced by federal prosecutors in obtaining forfeitures. It is the purpose of this legislative proposal to cure these problems.

The enclosed proposal is divided into three parts. Part A, which is comprised of section 101 of the proposal, amends 18 U.S.C. 1963, the provision of current law which sets forth the penalties, including criminal forfeiture, for the commission of the racketeering offenses described in 18 U.S.C. 1962. Part B amends the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.). Section 201 of Part B sets out a new generally applicable criminal forfeiture statute for all felony violations of the Act, and section 204 of Part B amends the civil forfeiture provisions of the Act (21 U.S.C. 881) to facilitate civil forfeitures. Most of the remaining amendments set out in Part B are minor clarifying or conforming amendments to existing drug laws. Part C establishes a two-year pilot program authorizing the Drug Enforcement Administration to set aside twenty-five percent of the proceeds of forfeitures under the Drug Abuse Prevention and Control Act out of which discretionary awards may be paid to persons providing assistance that results in a forfeiture under the Act.

The RICO criminal forfeiture amendments set out in 18 U.S.C. 1963, as amended by section 101 of the proposal, are designed to serve a number of purposes. The effectiveness of the present RICO criminal forfeiture statute has been limited by the fact that although upon conviction it clearly permits the forfeiture of enterprises, or interests in enterprises, which the defendant conducted, maintained, or acquired through the types of prohibited racketeering activity described in 18 U.S.C. 1962, it is questionable whether the statute permits the forfeiture of the proceeds generated through such activity. See, e.g., United States v. Martino, 648 F.2d 367 (5th Cir. 1981) (vacated in part, rehearing en banc pending), in which insurance proceeds obtained from an arson for profit scheme prosecuted under 18 U.S.C. 1962, were held not subject to criminal forfeiture under 18 U.S.C. 1963. As amended by section 101 of the proposal, 18 U.S.C. 1963 would address this problem by providing specifically that the proceeds of racketeering activity are subject to an order of criminal forfeiture. Other types of property now clearly subject to forfeiture under 18 U.S.C. 1963 are also described with greater specificity, in proposed subsection 1963(a)(2), and proposed subsection 1963(b) emphasizes that both real property and tangible and intangible personal property are subject to forfeiture, and that, in appropriate cases, forfeitable property may also include offices, positions, appointments, and compensation and benefits derived from such offices, as well as amounts paid under contracts awarded or performed through racketeering activity.

Section 101 of the proposal also amends 18 U.S.C. 1963 to address several of the practical problems we have encountered in attempting to achieve criminal forfeiture of property in RICO cases. Presently, the most significant of these problems arise from attempts by defendants to defeat forfeiture by concealing, transferring, and removing forfeitable property. Proposed subsection 1963(c) makes it clear that property becomes forfeitable to the United States upon the commission of the racketeering acts rendering the property subject to forfeiture, and that, therefore, subsequent transfers of such property to third parties will not bar forfeiture of the property to the United States. However, in order to protect the rights of third parties who may

have innocently purchased such property, this subsection would provide that these third parties could bar any disposition of forfeited property by the government by filing with the Attorney General an appropriate petition for remission or mitigation of the forfeiture.

Subsection (d) of 18 U.S.C. 1963, as amended by section 101 of the proposal, would permit the court to order the forfeiture of substitute assets of the defendant where the originally forfeitable property cannot be traced or located, has been transferred, removed or concealed, has been substantially diminished in value by the defendant, or has been commingled with other property that cannot be divided. Application of this provision would remove the opportunity for defendants to avoid the economic impact of forfeiture judgments by depleting, transferring, concealing, or removing the property prior to conviction.

Under current law, the courts have the authority to enter appropriate restraining orders and take other action to preserve the availability of property for criminal forfeiture, but this authority may be exercised only after the defendant has been formally charged with a violation of 18 U.S.C. 1962 that includes allegations that property is subject to criminal forfeiture as a result of that violation. Prior to indictment, however, subjects of an investigation involving a violation of the racketeering statute often become aware of the investigation and of the government's intent to seek forfeiture of property relating to the violation. Indeed, it is the Department's policy that the targets or subjects of a grand jury investigation generally be notified of the investigation so that they have an opportunity to appear before the grand jury. With this knowledge, defendants may act quickly to defeat any forfeiture by concealing, transferring, or removing the property. In light of this problem, subsection (e) of section 1963, as amended by section 101 of the proposal, would give the courts the discretion to enter appropriate restraining orders in the pre-indictment as well as post-indictment stages of the criminal case. A pre-indictment restraining order, however, would be limited to a term of ninety days, and must be based on a probable cause determination by the court and a finding that the need to maintain the availability of the property through the entry of the order has not been shown to have been outweighed by any substantial, irreparable harm to the affected parties. This proposed new subsection would also make clear the circumstances in which a temporary restraining order may be granted without prior notice to the affected parties. Such initial ex parte orders are necessary where the subject property can easily be transferred, concealed or removed even during the limited period of time that would elapse between the giving of notice to affected parties and the holding of a full hearing.

Subsections (f) and (g) of section 1963, as it would be amended by section 101 of the proposal, deal with the seizure and disposition of property that has been ordered forfeited. These subsections are largely based on the provisions of current 18 U.S.C. 1963, and practice that has developed under these provisions.

Proposed subsection (h) of section 1963 describes the authority of the Attorney General to grant petitions for remission or mitigation of forfeiture, return property to the victims of a violation of 18 U.S.C. 1962, and take other measures to protect the rights of innocent persons, to compromise claims arising from forfeiture actions, to award compensation to persons giving assistance leading to a forfeiture under 18 U.S.C. 1963, to take appropriate measures to dispose of property ordered forfeited, and to safeguard such property pending its disposition. Under current 18 U.S.C. 1963, these powers are to be exercised in accordance with the provisions of the customs laws. However, since RICO forfeitures often involve complex problems that are not adequately addressed in the customs laws, subsection 1963(i), as set forth in section 101 of the proposal, provides for the promulgation of regulations that would govern these matters.

In accord with current practice, subsection (j) of section 1963 as amended by the proposal, bars third parties with alleged interests in property that is the subject of a criminal forfeiture under RICO from intervening in the criminal case. In addition, subsection (j) is designed to promote the more orderly disposition of third party claims by requiring that third parties await filing any suits against the United States concerning any interest they may claim in property that has been ordered forfeited while the Attorney General is considering petitions for remission or mitigation of forfeiture or while the underlying criminal conviction is being appealed. This provision will encourage these persons first to seek appropriate relief in the context of a remission or mitigation petition. However, as provided in proposed subsection 1963(g), such third parties may stay any disposition of property during this period if they demonstrate that the intended disposition will work irreparable harm or injury to them.

Since criminal forfeiture is an in personam judgment against a defendant in a criminal case, the authority of the courts to enter orders with respect to property subject to forfeiture is not limited to property within the district in which the court is located. Subsection (k) of section 1963, as amended by section 101 of the proposal, simply makes the extent of the jurisdiction of the court in this respect clear.

The final subsection of the proposed revision of 18 U.S.C. 1963 simply authorizes the court to order the taking of depositions for the purpose of obtaining information to facilitate the location of property that has been ordered forfeited and the disposition of petitions for remission or mitigation of forfeiture.

Section 201 of Part B of the legislative proposal creates a new generally applicable criminal forfeiture statute for all felony violations of titles II and III of the Comprehensive Drug Abuse Prevention and Control Act. These violations represent the most serious drug trafficking offenses. Presently, the Continuing Criminal Enterprise statute (21 U.S.C. 848), which punishes those who control a group of five or more persons engaged in a continuing series of drug related crimes, is the only provision of title 21 which provides for the sanction of criminal forfeiture. While the civil forfeiture of most drug related property is permitted under 21 U.S.C. 881, there are important drawbacks to civil forfeiture that could be avoided if prosecutors had the option of seeking criminal forfeiture in major drug trafficking cases. Civil forfeiture is an in rem proceeding against the property itself, and thus a separate civil action must be filed in each district in which forfeitable property is located. Thus, in cases of large drug trafficking operations, it is often necessary to file separate actions in several jurisdictions, and pursue parallel proceedings in each jurisdiction although the basis for each proceeding rests on the same set of evidence. Criminal forfeiture, on the other hand, is an in personam proceeding against the defendant in a criminal case, and as is made clear in both sections 101 and 201 of the proposal, the jurisdiction of the court to enter orders affecting property subject to criminal forfeiture is not limited to property within the district in which the criminal case is tried.

Where the issues relating to civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, it seems a waste of valuable prosecutive and judicial resources to require separate civil forfeiture proceedings in each district in which forfeitable property may be located even though evidence presented in the criminal case will be largely dispositive of the civil forfeiture question. It is likely that the forfeiture of significant amounts of drug related property will be achieved most readily when the judge and jury considering the criminal case also consider the forfeiture issue, and when the prosecutor and investigators who have prepared the criminal case apply their enthusiasm and expertise to an aggressive pursuit of criminal forfeiture. Furthermore, it is often necessary to stay drug related civil forfeiture proceedings pending disposition of related criminal charges in order to avoid, in the context of the civil forfeiture proceeding, premature disclosure of the evidence that the government will produce in its prosecution.

In our view, a far more efficient mechanism for achieving the forfeiture of the proceeds of drug trafficking and of other property used in such violations is to permit criminal forfeiture of such property in the context of the criminal prosecution of the acts which in fact are the basis for forfeiture. Thus, in section 201 of the proposal, a new section 413 is added to the Comprehensive Drug Abuse Prevention and Control Act, which would

provide for the sanction of criminal forfeiture for felony violations of titles II and III of the Act. To the greatest extent practicable, the provisions of this general criminal forfeiture statute parallel the RICO criminal forfeiture provisions set out in section 101 of the proposal.

Subsection (a) of this new criminal forfeiture statute for major narcotics offenses describes the types of property which are to be subject to an order of criminal forfeiture. In addition to including the types of property now subject to criminal forfeiture under the Continuing Criminal Enterprise statute (21 U.S.C. 848), this section provides for the forfeiture of the proceeds of drug trafficking offenses and for the forfeiture of other types of property which are used in the commission of these offenses. In essence, these same types of property are now, and would continue to be, subject to civil forfeiture under 21 U.S.C. 881(a).

The proposed new criminal forfeiture statute for major drug offenses has provisions like those in the proposed amendment of the RICO criminal forfeiture statute concerning the forfeitability of property that has been transferred to third parties, the authority to order the forfeiture of substitute assets of the defendant in cases where property originally subject to forfeiture has been concealed or transferred, can no longer be traced, or has otherwise been rendered unavailable at the time of the defendant's conviction and the entry of the order of forfeiture, and the authority to obtain appropriate orders to preserve the property pending conviction both at the pre- and post- indictment stages of the criminal case. As noted above, such provisions are essential to address the recurrent problems of attempts by defendants to defeat forfeitures by disposing of forfeitable property prior to conviction.

In addition, the new criminal forfeiture statute for drug offenses set out in section 201 of the proposal incorporates provisions like those in the RICO forfeiture amendments in Part A of the proposal which bar intervention in the criminal case by third parties and require third parties with interests in forfeitable property to refrain from filing civil suits concerning property ordered forfeited until after disposition of any petitions for remission or mitigation of forfeiture, which make clear the broad jurisdiction of the courts to enter orders with respect to forfeitable property, and which provide for the taking of depositions to obtain testimony and documents that will assist in locating property that has been ordered forfeited and in the dispostion of petitions for remission or mitigation of forfeiture. In most respects, the provisions for the disposition of drug related property ordered forfeited under this proposed statute are similar to those set out in the RICO amendments of Part A of the proposal. However, the details of these matters will continue to be governed by the customs laws, as is now provided for criminal forfeitures under the Continuing Criminal Enterprise statute and for civil forfeitures of drug related property under 21 U.S.C. 881.

The proposed criminal forfeiture statute for drug offenses set out in section 201 of the proposal contains two subsections not incorporated in the amendments to the RICO forfeiture provisions of 18 U.S.C. 1963. First, subsection (e) of the narcotics criminal forfeiture statute provides for a rebuttable and permissive inference that property which is acquired by the defendant during, or within a reasonably related time after, the commission of the offense is property subject to forfeiture, if the defendant's apparent legal sources of income during that period were not sufficient to explain his acquisition of the property. The extremely lucrative nature of drug trafficking is well documented, and indeed is a primary reason why forfeiture of the proceeds of drug transactions is necessary to effectively punish and deter such criminal activity. But the proceeds of drug trafficking are usually in the form of cash or other liquid assets which are often difficult to trace to a specific transaction. The inference described in this subsection is designed to address this tracing problem, and is supported by a strong rational basis. Furthermore, inasmuch as the inference is permissively phrased, its application is not mandated where the facts of a particular case make the validity of its application questionable.

Subsection (g) of the new criminal forfeiture statute proposed in section 201 provides authority to obtain a warrant of seizure, based on a probable cause showing, where it appears that a restraining order would not be sufficient to preserve the availability of the property pending the conclusion of the criminal case. As noted above, the types of property subject to forfeiture in narcotics cases are often proceeds which are easily moved or concealed, or are highly liquid. This subsection recognizes that with respect to such property, a restraining order alone may be insufficient to assure that the property will be available in the event that the defendant is convicted and the property is ordered forfeited.

In addition to certain clarifying and conforming amendments, Part B of the proposal also amends, in section 204, 21 U.S.C. 881, the provision of the Drug Abuse Prevention and Control Act which both governs civil forfeitures of drug related property and provides for the disposition of property forfeited either civilly or criminally under the Act. The first of the substantive amendments to 21 U.S.C. 881 set forth in section 204 of the proposal adds to the list of property subject to civil forfeiture real property which is used in a felony drug offense. This provision would give clear authority for the forfeiture of property such as warehouses in which illicit drugs are stored or lands on which controlled substances are cultivated.

The second substantive change in 21 U.S.C. 881 would be the addition of a new subsection (i) that would provide for the stay of civil forfeiture proceedings when a criminal action involving the forfeiture of the same property has been filed. Even though the criminal forfeiture statute proposed in section 201 of the proposal would diminish the need to proceed with civil forfeiture actions, there will continue to be cases where it will be proper to commence a civil forfeiture proceeding, although it may eventually be

superseded by a prosecution in which criminal forfeiture may be sought. This situation might occur, for example, where a defendant has fled to avoid prosecution. While he is a fugitive, it would be advisable to move against his forfeitable property civilly, but if he were located and arrested it would then be appropriate to stay the civil forfeiture proceedings pending disposition of the criminal case both to avoid the inefficiency of dual consideration of issues relating both to criminal conviction and forfeiture, and, as noted above, to avoid premature disclosure of the government's case in the context of the civil forfeiture proceeding.

The final part of the proposal, section 301, establishes, for a two-year trial period, a program for the set aside of twenty-five percent of the amounts realized by the United States from forfeitures under the Drug Abuse Prevention and Control Act which are to be available for the payment of awards for information and other assistance that result in such forfeitures. The Administrator of the Drug Enforcement Administration would have the discretion to determine whether an award was merited in a particular case and to set the amount of the award within an upper limit for each case of the lesser of $50,000 or twenty-five percent of the proceeds of the forfeiture. Under this program, payments could be made to either private individuals or entities other than agencies or instrumentalities of the United States. We believe that the ability to pay significant rewards would enhance our efforts to achieve larger forfeitures of drug related property, and that it is particularly appropriate that these rewards be paid out of, and linked in amount to, the money we in fact realize from forfeitures.

Until recently, 21 U.S.C. 881 provided for the payment of rewards for information leading to forfeitures under the "moiety" provisions of the customs laws (19 U.S.C. 1619). However, the utility of the moiety provisions was limited because of court decisions construing these provisions as creating an absolute entitlement or contract right to payment and suggesting that calculation of the amount of these payments was to be based not only on the proceeds actually realized by the United States in a forfeiture action, but on the value of forfeited controlled substances as well. In response to these problems, 21 U.S.C. 881 was amended in 1979 to remove the reference to the moiety provisions. The trial program that would be established under section 301 of the proposal restores the authority to pay rewards out of a portion of the proceeds of forfeitures and avoids the problems posed by the former moiety provisions. Furthermore, as a trial program with requirements of detailed audits and semiannual reports to the Attorney General and annual reports to the Congress, it would provide an opportunity for close study of the effectiveness of such a rewards program and for ascertaining any problems that may arise in its implementation.

In sum, it is our view that the enclosed legislative proposal would significantly improve the government's ability to separate racketeers and major drug offenders from their sources of economic power by obtaining the forfeiture of the property which they derive from and use to sustain their criminal activity. Without such tools, efforts to combat the increasingly serious problems of organized crime and illicit trafficking in dangerous drugs cannot be fully effective.

The Office of Management and Budget advises that submission of this proposal is consistent with the Administration's objectives

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

CRIMINAL FORFEITURES UNDER THE RICO AND CONTINUING CRIMINAL ENTERPRISE STATUTES

(TITLE 18 UNITED STATES CODE, SECTIONS 1961-1968
AND
TITLE 21 UNITED STATES CODE, SECTION 848)

PREPARED BY

DAVID B. SMITH
EDWARD C. WEINER

CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

NOVEMBER, 1980

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INTRODUCTION

The criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organization ("RICO") statute, 18 U.S.C. 1961-1968, and the Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. 848, are among the most powerful tools the government has for combating organized crime, white collar crime and narcotics trafficking. The RICO and CCE statutes were both enacted in 1970 and reflected a new economic approach to the problem of large-scale group criminality. The then Attorney General, in testimony before a Senate subcommittee on the proposed RICO statute, stated:

> While the prosecution of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.

S. Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1969). The Senate Report reflected the same point of view (id. at 79):

> What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which these individuals constitute such a serious threat to the well-being of the nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

The language and legislative history of 21 U.S.C. 848 indicate that it was modeled upon the RICO statute, which had been enacted into law shortly before.

It is official Department policy that forfeiture should be vigorously sought in every RICO or CCE prosecution where substantial forfeitable property exists and there is a reasonable likelihood of success.

The purpose of this manual is to provide guidance on how to obtain criminal forfeiture under the two statutes. A number of questions of statutory interpretation not answered by the relatively few reported cases, as well as practical problems associated with criminal forfeiture, will be addressed. The Appendix to the manual contains model forms that, it is hoped, will prove useful but not freeze government pleadings into a rigid mold. For the convenience of the reader, the forfeiture provisions of the RICO and CCE statutes and the procedural provisions of 21 U.S.C. 881 are reprinted at Appendix A. 1/

All RICO and CCE prosecutions require the authorization of the Criminal Division. U.S.A.M. 9-110.101 and 9-2.133(d) and (s). With the publication of this manual, all prosecutors seeking such authorization will be required to provide the Division with information concerning the property they will seek to forfeit and the estimated likelihood of success, or an explanation of why they do not intend to pursue such forfeitures. It is expected that prosecutors will use the forfeiture provisions of the two statutes to the maximum extent consistent with good judgment.

1/ Those prosecutors who feel they have additional insights into the problems addressed in the manual, or who are aware of other cases that should be discussed, are urged to share this information with us so that an improved second edition can be published. Call David Smith at (FTS) 633-3675.

I

CHOICE OF STATUTE: CIVIL OR CRIMINAL FORFEITURE?

Under 18 U.S.C. 1963(a), a person who is convicted of violating the RICO statute forfeits 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.

If illegal drug trafficking is not involved, the RICO statute is the only general purpose forfeiture statute available.

However, in drug cases the prosecutor will often have a choice of seeking criminal forfeiture under the CCE statute or civil forfeiture under 21 U.S.C. 881. Under 21 U.S.C. 848(a)(2), any person who is convicted of engaging in a continuing criminal enterprise forfeits 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.

Effective November 10, 1978, Congress added subsection (a)(6) to the civil forfeiture provisions of 21 U.S.C. 881. It 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 in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used to facilitate any violation of this title * * *.

