Written Statement of

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Re: Civil Asset Forfeiture

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Introduction

The vast majority of civil forfeiture cases begin and end as administrative forfeitures. Only civil forfeiture cases involving real property or very high dollar amounts are required to be adjudicated by a court. The use of the administrative forfeiture procedure was greatly expanded by Congress in 1984 and 1990. Prior to 1984, only property valued at less than $10,000 was subject to administrative forfeiture under 19 U.S.C. § 1607. The purpose of administrative forfeiture is to allow the government to avoid the need of filing suit and obtaining a default judgment in uncontested cases. Because most property owners cannot afford to retain counsel, or the cost of litigation exceeds the value of the property, the vast majority of civil forfeiture cases are uncontested. The DoJ's statistics show that 80% of the cases that are initiated administratively are not contested. So these uncontested cases never go to court and are never seen by a judge.

During her recent confirmation hearing before the Senate Judiciary Committee, Senator Mike Lee (R. Utah) asked Ms. Loretta Lynch about the fairness of civil forfeiture procedure. Ms. Lynch replied that civil forfeiture is "done pursuant to supervision by a court, it is done pursuant to court order, and I believe the protections are there." This statement is woefully incorrect. As Ms. Lynch should know, the vast majority of civil forfeitures, including many of the most abusive ones, are never brought to the attention of a court. They are accomplished administratively by the seizing agency which stands to benefit from the funds obtained through that forfeiture process, thus creating a blatant conflict of interest. There is tremendous, daily abuse and unfairness in the administrative forfeiture procedure, where most property owners lack counsel. Even if they have counsel, the lawyer is generally unfamiliar with the technicalities of the process and many fatal errors are made by counsel --- such as failing to file a claim on time. There are only about ten lawyers ***in the entire United States*** who regularly defend civil forfeiture cases. They practice largely on the East and West Coasts. So even if you have the ability to retain counsel, you often can't find a qualified lawyer.

Ms. Lynch's U.S. Attorney's Office in Brooklyn and Central Islip, Long Island, has the largest staff of prosecutors who do nothing but forfeiture cases in the country. She typically has around ten such specialized forfeiture prosecutors and they are very aggressive (as in almost all U.S. Attorneys' offices). If even ***she***

does not understand the basics of the forfeiture process, how many U.S. Attorneys are there who do? How many U.S. Attorneys really care what is going on in their district with regard to forfeiture? I can tell you: very few. Their main focus in on how much property their office forfeits, since their office is graded on the basis of how much money it brings in, not on the quality of their cases. There is no grade for how many just results they achieve. The situation at Main Justice is even worse. Very few high-level Justice officials know much, if anything, about forfeiture. It has always been that way, unfortunately. So decisions get made by the attorneys in the Asset Forfeiture and Money Laundering Section of the Criminal Division. Those career attorneys resemble independent counsel who have only a single target: they become overly focused on forfeiture as a remedy. If you only have one tool, a hammer, then everything looks like a nail that needs to be hammered.

What follows are some suggestions for improving the administrative forfeiture process. I am also separately submitting a paper that will be published by The Heritage Foundation entitled "A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?"

Suggestions for Improving the Administrative Forfeiture Process

A. STOP FEDERAL SEIZING AGENCIES FROM REJECTING ADMINISTRATIVE CLAIMS BASED ON ARBITRARY INTERPRETATIONS OF THE 30 DAY "FILING" DEADLINE.

(1) STOP THE ABUSE BY THE FEDERAL SEIZING AGENCIES OF THE 30 DAY TIME LIMIT FOR RECEIPT OF ADMINISTRATIVE CLAIMS.

This type of abuse was supposed to be stopped by the CAFRA reforms. But the seizing agencies continue to play these games in order to prevent as many claimants as possible from being able to pursue their cases in court.

(2) ALLOW FOR EQUITABLE TOLLING OF THE DEADLINE FOR REASONS SUCH AS A LENGTHY DELAY IN DELIVERING THE CLAIM LETTER BY THE U.S POSTAL SERVICE.

The U.S. Postal Inspection Service is one of many federal seizing agencies authorized to administratively forfeit property. Why should a long delay of the claim letter's delivery by the U.S. Postal Service itself result in the automatic forfeiture of the owner's assets to the government? Yet, incredibly, the courts have approved such arbitrary actions by the seizing agencies. This is but one example of the games the seizing agencies lawyers play to deny the property owner a fair opportunity to contest the forfeiture. These issues are discussed in 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, 6.02[4][b], 6-30 to 6-35 (Matthew Bender, Dec. 2014 ed.).