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The November, 1978, amendment provided considerable impetus to forfeitures in the narcotics area. Seizures by the Drug Enforcement Administration under Section 881 in fiscal year 1980 exceeded $30 millon, of which completed forfeiture has been obtained of $5 million. A general discussion of Section 881 forfeiture is beyond the scope of this manual. Prosecutors contemplating a forfeiture action under Section 881 should consult a publication of the Narcotic and Dangerous Drug Section entitled Forfeitures Pursuant to 21 U.S.C. 881. Another helpful publication is DEA Legal Comment No. 17 (issued November 20, 1978), which contains an analysis of the term "proceeds" as used in Section 881(a)(6). DEA's Office of Chief Counsel is also preparing more extensive materials on Section 881 forfeiture.

As far as forfeiture is concerned, proceeding under Section 881(a)(6) is preferable in a number of ways. In the first place, it allows for the seizure of the tainted property prior to trial, thus preventing the defendant from transferring or dissipating his assets in an attempt to frustrate the government's forfeiture action. 2/ The second important advantage is the lower standard of proof applicable in a civil forfeiture proceeding. The third advantage derives from the difference between "profits" and "proceeds." It is easier to prove proceeds than net profits and the total forfeiture obviously will be greater

2/ Under Section 881, property may not only be seized prior to trial, but also prior to any judicial action. See 21 U.S.C. 881(b)(4). However, prosecutors ordinarily should take the precaution of filing an ex parte motion for issuance of a warrant of seizure pursuant to Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure.

where it encompasses all proceeds rather than merely profits. 3/ There will be some cases where the defendant is a fugitive but has large, identifiable assets derived from drug proceeds. Since he cannot be convicted, usually the only way to forfeit the assets will be through a civil forfeiture action under 21 U.S.C. 881. There are, however, also certain drawbacks to using Section 881 as opposed to Section 848. In the first place, two lawsuits rather than one will be required. Also, unless the civil forfeiture action is stayed pending the outcome of the criminal prosecution, it may result in the disclosure of the government's criminal case and may place government informants in jeopardy. 4/

3/ In United States v. Jeffers, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part, vacated in part, Jeffers v. United States, 432 U.S. 137 (1977), the court took notice of "the extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." However, it will probably suffice to prove that a drug dealer bought a quantity of narcotics for, let us say, a million dollars and sold them for approximately three million dollars, based on the known wholesale or street value of the drug. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were. In United States v. Mannino, 79 Cr.744 (S.D.N.Y. 1980), the government took the position that the defendant could argue such overhead expenses to the jury, but that the government need not adduce any proof in that regard. The court (Judge Robert W. Sweet) accepted this position, and the government was therefore able to establish Mannino's drug profits quite easily on the basis of a ledger that was seized during a search of his house. A number of documents from the Mannino case are reprinted at Appendix I to this manual as examples of forms that may be used at different stages in a forfeiture case. Those desiring further information about the case may call AUSA Stewart Baskin at (FTS) 662-1949.

4/ If a civil forfeiture action is merely delayed until the end of the related criminal proceeding, it may be barred on due process grounds because of the length of time between the deprivation of property and a judicial determination of its legitimacy. However, in the government's view, the appropriate remedy is merely the interim return of the seized property, not dismissal of the civil forfeiture action. This issue is extensively discussed in the Government's brief in opposition in Laurenti, et al. v. United States, No. 78-988. Such problems may be avoided by seizing the assets and instituting the civil forfeiture action, and thereafter requesting a stay and an order sealing the necessary documents pending the resolution of the criminal case. When both civil and criminal proceedings arise out of the same or related transactions, the government is, as a general rule, entitled to a stay of discovery in the civil action until disposition of the criminal matter. Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962); United States v. One 1967 Buick Hardtop Electra, 304 F. Supp. 1402 (W.D. Pa. 1969); United States v. One Ford Galaxie, 49 F.R.D. 295 (S.D. N.Y. 1970); United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (S.D. N.Y. 1966).

Finally, and perhaps most importantly, Section 848 forfeiture enables the government to reach certain property not within the scope of Section 881. Section 848(a)(2)(B) reaches any of the defendant's "interest in, claim against, or property or contractual rights of any kind affording a source of influence over" the enterprise. 5/ This provision allows the government, for example, to seek the forfeiture of real property and buildings where drugs are stored. Such property could not be reached under Section 881 unless it was purchased with money forfeitable under Section 881(a)(6).

It should also be noted that seeking the civil forfeiture of assets acquired with the proceeds of narcotics transactions prior to November 10, 1978, the effective date of Section 881(a)(6), raises a difficult ex post facto question. 6/ This question has not yet been addressed by case law.

5/ The language of Section 848(a)(2)(B) was taken word for word from 18 U.S.C. 1963(a), the RICO forfeiture provision.

6/ While the Supreme Court has held that the ex post facto provision of the Constitution does not apply to civil proceedings, Harisiades v. Shaughnessy, 342 U.S. 580, 594-595 (1952), the courts have frequently adopted a rule of statutory construction under which civil legislation that alters substantive rights will be considered prospective only, unless the contrary intention is unequivocally manifested by the legislature. E.g., Green v. United States, 376 U.S. 149, 160(1964); Popkin v. N.Y. State Health & Mental Hygiene, Etc., 547 F.2d 18, 20 (2d Cir. 1976).

II.

HOW TO OBTAIN A CRIMINAL FORFEITURE

1. Conducting a Financial Investigation

A. The importance of conducting a prompt and thorough financial investigation in criminal forfeiture cases cannot be over-emphasized. There will be relatively few cases in which significant forfeitures can be obtained without such a financial investigation. 7/ A preliminary investigation to determine what property would be subject to forfeiture may be required simply in order to obtain Departmental authorization for a RICO or CCE prosecution.

Even when a financial investigation does not lead to significant forfeitures, it may well be worthwhile. In the first place, it provides intelligence on the criminal organization involved that could be helpful in further investigations. Second, tracing the profits of an illegal enterprise may lead to the identification of the well-insulated managers or financial backers. Third, financial data can be most effective in proving the government's case in court. A judge or jury may not be impressed by the fact that a defendant sold two kilos of cocaine or heroin. But when they are told of the millions of dollars in profit from such drug sales and shown pictures of luxurious homes, boats and cars bought with those profits, they understand the magnitude of the business and the incentives for carrying it on. Finally, evidence of vast illegal incomes has also helped prosecutors explain to the court the need for setting a high bail and the

7/ However, there are probably some important forfeiture cases that could be made with a relatively simple investigation. We should not assume that the typical "big-time" criminal has carefully hidden or laundered his ill-gotten gains. For a fine example of a relatively simple, yet extremely successful RICO prosecution involving a huge forfeiture, see Magarity, RICO Investigations: A Case Study, 17 Am. Crim. L. Rev. 367 (1980). This article gives one a good idea of the power of the RICO statute to root out organized crime and corruption.

propriety of a lengthy sentence. On occasion, bail has been set too low to provide a deterrent to flight by big narcotics traffickers who, as a result, have escaped justice.

Criminal investigations do not follow any fixed pattern. Each tends to have a life of its own, dependent to a large extent on circumstances peculiar to the individual case. It is therefore impossible to lay down a simple series of steps to follow in conducting a financial investigation. Nor is this the appropriate place to provide detailed information on investigatory techniques. 8/ All that we will attempt to do here is to provide a number of suggestions that we believe will prove helpful in conducting a financial investigation aimed at obtaining criminal forfeitures.

B. It is recommended that the prosecutor or case agent who is in charge of the investigation call a meeting of local law enforcement agency representatives at the outset in order to learn what information is available, to map out an investigative strategy and to divide up the work.

If at all possible, IRS should be brought into the investigation in order to utilize its unique expertise. Even if a joint tax/non-tax grand jury is not available, IRS may be able to lend its assistance. An IRS special agent is already detailed to each of the DEA's CENTAC units and to many of its Mobile Task Force units -- the investigative teams directed at the most sophisticated, complex drug conspiracy cases. A number of prosecutors have obtained tax returns and much other useful financial information by simply subpoenaing the records of the defendant's accountant. Many prosecutors have been discouraged from directly seeking IRS assistance and, consequently, from pursuing complex

8/ The Narcotic and Dangerous Drug Section is preparing a manual on how to conduct financial investigations in drug cases. This manual will provide detailed guidance to prosecutors and investigators.

financial investigations, by the extensive procedural mechanisms initially established under the Tax Reform Act of 1976. Obtaining either tax information or approval for joint tax/non-tax grand jury investigations from the IRS has been time-consuming. However, IRS has recently simplified and streamlined both procedures. 9/ As a result, the amount of time and effort needed to obtain tax information and joint grand jury authorization has been greatly reduced. Although a joint grand jury investigation will not be appropriate in every case, the expedited tax information disclosure procedure should now be utilized in virtually all forfeiture cases.

C. The grand jury subpoena is, of course, the prosecutor's most powerful tool in conducting a financial investigation. The Supreme Court's landmark decision in Fisher v. United States, 425 U.S. 391 (1976), permits the law enforcement community to pursue complex white collar crimes aggressively. Subpoenas duces tecum can be served upon every financial institution with which the target of the investigation transacts business, and, of course, upon the target himself, his accountants, secretaries and corporate officers. In cities where chain banks prevail, it is relatively easy to discover the location of the target's bank accounts by subpoenaing the information from each bank chain in the area. Prosecutors should also not neglect the possibility of subpoenaing telephone toll records. They could be particularly useful in proving that a legitimate business is being used as a front for racketeering activities, thereby subjecting the business to forfeiture under RICO.

9/ See the June 9, 1980, DOJ Memorandum entitled "Obtaining Information and Assistance from the Internal Revenue Service," which is reprinted at Appendix B. This memorandum provides information on how to initiate a request for a Title 26 grand jury and how to obtain tax information from IRS.

Grand jury subpoenas are exempt from the provisions of the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq. 10/ See 12 U.S.C. 3413(i) and 3420. The five information request methods spelled out in the Act at 12 U.S.C. 3402 all require notice to the customer of the law enforcement inquiry. Therefore, in cases where speed and confidentiality are necessary, a grand jury subpoena may be a preferable alternative. Where the investigators want to obtain information at a time when a grand jury subpoena is not available, the provision to be aware of is 12 U.S.C. 3409, which allows the government to apply for an ex parte court order delaying notice to the customer for a period up to ninety days. Extensions of the delay of notice for additional periods of up to ninety days may be granted by the court. 11/

D. Another important statute in the area of criminal financial investigations is the Bank Secrecy Act of 1970. Designed to pierce bank secrecy, the Act was passed by the same Congress that enacted the RICO and CCE statutes. It

10/ The Act establishes complex procedural restrictions on the obtaining of information by federal law enforcement agencies from private financial institutions. The U.S. Attorneys' Manual contains a lengthy section on the Right to Financial Privacy Act. It should provide all the detailed information prosecutors need on the subject. Because the Act is complex and subject to various interpretations, it is essential that prosecutors familiarize themselves with that material. See U.S.A.M. 9-4.800 to 9.4.880 and particularly the Supplement issued on September 21, 1979, which was also distributed as a memorandum. A new revision of the material is underway. Any questions concerning the Act may be addressed to Cary Copeland in the Criminal Division's Office of Legislation, (FTS) 633-4182.

11/ It would be useful to make area banks aware of 12 U.S.C. 3403(c), which provides that nothing in the Act "shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation."

There are many public spirited bankers who would be happy to assist the government in discovering and prosecuting crime, even if it means the loss of an account. There is no reason why U.S. Attorneys should not do all within their ability to encourage banking institutions to play an important role in this endeavor. The U.S. Attorneys' Manual explains precisely what information banks may provide on their own initiative under 12 U.S.C. 3403(c).

was, in fact, the third prong in a coordinated assault on the economic base of organized crime. Congress concluded that criminals tend to deal in cash and that the deposit or withdrawal of large amounts of currency or its movement abroad could lead to the identification of criminal activity. Under the Act, the Treasury Department has issued regulations requiring financial institutions to report unusual currency transactions in excess of $10,000 and requiring the public to report the international transportation of currency in excess of $5,000. All of the federal bank supervisory agencies, the SEC, IRS, and the Customs Service have been given responsibilities for assuring compliance with the regulations.

In order to use the criminal forfeiture statutes effectively, it is essential that the law enforcement community make an effort to become familiar with the Bank Secrecy Act and with the vital information it can provide. Some of the biggest narcotics conspiracies have been uncovered because of the data that banks are required to report under the Act. The Narcotic and Dangerous Drug Section has prepared a monograph entitled Narcotics Prosecutions and the Bank Secrecy Act, which is reprinted at Appendix C. It contains a detailed description of the Act's provisions and case law interpreting them, as well as the kinds of financial information the Act makes available to law enforcement agencies and instructions on how to obtain that information. Since the monograph was written, the Treasury Department's computer analysis techniques have been improved and strict new reporting regulations (31 C.F.R. Part 103) effective July 7, 1980, have been issued. See Federal Register, Vol. 45, No. 10 (June 5, 1980), pp. 37818 ff. 12/ The computerized combination of Treasury's bank data

12/ The new regulations enhance the Treasury Department's capability to monitor and assure compliance with the Currency and Foreign Transactions Reporting Act (Title II of the Bank Secrecy Act) with regard to possible illegal or improperly reported flows of currency in the United States and abroad.

with DEA's narcotics trafficking information, already well advanced, would seem to promise significant results.

While the Bank Secrecy Act provides the government with a vast amount of useful information, it is important to be aware of the Act's limitations. In a typical laundering operation money is wire-transferred from the U.S. bank account of a dummy corporation to a bank in the Caribbean. Once the money is in an off-shore bank, it can be sent back into the U.S. without leaving a paper trial. There are many ways to accomplish this. For example, the money might be transferred to the U.S. bank account of a different domestic front corporation using a false loan document that not only explains the money transfer, but also makes it appear exempt from U.S. income taxes. The laundered money can then be used to invest in legitimate businesses or real estate. In December, 1979, Congressional testimony, a real estate economist estimated that a billion dollars of drug money was invested in Florida real estate alone in 1977 and 1978.

The major loophole in the Treasury regulations issued pursuant to the Bank Secrecy Act is that they do not require banks to make reports of large sums of money that are wire-transferred in and out of the country. The sheer volume of wire transactions would make such a reporting requirement impractical. To be sure, the Act's record keeping requirements (Title I) insure that bank records of such wire-transfers will exist. The problem is that they are unlikely to come to the attention of the law enforcement community. 13/

13/ The government is trying to increase its knowledge of how criminal assets move through the off-shore banking system. An Interagency Study Group on International Financial Transactions is seeking to coordinate the information collected by federal agencies on such transactions and to increase the dissemination of such information to law enforcement agencies.

The government is also attempting to breach the cover that foreign banking laws provide through the signing of Mutual Judicial Assistance Treaties with foreign countries. One such agreement with Switzerland is already in force; agreements with Turkey and Colombia have been signed but not yet ratified; and a fourth agreement with the Netherlands is being negotiated.

E. Because we have focused on "sophisticated" and somewhat esoteric investigative techniques, we should add that prosecutors ought not to overlook the simple, mundane ways to obtain relevant financial information. The most obvious technique would be to question and, if possible, obtain the cooperation of individuals who know where the organization's profits have been hidden or invested. A lower level corporate officer or a secretary might fit the bill. Real estate transactions can be traced by checking the grantee/grantor index at the county records office. Much corporate information is also publicly available in state or local record offices. Simple physical surveillance of the key defendants may disclose the location of a business or a bank account previously unknown.

A list of names and telephone numbers within the federal law enforcement/intelligence community that may be helpful to those conducting financial investigations can be found at Appendix D.

2. Giving Specific Notice in the Indictment

Rule 7(c)(2) of the Federal Rules of Criminal Procedure provides:

> No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

The present version of the Rule is the result of a 1979 amendment designed to clear up the confusion created by the decision in United States v. Hall, 521 F.2d 406 (9th Cir. 1975), which applied the Rule to a forfeiture under 18 U.S.C. 545. 14/ The Notes of the Advisory Committee state that the Rule "is intended

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14/ Hall also indicated that the appropriate "remedy" for failing to include a forfeiture clause in the indictment was dismissal of the indictment rather than merely barring forfeiture. However, a subsequent Ninth Circuit decision cast doubt upon the validity of Hall even within that circuit. United States v. Bolar, 569 F.2d 1071 (1978).

to apply to those forfeitures which are criminal in the sense that they result from a special verdict under Rule 31(e) and a judgment under Rule 32(b)(2), and not to those resulting from a separate in rem proceeding." In other words, the Rule applies only to forfeitures sought under RICO or Section 848.

Another result of the Hall decision was a memorandum dated April 20,1976, from then Assistant Attorney General Richard Thornburgh, advising prosecutors that an indictment brought under RICO or Section 848 "should contain a forfeiture paragraph regardless of whether the government intends to seek forfeiture of property." This memo is no longer persuasive and it should not be followed. 15/ However, the indictment should include a paragraph where, for example, the prosecutor may want to seek forfeiture but does not yet know whether there are forfeitable assets. In such a case a catch-all forfeiture paragraph tracking the language of the forfeiture provisions of RICO or Section 848 should suffice. 16/ Of course, compliance with Rule 7(c)(2) should be in as specific terms as possible. Several model indictments can be found at Appendix E.

There is one other point that needs to be made here. In drafting a RICO indictment, you should be aware of the way in which your characterization of the "enterprise" may determine the scope of the forfeiture permitted by the court. In United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979), which involved a huge pornography empire operating through several corporate entities controlled by Thevis, the government characterized the "enterprise" as "a group of persons

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15/ The Thornburgh memo will be deleted from the U.S. Attorneys' Manual, where it is now found at 9-100.280 (January 10, 1977), pp. 37-38.

16/ In United States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976), the court held that a Section 848 indictment seeking forfeiture of "all profits, interest in, claims against or property or contractual rights" that the defendant obtained from his participation in the continuing criminal enterprise provided sufficient notice under Rule 7(c)(2). Id. at 1318-1319 n. 17. Compare United States v. Smaldone, 583 F.2d 1129, 1133 (10th Cir. 1978).

associated in fact with various corporations to operate a pornography business through unlawful means." The district court adopted a restrictive view of the scope of the enterprise, based on a literal reading of the indictment. Thus, in the district court's view, contained in an unpublished decision, the "enterprise" was not Thevis' pornography business, but rather a conspiracy formed for the purpose of operating that business "through unlawful means." Based on this reading, the court concluded that only those business assets that could be directly linked to specific acts of racketeering were subject to forfeiture. Consequently, the only property the court deemed forfeitable were two pieces of realty upon which Thevis' competitors happened to have been murdered. This result might have been avoided had the indictment charged that the various pornography companies constituted the RICO enterprise. While the Thevis court's view in this regard is unlikely to be followed elsewhere, the decision is a salutary reminder that forfeiture indictments should be drafted with great care.

3. Restraining Orders and Performance Bonds

18 U.S.C. 1963(b) provides:

> 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.

The Continuing Criminal Enterprise statute contains a nearly identical provision, 21 U.S.C. 848(d). It is the government's position that any transfer of assets contrary to the provisions of a restraining order is null and void. This position

was accepted by the district court in United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert denied, No. 79-896 (March 17, 1980), which is discussed at p. 31, infra. See also Appendix H.

Prosecutors should normally seek a restraining order at the time the indictment is returned or immediately thereafter. There are few published opinions in this area. 17/ The case law consists of three published district court decisions, all dealing with the claim that the entry of a restraining order would be inconsistent with the presumption of innocence. United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), and United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979), rejected the defendant's claim, declaring that a defendant was "no more stripped of the presumption of innocence by [a] restraining order than would be the case were he required to post bond." 408 F. Supp. at 1015. See 470 F. Supp. at 724-725. 18/ However, in United States v. Mandel, 408

17/ One of the unanswered questions is whether notice to the defendant and/or interested third parties should be given. Some prosecutors have obtained ex parte restraining orders, while others have given notice. We believe that notice should clearly not be given if it would allow the defendant to transfer his assets before a restraining order can be issued. There is no due process problem because the defendant can then ask the court to modify or remove the restraining order.