See *Okafor v. U.S.*, 2014 U.S. Dist. LEXIS 91339, *16-19 (N.D. Cal. July 3, 2014) ("Equitable tolling of the statutory period [for filing a claim] is appropriate where the claimant (1) diligently pursues his rights, and (2) some extraordinary circumstance stood in his way and prevented timely filing." The court observes that the government made the absurd argument that "even the equivalent of a force majeure for the period from notice to the claims deadline would not excuse a late claim."); *In re Return of Seized $11,915 in U.S. Currency*, 2012 U.S. Dist. LEXIS 99154 (S.D. Cal. July 17, 2012) (same).

(3) REQUIRE THE AGENCY'S NOTICE LETTER TO INCLUDE A STREET ADDRESS FOR OVERNIGHT MAIL OR COURIER DELIVERY AND MAKE AGENCIES PROVIDE A FAX NUMBER AND ACCEPT FAXED CLAIM LETTERS. REQUIRE THE AGENCIES TO PROVIDE CLEAR NOTICE THAT THE CLAIM MUST BE ***RECEIVED*** BY THE AGENCY BY THE DUE DATE. ALSO REQUIRE NOTICE OF HOW LATE THE SEIZING AGENCY IS OPEN TO RECEIVE MAIL OR COURIER DELIVERIES. MANY CLAIMS ARE DENIED BECAUSE THE PROPERTY OWNER DOES NOT KNOW HOW DIFFICULT IT IS TO "FILE" A CLAIM CLOSE TO THE TIME DEADLINE.

B. BRING THE REMISSION AND MITIGATION PROCESS UP TO DATE.

(1) PROVIDE FOR JUDICIAL REVIEW OF THE MERITS OF REMISSION AND MITIGATION DECISIONS. JUDICIAL REVIEW IS CURRENTLY AVAILABLE ONLY WITH RESPECT TO SERIOUS PROCEDURAL ERRORS SUCH AS A FAILURE TO RULE ON A PETITION OR THE DENIAL OF A PETITION AS UNTIMELY WHEN IT IS IN FACT TIMELY.

(2) IN ORDER TO FACILIATE JUDICIAL REVIEW AND MORE JUST DECISIONS, REQUIRE AGENCIES TO PROVIDE A DETAILED EXPLANATION WHEN A PETITION IS DENIED.

Customs already requires "a written statement setting forth the decision of the matter and the findings of fact and conclusions of law upon which the decision is based" but only if the petition for relief relates to violations of certain statutes. 19 C.F.R. 171.21.

(3) PROVIDE FOR FEE AWARDS TO PERSONS WHO PREVAIL IN THE COURTS AFTER BEING DENIED REMISSION OR MITIGATION BY THE AGENCY.

(4) MAKE REMISSION DECISIONS PUBLICLY AVAILABLE TO ALLOW OVERSIGHT AND A BODY OF PRECEDENTS FOR LAWYERS TO REVIEW.

(5) EXPAND REMISSION'S CURRENT NARROW SCOPE SO ONE CAN CONTEST THE FACTUAL AND LEGAL BASIS FOR FORFEITURE, NOT JUST RAISE AN INNOCENT OWNERSHIP ISSUE. THIS CAN BE ACCOMPLISHED BY ABOLISHING THE OUTDATED, TRADITIONAL RULE THAT "REMISSION PRESUMES A VALID FORFEITURE." MOST PERSONS SEEKING REMISSION ARE NOT AWARE OF THAT RULE.

Customs has long allowed a petitioner to seek remission or mitigation on the ground that "the act or omission forming the basis of a penalty or forfeiture claim did not in fact occur." 19 C.F.R. 171.31. The other seizing agencies should be required to adopt the same rule.