As far as we are aware, performance bonds have not yet been used, despite the fact that they would appear to be a practical and effective way to assure compliance with a restraining order, or, indeed, a good substitute for a restraining order. For an idea of how they operate, see 18 U.S.C. 3617(d).

18/ In Bello, the court also rejected the defendant's claim that the restraining order would prevent him from raising the money needed to hire an attorney and thus deprive him of the right to counsel. The court pointed out (id. at 725) that Bello would still be entitled to court-appointed counsel if he had no means to hire an attorney. In United States v. Meinster, et al., No. 79-79-165-Cr-JLK (S.D.Fla. 1980), the "Black Tuna" case, the court took the opposite position and permitted most of the forfeitable assets to be sold to raise attorneys' fees.

F. Supp. 679, 682-684 (D. Md. 1976), the district court reached the opposite conclusion. Its opinion would render the restraining order provision of the RICO statute virtually useless except as a post-verdict device. The reasoning of the Mandel decision can readily be countered, however. If the government can incarcerate a person prior to trial to insure his appearance, it surely may restrain that individual from alienating property subject to forfeiture in order to insure that the property remains available to be forfeited. "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it has no application to a determination of the rights of a pretrial detainee," Bell v. Wolfish, 441 U.S. 520, 533 (1979), or to the rights of a property owner whose property may be subject to forfeiture.

The final point we wish to make here is that Section 1963(b) gives the court broad authority to take "such other actions * * * it shall deem proper," in addition to issuing a restraining order and/or establishing a performance bond. In United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978), this authority was used to place a labor union and a district labor council in trusteeship pending the outcome of the trial. 19/ Such an extreme measure may sometimes be warranted in the corporate context as well, for example, to prevent the defendant from continuing to use the corporation for criminal purposes or from bleeding the corporate

19/ Rubin ultimately forfeited his offices in the various unions and employee welfare benefit plans. Although the Rubin decision does not mention the labor union trusteeship, it does contain a good discussion of the issues surrounding the forfeiture of Rubin's official positions. While the court upheld the forfeiture, it ruled that Rubin had the right to seek re-election to such offices in the future. The court stated (id. at 993) that "the forfeiture provision itself contains no prophylactic ban on reacquisition of the same interest as that forfeited." According to the court (ibid.), "Congress specifically attended to the problem of reacquisition in the civil remedies of §1964. Included among those remedies are injunctions against a defendant conducting in the future the same type of enterprise he conducted through racketeering activity in the past."

treasury dry prior to the jury's verdict. Placing a corporation in receivership pending the outcome of the trial would be analogous to placing a labor union in trusteeship.

Model motions for a restraining order and the orders themselves can be found at Appendices F and I.

4. The Special Jury Verdict and the Role of the Court

Rule 31(e) of the Federal Rules of Criminal Procedure states:

> If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Rule 32(b)(2) of the Federal Rules of Criminal Procedure states:

> When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

See also 18 U.S.C. 1963(c). In some cases, because of the perceived complexity of the forfeiture issue, both sides have stipulated that it would be decided by the court rather than by a special jury verdict. In deciding whether to waive the government's right to a special jury verdict under Rule 31(e), the prosecutor should consider the complexity of the case and the fact that juries have proven somewhat more inclined than district judges to find assets subject to forfeiture. Where the jury is to decide the forfeiture issue, the usual practice is first to require the jury to decide the issue of guilt and then to instruct it on the forfeiture issue. After closing argument and instructions on the forfeiture issue, jurors are then sent back to the jury room to decide the extent of the

interest or property subject to forfeiture, if any. Model jury instructions and special jury verdict forms are reprinted at Appendix G.

In United States v. L'Hoste, 609 F.2d 796 (5th Cir.), cert. denied, No. 79-1898 (Oct. 6, 1980), the court held that once the jury determines what interests are subject to forfeiture, the district court must issue an order forfeiting the property. The discretion given to the district court by Section 1963(c) to determine the "terms and conditions" of the forfeiture merely encompasses "such administrative details as the time and place that the property declared forfeited is to be seized by the Attorney General." Id. at 811. Even with regard to determining the "terms and conditions" of the forfeitures, however, the district court's discretion is limited by Section 1963(c)'s incorporation of the relevant provisions of the customs laws dealing with forfeitures. As the court noted, under the customs laws the decision whether to grant a remission or mitigation of a forfeiture is solely in the hands of Executive Branch officials. However, as we indicate in the final section of this manual, courts must have power to adjudicate subsequent third-party claims to the forfeited property -- even if the legal rights of third parties are very limited.

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III.

SCOPE OF THE FORFEITURE PROVISIONS

The RICO and CCE statutes do not place any restrictions on the type of property that is subject to forfeiture. The government is attempting to forfeit or has already obtained the forfeiture of companies engaged in stevedoring; seafood processing; juke box, record and tape distribution; demolition work; computer software and teleprocessing services; trucking; construction; and medical care; as well as a supermarket and pharmacy, a jewelry store, a stamp and coin shop, restaurants, massage parlors, office buildings, real estate, airplanes, private airfields, automobiles, personal jewelry, and official labor union positions.

There are a number of important issues, however, concerning the scope of the forfeiture provisions.

1. Forfeitable Interests in a Legitimate Business.

Legitimate businesses are subject to forfeiture under both the RICO and CCE statutes. Section 1961(4) of Title 18 specifically refers to partnerships and corporations and, of course, the primary purpose of the RICO statute was to remove the criminal element from legitimate businesses. Under the CCE statute a business may be forfeited if it was purchased with profits derived from the continuing criminal enterprise or if it constitutes the defendant's interest in or a source of influence over the enterprise. A store used as a front for narcotics trafficking would fall in either of the latter categories.

Since a continuing criminal enterprise itself has no legitimate function, no one questions the fairness of forfeiting all profits derived from (and anything purchased therewith) and all interests in a Section 848 drug enterprise. But a RICO enterprise that is a legitimate business will always carry on a certain volume of lawful and productive commercial activity. Either the law or the

appropriate exercise of prosecutorial discretion may direct the government to seek forfeiture only of some portion of such an enterprise. The legal limitiation is clear: only the defendant's interest in the enterprise is subject to forfeiture. Of course, if the other partners or stockholders are merely nominees of the defendant, the defendant's forfeitable interest may exceed his percentage of legal ownership. The considerations bearing on prosecutorial discretion are less precise. In some cases it may be appropriate to forgo forfeiture of those components of the business conducting purely legitimate activity. On the other hand, the racketeering activity to which the RICO statute is applied will ordinarily be serious and pervasive enough to justify forfeiture of the defendant's entire interest, even if it encompasses the whole enterprise. 20/

20/ In an in rem forfeiture proceeding a party who is legally innocent may be deprived of his property without violating due process. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). It is therefore difficult to discern how a forfeiture that is predicated upon a jury determination that the defendant is guilty of serious criminal conduct beyond a reasonable doubt could raise constitutional questions. The courts have, in fact, repeatedly rejected the claim that RICO's criminal forfeiture provision constitutes cruel and unusual punishment in violation of the Eighth Amendment or a "forfeiture of estate" prohibited by Article III, Section 3, Clause 2 of the Constitution. United States v. Grande, 620 F.2d 1026 (4th Cir. 1980); United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert. denied, No. 79-896 (March 17, 1980); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979). See also United States v. L'Hoste, 609 F.2d 796, 813 n. 15 (5th Cir. 1980); United States v. Mandel, 602 F.2d 653 (4th Cir. 1979)(en banc), cert. denied, No. 79-1028 (April 14, 1980).

However, a number of courts have warned that the RICO forfeiture provision may, in the hands of an overzealous prosecutor, "produce penalties shockingly disproportionate to the offense." United States v. Marubeni America Corp., 611 F.2d 763, 769 n. 12 (9th Cir. 1980). See United States v. Huber, supra, 603 F.2d at 397 ("We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment."). One of the purposes of Criminal Division review of all RICO prosecutions is to prevent any Eighth Amendment questions from arising.

2. Forfeitable Interests in an "Association in Fact"

Section 1961(4) permits the government to define the RICO enterprise as a traditional legal entity or as a de facto combination -- an "association in fact." 21/ Because one cannot own a legal interest in an association in fact, a conceptual problem arises: how can one own a forfeitable interest in such an association? The same question arises when the government seeks forfeiture of a defendant's interest in a continuing crminal enterprise under Section 848(a)(2)(B). Apparently, only two courts have addressed this fundamental question. United States v. Thevis, 474 F. Supp. 134, 143 (N.D. Ga. 1979) held that

> [l]ike an investment in the stock of a corporation or a capital interest in a partnership, a person's informal contribution of property to an association [in fact] is an interest in that association subject to forfeiture * * * since the contributed property has been put at the risk of the association's success. It is an investment in the success of the association just as surely as a purchase of stock in a corporation or a contribution of capital to a partnership. 22/

21/ Two recent decisions have held that the RICO statute is limited to legitimate enterprises. See United States v. Turkette, Nos. 79-1545 and 79-1546 (1st Cir. Sept. 23, 1980), petition for cert. filed; United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), opinion withdrawn and reargued en banc (1980).

22/ The Thevis court also addressed another issue of importance by interpreting the phrase "affording a source of influence over" as modifying only the immediately antecedent words "property or contractual right of any kind" (ibid.). Thus, "any interest in, security of, [or] claim against" the enterprise is forfeitable whether or not it affords the defendant a source of influence over the enterprise. The court also stated that the property or contractual rights affording a source of influence over the enterprise need not be rights "in" the enterprise (id. at 144 - 145). This could substantially broaden the scope of forfeiture in some cases. For example, it could well be argued that a defendant's ownership of an interest in a bank involved in laundering drug money affords him a source of influence over a drug ring of which he is a part. Thus, even if the bank is not involved in any illegal activity, the defendant's interest in the bank could be forfeited.

This analysis was adopted by Judge Sweet in United States v. Mannino, supra. Thevis has been criticized by one commentator on the ground that it "permits forfeiture of instrumentalities of crime [and thus] resembles statutory in rem forfeitures of cars and other property used to commit crimes." Taylor, Forfeiture under 18 U.S.C. §1963--RICO's Most Powerful Weapon, 17 Am. Crim. L. Rev. 379, 392 (1980). The commentator believes that this "is not what Congress had in mind" (ibid.), but he ignores the fact that Congress wrote the same language into Section 848(a)(2)(B) and that all narcotics enterprises are illegal "associations in fact." Unless Thevis is correct, Section 848(a)(2)(B) is a nullity without any meaning.

3. Forfeiture of Income Derived from a Criminal Enterprise

If the enterprise involves drug trafficking, the profits or proceeds may be forfeitable under either the CCE statue or 21 U.S.C. 881(a)(6). In 21 U.S.C. 848(a)(2)(A), Congress specifically provided that any person convicted of engaging in a continuing criminal enterprise shall forfeit to the United States "the profits obtained by him in such enterprise."

If the criminal enterprise does not involve drug trafficking and the RICO statute is used, it is uncertain whether income derived from the enterprise is subject to forfeiture. Although 18 U.S.C. 1963(a) does not use the words "profits," "proceeds" or "income," the government's position is that the statutory phrase "any interest he has acquired * * * in violation of section 1962" encompasses income or proceeds derived from a RICO enterprise. So far, however, the courts that have directly addressed the question have not agreed with the government. See United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) (Section 1963(a)(1) applies only to "interests in an enterprise" illegally acquired or maintained, not to income derived from the enterprise); United States v. Mannino, 79 Cr. 744 (S.D.N.Y. April 21, 1980); United States v. Thevis, supra;

United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa.), rev'd on other grounds sub nom. United States v. Forsythe, 560 F. 2d 1127 (3d Cir. 1977). 23/ Cases awaiting decision by the Second Circuit, United States v. Juiliano, No. 80-1291, and by the Fifth Circuit, United States v. Holt, No. 78-5260, raise the issue again. Although in Juiliano and Holt the question was not raised directly in terms of the Marubeni opinion, the district courts did order forfeiture of proceeds under RICO. However, at this time it is certain only that more obvious "interests" such as the defendant's stock in the enterprise, official position, contractual rights or share of the assets are subject to forfeiture. 24/

It is indisputable, however, that if the income derived from a pattern of racketeering activity is invested in or used to operate an "enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce," that action itself constitutes a violation of Section 1962(a) and subjects the defendant not only to a prison term of 20 years and a $25,000 fine, but also to the forfeiture of his entire interest in the enterprise. 25/ Such interest

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23/ The Thevis decision made a distinction between distributed and undistributed profits, stating that the latter were subject to forfeiture as an interest in the enterprise. 474 F. Supp. at 143.

24/ Congress may provide a solution to this problem. Section 2004 of the Criminal Code Reform Act of 1979, S. 1722, would make all proceeds from a "racketeering syndicate or enterprise" and all property derived from such proceeds subject to forfeiture. Moreover, Section 2004 provides that if such proceeds cannot be located or identified "any other property of the defendant to the extent of the value of such unlocated or unidentified property" shall be forfeited instead.

S. 1722 would also alter the definition of a RICO violation and eliminate CCE as a separate offense. See Sections 1801-1803.

25/ A single course of conduct may violate both Sections 1962(a) and 1962(c). For example, assume the defendant operates a pharmacy through a pattern of racketeering activity, e.g., dispensing controlled substances illegally. He uses the income derived from such racketeering activity to invest in a restaurant that is operated in a strictly legal manner. Defendant has thereby violated both Sections 1962(a) and (c) and his interests in both the pharmacy and restaurant are subject to forfeiture.

will often amount to much more than the value of the racketeering-derived income he has invested in the enterprise.

4. Forfeiture of Property Transferred to Third Parties

Although this is perhaps the most important question in the interpretation of the two criminal forfeiture statutes, there is almost no law on the point. Unless the courts interpret the statutes so as to allow the government to follow assets into the hands of third parties, then it will be all too easy for defendants to avoid forfeiture by simply transferring ownership to relatives or associates prior to indictment, at which time the issuance of a restraining order becomes likely. Indeed, assuming that they are willing to suffer criminal contempt and/or the forfeiture of whatever performance bond the court may establish, there is nothing to prevent defendants from attempting to transfer their property even after the issuance of a restraining order. 26/ In view of the long sentences often handed out in RICO and CCE prosecutions, many defendants will not be deterred by the possibility of serving additional time for violating a restraining order. Thus, the ultimate effectiveness of the whole forfeiture scheme depends upon the development and acceptance of a legal theory that will allow the government to forfeit criminal assets that have been transferred to third parties. 27/ Fortunately, such a theory has already been put forward and it has proven successful in its initial test. In United States v. Mannino, supra, a case involving the largest wholesaler of quaaludes ever apprehended in the New York area,

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26/ Of course, in the government's view, such post-restraining order transfers would be null and void. See p. 15, supra.

27/ In United States v. Thevis, supra, the court dismissed that portion of the indictment that sought the forfeiture of interests held by the defendant's heirs, successors and assigns, despite the fact that there was strong evidence that Thevis still controlled the transferred pornography businesses. The court reasoned that because the transferees were not indicted, their assets could not be forfeited. 474 F. Supp. at 145. Thevis can be readily distinguished on the ground that the transfers occurred several years prior to indictment and were not made for the purpose of avoiding forfeiture.

the government sought forfeiture under both RICO and CCE. 28/ It took the position that all property derived from the drug enterprise's profits was tainted at the moment it was acquired and thus forfeitable even if it was subsequently transferred to an innocent third party. 29/ Thus, in the government's view, tainted property transferred to third parties prior to or after indictment was subject to forfeiture without any showing that the property had been transferred to avoid such forfeiture. The government's theory was a direct application of principles long established in the area of in rem civil forfeiture. 30/ There is no reason why such principles should not be deemed applicable in a criminal forfeiture case. Indeed, the fact that serious criminal wrongdoing and the nexus between the property and that wrongdoing must both be proved beyond a reasonable doubt under RICO and Section 848 before any property is subject

28/ The district court followed Marubeni, supra, and thus rejected the government's RICO theory with regard to most of the property. The bulk of the property was therefore forfeited pursuant to CCE alone. Unless exceptional circumstances are present, the Criminal Division will not approve the use of both RICO and CCE counts predicated on the same criminal conduct.

29/ In the Mannino case, the indictment sought the forfeiture of (1) a Brooklyn house in the name of Mannino; (2) an Atlantic City house in the name of Neil Lombardo, Mannino's partner, who was a fugitive; and (3) shares of stock in a business entitled Harbor Racquetball of Brooklyn in the names of Mannino or Lombardo. However, Mannino transferred his shares of stock to his brother and Lombardo "sold" the Atlantic City property to his girl friend for $10,000 before the government could obtain a restraining order.

30/ The theory is that the property becomes tainted at the moment it is connected with or generated by illegal activity. "At that moment the right to the property vests in the United States, and when forfeiture is sought the condemnation when obtained relates back to that time and avoids all intermediate sales and alienations, even as to purchasers in good faith." United States v. Simons, 541 F.2d 1351, 1352 (9th Cir. 1976), citing United States v. Stowell, 133 U.S. 1 (1890). As Simons pointed out (ibid.), "courts have dismissed oppositions to civil forfeiture on the ground that the claimant acquired his interest after the illegal use." See also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-688 (1974); United States v. Huber, 603 F.2d 387, 396-397 (2d Cir. 1979), cert. denied, No. 79-896 (March 17, 1980).

to forfeiture makes the "taint" theory far less objectionable when applied to such criminal forfeitures than when applied to in rem civil forfeitures. 31/

A similar issue was raised in United States v. L'Hoste, 609 F.2d 796 (5th Cir.), cert. denied, No. 79-1898 (Oct. 6, 1980). The defendant's wife, who was not charged with any wrongdoing, had an undivided community property interest in half of L'Hoste's shares in the contracting company that the government sought to forfeit under RICO. The district judge, in an effort to protect Mrs. L'Hoste, declined to order any forfeiture. The court of appeals granted the government's petition for a writ of mandamus, requiring the district judge to order the forfeiture of L'Hoste's entire interest in the company. The court of appeals ruled that the forfeiture provisions of the statute were mandatory and that Mrs. L'Hoste's sole remedy lay in petitioning the Attorney General for remission or mitigation of the forfeiture. See p. 19, supra. The court of appeals' opinion did not directly address the difficult question posed by the forfeiture of Mrs. L'Hoste's interest in the company, but the result is clear. Had the court addressed the question, the answer would presumably be based upon the facts that Mrs. L'Hoste's inchoate community property interest was obtained through her husband, and that he actually ran the company and controlled all the shares, which were solely in his name. Thus, her interest was subject to forfeiture not only because it was an interest in tainted property, but also because it was an interest controlled by her husband.

31/ Steps should be taken, of course, to avoid unfairness to an innocent third party. If the third party has paid a fair price for the tainted asset, the government should ordinarily seek forfeiture of the purchase price directly from the defendant. If the money has been dissipated, the "taint" theory would permit the government to obtain forfeiture of the asset itself. The third party's legitimate claim on the asset should be raised by a petition for mitigation filed after the forfeiture, and the petition should ordinarily be granted. See Section IV below.

A rather different problem arises when the defendant places ill-gotten gains in foreign depositories beyond the jurisdiction of the United States, yet retains "clean" money in domestic banks or investments. The taint theory would not appear to be sufficient to allow the government to forfeit the "clean" assets in substitution for those sent abroad. Hence, the need for legislation such as that embodied in Section 2004 of the Criminal Code Reform Act, supra. This problem will not arise, however, when, as in most narcotics cases, the government is able to show that the defendant has no legitimate sources of income capable of accounting for his financial and/or other assets. Thus, the government will be able to argue that all such assets should be considered derivative profits of the defendant's drug trade.

IV.

DISPOSING OF THE FORFEITED PROPERTY

1. Introduction

Once a special jury verdict and a judgment ordering the forfeiture of the defendant's property have been obtained, the forfeiture is completed by disposing of the property. The disposition of forfeited property presents a number of technical legal and practical issues outside the realm of more conventional criminal procedure. Accordingly, prosecutors are encouraged to call upon the Criminal Division for advice and assistance in disposing of forfeited property. Contact Ronald Roos, Chief of the Criminal Collections Unit of the Office of Legal Support Services, at (FTS) 633-5541.