(6) THE REMISSION PROCESS SHOULD PROVIDE AN INEXPENSIVE AVENUE FOR PROPERTY OWNERS TO CONTEST THE FORFEITURE. AT PRESENT IT IS LARGELY AN ILLUSORY REMEDY, AT LEAST IN CASES HANDLED BY THE DEA WHERE RELIEF IS ALMOST NEVER OBTAINED BY INDIVIDUAL PETITIONERS**. AT A MINIMUM, REQUIRE THE DEPARTMENT OF JUSTICE SEIZING AGENCIES TO ADOPT CUSTOMS' LONG ESTABLISHED PRACTICE OF ALLOWING A PROPERTY OWNER TO FILE A CLAIM (REQUIRING A JUDICIAL PROCEEDING) *AFTER* HER PETITION FOR REMISSION OR MITIGATION IS DENIED**.

(7) REQUIRE AGENCIES TO INCLUDE A DETAILED EXPLANATION OF THE ADMINISTRATIVE RELIEF PROCESS IN THE NOTICE OF SEIZURE. FEW PETITIONERS OR THEIR ATTORNEYS UNDERSTAND HOW IT WORKS.

All of these issues are discussed in Chapter 15 of my two volume forfeiture treatise, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender, Dec. 2014 ed.).

The "culture" of the forfeiture lawyers in some of the seizing agencies' counsel's offices is a significant problem. Their actions bespeak indifference to elementary fairness and justice; their only interest appears to be in declaring property administratively forfeited as quickly as possible. Without new leadership, these abuses will persist in the face of congressional reform efforts. I would also urge Congress to pay more attention to

the importance of the judicial nomination process to ensure that nominees will not be afraid to rule against the government. An independent judiciary is one thing that distinguishes our society from most other countries. Judges are our first line of defense against Executive Branch overreach, including law enforcement abuses.

A COMPARISON OF FEDERAL CIVIL AND CRIMINAL FORFEITURE PROCEDURES: WHICH PROVIDES MORE PROTECTIONS FOR PROPERTY OWNERS?

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A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?

David B. Smith

Abstract

Forfeiture reform efforts have focused on civil forfeiture, not criminal forfeiture. Most states only have civil forfeiture statutes or criminal forfeiture statutes that are seldom used. The most obviously abusive seizures typically occur at the state and local level; many of those bad seizures get "adopted" by federal law enforcement agencies, which commence civil forfeiture proceedings and return 80% of the forfeited money or other property to the state or local police department under the Department of Justice's much criticized "Equitable Sharing Program." Few of those state originated cases end up as criminal forfeitures because they are so weak that no prosecutor would bring a criminal charge. This partly explains why reform groups, the media and Congress have focused their attention on civil forfeiture reform and neglected the even more pressing need for criminal forfeiture reform. This paper will compare federal civil and criminal forfeiture procedure and evidentiary rules, showing that the current civil forfeiture procedural protections for property owners are actually much better than in criminal forfeiture cases. The biggest problem with civil forfeiture is that most people cannot afford to retain a competent attorney --- or any attorney for that matter --- to defend a federal civil forfeiture case. That, plus the bounty-hunter system, where all forfeited property is earmarked for law enforcement agencies, is why there is so much civil forfeiture abuse. However, if one can afford to pay for a competent attorney, the reformed civil forfeiture process is considerably more protective of property owners than the unreformed criminal forfeiture process. Thus, reformers should focus at least as much of their efforts on long overdue reforms of the criminal forfeiture process.

Key Points

- Groups supporting forfeiture reform, the media and Congress have focused their attention on abuses of civil forfeiture and produced proposals for its legislative reform, while ignoring the problems with, and abuses of, federal criminal forfeiture, which are at least as serious.
- Criminal forfeiture affords two very important protections that civil forfeiture does not: the requirement of a criminal conviction of the offense giving rise to the forfeiture and the right to appointed counsel for defendants facing criminal forfeiture. (However, third parties seeking to contest a criminal forfeiture of their property are not entitled to court-appointed counsel even if they are indigent.)
- In every other way, the procedural protections available to the property owner are much greater in a civil in rem forfeiture proceeding than in a criminal forfeiture proceeding under current federal law, as this paper will demonstrate.
- Prosecutors often use both civil and criminal forfeiture proceedings in the same case in a way that deprives the property owner of important procedural protections. The courts have tolerated these abuses.
- Civil forfeiture procedure was modernized and substantially reformed in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), but criminal forfeiture has steadily become less fair as a result of rules changes promulgated by a committee of very conservative judges selected by the Chief Justice of the Supreme Court and improper judicial decisions that have greatly expanded the scope of criminal forfeiture without congressional approval.
- Accordingly, reform groups, the media and Congress should focus their attention on criminal forfeiture reform at least as much as on further --- and much needed --- civil forfeiture reform. Reforming civil forfeiture alone will not end forfeiture abuse but merely shift it further into criminal forfeiture proceedings.

Introduction

Unlike civil forfeiture, our criminal forfeiture laws have never been reformed. Chairman Hyde decided to focus solely on civil forfeiture reform in order to avoid a whole new round of fights with the DoJ that would hold up enactment of his reform bill, first introduced in 1993. CAFRA actually greatly expanded the scope of criminal forfeiture as part of the compromise with the DoJ necessary to secure passage of the bill in both houses of Congress through the unanimous consent procedure. Not coincidentally, the DoJ pushed major changes in criminal forfeiture procedure (found in Rule 32.2 of the Federal Rules of Criminal Procedure) through the Advisory Committee on Criminal Rules in 2000, just as CAFRA was nearing enactment. Those rules changes consistently reduced or eliminated procedural rights and protections for defendants --- including the right to have the forfeiture issue decided by a jury --- and innocent third parties with interests in the property subject to criminal forfeiture. These rule changes tilted the criminal forfeiture "playing field" sharply in favor of the prosecution. Since then, criminal forfeiture has steadily become more oppressive thanks to other rules changes in 2009 and unwarranted judicial lawmaking sought by DoJ prosecutors. Rather than interpreting statutes, federal judges have systematically usurped legislative prerogatives by rewriting criminal forfeiture statutes to expand prosecutorial power. The Supreme Court has checked such judicial lawmaking in other spheres but not with regard to criminal forfeiture.[1] In fact, the High Court has simply declined to review most of these criminal forfeiture issues, so the erroneous lower court decisions have stood.

Despite the many problems with civil forfeiture, it is now provides considerably more due process safeguards to a property owner than criminal forfeiture. The rest of this paper explains this gap in due process safeguards point by point. The biggest problem with civil forfeiture is that most owners cannot afford --- or cannot even find --- competent counsel or any counsel to defend the

[1] *E.g., United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts…"); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985) ("It is the legislature, not the Court, which is to define a crime.").

case.[2] In criminal forfeiture cases an indigent defendant (but not an indigent third party) is entitled to appointed counsel. However, few appointed counsel are competent or have the time and resources to litigate complex criminal forfeiture issues. They are easily buffaloed by AUSAs who are forfeiture specialists into signing plea agreements that include Draconian forfeiture provisions that waive all of the defendant's rights to resist an overly broad or excessively punitive forfeiture order.

Many years ago, when criminal forfeiture procedures were much fairer than today, the Supreme Court observed that "broad [criminal] forfeiture provisions carry the potential for Government abuse and 'can be devastating when used unjustly.'" *Libretti v. U.S.*, 516 U.S. 29, 43 (1995) (quoting *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 634 (1989)).[3] Unfortunately, the government is abusing criminal forfeiture on a daily basis --- to raise money earmarked for law enforcement, to deprive defendants of the wherewithal to retain counsel and to bully defendants into harsh and unfair plea agreements --- and no one but under-resourced defense counsel is trying to stop it.

What follows is a comparison of the procedural protections and substantive rights available to property owners facing civil and criminal forfeiture proceedings. With the major exceptions of whether a conviction is required and right to appointed counsel, civil forfeiture offers superior protections for the property owner.

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[2] Few people realize that there are only about a dozen lawyers in the entire country who regularly defend civil forfeiture cases. People ask why that is so. There are probably many reasons. One is that law school professors are not familiar with forfeiture law, either criminal or civil. So this important subject is not covered in any criminal law classes. Professors would rather teach a course on the insanity defense, which is interesting but rarely encountered in the actual practice of criminal law. The author is not aware of a single law school that has a course on forfeiture law. Many law school libraries, full of obscure material no one reads, do not have a single book on the subject either.

[3] Ironically, this pious statement was made in a decision that deprived defendants of their Sixth Amendment right to a jury trial on the forfeiture issue and lowered the burden of proof from beyond a reasonable doubt --- clearly intended by Congress --- to a mere preponderance of the evidence.

Comparison

1. Procedural Rights.

(a) Time limits for the prosecution to provide notice of the seizure and to commence forfeiture proceedings.