In drafting the RICO and CCE statutes, Congress did not address the issues of obtaining control of the property, taking care of it, settling the rights of third parties, and selling the property. In the RICO statute Congress simply provided that customs law procedures should be followed "insofar as applicable and not inconsistent with the provisions [of the RICO statute]." 18 U.S.C. 1963(c). The CCE statute has no provision dealing with the disposal of the forfeited property. However, 21 U.S.C. 881(b)-(e) contain detailed provisions on the seizure and disposition of forfeitable property. These provisions are set out in Appendix A. They apply not only to civil forfeitures under Section 881(a), but also to all forfeitures "under this subchapter," which includes Section 848. See also 21 U.S.C. 824(f). As with the RICO provisions, the Section 881 provisions also refer to the customs procedures, but the Section 881 provisions are somewhat more detailed than 18 U.S.C. 1963(c). For example, Section 881(e)

specifically authorizes the Attorney General [32] to retain property for official use or to "require that the General Services Administration take custody of the property and remove it in accordance with law," as well as to sell the property himself. [33]

There are no reported cases that consider disposition of property forfeited under either RICO or CCE. As a result of the absence of detailed guidance, disposal procedures should be devised 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. [34] Obviously, disposing of a bankrupt corporation with dozens of creditors is a good deal more complicated than auctioning off a few crates of ball bearings or some jewelry seized by Customs. Likewise,

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32/ All functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (which includes 21 U.S.C. 884 and 881) have been delegated to DEA by regulation. See 28 C.F.R. 0.100(b). Accordingly, DEA is responsible for the disposition of property forfeited under Sections 848 and 881.

33/ The applicability of Section 881(b)-(e) to Section 848 forfeitures produces at least one incongruous result. Section 881(b) authorizes the Attorney General to seize "any property forfeitable to the United States under this subchapter" under certain conditions. One of those conditions is where "the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter." However, where a seizure is based merely upon probable cause, Section 881(b) requires that the customs-type forfeiture proceedings of Section 881(d) "be instituted promptly." These provisions do not seem to contemplate criminal forfeiture proceedings, since in a criminal forfeiture the trial and conviction of the defendant and issuance of the order of forfeiture must occur prior to any customs-type proceeding. Accordingly, seizure based upon probable cause is presumed not to be available in a criminal forfeiture proceeding, despite the language of Section 881(b).

34/ The Department of Justice has issued regulations, 28 C.F.R. 9a, which govern the confiscation and disposal of property used in an illegal gambling enterprise and forfeited under 18 U.S.C. 1955(d). Section 1955(d) contains much the same language as Section 1963(c). This is not surprising since the illegal gambling statute originated as Title VIII of the Organized Crime Control Act of 1970 and the RICO statute was Title IX of the same Act. Therefore, the Department's regulations issued to implement Section 1955(d) have been adopted by some prosecutors as a procedural guide to Section 1963(c). Similarly, in Section 848 forfeitures the civil forfeiture regulations contained in 28 C.F.R. 9 may be helpful.

Customs has no problem in obtaining physical control of the goods subject to forfeiture and warehousing them pending their sale at auction. But obtaining physical and legal control of a corporation or, as in the Huber case, seven different shell corporations, when the defendant is unwilling to cooperate, is another matter. The corporation must be managed pending its sale. The claims of the numerous third parties who may assert that they have legal interests in the property of the forfeited corporation must also be investigated and passed upon. As far as we know, the only case in which all of these concerns have arisen is Huber, but that may merely be due to the fact that relatively few significant forfeitures have been obtained so far. Because the Huber case is a paradigm of the types of issues that can face a prosecutor at this final stage of the forfeiture proceedings, we have reprinted a number of documents filed in that case at Appendix H. The documents tell the story of the ongoing case and illustrate some of the problems and the prosecutor's responses to them. For further information on the Huber case, call AUSA Thomas Warren at (FTS) 662-9174.

2. Safeguarding the Forfeited Property

Since the defendant will almost certainly appeal his conviction, the disposition of the forfeited property should normally await affirmance of the judgment by the court of appeals, or, if there is any likelihood of further review, final action by the Supreme Court. If the defendant has not yet attempted to frustrate the forfeiture by dissipating or transferring the property, he may do so now, after he has been convicted. Therefore, if a restraining order has not been obtained already, it should certainly be sought at this point. Indeed, because the defendant will have little interest in preserving the forfeited property, the government can argue that it should be allowed to take possession or control of the property after the verdict, pending the outcome of the appeal. If the

property is a going concern, it obviously can't be run by the prosecutor. The court may be asked to appoint an outside receiver who will be paid from whatever cash the business generates or from the proceeds obtained from its sale, or to appoint a government agency such as the General Services Administration, Customs or IRS as receiver. The court's expertise in such matters should be relied upon.

Where the property is such that it can be seized and stored in preparation for a sale, any employee of the Department of Justice or any other government agency designated by the Attorney General, such as the GSA, may perform that task. See 18 U.S.C. 1961(1)(10) and 21 U.S.C. 881(e)(3). The investigating agency that worked on the prosecution would be a logical choice. Some property, such as automobiles, may be used by the agency in lieu of sale at auction. See 21 U.S.C. 881(e)(1). If 28 C.F.R. 9a is used as a guide, see note 34, supra, seizures would be carried out by the FBI or the United States Marshals. 28 C.F.R. 9a.1-9a.2. The U.S. Marshal also would have the duty of storing, inventorying, appraising and disposing of the seized property. 28 C.F.R. 9a.2-9a.6.

3. The Tracing Problem

A persistent problem at every step of a RICO or CCE prosecution is the identification of the property subject to forfeiture. Identification problems arise where the property subject to forfeiture has changed hands, or form, or both. We suggest that the tracing rules used to give effect to constructive trusts and equitable liens be employed to solve such identification problems. 35/ The policy rationale for these restitutionary remedies is the prevention

35/ Our discussion of tracing is taken from a paper by John Trojanowski entitled "RICO Forfeiture: Tracing and Procedure" printed in Materials on RICO (Cornell Institute on Organized Crime 1980), Vol. I, pp. 364-374. Trojanowski provides many useful illustrations of the application of restitution principles to solve various tracing problems. Space limitations prevent us from doing the same here.

of unjust enrichment. A criminal forfeiture should therefore place the government in a position analogous to that of a claimant attempting to identify property to a constructive trust or an equitable lien. Where "a conscious wrongdoer uses the property of another in acquiring other property the person whose property is so used is entitled at his option either to enforce a constructive trust or to enforce an equitable lien upon the property so acquired." 5 A. Scott, Trusts §508 (3d ed. 1967).

Let us assume, for example, that the defendant is convicted under Section 848. The profits he has made from the drug enterprise are invested in real estate. If the land is now worth more than its purchase price, the constructive trust theory allows the government to forfeit the real estate, thus depriving the defendant of the additional profit he has made through a good investment. If the real estate is now worth less than the purchase price, the government can rely on the equitable lien theory and reach the land as security for its claim. The defendant would be personally liable for the difference between the original purchase price and the real estate's present value.

The application of these restitution principles to other fact patterns is relatively simple. In particular, it is worth noting that detailed rules have been developed to determine the ownership of money that has been commingled in mixed bank accounts and in other situations where the identity of the money has been lost. See generally, Restatement of Restitution (1937); Scott, Trusts.

4. The Rights of Third Parties

A. 18 U.S.C. 1963(c) provides that the United States shall dispose of forfeited property "as soon as commercially feasible, making due provision for the rights of innocent persons." Section 1963(c) also states that the provisions of law relating to the remission or mitigation of forfeitures for violation of the customs laws shall apply to RICO forfeitures "insofar as applicable and not

inconsistent with the provisions hereof." As we have already, indicated, the requirements of Section 881(d) and (e) are similar.

Due process would seem to require that two categories of third-party claimants, whether "innocent" or not, be afforded an opportunity to litigate their legal interest in the forfeited property. 36/ In an in rem forfeiture proceeding, all parties who claim an interest in the property have an opportunity to present their claims in court before the property is declared forfeited to the government. See, e.g., 19 U.S.C. 1607-1612; 19 C.F.R. 162.46-47; 21 C.F.R. 1316.75-77. Because criminal forfeiture is an in personam rather than an in rem procedure, third-party rights must be adjudicated after the jury has rendered a special verdict declaring the property subject to forfeiture. The only alternative would be to allow third parties to intervene in the criminal trial itself -- a procedure that the courts would not favor, for obvious reasons.

We believe that, where a special verdict has been returned and a judgment of forfeiture entered, third-party rights will be adequately protected if the government then follows the administrative forfeiture procedures set forth in

36/ The two types of claims that would be legally cognizable in district court are (1) that the property was not properly subject to forfeiture at all; and (2) that the claimant's interest in the property should he given legal priority over that of the government. The facts of the Mandel case provide the material out of which a hypothetical claim of the first type can be constructed. In Mandel the government alleged that one of the defendants was a secret owner of shares in the Marlboro racetrack that were subject to forfeiture under RICO. The shares were held in the name of a third person who was not charged in the indictment. The government alleged that the third person was merely a nominee for the defendant. Let us assume that the government was wrong and that the third person was really the owner of the shares, in fact as well as in name. The defendant would have little or no interest in litigating the issue of ownership, since under the assumed facts he was not the real owner. The third person obviously has a right to be heard before he can be deprived of his shares in the racetrack. And due process would not be satisfied merely by affording him the opportunity to petition the government for remission of the forfeiture, since the granting of such a petition is a matter of executive grace and depends upon a showing that the third party is morally blameless.

A claim of the second type would be made by lienholders and other creditors; e.g., a bank holding a mortgage to forfeited property.

19 U.S.C. 1607-1609 and 19 C.F.R. 162.46-47 regardless of whether the value of the forfeited property is over $10,000. See also 28 C.F.R. 9a.5; 21 C.F.R. 1316.75-76. However, in addition to general notice by publication, the government should provide specific written notice to "each party that the facts of record indicate has an interest in the [forfeited] property." 19 C.F.R. 162.31(a). 37/ Once notice of intent to forfeit the property has been given, interested third parties have "20 days from the date of the first publication of the notice" in which to come forward and assert their claims. Filing a legally cognizable claim and a bond will permit the matter to be heard before a federal district court. 38/ 19 C.F.R. 162.47. Otherwise, assuming that no petition for remission or mitigation is timely filed, the property is declared forfeited and sold without further hearing. If a third party does assert a legally cognizable claim to the property, he has the burden of proving that the property is not subject to forfeiture. See 19 U.S.C. 1615. 39/

B. An innocent third party may choose to forgo a hearing in court and instead petition the government for remission or mitigation of the forfeiture. This customs procedure is governed by 19 U.S.C. 1613 and 1618 and 19 C.F.R. 171.11 - 171.44. However, the Department of Justice has already issued regulations (28 C.F.R. 9 and 9a) adapting the customs procedures to civil forfeitures arising under a number of federal criminal statutes, including 21

37/ Such notice should inform each interested party of his right to petition for remission or mitigation of the forfeiture. See 19 C.F.R. 162.31(a). Where the government knows the names and addresses of interested parties, notice by publication alone would probably not pass constitutional muster.

38/ 28 C.F.R. 9a.5 provides that the claim and bond must be filed with the U.S. Marshal, but the Assistant United States Attorney would seem to be a preferable choice in the circumstances of a criminal forfeiture.

39/ We discuss the subject of how to deal with creditors' rights in the forfeited property separately at p. 38, infra.

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U.S.C. 881(a) and 18 U.S.C. 1955(d). See also 21 C.F.R. 1316.79-81. We recommend that the procedures set forth in 28 C.F.R. 9 and 9a be used as a rough guide. 40/ They will, however, need to be adapted to the different circumstances of a criminal forfeiture.

Although the customs regulations do not so provide, it seems reasonable to adopt a rule that the filing of a petition for remission or mitigation will toll the running of the 20-day period in which third parties must give the government notice that they will contest the forfeiture in district court. 41/ Otherwise, third parties with substantial interests would presumably seek court review immediately in every case. Where a third party files suit in district court and at the same time, or while the court suit is pending, files a timely petition for remission or mitigation, the petition should be accepted and passed upon. 42/ But the filing of the petition should temporarily suspend proceedings in district

40/ The United States Attorneys' Manual also contains a discussion of the procedures that apply to petitions for remission or mitigation. See U.S.A.M. 9-38.200 to 9-38.224.

41/ By the same token, the filing of a petition should not be considered a waiver of the claimant's right to seek redress in district court. But cf. Bramble v. Kleindienst, 357 F. Supp. 1028, 1033 (D. Colo. 1973); Jary Leasing Corp. v. United States, 254 F. Supp. 157, 159 (E.D.N.Y. 1966). However, a district court should not assume jurisdiction of a third party claim where a petition for remission or mitigation has been filed and has not yet been passed upon. But cf. United States v. One (1) Douglas A-26B Aircraft, 436 F. Supp. 1292, 1297 (S.D. Ga. 1977). Whether third party claimants should be required to exhaust their administrative remedies before seeking relief in district court is another question.

42/ What constitutes a timely petition is unclear. 19 U.S.C. 1618 provides that the petition may be filed at any time before the sale of the property. 19 C.F.R. 171.12(b) provides that the petition "shall be filed within 60 days from the date of mailing of the notice of fine, penalty, or forfeiture incurred"; 21 C.F.R. 1316.80 states that the petition "should be filed within 30 days of receipt of the notice of seizure"; 28 C.F.R. 9 fails to provide any guidance on this point. See also 19 U.S.C. 1613 and 28 C.F.R. 9.3(f), which allow petitions to be filed within three months after the property has been forfeited and sold where the petitioner's failure to file earlier is excusable because of lack of notice.

court. Even if the third party has no legally cognizable claim to the property, there may be equitable reasons why the government should grant his petition. 43/ Moreover, if the government grants his petition this will usually moot the litigation.

It is settled law that the denial of a petition for remission or mitigation is not subject to judicial review on the merits. United States v. One Buick Riviera Auto, 560 F.2d 897, 900 (8th Cir. 1977); United States v. One 1972 Mercedes-Benz 250, 545 F. 2d 1233 (9th Cir. 1976); United States v. One 1970 Buick Riviera Sedan, 463 F.2d 1168, 1170 (5th Cir.), cert. denied sub nom. Nat'l. American Bank of New Orleans v. United States, 409 U.S. 980 (1972); United States v. One 1961 Cadillac, 337 F.2d 730, 732 (6th Cir. 1964). However, as already indicated (see note 36, supra), we believe that the claimant is not precluded from seeking legal relief in district court on the theory that the property was not properly subject to forfeiture or that his claim to the property has priority over that of the government.

5. The Sale or Other Disposition of Forfeited Property

Forfeited property may either be sold, retained for government use, destroyed or donated. Sale will probably be the usual method of disposing of the property. If we take 28 C.F.R. 9a.2-9a.6 as our guide, the U.S. Marshals would have responsibility for this task. But there is no reason why the General

43/ For example, a bona fide purchaser of "tainted" property may have no legal right to the forfeited property, but if he is "innocent" there would be a strong case for remission of the forfeiture. Whether innocence can ever be a legal defense to forfeiture is unclear. See United States v. One Buick Riviera Auto, 560 F.2d 897, 900-901 (9th Cir. 1977).

Services Administration or a trustee cannot be appointed to handle the matter. See 31 U.S.C. 686. 44/ The type of sale and the notice required will depend on the kind of property involved. The notice of sale should be calculated to reach the buyers sought. If selling a fleet of bulldozers, for example, it would be logical to place advertisements in a construction trade journal. Auction sales may be inappropriate where the property is of limited marketability. Innocent third parties such as creditors may be able to help the government negotiate a sale of the property, or even purchase the property themselves. 45/ Care should be taken to insure that the purchaser is not a straw man for the defendant.

If the property is sold, how should the proceeds be distributed? First, expenses incidental to the forfeiture and sale should be paid. Next, the claims of innocent third parties should be satisfied. Although the government's claim to the property might have legal priority over those of creditors, or certain categories of creditors, we believe that the government has no interest in defeating the claims of innocent creditors since the purpose of the criminal forfeiture statutes is not to raise revenue. 46/ Moreover, Section 1963(c) explicitly provides that in disposing of forfeited property, the United States

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44/ Before disposing of the property, the GSA or other government agency may determine if any federal agency can make use of it. See 40 U.S.C. 304. If the property is sold, the proceeds make their way into the Treasury as miscellaneous receipts. Federal regulations also authorize the donation of certain surplus federal property to state or local government or non-profit institutions for public purposes, such as recreation, education or health research. Thus, for example, a piece of forfeited real property could become a municipal park. See 41 C.F.R. 101-47.308-7 (1979).

45/ Authority to dispose of property through a negotiated sale is found in the regulations concerning the sale of government property. 41 C.F.R. 101-45.304-2 (1979). See also 19 U.S.C. 1614.

46/ We emphasize the word "innocent" because the government does have an interest in defeating the claims of creditors who knew or should have known that they were dealing with a criminal organization. The greater the financial risk such creditors incur, the more difficult and expensive it will become for organized criminals to obtain credit.

shall make "due provision for the rights of innocent persons." 47/ However, if an unsecured creditor could not have reached the forfeited property to satisfy the debt, his claim should not be honored because to do so would simply give him a windfall benefit. 48/ Whatever money is left over after proper third party claims have been satisfied will be deposited in the Treasury. See 19 U.S.C. 1613.

6. Cash in Lieu of Forfeited Property

In several cases, prosecutors have entered into agreements whereby the defendant was permitted to substitute cash for a specific property interest that had been found forfeitable. This is a simple answer to the practical problems presented in this section of the manual, but it is frequently the wrong answer. Where the forfeited property is an ongoing business, allowing the defendant to retain control of the business flies in the face of Congress' purpose, which was to remove racketeers from their sources of commercial influence. Moreover, defendants will be in the best position to know the actual value of the business and the government is therefore likely to strike an unfavorable bargain. On the other hand, there are circumstances where accepting cash in lieu of a forfeiture would clearly be appropriate. Let us assume that the defendant is about to go to prison on a Section 848 count. His home has been declared forfeited because it was used as a stash house. The home has been appraised at $500,000. The defendant offers to pay a fine of $500,000 in substitution for the house so that his wife and children do not have to move to another home. There is no reason to refuse the defendant's offer.

47/ In the case of a closely held corporation, the statutory language might require that innocent shareholders be given a voice in determining to whom the defendant's interest should be sold.

48/ The priorities among creditors themselves may be determined either by reference to Article 9 of the Uniform Commercial Code or the provisions of the Bankruptcy Act. U.C.C. §9-303, 312; 11 U.S.C. 507.

CONCLUSION

This manual has attempted to provide practical guidance on obtaining criminal forfeiture and to address the common problems a prosecutor can expect to encounter in doing so. Obviously, detailed analysis of many issues raised by criminal forfeiture has not been possible; indeed, given the limited case law in a number of areas such treatment would be premature. The prosecutors who carry forfeiture actions to completion in the next few years will play a large role in shaping the law and practice in this area.

Nevertheless, this manual represents a relatively complete compilation of current experience with the criminal forfeiture statutes, and we are confident that with it in hand federal prosecutors will be well equipped to tackle the most ambitious of forfeitures. We believe they will increasingly do so. There is now widespread recognition of the need to inflict damage to organized crime and narcotics trafficking networks that is more permanent than the involuntary leadership turnover that results from imprisonment. If pursued with energy and good judgment, forfeiture has the potential to fill this need and to become an integral and uniquely effective part of federal law enforcement.

APPENDICES

APPENDIX A: The Forfeiture Provisions of the RICO and CCE Statutes

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1. Order to Show Cause why Transfer of Stock to United States should not be Ordered
2. Affidavit in Support of Order to Show Cause
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APPENDIX I: Selected Documents from United States v. Mannino (S.D.N.Y. 1980)

1. Notice of Motion for Restraining Order
2. Affidavit in Support of Restraining Order
3. Restraining Order
4. Order and Judgment of Forfeiture
5. Letter to Counsel Explaining Petition for Remission or Mitigation Procedure

[APPENDIX A]

§ 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 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) 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.

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

(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); 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).

(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, 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) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when -

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this subchapter, the Attorney General may -

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the

remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of the property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property

Whenever property is forfeited under this subchapter the Attorney General may -

(1) retain the property for official use;

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs;

(3) require that the General Services Administration take custody of the property and remove it for disposition in accordance with law; or

(4) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR 101 CFR 101-11.6

UNITED STATES GOVERNMENT

[APPENDIX B]

Memorandum

TO : All United States Attorneys and Strike Force Chiefs

DATE: 9 JUN 1980

FROM : Philip B. Heymann
Assistant Attorney General
Criminal Division

SUBJECT: Obtaining Information and Assistance from the Internal Revenue Service

For the past six months the Criminal and Tax Divisions have worked with the Internal Revenue Service to minimize the impediments to cooperation between the two agencies created by 26 U.S.C. 6103, the disclosure provisions of the Tax Reform Act of 1976. The Department's recent survey indicated that the procedures established under the statute are cumbersome and time-consuming and that many federal prosecutors are reluctant to use them. As a result of extensive discussions the IRS has established new procedures which should substantially expedite the obtaining of information or assistance from the Service by Department attorneys.

I. Joint Grand Jury Approval Procedures

On May 16, 1980, the IRS promulgated a manual revision (9267.1-.5) designed to reduce substantially delays in obtaining approval for joint tax/non-tax grand jury investigations and for adding new targets to ongoing joint investigations. The Service has established strict time limitations for each step in the approval process, so that the overall IRS processing time should be 35 days for IRS-initiated requests and 30 days for DoJ-initiated requests. This compares with a current average total processing time (including Tax Division approval) of 3.6 months.

The process for adding new targets to an ongoing joint investigation has also been streamlined, and a procedure for use in emergencies has been established.

These procedures should be a substantial improvement, but only if IRS officials are able to adhere to the published deadlines. Please inform George Kelley of the Tax Division at FTS 633-5198 of any processing times in excess of 35 days.

II. Tax Information Disclosure Procedures

Effective May 31, 1980, the Internal Revenue Service decentralized its procedures for providing tax returns and tax information to the Department of Justice pursuant to 26 U.S.C. 6103(i)(1), (2), and (3). The final revision of Chapter 2800 of the IR Manual has not yet been published.

Under the new procedure, the IRS District Director in each United States Attorney's district will process all completed requests for tax returns or tax information (26 U.S.C. 6103(i)(1) and (2)) and make the release directly to the Assistant United States Attorney or Strike Force Attorney seeking the information. Review of such requests by IRS headquarters has been eliminated. IRS-initiated disclosure of return information concerning possible criminal activities (26 U.S.C. 6103(i)(3)) will be made directly by IRS Regional Commissioners or their designees to the Justice Department in Washington, which will relay the information to the appropriate investigative agency, United States Attorney's office or Strike Force.

As with the joint investigation approval process, strict deadlines have been established for responding to disclosure requests -- 5-8 days for routine requests from the time the (i)(2) request or (i)(1) court order reaches the District Director and a shorter time in emergencies.

Due to statutory requirements, requests for disclosure under 26 U.S.C. 6103(i)(1) and (2) must still be approved by the Justice Department in Washington. All Justice Department processing has been centralized in the Office of Legal Support Services, with significant improvement in expertise and processing time. All (i)(1) and (2) requests should be sent directly to the Office of Legal Support Services, Criminal Division, U.S. Department of Justice, 315 9th Street, N.W., Washington, D.C. 20530. At the time the request is mailed to Washington, the attorney making the request should telephone the Disclosure Officer of the nearest District Office of IRS and relay the name of the taxpayer, identifying information, including social security number if available; and the fact that a request under (i)(1) and/or (i)(2) is being made. This will permit the District Office to begin immediately to assemble the relevant material so that disclosure can be made as soon as possible after the Department approves the request. The Office of Legal Support Services will send the approved (i)(2) disclosure request directly to

the appropriate IRS District Director. For (i)(1) requests, the requesting attorney will be sent the authorization to file for a court order and will forward the signed court order, when obtained, to the District Director. We recommend that an (i)(2) request be made along with every (i)(1) application. This saves time by eliminating the need for IRS to classify tax information according to source.

In the next week or two you can expect to be contacted by your local IRS District Disclosure Officer, who will offer to meet with you and your staff to brief you on these new procedures. We urge you to arrange such meetings so that all concerned will understand the new decentralized system. In addition, an IRS-DoJ Coordinating Committee has been established to resolve quickly any problems with disclosure in particular cases. Delays in disclosure or restrictive statutory interpretations by IRS field personnel should be immediately brought to the attention of the Office of Legal Support Services at FTS-724-6673.

Section 9-4.900 of the U.S. Attorneys' Manual sets forth in detail the necessary processing instructions and application forms. It is currently under revision to reflect these procedural changes.

Attachment

APPENDIX

Tax Information Disclosure Standards

These decentralized procedures should expedite the disclosure of tax information. The statutory standards for disclosure, of course, will remain the same. The Department has been working closely with the Administration to develop legislation liberalizing these standards, as well as eliminating the need for Washington approval of disclosure requests. However, our growing experience with §6103(i) suggests that even without revision the statute can be used more effectively and in a greater number of cases than is now being done.

Section 6103 divides tax information into two categories: the returns, books, records and information obtained by the IRS from the taxpayer or his representative, and all information obtained from third parties. An ex parte court order is required to obtain the first; the second requires a formal request letter to the IRS. The statute establishes different standards for these two kinds of requests. Many prosecutors share the perception that these tests are so stringent that tax information can be obtained only when the prosecutor already knows a great deal about its content or when the tax information is an integral part of the criminal case.

As a matter of fact, however, the Department, the IRS and, most important, the courts all interpret the standards more liberally. Of more than 300 applications for disclosure orders, fewer than a half dozen have been denied. In general, tax information may be obtained if there is some reason to believe it would be relevant to an investigation or prosecution -- which is true of almost all cases involving financial crimes.

A. Returns and Taxpayer Return Information - 6103(i)(1)

The statute authorizes a District Court judge to grant the court order needed to obtain the returns, books and records of the taxpayer if the application presents facts showing three things:

1. "there is reasonable cause to believe, based on information believed to be reliable, that a specific criminal act has been committed;" To make this showing, the application must identify the specific statutory violations involved, state the facts supporting the belief that criminal acts have been committed, and state that the information is believed to be reliable.

2. "there is reason to believe that such return or return information is probative evidence of a matter in issue related to the commission of such criminal act;" Although the terms used here -- "probative," "evidence," "in issue" -- are more commonly associated with litigation, (i)(1) disclosure is also available in the pre-indictment stages of an investigation. There is no need to show the tax information will ever be introduced into "evidence" or will relate to a matter "in issue" at trial. The information must, however, relate directly to the crime itself or to establishing the identity of the criminal, not to the credibility of witnesses. The application must contain facts showing that information about the financial status and activity of a particular taxpayer could be helpful in identifying and convicting the perpetrator of the specified crime.

3. "the information. . .cannot reasonably be obtained from any other source. . .(or) constitutes the most probative evidence." Although this is often cited as the most difficult test to meet, the Criminal Division takes the position that a conclusory statement that the information is not reasonably obtainable elsewhere is sufficient. Only one judge has ever denied an application on the grounds that it did not contain a factual basis sufficient to make this determination.

Examples of Permissible (i)(1) Disclosure

- When a target is suspected of engaging in crimes yielding large amounts of income, such as narcotics trafficking, and is leading an extravagant lifestyle, his tax returns may be disclosed. The tax returns will reveal his legitimate income, which may be insufficient to support his lifestyle. This would create the inference that the target has another source of income and would be probative of the narcotics offense.

- In cases involving illegal payments, such as bribery, and where the defense is expected to claim the payments were legal, tax returns of both the source and recipient of the bribe may be disclosed. The returns may show that the bribe was not reported as income by the recipient or that the source improperly characterized the deduction. This would indicate an awareness of illegality that would refute the defense.

- The target of a recent investigation was a government employee suspected of receiving kickbacks in exchange for awarding contracts. Evidence indicated the kickbacks were made through a corporation owned solely by the target's wife. The returns and return information of the target, his wife, and the corporation were all disclosed: of the target because they might show payments received from the corporation; of the corporation because they might show payments to the target or they might show few or no assets, indicating the corporation was only a conduit; and of the target's wife because the payments from the corporation to the target might have been routed through her.

- A recent undercover investigation discovered evidence of a large-scale scheme to produce and distribute illegal copies of motion pictures. The tax information of 15 corporations and 11 individuals involved in the scheme was disclosed. It might have shown business relationships between the various individuals and corporations, which, even if no illegality was revealed, would indicate the extent of the racketeering enterprise reached by the RICO statute. Also, the tax information might have shown that income was invested in an illegal enterprise in violation of the RICO statute.

As is evident from these examples, the disclosure of tax information from individuals other than targets or defendants is permissible. Also, tax information may be obtained in the pre-indictment stages of an investigation. In fact, it is in these early stages when it may be most useful.

B. Third-party Information - 6103(i)(2)

Information obtained by the IRS from third parties, ("return information other than taxpayer return information") may be obtained by a letter from the Assistant Attorney General to the IRS. The statute requires the letter to state four things:

1. The name and address of the taxpayer.

2. The taxable periods for which disclosure is sought.

3. "the statutory authority under which the proceeding is being conducted," which is interpreted to mean the criminal statutes suspected of being violated.

4. "the specific reason or reasons why such disclosure is or may be material to the proceeding or investigation." Materiality is a low standard. If third-party information might aid the investigation or prosecution, it may be obtained. Also note that (i)(2) materiality, unlike (i)(1) probativeness, relates to the investigation, not to the commission of the crime. Consequently, the major difference between the (i)(1) and (i)(2) standards is that (i)(2) also allows third-party information to be obtained solely because there is a possibility it will contain an investigative lead or reflect on the credibility of a witness. As with (i)(1) information, tax information may be obtained under (i)(2) for taxpayers other than the target or defendant.

Example of (i)(2) Disclosure

- An automobile dealer was suspected of laundering illegally obtained funds through his dealership. IRS information on the dealer obtained from sources other than the dealer or his representative was considered "material" because it might identify sources or recipients of funds passing through the dealership, thereby revealing "possible witnesses to or participants in the illegal activities." The latter phrase is a common explanation of the materiality of (i)(2) information.

U.S. Department of Justice

Criminal Division

[APPENDIX C]

NARCOTIC AND DANGEROUS DRUG SECTION

NARCOTICS PROSECUTIONS AND THE BANK SECRECY ACT

NARCOTICS PROSECUTIONS AND THE BANK SECRECY ACT

FINANCIAL INVESTIGATIONS AND THE BANK SECRECY ACT

I. The Need for Financial Investigations in Narcotics Prosecution

Investigations of high-level narcotics trafficking organizations commonly involve the need to analyze and understand complex financial transactions. Emphasis is currently being placed on utilizing the various tools provided by Congress to trace these financial transactions and immobilize narcotics organizations through prosecutions and seizures of ill-gotten assets. The statutes and sources of information available to prosecutors and investigators to accomplish this goal are scattered among various agencies of the federal government. For this reason, the most successful prosecutions have taken, and will continue to take, an integrative approach in this area. Such an approach requires the early involvement of other federal agencies with expertise in financial investigations.

The Narcotic and Dangerous Drug Section and the Drug Enforcement Administration, with the assistance of U.S. Customs and other law enforcement agencies, are working to develop and refine the financial investigative and prosecutive tools that exist within the federal law enforcement community. To this end, the procedure for obtaining information from IRS has been streamlined. The Department of Justice has designated the Office of Legal Support Services to be the conduit for all requests while The Narcotic and Dangerous Drug Section has assigned Ted Bockelman (FTS) 724-6987, a staff attorney with IRS background, to handle questions from the field on obtaining information from IRS and instituting joint IRS-DEA prosecutions. In addition, the Drug Enforcement Administration has formed a Financial Investigation Unit Charles Olender, Chief, (FTS) 633-1271 which has been concentrating on the implementation of the forfeiture possibilities of Subsection (a)(6) of 21 U.S.C. 881. An informal committee of DOJ and DEA attorneys is creating the paperwork needed to properly execute the many seizures possible under 881. This memorandum and the discussion below examines the reasons why an investigation of a significant narcotics trafficking organization should consider the prosecution of currency violations and avail itself of the information obtainable from Customs which has been generated by the reporting requirements of the Bank Secrecy Act.

II. THE BANK SECRECY ACT

A. An Overview

In 1970 Congress enacted legislation to augment the amount of financial information available to criminal, tax, and regulatory investigations and proceedings. The thrust of this legislation was two-fold. Congress wanted the banking institutions to retain records of certain transactions which were of importance to investigators and regulators and which were becoming increasingly difficult to trace as the industry turned to electronic record-keeping systems. At the same time it recognized that reports of certain other transactions would enhance the government's ability to detect criminal, tax, and regulatory violations. Thus, Title I of Public Law 91-508 requires the banks to retain certain financial records for periods of up to five years; Title II, the Currency and Foreign Transactions Reporting Act, requires that certain reports be filed with the federal government.

B. THE FINANCIAL RECORDKEEPING REQUIREMENT

1. Records Required to be Created and Retained

The requirement in Title I of the Bank Secrecy Act that banks and other financial institutions retain records of certain transactions (now contained in 12 U.S.C. Sections 1829(b) and 1951 et seq., and Treasury Regulations 31 CFR Section 103.31 et seq.) is of particular value to the law enforcement community. The list of records which must be kept is extensive and includes the original or copy of signature cards, checks, deposit records, statements, and other documents. This requirement ensures that a paper trail will exist when investigators arrive at a bank with a subpoena. Knowledge of the records required to be kept by the regulations is valuable in making sure the bank provides every record it is required to keep. It should also be realized that the definition of financial institution (31 CFR Section 103.11) includes securities dealers, currency exchange houses, and others. Such institutions are often overlooked as sources of financial information.

2. Enforcement Provisions

a. Injunctions

12 U.S.C. Section 1954 (no Treasury Regulation counterpart) authorizes an action to enjoin acts or practices constituting a violation of the provisions of the record-keeping requirements.

b. Civil Penalties

A willful violation of any of the recordkeeping requirements of the Act can result in a civil penalty not to exceed $1,000 assessed against the financial institution and any partner, director, officer, or employee willfully involved in the violation. 12 U.S.C. 1955(a); Treasury Regulations 31 CFR Section 103.47(a).

c. Criminal Penalties

i. Misdemeanor Violations

Whoever willfully violates any regulation of the Act can be fined not more than $1,000 and/or imprisoned not more than one year. 12 U.S.C. Section 1956; Treasury Regulations 31 CFR Section 103.49(a)

ii. Felony Violations

12 U.S.C. Section 1957 (Treasury Regulation counterpart - 31 CFR Section 103.49(a)) increases the above penalties to five years and/or $10,000 where the violation of the recordkeeping requirement "is committed in furtherance of any violation of Federal law punishable by imprisonment for more than one year." Therefore, a violation of the recordkeeping requirement committed as part of a narcotics violation would be punishable under this provision.

C. THE REPORTING REQUIREMENT

1. The Three Reports

The purpose of Title II of the Bank Secrecy Act, officially entitled the 'Currency and Foreign Transactions Reporting Act', is "to require certain reports or records where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. Section 1051. This Act is now found at 31 U.S.C. Sections 1051 et seq. There are three types of transactions which the Act is intended to cover. Subchapter II deals with domestic currency transactions; Subchapter III deals with reports of exports or imports of monetary instruments; Subchapter IV deals with foreign transactions. (This last Subchapter is presently of minor importance to prosecutors and investigators; however, reports filed under this Subchapter may become more valuable in the future.)

CURRENCY TRANSACTION REPORT - FORM 4789

31 U.S.C. Section 1081, as effectuated by Treasury Regulations 31 CFR Section 103.22, requires that reports of domestic currency transactions in excess of $10,000 be filed with the IRS. This report is filed by the financial institution handling the currency transaction on a Form 4789, also known as a Currency Transaction Report or CTR.

TRANSPORTATION OF CURRENCY OR MONETARY INSTRUMENTS - FORM 4790

31 U.S.C. Section 1101, as effectuated by Treasury Regulations 31 CFR Section 103.23, requires that reports dealing with the transportation, mailing, or shipping of currency or bearer monetary instruments into or out of the United States in excess of $5,000 be filed with Customs. This report, filled out by the person transporting, mailing, or shipping, or causing the transportation, mailing, or shipping of the currency or monetary instrument involved, is filed on a Form 4790, also known as a Report of Transportation of Currency and Monetary Instrument or CMIR.

FOREIGN BANK ACCOUNT REPORT - FORM 90-22.1

This report is required by 31 U.S.C. Section 1121(a) as effectuated by Treasury Regulations 31 CFR 103.24. It is filed annually by each person subject to United States jurisdiction having a financial interest in or authority over a financial account in a foreign country. This form is also known as the Foreign Bank Account Report or FBA and is filed with the Treasury Department at the Reports Analysis Unit by the person having the foreign account.

The FBA will be computer retrievable at the Reports Analysis Unit from TECS as of approximately September 1979 for the calendar year 1977. (TECS is an acronym for Treasury Enforcement Communication System.) Calender year 1978 (which became due June 30, 1979) should be available by December, 1979. So far, the FBA is of minimal value. For this reason, the discussion below is limited to the two reports required to be filed pursuant to subchapters II and III, Form 4789 and Form 4790.

2. The Method by Which the Reports are Generated

It is important that the manner in which the reports are created and transmitted to Customs is understood so that certain problems inherent in the data base are recognized.

Form 4789

Financial institutions are charged with the responsibility of filing Form 4789's, not the customer. Unfortunately, many banks are not complying with the reporting requirements of the Act, primarily because the regulatory agencies have failed to educate the banks as to the reporting requirements of the Act and thereafter enforce them. In addition, the Treasury regulations, as written, have permitted many banks to define the scope of their compliance. 31 CFR Section 103.22(b)(3) exempts a bank from reporting transactions involving an 'established customer'. This provision was intended to eliminate reports on customers normally transacting more than $10,000 in currency. Many banks, however, have used this as a loophole to avoid reporting any transactions. An absence of reports from a particular financial institution should prompt an investigator who believes no such reports are being filed to try to obtain through the Reports Analysis Unit at Customs the accounts listed on the bank's 'established customer' list, which the bank is required to maintain. Treasury requires a reasonable basis to institute a request for the established customers list. If it is suspected that deposits or transactions in excess of $10,000 are being made in a bank without 4789's being filed, surveillance should attempt to actually view the transaction to provide grounds for obtaining the list. Any such evidence would also help Treasury show the exemption is being abused. The problem with this approach is that the financial institutions have 45 days after the transaction to file the Form 4789 with IRS. It then has to be processed by IRS before the information is provided to Customs for TECS input. Efforts To amend the regulations to require the financial institutions to greatly restrict established customer' lists, will minimize this problem. Stricter enforcement of the reporting requirements may also help close this loophole.

In addition to the problems listed above, the forms which are submitted are many times incomplete or illegible. This necessitates an examination of the records kept by the filing institutions which should be more complete.

Those Form 4789 reports which are filed are sent to Philadelphia Service Center of IRS. IRS puts the information they contain on a magnetic tape and sends it to Customs

monthly. The information fed into the computer consists of the name of the person conducting the transaction, his address, the amount transacted, the date, and the number (social security number, passport number, date of birth, etc.) identifying that individual. An on-line retrieval system of all 4789's is maintained at the Currency Investigation Division. Once a transaction has been confirmed in the computer, a simple search can be made of the microfiche file to examine a computer generated reproduction of the original form. The original is maintained by IRS. (At least one original was stamped by IRS with an internal classification heading, resulting in the determination by IRS that it was a taxpayer return information document, a clearly erroneous decision.)