If the property is seized pursuant to a warrant of seizure under 21 U.S.C. § 853(f), there is no time limit except the criminal statute of limitations (typically five years) for seeking criminal forfeiture. If the property is restrained under 21 U.S.C. § 853(e)(1)(B), the order is effective for not more than 90 days, unless extended by the court "for good cause shown or unless an indictment or information…has been filed."

In a "*nonjudicial* civil forfeiture proceeding"[4] under the CAFRA, by contrast, the government must comply with two separate deadlines. First, under 18 U.S.C. § 983(a)(1)(A)(i), the government must send written notice to interested parties "as soon as practicable, and in no case more than 60 days after the date of the seizure."[5] A supervisory official in the headquarters of the seizing agency may extend the 60 day period for up to 30 days and thereafter a court can grant further extensions of time under certain conditions, on an *ex parte* basis. 18 U.S.C. §§ 983(a)(1)(B)-(D). The courts have been overly liberal in granting such extensions, thereby undermining the effectiveness of the 60 day notice provision. Moreover, the government suffers no real penalty if it misses the 60 day deadline.

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[4] A "nonjudicial" proceeding is one commenced through the administrative forfeiture process, as opposed to the judicial forfeiture process. The vast majority of civil forfeiture cases are commenced nonjudicially. Because Congress, through an oversight, failed to provide specific time limits for a civil forfeiture commenced **judicially** (typically the cases with high value properties), the DoJ takes the position, so far approved by the courts, that there are no time limits other than the statute of limitations for filing the civil complaint. Thus, this important CAFRA reform has been rendered nugatory with respect to the more significant civil forfeiture cases. This is a problem Congress can readily fix. The issue is discussed in my forfeiture treatise in section 9.02[4].

[5] The "as soon as practicable" requirement has never been complied with by the federal seizing agencies but claimants' counsel have rarely raised an issue about it --- so there is little or no reported case law on the point.

If a claimant, in response to the notice of seizure, sends an administrative claim to the seizing agency, the government has 90 more days from the date when the claim is received in which to file a complaint for civil forfeiture in court **or** to obtain a criminal indictment alleging that the property is subject to criminal forfeiture. 18 U.S.C. § 983(a)(3).

(b) Right to appointed counsel.

In a criminal forfeiture case an indigent defendant has a right to appointed counsel under the Criminal Justice Act (CJA). An indigent third party who wishes to contest the forfeiture in an "ancillary proceeding" under 21 U.S.C. § 853(n) has no right to appointed counsel. If the third party claimant prevails against the government, CAFRA does not authorize a fee award for the third party.

In a civil forfeiture case an indigent property owner has no statutory right to appointed counsel except in one narrowly defined situation: where the government is seeking to forfeit the owner's "primary residence." 18 U.S.C. § 983(b)(2).[6] A court has **discretion** to appoint an attorney already representing a criminal defendant under the CJA to be counsel in a related civil forfeiture case under § 983(b)(1). This authority appears to be seldom exercised by our courts, perhaps because defense counsel commonly are unaware of the statutory provision in question and therefore fail to ask for an appointment. The court may also appoint *pro bono* counsel for an indigent claimant under 28 U.S.C. § 1915(d) but few claimants are aware of this statutory provision and courts have rarely used it in civil forfeiture cases. If the claimant prevails against the government, the CAFRA requires that the government pay the "reasonable" attorney fees of the claimant. 28 U.S.C. § 2465(b)(1). This fee-shifting provision is no substitute for appointed counsel, a critical reform provided in the House-passed CAFRA bill in 1999 that was removed from the final Senate bill in order to obtain passage by unanimous consent of both houses in 2000.

[6] There is a good argument that, at least in some situations, the interests at stake, including protection against self-incrimination, may require appointment of counsel for an indigent claimant under the Due Process Clause. 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, 11.02[1] (Matthew Bender, June 2014 ed.) (examining due process cases).

(c) Discovery and opportunity to obtain dismissal of the proceedings at an early time.

It is well known that discovery is severely and unduly limited in federal criminal cases, while some states have far more generous criminal discovery rules. So a defendant who is faced with a boilerplate, wholly opaque criminal forfeiture allegation in the indictment, cannot use criminal discovery to determine what the government's contentions really are and what evidence the government has to support them.