Form 4790

The Form 4790 is filed by the traveler or the person causing the currency or bearer monetary instrument to be transported into or out of the United States. Caselaw has ruled that no violation of the statute occurs until a traveler actually leaves the United States and, further, that there is no 'attempt' provision in the law. United States v. Gomez Londono, 422 F.Supp. 519 (D.C. N.Y. 1976), rev'd on other grounds, 553 F.2d 805, aff'd 580 F.2d 1046 (C.A. 2 1977). As a result of this and other cases, a bill is pending in Congress to add the crime of 'attempt' to the existing statute. In the meantime, this interpretation has made the reporting requirements difficult to enforce as to outbound travelers since an agent would have to accompany the traveler over the border before making an arrest. Consequently, the bulk of the 4790's are filed by inbound travelers whose persons and baggage are searched by Customs upon arriving in the United States. (For the same reason, the violations which have been prosecuted concern inbound travelers almost exclusively.)

After filing, the information on the form 4790 is entered into a separate automated on-line file maintained in the Customs TECS computer which is retrievable at certain select Customs secondary TECS terminals. The retrieved form is a mirror image of the original except for the signature. Copies are kept at Customs headquarters.

3. Uses of the Information Provided

The Currency Investigations Division examines the data supplied to its computer by the forms filed by the banks on currency transactions in excess of $10,000 (Form 4789 or

CTR) and the information supplied by travelers transporting in excess of $5,000 into or out of the United States (Form 4790 or CMIR). Indications of possible violations of law within the jurisdiction of the Customs Service are referred to the field as investigative leads. In addition, information on possible violations coming within the jurisdiction of other law enforcement agencies are referred to those agencies. Finally, the data bank is available to other agencies for examination provided the request meets disclosure requirements and proceedures formulated by the Department of Treasury.

The data base has not only provided financial information and investigative leads on drug traffickers and other criminals already known to law enforcement agencies but has also provided the raw intelligence from which previously unknown operations have been detected. A case in point is the discovery of a bank account in California through which over 17 million dollars was funneled in twenty months. An analyst examining the 4789's from this bank saw recurrent large cash deposits into a particular account. The information was referred to the local Customs office with the result that a joint DEA-Customs-IRS investigation as now uncovered a major drug trafficking ring and traced over 33 million dollars into and out of the United States.

Customs also has an ongoing arrangement with the Drug Enforcement Administration whereby certain information is automatically provided DEA. The search done by Customs is not the same for both forms (4789 and 4790). The information in the computer from the Form 4790 is compared with entries made by DEA into the TECS information base. This is not as complete as NADDIS. (NADDIS is an acronym for Narcotic and Dangerous Drug Information System.) In fact, a rough estimate is that this search connects suspects in TECS with only about 20 percent of the persons indexed in NADDIS. The information contained in the Form 4789 is currently searched manually. IRS sends over two stacks of 4789's, one with individuals having domestic addresses, the second with individuals having foreign addresses. A manual search is made to select those individuals from narcotic source and transshipment countries transacting over $50,000. Each of these searches is now done on a monthly basis. The names and information selected in these searches are sent over to the Financial Investigations Unit of DEA which distributes them to the appropriate DEA field offices.

A number of prospective developments will improve this information-gathering service. First, the report generator capability on the 4789's will be brought up to the same level as the 4790's by September, 1979. This means that searches for 4789's revealing individuals from narcotics source or transshipment countries transacting over $50,000 will be conducted through automatic means rather than manually. This also means that more sophisticated crossmatches between 4790 and 4789 forms will be possible. Second, DEA and the Narcotic and Dangerous Drug Section of DOJ are in the process of formulating additional search criteria to broaden the scope of information provided by the system. These criteria, of course, must be approved by Treasury. At the least, however, it should be possible in the near future to have the information on the forms run against NADDIS. The Currency Investigation Division at Customs Headquarters has requested a NADDIS terminal. When installed, this would permit both forms to be run against the information in NADDIS, not merely, as is the case now, the 4790's against DEA entries in the TECS computer base. Agreement should also be forthcoming to select out those 4790's reflecting transactions in excess of $50,000 conducted by individuals from narcotic source of transshipment countries, something which is only done manually at the present time with the 4789's.

Prosecutors and investigators may also obtain access to the information in the TECS computer by submitting requests to the Currency Investigation Division which meet the requirements formulated by the Treasury Department. This particular service is expected to provide assistance to the prosecutor or investigator already involved in an investigation.

The simplest request involves the submission of the names of persons already identified as being part of a drug trafficking organization. The information supplied in response to such a request can provide the evidence to link known members of the organization as well as provide the names of individuals previously unknown to the investigation. The information can also provide evidence of currency transportation violations, including proof that the required forms were not filed, permitting the imposition of additional counts in the indictment and increased fines (see explanation below). Finally, the information can provide evidence of the scope of the organization's financial operations, information which is valuable in narcotics prosecutions and particularly so in 21 U.S.C. Section 848 (Continuing Criminal Enterprise) and 18 U.S.C. Section 1961-1968 (RICO) cases.

Treasury Department regulations govern access to information contained in the TECS computer. It should be remembered that the simplest route will always be through the local Customs agent. (Since it is a Customs document, Customs agents have immediate access to the 4790's at local terminals on a need to known basis.) If an investigation has progressed to the point where there is a belief that largescale financial transactions or movements of currency into or out of the United States are involved, it would probably pay to involve Customs in the case and obtain the benefit of their expertise in currency matters as well as the use of the currency statutes and the information in the TECS computer.

The regulations for disclosure of information in the TECS computer to agencies outside Treasury require that the request be made in written form and submitted by a "Treasury Department agreed upon pre-designated supervisory official of the requesting agency." DOJ has designated an attorney in the Office of Legal Support Services Section (Edgar Brown FTS 724-7050) to be the conduit for DOJ requests. Douglas Hollmann, an attorney in the Narcotic and Dangerous Drug Section (FTS 724-7152), can also be contacted regarding questions on how to get access to needed reports information.

The following information must be provided to Customs in the request:

a) a certification that the information requested is relevant to an investigation being conducted by the requesting agency;
b) a certification as to the specific nature of the investigation;
c) a statement containing sufficient identification of individuals named in the request to permit a valid examination of the available files. The information must be as specific as possible to ensure the legitimacy and accuracy of the information selected for dissemination.

The reason for the emphasis on providing as much information on identification as possible is to limit the possibility of providing information on persons not involved in criminal activity. The database compiled of 4789 and 4790 forms is not a criminal indexing system such as NADDIS but a

reporting or compliance file. For this reason, information provided pursuant to a request must not be disseminated further or incorporated into a criminal indexing system unless there is some additional basis for doing so.

Other methods of accessing the information in the TECS computer are possible. The regulations specifically recognize that criteria can be developed through cooperation with other agencies "in selecting reports which are likely to be useful to the other agency in carrying out its regulatory or other law enforcement functions." Such reports would thereafter be forwarded automatically. This is the type of system already in existence with DEA discussed above. The criteria, however, must have some relation to the law enforcement function of the requesting agency. Requests for information which cannot be related to a definite investigation or defined law enforcement goal will be treated as fishing expeditions and denied. For example, requests for a complete listing of all the 4789's filed by financial institutions in a certain geographic area, without more, will not be approved. It is possible, however, that a similar request for a series of banks being used by a narcotics organization might be approved. Discussion among Customs, DEA, and the Narcotic and Dangerous Drug Section will hopefully delineate the parameters of this approach but the detection of currency transactions which are indicators of illegal activity will remain primarily in the hands of the Currency Investigations Division of Customs.

4. Enforcement Provisions

a. Forfeitures

21 U.S.C. Section 1102 (counterpart 31 CFR Section 103.48) provides for the forfeiture of any monetary instrument transported in violation of the Act. United States v. One 1964 MG, 408 F. Supp. 1025 (W.D. Wash. 1976) reached the curious result that the first $5,000 of any currency transported in violation of the Act was exempt from forfeiture. In Ivers v. United States, 581 F.2d 1362 (C.A. 9 1978), the 9th Circuit reversed a district court decision reaching the same conclusion as being inconsistent with the clear purpose of the statute. And when One 1964 MG reached the Ninth Circuit, it was also reversed. 584 F.2d 889 (C.A. 9 1978). To hold otherwise would have meant that a $5,001 violation would forfeit only one dollar to the United States, a result clearly not intended by Congress.

b. Injunctions

31 U.S.C. Section 1057 (no CFR counterpart) authorizes an action to enjoin acts or practices constituting a violation of the Act. For example, a civil action has been instituted in connection with the prosecution of the United Americas Bank in New York to obtain a permanent injunction against the bank ordering it to comply with the Act.

c. Search Warrant Authorization

31 U.S.C. Section 1105 (counterpart 31 CFR Section 103.50) confers authority on the Secretary to seek a search warrant if he has probable cause to believe that monetary instruments are in the process of being transported in violation of the reporting requirements of the Act. The provision permits the issuance of a warrant to search persons, letters, parcels, packages, physical objects, places, premises, and vehicles.

d. Civil Penalties

Form 4789

Willful failure to file a Form 4789 will subject a domestic financial institution and any partner, director, officer, of employee willfully participating in the violation, to a fine not to exceed $1,000. 31 U.S.C. Section 1056(a) Treasury Regulation counterpart 31 CFR Section 103.47(a).

Despite its placement in Subchapter I - General Provisions subsection (a) of Section 1056 does not appear to apply to violations of the requirement to report the transportation of monetary instruments into or out of the United States (Form 4790) by individual travelers. Subsection (a) reads as follows:

> For each willful violation of this chapter, the Secretary may assess upon any domestic financial institution, and upon any partner, director, office or or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

There is no provision in subsection (a) for fining someone other than a domestic financial institution or its employees. Therefore, this penalty, despite its placement in

the General Provisions subchapter, appears to have no application to a traveler who fails to file a Form 4790. (It would seem to apply, however, to a financial institution moving currency or monetary instruments over the border which is required to file Form 4790's. Cf. United States v. Deak, 596 F.2d 871 (C.A. 9 1979) discussed below under Felony Violations.)

Form 4790:

Failure to file a Form 4790 (Report of International Transportation of Currency and Monetary Instrument), or the filing of a report containing any material omission or misstatement, is sufficient in itself to subject the person under a duty to file (the traveler or person causing the transportation of monetary instruments) to forfeiture and/or a civil penalty not to exceed the value of the currency or monetary instruments involved. 31 U.S.C. Sections 1102 and 1103 counterpart 31 CFR Section 103.47(b).

It should be noted that this provision provides for a civil penalty for merely failing to file the required 4790 report; there is no requirement that the failure be willful, as in the previous civil penalty section (Section 1056(a)). It should also be noted that civil penalties assessed under this section will be reduced by the amount of any forfeiture action undertaken pursuant to Section 1102.

e. Criminal Penalties
   i. Misdemeanor Violations

31 U.S.C. Section 1058 (counterpart 31 CFR Section 108.49) provides for a fine not to exceed $1,000 and/or imprisonment for not more than one year for any willful violation of the reporting requirements of the Act.

As noted above, there have been few prosecutions of financial institutions or personnel for willfully failing to file 4789's or Currency Transaction Reports. Most such prosecutions have resulted from narcotics investigations uncovering the use of banks to launder money. And of these, almost all have resulted in pleas (Chemical Bank in New York, for example).

One prosecution which proceeded to verdict involved the officer of a bank in Fort Worth, Texas, who disbursed cash loans to a narcotics dealer without reporting the transactions. Proof of willfulness to violate the reporting requirements of the Act was provided by the narcotics trafficker who testified that the defendant asked him how to avoid the regulatory agencies and personally gave him the

proceeds of the loans to prevent other personnel in the bank from generating the required documents. Since the violation was committed in furtherance of the violation of another federal law (the Controlled Substances Act), the defendant was charged with a felony. (See discussion of Felony Violations below.) The defendant was sentenced to 3 years and fined $20,000. (United States v. George Thompson III, verdict returned March 12, 1978).

Financial institutions may, of course, raise the defense that the employee committing the criminal violation did so on his own and that the normal agency theories which link the employee's conduct to his principal, the bank, do not apply. This argument was raised in the case of United States v. Deak and Company, supra, which involved a failure to file 4790's. (This case is discussed more fully under Felony Violations, below.) Deak and Company argued that the employee committed the acts charged for his own benefit. The government, however, introduced testimony that the employee had said he had acted for Deak and not for himself. The court stated that the acts of an agent may be imputed to the principal only if it is the agent's purpose to benefit the principal, thus bringing his acts within the scope of his employment. United States v. Hilton Hotels Corp., 467 F.2d 1000 (C.A. 9, 1972) cert. denied, 408 U.S. 1125 (1973). If the intent to benefit is present, then actual benefit is largely irrelevant. Standard Oil Co. of Texas v. United States, 307 F.2d 120 (C.A. 5 1962). (See also discussion in Deak as to the weight to be given corporate instruction and policies in determining whether the employee acted for himself or to benefit the corporation. United States v. Demauro, 581 F.2d 50 (C.A. 2 1978), an offshoot of the Chemical Bank case in New York dealing with the issuance of grand jury subpoenas, also discusses corporate liability.

The scarcity of decisions on failing to file Form 4789's, however, has been somewhat offset by a number of decisions dealing with the elements required to prove a criminal violation of the requirement that persons transporting or causing the transportation of more than $5,000 into or out of the United States file a Form 4790 or Report of International Transportation of Currency and Monetary Instrument. It should be remembered that this requirement is difficult to enforce against outbound travelers since the Gomez Londono case, discussed above, which ruled that there was no attempt provision in the statute and no violation of law until the traveler actually left the

United States. Most decisions have dealt, therefore, with inbound travelers. These case have made it clear that the criminal penalty provisions of the Act require proof of the defendant's knowledge of the reporting requirement as well as a specific intent (willfulness) to commit the crime. United States v. Granda, 565 F.2d 922 (C.A. 5 1978). A prosecution will fail if either of these elements is not proven.

In the cases which have discussed these elements, specific intent or willfulness has been inextricably bound up with proof of knowledge. Proof of the latter element will many times carry the former along with it since the defendant's conduct is usually ambiguous until knowledge is proven, after which the willful intent to avoid reporting the currency is easily inferred. Thus, in a forfeiture action involving currency carried into the United States by a woman who claimed that she was unaware of how much currency she was carrying with her, the District Court of the Southern District of California reasoned that a conscious effort to avoid ascertaining the true facts permitted the inference that the woman had knowledge of the law and therefore the specific intent to violate the statute. United States v. $7,320 F. Supp. (D.C. S.D. Cal. 1979). But proof of knowledge will not always automatically satisfy the specific intent element. Persons of different cultural backgrounds may treat an inquiry into the amount of currency they are carrying as the prelude to a bribe attempt. Thus, they may knowingly fail to report the transportation of currency but do so without the specific intent to violate the statute.

Problems in the early enforcement of the statute arose primarily from a failure to properly apprise travelers of the reporting requirement. In United States v. Granda, supra, a false statement on a customs declaration form that the defendant was not carrying more than $5,000 into the United States did not establish that the defendant was aware of the separate reporting requirement. In United States v. Schnaiderman, 568 F.2d 1208, (C.A. 5 1978), rehearing denied, 573 F.2d 1309, a resident's statement that he was aware of United States currency laws was too vague and unspecific to warrant a finding of knowing and willful violation of the reporting requirements. In United States v. Warren, 578 F.2d 1058 (C,A, 5 1978), while the question was unnecessary to sustain a conspiracy conviction, the court indicated that the mere presence of currency on board a ship, without more, was insufficient to give rise to the inference that the defendants had knowledge of the reporting requirements.

These problems arose from the failure to make clear the distinction between the transportation of currency, which is legal, and the willful failure to report such movements, which is not. In United States v. San Juan, 545 F.2d 314 (C.A. 2 1976), the Second Circuit said at page 318: "It must be remembered that Mrs. San Juan was not charged with carrying the cash across the border but with failing to file a report while doing so."

Subsequent modificaton of the Customs form presented to travelers seems to have overcome these problems. Thus, in United States v. Rodriguez, 592 F.2d 553 (C.A. 1979) the signing of a Customs form informing a traveler carrying currency over $5,000 that "[he] must file a report on form 4790, as required by law," page 557, was sufficient to prove knowledge and the requisite intent to violate the reporting requirements of the statute. The form has been modified further since the Rodriguez case to clearly inform the traveler that the transportation of over $5,000 is legal.

Despite these changes knowledge remains a difficult element to prove. Innovative use of investigative techniques, however, has resulted in the conviction of persons who otherwise would have avoided prosecution. For example, Customs places into its computer the names of persons who enter the United States with unreported currency but who successfully explain their failure to report it. No prosecutions are instituted on this initial trip. A subsequent entry, however, where the individual attempts the same explanation, is defeated by the record made of his prior encounter which provides ample proof of his knowledge of the reporting requirement and, therefore, his willful intent to violate the statute. In effect, the computer prevents him from claiming ignorance twice.

This has helped enforce the law against couriers bringing currency into the United States. Outbound persons are more difficult to prosecute but in Minnesota creative agents made sure they had nailed down the knowlege element of the crime before the first currency violation took place. Investigating the Ashok Solomon organization, which they knew was importing hashish from India, the agents made contact with the man who acted as a broker for many of the organization's members. They persuaded him to send each of the suspects a letter detailing the reporting requirements of the Act. To leave no doubt, the agents also made a point of boarding every outbound flight carrying members of the

organization to distribute leaflets explaining the reporting requirements. Another agent then secretely photographed them reading the notice. Executions of search warrants at the time of arrest surfaces one of these letters with the addressee's fingerprints on it. When the organization finally violated the currency reporting requirements, there was no difficulty in showing the violation was a knowing and willful one. (Three members of this drug ring were fined $500,000 each because of the currency violations. See discussion in Felony Violations below.)

Many of the decisions dealing with the elements of knowledge and willfulness concentrate on the circumstances surrounding the giving of notice to a traveler. The manner in which notice is given is extremely important to the success or failure of a subsequent prosecution for willfully failing to report the transportation of currency. Potential problems begin to appear the closer the confrontation between the traveler and the agents gets to custodial interrogation. Once the situation approximates custodial interrogation, the suspect's Fifth Amendment rights not only permit him to refuse to answer any questions but may vitiate any statements he does make. Thus, the handing out of leaflets to a group of passengers, or the asking of questions relative to the form when the person queried is not in a custodial environment is proper. No Miranda warnings are necessary at this point even though the answer, added to other facts, might form the basis for the prosecution of a criminal violation of the Act. United States v. Gomez Londono, supra. The reason for this is that the expected or probable result is compliance with the law, not the eliciting of a violation of the law. The government also has a substantial interest in transactions which extend across national boundaries and the question and forms apply to all travelers. However, when the expectation is that the compelled disclosures will themselves confront the suspect with substantial hazards of self-incrimination, the eliciting of further responses runs the risk that they will be suppressed as in violation of the suspect's Fifth Amendment rights. United States v. San Juan supra. The sequence of events is, therefore, very important. The form advising the suspect of the reporting requirement must be presented to him before a custodial situation develops.

ii. False, Fictitious or Fradulent Reports

31 CFR 103.49(c) provides for a penalty of nor more than $10,000 and/or five years imprisonment for anyone convicted of knowingly making any false, fictitious or fraudulent statement or representation in any report required by the Act.

(False statements or representations in reports may also be punishable by fines not to exceed $10,000 and/or imprisonment for not more than five years under 18 U.S.C. §1001. Convictions under 18 U.S.C. §1001 cannot be upset by attacking the reporting requirements of the Bank Secrecy Act. United States v. Fitzgibbon, 576 F.2d 279 (C.A. 10 1978), held that the reporting requirements do not violate the Fifth Amendment rights of travelers, relying on United States v. San Juan, supra, and that a conviction under 18 U.S.C. §1001 for making a false statement in a Form 4790, situation would stand. See also United States v. Pereira, 463 F.Supp 481 (E.D. N.Y. 1978) and discussion therein.)

iii. Felony Violations

31 U.S.C. Section 1059 (counterpart 31 Section 103.49(b)) reads as follows:

> Whoever willfully violates any provision of this chapter where the violation is
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> (1) committed in furtherance of the commission of any other violation of Federal law,
>
> or
>
> (2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, shall be fined not more than $500,000 or imprisoned not more than five years, or both.