In civil forfeiture cases discovery proceeds under the Federal Rules of Civil Procedure, which allow a party to discover everything relevant to the case unless it is privileged. Because the government typically has much greater investigative resources than a private party, civil discovery serves to level the playing field, at least where a claimant can afford competent counsel. A claimant can require the government to state all of the evidence known to the government that supports each detailed allegation in the civil forfeiture complaint. All of the government's witnesses can be deposed prior to trial. The discovery process often produces evidence that leads to an early settlement or to a successful motion for summary judgment, thereby avoiding the expense of a trial. By contrast, it is seldom possible to obtain dismissal of criminal forfeiture charges prior to their trial. And it is practically impossible to settle a criminal forfeiture charge before trial, outside of a plea agreement.

(d) A timely and meaningful opportunity to be heard.

In a criminal forfeiture the defendant does not have a meaningful opportunity to be heard on the forfeiture aspect of the case until after he is convicted. Third parties are barred by statute from intervening in the criminal forfeiture case until after there is a preliminary order of forfeiture against the defendant and notice of that order is sent to them by the government. 21 U.S.C. § 853(k)(1).[7] They are also barred from "commencing an action at law or equity against the United States concerning the validity of [their] alleged interest in the property," § 853(k)(2). The Senate Report says that this provision "is not intended

[7] The courts have recognized that if delay in getting heard would cause irreparable harm to a third party, due process may require that he be permitted to intervene in the criminal case at an earlier time, but the courts are very reluctant to find that such an exigent situation is present.

to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however."[8]

In a civil forfeiture proceeding, all persons with an interest in the property may appear as parties and be heard in a timely fashion once the complaint for forfeiture is filed. A claimant may quickly file a motion to dismiss the complaint or a motion for summary judgment. Even before then, a person with a possessory interest in property suffering substantial hardship from the seizure may seek the release of the property pursuant to 18 U.S.C. § 983(f) --- under certain conditions. However, this provision has so many exceptions that it has not served its intended purpose.

(e) Right to trial by jury.

The criminal forfeiture statutes clearly contemplated trial by jury of the forfeiture issue and requiring the government to prove its case beyond a reasonable doubt. That is the way the statutes were interpreted and applied for many years. Under former Rule 31(e), the jury was also required to find that the defendant was the owner of the property. However, everything was changed for the worse by the very pro-law enforcement Advisory Committee on Criminal Rules in 2000, without any input from Congress. The Committee rubber stamped amendments submitted to it by "experts" at the DoJ that sharply tilted the "playing field" in favor of the government. After initially deciding to abolish jury trial altogether, the Committee reached a compromise whereby the former jury trial right embodied in Rule 31(e) was substantially cut back. These amendments were codified in the new Rule 32.2. Under Rule 32.2(b)(5)(B), the jury is restricted to determining "whether the government has established the requisite nexus between the property and the offense committed by the defendant." There is no right to a jury trial if the government seeks what is known as a "money judgment" instead of the forfeiture of specific property. And the jury no longer determines whether the defendant or someone else owns the property. That is determined by the court in the ancillary proceeding if some third party requests that the court adjudicate its rights. The government seeks a "money judgment" in the vast majority of forfeiture cases today because it affords the government many advantages over a traditional

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[8] S. Rep. at 206 n. 42. However, many courts have ignored this legislative history and barred third parties from seeking relief from the burdens imposed by a restraining order affecting their property. And almost all courts have prohibited the third party from litigating the issue of who owns the property until the ancillary hearing following the preliminary order of forfeiture.

forfeiture of specific property items. Avoiding a jury trial is only one of those advantages. As explained below, there is no statutory basis for "money judgments" in criminal forfeiture cases. It is an improper piece of judicial legislation that has extended the scope and harshness of criminal forfeiture and diminished the defendant's procedural protections.

It is well established by a long line of cases that a party in a civil forfeiture case has a right to trial by jury under the Seventh Amendment to the Constitution. Indeed, the abrogation of that jury trial right in civil forfeiture cases by King George III was listed in the Declaration of Independence as one of the infringements on American liberty justifying the break with Britain.

2. Applicability of the Rules of Evidence.

As already noted, the criminal forfeiture statutes contemplate --- although they do not explicitly state --- that the forfeiture issue will be tried by a jury under the traditional "beyond a reasonable doubt" burden of proof. They likewise contemplated that the Federal Rules of Evidence would apply to the forfeiture trial. When the Advisory Committee on Criminal Rules abolished those rights, it also opened the door to otherwise inadmissible evidence. Rule 32.2(b)(1)(B) allows forfeiture to be proven by any "information" the court considers "relevant and reliable." The Rule does not say whether such "information" is also admissible *before the jury* when it is hearing evidence, but that is the way the government interprets Rule 32.2.

In a civil forfeiture case, the Federal Rules of Evidence are fully applicable.

3. Burden of Proof.

Although Congress plainly intended that the government have to prove criminal forfeiture beyond a reasonable doubt, and that burden was originally applied by the courts, the courts later decided that, because forfeiture is part of the sentence in a case, the burden of proof should logically be by a preponderance of the evidence, the normal burden on the government at sentencing. In so holding,

the courts simply ignored congressional intent --- as if it did not matter.[9] Those decisions were embodied in Rule 32.2 in 2000.

In civil forfeiture cases covered by the CAFRA reforms, the government's burden of proof is by a preponderance of the evidence as well. However, in the many Customs cases exempted from the CAFRA reforms (see 18 U.S.C. § 983(i), the "Customs carve-out" provision of the CAFRA), the pre-CAFRA and blatantly unfair burden of proof codified in 19 U.S.C. § 1615 still applies. Under that statute, which dates back to colonial times (1740), the government merely has the burden of showing probable cause for the forfeiture and may use otherwise inadmissible hearsay evidence to do so. Then the property owner has the burden of proving by a preponderance of the evidence (no hearsay allowed for the owner's case) that the property is **not** subject to forfeiture. A number of courts had concluded that this absurd allocation of the burden of proof violated due process, but the issue has not gotten the attention it deserves after the enactment of the CAFRA in 2000, despite its continuing presence in Title 19 and 26 cases "carved out" of the CAFRA reforms.

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[9] This line of cases was affirmed by the Supreme Court in *Libretti v. United States*, 516 U.S. 29 (1995). The Court rejected Libretti's cogent argument that forfeiture was not simply an aspect of sentencing but rather a unique hybrid that shares elements of both a substantive charge and a punishment. The *Libretti* decision also held that a defendant has no Sixth Amendment right to jury trial with respect to the factual basis for a forfeiture. The decision has now been completed undermined by the *Apprendi-Booker* line of cases. In *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), the Court held that, where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, *Apprendi* applies in full and requires the jury to determine, beyond a reasonable doubt, any facts that set a fine's maximum amount. The Court held that there was no principled basis under *Apprendi* to treat criminal fines differently than imprisonment or a death sentence. 132 S. Ct. at 2350. At oral argument, Deputy Solicitor General Dreeben conceded that there was no basis for distinguishing criminal forfeitures from fines for *Apprendi* purposes. Tr. Of Oral Argument at 37. So it is just a matter of time until the Court gets around to explicitly overruling *Libretti*. Until that time, the lower courts will continue to apply *Libretti* because of the rule that only the Supreme Court may overrule one of its own decisions that is directly on point. *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005). Congress could in the meantime enact legislation restoring the rights that *Libretti* took away.

4. Substantive Law.

(a) Whether a conviction is required.

A criminal forfeiture requires that the defendant be convicted of the crime triggering the forfeiture. However, innocent third parties (*i.e.*, persons claiming a property interest in the assets who have not been charged with a crime) may have their property forfeited although they have done nothing wrong. Ironically, the third party has even fewer protections than the criminal defendant.

In a civil forfeiture proceeding there is no requirement that anyone be charged with a crime or convicted. This opens the door to abuse since the government is able to civilly forfeit property where it could not possibly charge someone with a crime. But complete abolition of civil forfeiture --- sought by many reformers such as the Institute for Justice --- would undoubtedly lead to an increase in otherwise unwarranted criminal prosecutions solely for the purpose of obtaining forfeitures. That is a big price to pay, particularly when criminal forfeiture procedures and substantive law remain so unfair to property owners.

(b) Availability of substitute assets.

One important difference between criminal and civil forfeiture is the prosecution's ability to criminally forfeit **untainted** (clean) "substitute assets" if, "as a result of any act or omission of the defendant" the directly forfeitable tainted property (1)"cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty." 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m).[10]

[10] The Fourth Circuit, contrary to all other circuits, has held that the forfeiture of substitute assets "relates back" to the time when the criminal offense was committed. This incorrect interpretation of the statute has had a devastating effect on defendants' ability to retain counsel and support their families during their struggle with the government. It gives the prosecution the ability to pauperize many white collar defendants at the outset of the case.