When a misdemeanor currency violation is committed in furtherance of a narcotics violation, the violator can be prosecuted under the felony provisions of the statute and subjected to a possible $500,000 fine. In the Ashok Solomon case (District Court, Minnesota), three of the principal defendants in a hashish smuggling organization were each fined $500,000 and sentenced to 5 years in addition to sentences on narcotics counts.

Subsection (2) of Section 1059, which raises misdemeanor violations to a felony where the violations are committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, is not as applicable to narcotics prosecutions as subsection (1).

Nevertheless, there may be instances where there is insufficient evidence to make out a narcotics case but enough violations to satisfy subsection (2). So far, only one case United States v. Deak and Company, 596 F.2d 871 (C.A. 9 1979), has examined the language of this provision.

Deak and Company of California is a subsidiary of Deak and Company of New York, one of the largest foreign currency exchange dealers in the world. The defendant Beusch was an officer of the firm who was convicted of 377 misdemeanor violations of the Bank Secrecy Act (31 U.S.C. Sections 1101 and 1058) for failing to report the movement of currency into the United States. The firm was also convicted of the 377 misdemeanors. The facts proved at the trial showed that Beusch handled the importation of approximately $11 million from two Filipino nationals without reporting the importation to the Treasury Department. Both defendants were also indicted under the felony provisions, the government arguing that the evidence showed a violation which came within the purview of Section 1059, subsection (2). The district court dismissed the felony counts. The government appealed the dismissal (along with the defendants appeal contesting their misdemeanor convictions) and the Court of Appeals for the Ninth Circuit, voting 2 to 1, affirmed the convictions and reversed the dismissal of the felony counts.

The district court read into the statute the requirement that something more than a series of misdemeanor violations was required to meet the elements of the felony provision. The dissent in the Court of Appeals concentrated on this, arguing that the phrase 'part of a pattern of illegal activity' required some separate illegal activity, such as state or local violations. The dissent based this on the subsection's proximity to subsection (1) which speaks of violations committed 'in furtherance of the commission of any other violation of Federal law.'

The majority, however, decided that the plain language of the statute indicated that a series of misdemeanor violations could rise to the level of a felony. They did not decide, however, what circumstances would provide such a result, stating merely that the facts in the case before them could have provided such a finding. This reasoning seems to be in accord with the intent of the statute (the legislative history of which is silent on this particular question) since Congress intended that very large violations of the reporting requirements should be fined heavily to prevent violations from being shrugged off as part of the cost of doing business.

There is another reason for believing the dissent's concern that the government will use the statute to bootstrap

misdemeanor violations into felonies is misplaced. The Racketeer and Corrupt Organizations Statute (RICO), 18 U.S.C. Sections 1961 et. seq., was enacted in the same year and uses terminology similar to that in the Bank Secrecy Act. The phrase, "a pattern of racketeering activity," is not directly on point but may help illustrate the attributes which Congress intended the phrase in the Bank Secrecy Act, "a pattern of illegal activity", to possess. While Congress did not define in the RICO statute what is meant by the word "pattern", it is nevertheless clear that there must be some nexus or interrelationship between the acts or activity charged in order to establish a "pattern". The cases interpreting the RICO statute require proof that the acts possess the same or similar purposes, results, participants, victims, methods of commission, or are otherwise interrelated and not isolated events.

The same requirement would logically seem to apply to the terminology used in the Bank Secrecy Act. Thus, "a pattern of illegal activity" would require more than a series of unrelated misdemeanor violations to constitute a felony. This would appear to satisfy both the dissent and the district court in the Deak case since the government would not be able to bootstrap such violations, without more, into felonies. Deak and its employee Beusch would still be convicted under this analysis since the violations in that case were related, being connected to the same persons (the two Filipinos) and obviously a pattern of illegal activity, i.e., the attempt to move currency into the United States without reporting it to the Treasury Department. A series of violations, however, which are not related in some manner beyond the fact that they are committed by employees of the same financial institution would not appear to rise to the level of conduct intended to be punishable as a felony under subsection (2) of Section 1059.

III UTILIZATION OF BANK SECRECY ACT PROVISIONS IN NARCOTICS PROSECUTIONS

The Bank Secrecy Act provides information and penalties which can be of significant assistance in major narcotics prosecutions. Any investigation which becomes involved in the tracing of currency transactions, or the movement of currency into or out of the United States, should consider submitting a request (through a local Customs agent, DEA headquarters, or the Department of Justice) for information

contained in the TECS computer on the persons identified as being in the organization under investigation. Information revealed in this manner can be used to link individuals in a conspiracy, provide leads to other suspects, and furnish documentation of financial activities which can be useful in accurately defining the financial aspects of the organization under investigation. In certain cases, such as RICO or 848 prosecutions, the information may be crucial to the government's success at trial.

Whether or not such a request is made, or is successful, investigators and prosecutors should remain aware of the possibility of charging narcotics traffickers with violations of the Bank Secrecy Act. The civil penalties alone provide for fines levied up to the value of the currency illegally transported. Usually, however, the narcotics involvement will easily raise the misdemeanor violations to felonies, permitting the imposition of fines as large as $500,000, fines which even the most successful trafficking organizations will have difficulty passing off as part of the cost of doing business.

[APPENDIX D: Financial Investigation Assistance]

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Richard Shine	Chief, Multi-National Fraud Branch, Fraud Section, Criminal Division	(FTS) 724-7116
Robert B. Serrino	Director, Enforcement and Compliance Division, Office of the Comptroller of the Currency	(FTS) 447-1847 (202) 447-1847
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[APPENDIX E]

[NOTICE OF INTEREST SUBJECT TO FORFEITURE UNDER 18 U.S.C. 1963(a)(1).]

ABC Corporation, an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, was acquired by defendant John Doe with income derived from the aforementioned pattern of rackeetering activity in violation of Title 18, United States Code, Section 1962(a). Therefore, defendant John Doe's 100% ownership interest in ABC Corporation is subject to forfeiture pursuant to Title 18, United States Code, Section 1963(a)(1).

[NOTICE OF INTEREST SUBJECT TO FORFEITURE UNDER 18 U.S.C. 1963(a)(2).]

Defendant Joe Smith owns 25% of the common stock of Acme Corporation. This ownership interest affords defendant Smith a source of influence over Acme Corporation, an enterprise which, as alleged above, defendant Smith conducted, or participated in the conduct of, in violation of Title 18, United States Code, Section 1962(c). Therefore, defendant Smith's ownership interest is subject to forfeiture pursuant to Title 18, United States Code, Section 1963(a)(2).

[MODEL CCE INDICTMENT AND NOTICE OF INTEREST SUBJECT TO FORFEITURE UNDER 21 U.S.C. 848(a)(2).]

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of April 1974 and continuously thereafter up to and including September 30, 1979, in the Eastern District of New York and elsewhere, NANCY ROE the defendant, unlawfully, wilfully, and

knowingly did engage in a continuing criminal enterprise in that she unlawfully, wilfully, and knowingly did violate Title 21, United States Code, Sections 841(a)(1), and 841(b)(1)(B), as alleged in Counts Two, Three, Four, Five and Six of this indictment which are incorporated by reference herein, and did commit other violations of said statutes, which violations were part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant NANCY ROE occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant NANCY ROE obtained substantial income and resources.

2. With profits obtained by the defendant NANCY ROE in such enterprise, the defendant did purchase and obtain the following property, which is subject to forfeiture to the United States of America pursuant to Title 21, United States Code, Section 848(a)(2)(A):

a. Residential property located at 1235 East 102 St., Brooklyn, N.Y.

b. 10,000 shares of common stock in Sutton Corporation.

c. a 50% ownership interest in Sunshine Health Spas.

d. a diamond necklace purchased at Tiffany's on December 24, 1978.

3. NANCY ROE's ownership interest in a warehouse located at 1200 Coffey St., Brooklyn, N.Y., which was used by members of the criminal enterprise to store marijuana after it was unloaded from Colombian vessels, is subject to forfeiture to the United States of America pursuant to Title 21, United States Code, Section 848(a)(2)(B).

[APPENDIX F]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. S-CR-75-53
	)	
ROBERT CHARLES FOX	)	
JOHN J. NERONE, a/k/a "J.J.",	)	
VICTOR JOSEPH SEPPI	)	
MARVIN MARTIN HORNSTEIN, a/k/a "Pete",	)	
LEONARD VIETH	)	
ARTHUR GENTRY	)	
DONALD LEE HORNSTEIN	)	
DONALD J. BRADLEY, a/k/a "Moose",	)	
WILBUR Y. CAPLES, a/k/a "Butch",	)	
LAVERNE JAMERSON	)	
REUBIN HELFER	)	
LARRON JOE SCHELLINGER, a/k/a "Jo-Jo", and	)	
DOMINIC JOSEPH GRECO, SR.	)	

MOTION AND ORDER FOR RESTRAINING ORDER

The United States of America, pursuant to Section 1963(b), Title 18, United States Code, hereby moves this Honorable Court to enter an order restraining and prohibiting ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI from selling, leasing, mortgaging, encumbering and otherwise alienating any of their interest in and control over Maple Manor, Inc., doing business as the Cottonwood Cove Estates Mobile Home Park, or any of the assets thereof and restraining and prohibiting

the said ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI, from engaging in any conduct which would deprecate, damage, or in any way diminish the value of any asset of the Cottonwood Cove Estates Mobile Home Park and in support thereof shows as follows:

1. That ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI have been indicted for conducting the affairs of Maple Manor, Inc. doing business as Cottonwood Cove Estates Mobile Home Park through a pattern of racketeering activity in violation of Section 1962(c), Title 18, United States Code.

2. That the outstanding stock of Maple Manor, Inc. is owned by the following persons with the percentages indicated:

a. Blanche Fox - 85%

b. VICTOR JOSEPH SEPPI - 10%

c. JOHN J. NERONE - 5%

3. That ROBERT CHARLES FOX has a full power of attorney over the ownership interest which Blanche Fox has in Maple Manor, Inc.

4. That Blanche Fox is the president of Maple Manor, Inc.

5. That VICTOR JOSEPH SEPPI, and JOHN J. NERONE are officers and directors of Maple Manor, Inc.

6. That Cottonwood Cove Estates Mobile Home Park, which is located at 3617 North Grand Avenue East, Springfield, Illinois, is a wholly owned asset of Maple Manor, Inc.

7. That ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI, being persons employed by and associated with Maple Manor, Inc.,

d/b/a Cottonwood Cove Estates Mobile Home Park, did from on or about and before September 1, 1974, to on or about the date of the filing of the indictment in this cause, conduct and participate directly and indirectly in the conduct of the affairs of the said Maple Manor, Inc. doing business as Cottonwood Cove Estates Mobile Home Park, an enterprise, as defined in Section 1961(4), Title 18, United States Code, engaged in and the activities of which affect, interstate commerce, through a pattern of racketeering activity and collection of unlawful debt as set forth in Count VI of the indictment herein, which is hereby incorporated by reference and realleged as if set forth in full, thereby making the interest of the said ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI subject to forfeiture to the United States pursuant to Section 1963(a), Title 18, United States Code.

8. That pursuant to Section 1963(b), Title 18, United States Code, this Court has jurisdiction to enter such restraining orders or prohibition, or to take such other actions including but not limited to the acceptance of performance bonds in connection with such property subject to forfeiture as the Court deems proper.

9. That the Court's power to so act is plenary and may be entered sua sponte or ex parte without the necessity of a hearing.

10. That if the Court fails to enter such an order as prayed by the United States, the said ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI may sell, alienate, or otherwise place the property beyond forfeitable condition, and thereby frustrate the ends of public justice.

WHEREFORE, the United States of America respectfully requests this Honorable Court to enter an order providing as follows:

1. Restraining, prohibiting and enjoining ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI from selling, encumbering, disposing of, mortgaging, or otherwise alienating the said Maple Manor, Inc., doing business as Cottonwood Cove Estates Mobile Home Park or any of its assets, pending the outcome of the trial on the indictment herein.

2. Restraining, prohibiting, and enjoining, ROBERT CHARLES FOX, JOHN J. NERONE, and VICTOR JOSEPH SEPPI, from engaging in any conduct whatsoever which would tend in any way to diminish the value of the said Maple Manor, Inc., doing business as the Cottonwood Cove Estates Mobile Home Park or any of its assets pending the outcome of the trial on the indictment herein.

Respectfully submitted,

/s/ Elijah Richardson
ELIJAH RICHARDSON
ASSISTANT UNITED STATES ATTORNEY

O R D E R

It is so ordered.

/s/ Harlington Wood
UNITED STATES DISTRICT JUDGE

ENTERED: This 29th day of September, 1975.

[APPENDIX G]

Government's Proposed Jury Instruction and Special Verdict Forms in United States v. Jack O. McNary (N. D. Illinois).

Ladies and Gentlemen of the Jury, now that you have returned a verdict of guilty as to Counts One and Two of the Indictment, it is your duty to return a special verdict stating the extent, if any, of the interest or property of the defendant that is subject to forfeiture with regard to the "enterprise" alleged in each of those two Counts.

As to Count One of the Indictment, it is alleged in paragraph 6 of that Count that:

"The defendant JACK O. McNARY, having established and operated B. & M. Manufacturing Company in violation of Title 18, United States Code, Section 1962(a), has thereby made his 100 percent ownership interest in B. & M. Manufacturing Company and its accounts, real property, personal property, contracts and licenses subject to forfeiture pursuant to Title 18, United States Code, Section 1963(a)."

If you find that these allegations in Count One of the defendant's ownership interest subject to forfeiture have been proven beyond a reasonable doubt, say so by your verdict.

If you find that these allegations in Count One of the defendant's ownership interest subject to forfeiture have not been proven beyond a reasonable doubt, say so by your verdict.

Special verdict forms as to Count One have been prepared for your convenience.*

*[Editor's note: The special verdict forms have been omitted.]

As to Count Two of the Indictment, it is alleged in paragraph 4 of that Count that:

"The defendant JACK O. McNARY, having established and operated McNary's Ports of Call Travel Service in violation of Title 18, United States Code, Section 1962(a), has thereby made him 50 percent ownership interest in McNary's Ports of Call Travel Service, and its accounts, real property, personal property, contracts and licenses subject to forfeiture pursuant to Title 18, United States Code, Section 1963(a)."

It is the theory of the defense that the defendant Jack O. McNary's ownership interest in McNary's Ports of Call Travel Service is not a 50 percent ownership interest as alleged in the indictment but is only an 11 percent ownership interest.

If you find that the defendant's ownership interest in McNary's Ports of Call Travel Service that is subject to forfeiture has been proven beyond a reasonable doubt to be a 50 percent ownership interest, say so by your verdict.

If you find that the defendant ownership interest in McNary's Ports of Call Travel Service that is subject to forfeiture has been proven beyond a reasonable doubt to be an 11 percent ownership interest, say so by your verdict.

If you find that the Government has not proven beyond a reasonable doubt that the defendant's ownership interest in McNary's Ports of Call Travel Service is subject to forfeiture, say so by your verdict.

99-995 O—83——23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 77 CR 1623
	)	
JACK O. McNARY	)	

COUNT TWO SPECIAL VERDICT

We, the jury, find that the defendant Jack O. McNary HAS MADE his 11 percent ownership interest in McNary's Ports of Call Travel Service and its accounts, real property, personal property, contracts and licenses subject to forfeiture.

FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 77 CR 1623
	)	
JACK O. McNARY	)	

COUNT TWO SPECIAL VERDICT

We, the jury, find that the defendant Jack O. McNary HAS MADE his 50 percent ownership interest in McNary's Ports of Call Travel Service and its accounts, real property, personal property, contracts and licenses subject to forfeiture.

FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 77 CR 1623
	)	
JACK O. McNARY	)	

COUNT TWO SPECIAL VERDICT

We, the jury, find that the defendant Jack O. McNary HAS NOT MADE his ownership interest in McNary's Ports of Call Travel Service and its accounts, contracts and licenses subject to forfeiture.

FOREPERSON

[APPENDIX H]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

KARL R. HUBER,

Defendant.

ORDER TO SHOW CAUSE

77 Cr. 670 (CHT)

----------x

Upon the annexed affidavit of Assistant United States Attorney Thomas D. Warren and upon the Motion of the Honorable William M. Tendy, United States Attorney for the Southern District of New York,

IT IS ORDERED that the defendant Karl R. Huber appear before the Honorable Charles H. Tenney in Courtroom at the United States Courthouse, Foley Square, New York, New York 10007 on , 1980 at or as soon thereafter as counsel may be heard to show cause why he should not be ordered:

(1) to transfer to the United States of America and deliver forthwith to the United States Attorney for the Southern District of New York any and all stock certificates in the following entities or companies:

Tudor, Inc.
Boden, Inc.
Atlantic Medical Corporation
Hospital Equiptment Company
Debs Hospital Supplies, Inc.
Medical Facilities
Hospital Furniture/Medical Facilities;

along with any other documents evidencing defendant Karl R. Huber direct or indirect interest in the aforesaid entities or companies; and

(2) to deliver to the United States Attorney for the Southern District of New York any and all corporate books and records in defendant Karl R. Huber's possession or control relating to the aforesaid entities or companies, including but not limited to all corporate minute books, balance sheets and financial statements, accounting journals and ledgers, bank statements, passbooks, statements of investment accounts, and corporate income tax or information returns; and it is further

ORDERED that defendant shall bring to Court on the return date set by this Order all stock certificates, documents evidencing ownership interests, and corporate books and records specified above; and it is further

ORDERED that the restraining order dated February 27, 1978 and entered on February 28, 1978 by this Court shall be continued in full force and effect; and it is further

ORDERED that personal service of a conformed copy of this order and the annexed affidavit shall be made on Bohrer, Ullman and Taikeff, 335 Broadway, New York, New York 10013 attorneys for Karl R. Huber, by 5:00 P.M. on April , 1980.

Dated: New York, New York

1980

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

KARL R. HUBER,

Defendant.

AFFIDAVIT

77 Cr. 670 (CHT)

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

THOMAS D. WARREN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of William M. Tendy, United States Attorney for the Southern District of New York, and I have been assigned to handle certain aspects of the criminal forfeiture imposed as part of the Court's sentence in this case.

2. On November 30, 1978, the jury in this case returned verdicts of guilty on 31 counts of the Superseding Indictment. Included among these was Count 42, which charged defendant Karl R. Huber with conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). By special verdict the jury found that the enterprise alleged in Count 42 consisted of the following entities, all of which were owned or controlled one hundred percent by Karl R. Huber:

Tudor, Inc. ("Tudor")
Boden, Inc. ("Boden")
Atlantic Medical Corporation ("Atlantic")
Hospital Equipment Corporation ("Hospital Equipment")
Debs Hospital Supplies, Inc. ("Debs")

Medical Facilities
Hospital Furniture/Medical Facilities
("HF/MF")

3. In sentencing Karl R. Huber on March 30, 1979, this Court directed forfeiture to the United States of Tudor, Boden, Atlantic, Hospital Equipment, Debs, Medical Facilities and HF/MF in accordance with the special verdict of the jury. The Court also authorized the Attorney General to seize all property or other interest of the defendant in those entities. The Court provided, however, that the defendant could redeem and repossess himself of the entities in question at any time within six months of the date of the judgment upon payment or delivery to the Attorney General of cash or other property satisfactory to the Attorney General. A copy of the judgment of conviction is annexed as Exhibit A. In the judgment the Court also provided that its restraining order dated February 27, 1978, was continued in full force and effect.

4. On July 20, 1979, defendant's conviction was affirmed by the U.S. Court of Appeals for the Second Circuit. Petitions for rehearing and rehearing en banc were denied by orders of October 10, 1979. Defendant's subsequent motion for a stay of the mandate pending the filing of a petition for certiorari to the Supreme Court was granted by order of November 8, 1979.

5. The petition for certiorari was denied on March 17, 1980, and the mandate of the Court of Appeals issued on April 14, 1980.

6. To date, defendant has not redeemed the entities or companies subject to this Court's judgment of forfeiture by payment or delivery to the Attorney General of cash or property having a value of $100,000, as per the terms and conditions set forth in the judgment. Indeed, approximately $25,000 of the fines also imposed by the judgment, along with some $19,000 in costs, still remain unpaid.

7. The relief sought by the Government on this application is intended to effectuate the seizure of the property or other interests forfeited by the defendant in as orderly and expeditious a manner as possible. In accordance with the terms of 18 U.S.C. § 1963(c), the Government intends to dispose of the property in question as soon as commercially feasible, making appropriate provision for the rights of innocent persons.

8. Once in possession of the stock certificates or other ownership interests of the defendant, the corporate books and records, and a schedule of the various liabilities and creditors, the Government will be in a position to give due notice to all interested parties and to determine how best to proceed. We contemplate that certain supplementary proceedings may be necessary in order to marshal the assets subject to forfeiture, to determine the respective priorities of any other claimants thereto, and to make appropriate arrangements for their ultimate disposition.

9. Because defendant has been given notice to surrender on April 24, 1980 to begin his term of imprisonment, the instant application is made by Order to Show Cause and a return date of April 23 or before is requested.

10. No previous application has been made for this relief.

THOMAS D. WARREN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

- v - : ORDER

KARL HUBER and KARL R. HUBER, : 77 Cr. 670 (CHT)

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

Upon the annexed affidavit of Assistant United States Attorney Thomas D. Warren, the restraining order entered by this Court on February 28, 1978, the Judgment of Conviction of defendant Karl R. Huber entered on March 20, 1979, the Orders to Show Cause filed on April 18 and April 28, 1980, and upon all prior proceedings in this case,

IT IS HEREBY ORDERED AND DECREED that the transfer on or about September 28, 1979 by Karl R. Huber of his interest in Bavensdorf, Inc., to Karl Huber,* as Trustee of a 1965 Trust for the benefit of M.R. Huber and/or Karl R. Huber, is hereby set aside insofar as it effected any transfer of the property or other interest of Karl R. Huber as to which forfeiture was directed in the Judgment of Conviction entered on March 20, 1979; and it is further

ORDERED AND DECREED that Karl R. Huber and Bavensdorf Inc., are hereby divested of all right, title, and interest, direct or indirect, which they heretofore possessed in the following companies or entities or their assets:

*[Editor's note: Karl Huber is Karl R. Huber's father.]

Tudor, Inc.
Boden, Inc.
Atlantic Medical Corporation
Hospital Equipment Company
Debs Hospital Supplies, Inc.
Medical Facilities
Hospital Furniture/Medical Facilities

(hereinafter the "forfeited companies") and all such right, title, and interest is forfeited to the United States as provided in the Judgment of Conviction and subject only to the right of redemption contained therein; and it is further

ORDERED that the officers and directors of the forfeited companies and any subsidiaries of the forfeited companies shall cease to exercise all of the powers and authority heretofore possessed by them and that all such powers and authority under applicable state and Federal law and under the certificate of incorporation and bylaws of each such company shall henceforth reside in the Attorney General of the United States and be exercised by him or his delegates pursuant to 18 U.S.C. § 1963(c); and it is further

ORDERED that this Court shall take exclusive jurisdiction over the forfeited companies and their assets, wherever located, during the period in which the right of redemption specified in the Judgment of Conviction may be exercised and if it is not exercised, for such further period as may be necessary to allow the Attorney General to take all necessary action with respect to the forfeited property pursuant to 18 U.S.C. § 1963(c); and it is further

ORDERED that Karl Huber shall provide to the United States Attorney for the Southern District of New York any corporate books and records relating to the forfeited companies or any copies thereof in his possession or control, including all corporate minute books, balance sheets, financial statements, accounting journals and ledgers, bank statements, passbooks, statements of investment accounts, and corporate income tax or information returns; and it is further

ORDERED that in addition to any other discovery and procedural methods available to enforce a judgment, the attorneys for the Government shall have the right to compel the production of documents and the attendance of witnesses and to take deposition testimony under oath from all persons who may possess information as to the business activities, asse and liabilities of the forfeited companies; and it is further

ORDERED that the restraining order entered by this Court on February 28, 1978, shall continue to remain in full force and effect.

Dated: New York, New York
June , 1980

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

- against - : AFFIDAVIT

KARL HUBER and KARL R. HUBER, : 77 Cr. 670 (CHT)

Defendants. :

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.
SOUTHERN DISTRICT OF NEW YORK)

THOMAS D. WARREN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of John S. Martin, Jr., United States Attorney for the Southern District of New York, and I am primarily responsible for certain aspects of the criminal forfeiture imposed as part of the Judgment of Conviction in the above-captioned case.

2. This affidavit is submitted in further support of the Government's application for an order setting aside Karl R. Huber's purported transfer of Bavensdorf, Inc., on September 28, 1979 and divesting Karl R. Huber and Bavensdorf of their direct and indirect interest in seven specified companies or entities as to which forfeiture was directed in the Judgment of Conviction of Karl R. Huber entered March 20, 1979 (hereinafter the "forfeited companies"). The Government is also seeking additional relief necessary to remove the Hubers from control of the forfeited companies and to allow the Government to begin the process of identifying and marshalling the assets subject to foreclosure.

3. At trial Karl R. Huber testified that he owned 100 percent of Bavensdorf, Inc., which in turn directly owned Tudor Inc. and Boden, Inc, and indirectly owned the other forfeited companies (e.g., Tr. 4929-30, 4978-79, 4994). The jury found that all of the forfeited companies were part of an enterprise conducted by Karl R. Huber through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). It further found that Karl R. Huber owned 100 percent of each of the forfeited companies (Tr. 6364-66).

4. Accordingly, in sentencing Karl R. Huber on March 30, 1979, this Court directed forfeiture of Karl R. Huber's interest in each of the companies or entities in question pursuant to 18 U.S.C. § 1963 and authorized the Attorney General to seize the interests in question as provided by 18 U.S.C. § 1963(c).

5. On April 21, 1980, after all appeals were exhausted, this Court orally directed defendant Karl R. Huber to surrender to the Attorney General his direct or indirect interest in the forfeited companies. At that time, however, Mr. Huber, by his attorney, Jeffrey M. Ullman, stated that he was unable to effect the surrender of any of those companies since he had divested himself of his indirect ownership therein in September, 1979.

6. Specifically, Mr. Ullman informed the Court that on September 28, 1979, at the insistence of his father, Karl R. Huber transferred all his shares in Bavensdorf, Inc., to a trust controlled by his father.

7. The purported transfer of Bavensdorf, Inc., by Karl R. Huber on September 28, 1979, is memorialized in a document provided by Karl R. Huber to the Government after the hearing on April 21 and a copy of which is annexed as Exhibit A. In addition, Karl R. Huber testified under oath with respect to this transfer at a deposition on January 2, 1980. A copy of the relevant portion of his testimony is annexed as Exhibit B. At a subsequent deposition on June 10, he declined to answer questions on this subject, citing his Fifth Amendment privilege against self-incrimination.

8. At all times since February 28, 1978, and at the time of the purported transfer of Bavensdorf on September 28, 1979, both Karl R. Huber and his father have been subject to an order of this Court restraining them, inter alia, from "disposing of any part of their beneficial interest, direct or indirect," in the forfeited companies and from aiding in any disposition of the assets of those companies other than in the normal course of business.

9. Since the purported transfer of Bavensdorf, Inc., on September 28, 1979, was plainly in violation of this Court's restraining order insofar as it effected any transfer of the property or other interests forfeited in the Judgment of Conviction, the Government is requesting that such transfer be set aside. Since any direct or indirect

interest in the forfeited companies, possessed by Karl R. Huber (including his interest in those companies by virtue of his ownership of Bavensdorf) was forfeited to the United States pursuant to the Judgment of Conviction, the annexed order also explicitly provides that Karl R. Huber and Bavensdorf, Inc., are divested of all of their direct or indirect right, title, and interest in the forfeited companies, subject to the right of redemption set forth in the Judgment.

10. We are also requesting this Court to order that the corporate officers and directors of the forfeited companies shall cease to exercise their powers and authority to act on behalf of those corporations, and that such powers and authority shall henceforth be exercised by the Attorney General or his delegates to the extent necessary to effectuate the forfeiture directed in the Judgment of Conviction. Such relief is necessary at this time to remove the Hubers and their agents from control of the forfeited companies, to implement the seizure of these companies by the Government, and to prevent any further transfers or other actions by the Hubers to impede or frustrate enforcement of the forfeiture.

11. In view of the attempted transfer of Bavensdorf, there is ample reason to be concerned about further transfers by the Hubers of the forfeited companies or their assets in an effort to evade the Judgment of this Court. Indeed, the Government has information indicating the possibility that assets of Boden, Inc., have been diverted to other Huber companies and that Hospital Furniture/Medical Facilities has

recently been "merged" into a new Huber corporation. Accordingly, we believe that further delay would be prejudicial and we respectfully urge the Court to enter the requested relief forthwith. Where assets that are subject to the forfeiture have been moved out of the forfeited companies by the Hubers, the government reserves its rights to seek any appropriate relief to recover same. Moreover, until all the forfeited assets are fully accounted for, we strongly believe that the February 28, 1978, restraining order should continue in effect, and the annexed proposed order so provides.

12. There are two other aspects of the relief now sought by the Government. The first concerns the Government's request for all of the corporate books and records of the forfeited companies. Although Karl Huber professes to be unable to produce any of the documents in question because they are supposedly in the custody of a federal grand jury in West Virginia, I have been advised by the U.S. Attorney's office for the Southern District of West Virginia that the only forfeited company whose records have been subpoenaed is Boden, Inc. As a result, there would appear to be no justification for any failure to produce all requested records of the other forfeited companies.

13. The annexed proposed order thus directs Karl Huber to produce such corporate books and records or copies thereof as are "in his possession or control." This does not require Karl Huber to produce at this time any documents which are currently within the custody of the grand jury in West Virginia, but it does reaffirm his obligation to provide those documents which he has a present ability to produce. Moreover, while Mr. Huber has also adverted to his

blindness as a justification for his purported inability to locate relevant documents, he has previously testified that there are various employees, including several constituting an "accounting department", at the Hubers' office at 215 Central Avenue (e.g., Transcript before Magistrate Jacobs on February 16, 1979, pp. 5-6). There appears to be no reason why these employees could not search for and produce the documents in question.

14. As for those records which have in fact been produced to the grand jury in West Virginia pursuant to subpoena, we understand the Court to have instructed us to seek such records from the appropriate authorities in West Virginia and we are currently endeavoring to do so. Since grand jury records are involved, however, this may take some time to accomplish and should not, as discussed above, relieve Karl Huber from his obligation to produce those records or copies thereof which remain in his possession, nor should it delay the granting of the other relief requested herein.

15. Finally, in conjunction with the relief requested in the annexed order, we intend to take appropriate action to enforce the criminal forfeiture directed in the Judgment of Conviction, using such discovery and procedural devices as are available in supplemental proceedings to enforce a judgment. The proposed order also includes authorization for the issuance of subpoenas and the taking of deposition testimony under oath from all persons who may possess relevant information. This is designed to clarify the government's authority to use the same procedures that would be available to enforce a judgment in a civil action.

/s/
THOMAS D. WARREN
Assistant United States Attorney

[APPENDIX I]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : NOTICE OF MOTION

PAUL MANNINO, : S 79 Cr. 744 (RWS)

Defendant. :

- - - - - - - - - - - - - - - - - -x

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Stuart J. Baskin, Assistant United States Attorney, the United States of America, by its attorneys, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Stuart J. Baskin, Assistant United States Attorney, of counsel, will move this Court on submission, before the Honorable Robert W. Sweet, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on January 25, 1980, or such other time as the Court may direct, for the entry of:

(1) An order, pursuant to 21 U.S.C. § 848, restraining or prohibiting the transfer of property which is claimed to be subject of criminal forfeiture under Count Two of Indictment S 79 Cr. 744 (RWS).

(2) Such other and further relief as the Court may deem just and proper in the circumstances.

Dated: New York, New York
January 25, 1980

Yours, etc.,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	AFFIDAVIT IN SUPPORT OF RESTRAINING ORDER PURSUANT TO 21 U.S.C. § 848
- v -	:	
PAUL MANNINO,	:	S 79 Cr. 744 (RWS)
Defendant.	:	

STUART J. BASKIN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and I have primary responsibility for prosecution of the above captioned individual. I make this motion for the issuance of a restraining order pursuant to 21 U.S.C. § 848 prohibiting the pre-conviction transfer of certain properties which are claimed as forfeitable by the United States of America.

2. On January 24, 1980, the Grand Jury returned the above superseding Indictment. Count Two charges the defendant Paul Mannino with operating a continuing criminal enterprise in violation of 21 U.S.C. § 848. Part of the penalty mandated by that statute is forfeiture of profits derived through the enterprise. The Grand Jury has charged that Mannino invested his drug profits in two properties -- shares of the Harbor Racquetball Ltd. and real property at 474 Van Sicklen Avenue, Brooklyn, New York -- and the Government seeks their forfeiture.

3. Section (d) of 21 U.S.C. § 848 provides that: "[t]he district courts of the United States *** 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 *** subject to forfeiture under this section, as they shall deem proper." This section is essentially identical to a provision in the Racketeer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1963(b). The purpose of these provisions is "to prevent preconviction transfers of property to defeat the purposes of the [penalty]" provided by Congress. S. Rep. 91-617, 91st Cong., 1st Sess., 160 (1969). The Government seeks such relief in this case.

4. Judges in this Courthouse now regularly enter these restraining orders to ensure preservation of allegedly tainted property pending the jury's verdict. See United States v. Miller, S 78 Cr. 904 (March 23, 1979) (Knapp, J.); United States v. Clemente, 79 Cr. 142 (March 20, 1979) (Sand, J.); United States v. Conroy, 77 Cr. 670 (Feb. 27, 1978) (Tenny, J.); United States v. Parness, 73 Cr. 157 (May 11, 1973) (Bonsal, J.). I am advised that Judge Goettel entered such an order under 21 U.S.C. § 848 in United States v. Pellon. Such an order in no way prevents the defendant from enjoying the use of his property prior to trial. Rather, just as a bail bond assures a defendant's appearance at trial and sentence, so too a restraining order or performance bond simply guarantees preservation of property by freezing the status quo pending resolution of Mannino's guilt under Count Two. See, e.g., United States v. Scalzitti, 406 F. Supp. 1014 (W.D. Pa. 1975). Such an order also serves to protect unwary third parties who may mistakenly purchase property that is in fact

subject to forfeiture. See, e.g., Simons v. United States, 541 F.2d 1351, 1352 (9th Cir. 1976) (third party loses rights in forfeited property).

5. Should the Court require further papers or oral argument in this matter, the Government respectfully asks that this order temporarily be entered pending final resolution of this matter.

WHEREFORE, the Government respectfully moves this Court for the entry of the order herein requested.

STUART J. BASKIN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- ORDER

PAUL MANNINO, NEIL LOMBARDO, : S 79 Cr. 744 (RWS)

Defendants. :

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This Court, having considered the Government's application for relief pursuant to 21 U.S.C. § 848 and 18 U.S.C. § 1961-63 and it appearing that the United States of America may suffer irreparable injury unless the relief sought is granted in that its claim for forfeiture of certain property in this proceeding may be frustrated,

IT IS HEREBY ORDERED that the defendants, their agents, servants, employees, attorneys and all other persons in active concert or participation with them are restrained pending final disposition of the criminal charges against the defendants from directly or indirectly selling, assigning, pledging, distributing, or otherwise disposing of any part of their beneficial interest, direct or indirect, in Harbor Racquetball Limited located in Brooklyn, New York, in property located at 474 Van Sicklen Avenue, Brooklyn, New York, or in property located at 120 South New Hampshire Avenue, Atlantic City, New Jersey, without prior approval of this Court on notice to the United States.

Dated: New York, New York
February 6, 1980

HONORABLE ROBERT W. SWEET
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

- v - :

PAUL MANNINO, :

Defendant. :

ORDER AND JUDGMENT OF FORFEITURE

S 79 Cr. 744 (RWS)

The Court, having determined that the requirements of Rules 7(c)(2), 31(e) and 32(b)(2) of the Federal Rules of Criminal Procedure have been met, and a duly empaneled jury having returned special verdicts calling for the criminal forfeiture of certain properties and interests under Titles 18 U.S.C. § 1963 and 21 U.S.C. § 848, and adjudged

1. IT IS HEREBY ORDERED that pursuant to Count Two of the above captioned Indictment, property located at 474 Van Sicklen Street, Brooklyn, New York; property located at 120 South New Hampshire Avenue, Atlantic City, New Jersey; and shares of stock in Harbor Racquetball Limited of Brooklyn, New York, registered in the records of that corporation in the names of Paul Mannino and Neil Lombardo, are forfeited to the United States of America;

2. IT IS FURTHER ORDERED that pursuant to Count Eleven of the above captioned Indictment, as redacted and submitted to the jury as Count Nine, property located at 474 Van Sicklen Street, Brooklyn, New York, is hereby forfeited to the United States of America;

3. IT IS FURTHER ORDERED that this order shall serve as a judgment in favor of the United States of America regarding the aforementioned property, and the United States of America shall seize the interests and property subject to forfeiture (A) by filing this order with the appropriate real estate filing offices having jurisdiction over the realty so forfeited; (B) by filing this order with the Secretary or other authorized officer of Harbor Racquetball Limited of Brooklyn, New York; and (C) by taking all other steps necessary and appropriate to protect the interests of the United States of America;

4. IT IS FURTHER ORDERED that 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 in respect of such forfeitures shall apply to the forfeitures incurred under this order, insofar as applicable and not inconsistent with the provisions of Titles 18 U.S.C. § 1963 and 21 U.S.C. § 848;

5. IT IS FURTHER ORDERED that the present occupants of 474 Van Sicklen Streen, Brooklyn, New York and 120 South New Hampshire Avenue, Atlantic City, New Jersey shall be entitled to maintain their occupancy of such premises pending compliance with the requirements of paragraph four above, provided that the occupants shall preserve and maintain the interest of the United States of America in those premises; and

6. IT IS FURTHER ORDERED that the United States of America shall take no steps to dispose of any property forfeited except as authorized by paragraph four of this order.

Dated: New York, New York
May 27, 1980

HONORABLE ROBERT W. SWEET
United States District Judge

July 3, 1980

Bernard Klieger, Esq.
67 Wall Street
New York, New York

Re: United States v. Paul Mannino, et al.
S 79 Cr. 744 (RWS)

Dear Mr. Klieger:

On June 17, 1980, the United States District Court for the Southern District of New York entered a judgment and order of forfeiture regarding certain properties in connection with the sentencing of the defendant Paul Mannino. The order specifies in paragraph four that all claims in mitigation and remission of forfeiture shall be governed by the customs forfeiture provisions as provided for in the anti-racketeering statute, Title 18, United States Code, Section 1963(c). Since you represent Mr. Mannino and certain other parties regarding the forfeiture aspect of the Court's order and judgment, the Government writes this letter to assist you in any applications that you may choose to make for remission or mitigation of that penalty.

The Government respectfully directs your attention to 28 C.F.R. Part 9 et seq., which details the procedures that are to be followed in connection with any claim in mitigation or remission. In brief, any applicant must submit his petition for remission or mitigation to the Attorney General of the United States, coupled with affidavits demonstrating the legal and factual bases for his claim of ownership or beneficial interest in such property. The Government thereupon will proceed to examine and consider each petition filed in accordance with these regulations. For your convenience you may file these petitions with the undersigned, who will arrange for their transmission to the Attorney General in Washington or his appropriate designatee.

END