In a civil forfeiture proceeding, by contrast, there is no authority to substitute "clean" property for "dirty" property that is not available for forfeiture.[11] It is believed that the very nature of an *in rem* forfeiture proceeding, where the tainted property is the defendant, does not allow for substitute asset forfeiture.

(c) Availability of money judgments.

Despite Congress' enactment of the substitute asset provision in 1986, courts continued to allow their earlier invention of the concept of "money judgments" in lieu of the forfeiture of specific property, to be used to further expand the government's criminal forfeiture powers.[12] The concept of a personal money judgment, which looks and acts like a criminal fine, departs from the basic nature of a forfeiture, whether civil or criminal. It is deemed a "forfeiture" of sorts but no specific property is forfeited. More importantly, this judicial lawmaking violates the principle of separation of powers[13] as well as an important rule of statutory construction.[14] As discussed below, money judgments allow the government to

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[11] There is one important exception, provided by 18 U.S.C. § 984, which allows the civil forfeiture of "any identical property found in the same place or account" as the tainted property involved in the offense. This provision was designed to deal with cases in which a bank account containing forfeitable money has been "zeroed out," thereby preventing tracing of the tainted money under the "lowest intermediate balance" test adopted by the courts. The use of § 984 is circumscribed by a special one year statute of limitations found in § 984(c).

[12] The case that invented the money judgment is *U.S. v. Conner*, 752 F.2d 566, 575-77 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985). The decision predates Congress' creation of the similar, but more limited, substitute asset remedy by one year.

[13] "The authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO*, 451 U.S. 77, 95 (1981). *See also Flores-Figueroa v. United States,* 556 U.S. 646, 129 S. Ct. 1886, 1893 (2009) ("concerns about practical enforceability are insufficient to outweigh the clarity of the text"); *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written --- even if we think some other approach might 'accord with good policy.'").

[14] There is a long line of Supreme Court cases holding that "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional [judicially inferred] remedies." *Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO*, 451 U.S. 77, 93-94 (1981). *Accord, e.g., National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (same). At least

avoid the need to trace. They provide a way for the government to exaggerate the amount of proceeds generated by the offense of conviction through erroneous extrapolations. They allow for joint and several liability among co-defendants thorough an additional judicial invention. They produce forfeiture judgments that hang over a defendant for the rest of his life, regardless of his ability to pay --- thus interfering with his rehabilitation.

The use of a money judgment also has the advantage of precluding the need for a jury to determine the facts on which the forfeiture rests because Rule 32.2 arbitrarily denies the jury any role in determining the amount of a money judgment.

(d) Tracing requirement.

In a civil forfeiture case the government bears the sometimes heavy burden of tracing the seized property back to the crime that triggers the forfeiture. For example, if a car is used to smuggle narcotics, then sold to a bona fide purchaser, and sale proceeds are used to buy furniture and a computer, the government will only be able to forfeit the furniture and the computer --- assuming it wants those items --- and it must prove that the money from the sale of the car was used to purchase those things.

In a criminal forfeiture case, the government used to have to trace the property it wants to forfeit back to the crime, *i.e.*, show that the money used to buy the property was the proceeds of the crime. Even if the government attempts to forfeit "substitute assets" it must still prove that the directly forfeitable ("tainted") property, which is no longer available, is traceable to the crime of conviction. But through the magic of a money judgment, abracadabra, the government no longer has to trace the proceeds of the crime into any particular property. It just has to estimate the amount of proceeds that the defendants obtained from the offenses of

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two circuits initially recognized that it was impermissible to authorize "money judgments" after the 1986 enactment of the more limited, but similar substitute asset remedy, but those circuits later ignored their own decisions with no explanation as to why they had become "inoperative." *See U.S. v. Ripinsky*, 20 F.3d 359, 365 n.8 (9th Cir. 1994) (*Conner* line of cases creating money judgment remedy cannot be relied on after enactment of substitute asset provision); *U.S. v. Voigt*, 89 F.3d 1050, 1085-86 (3d Cir. 1996) (same). None of the decisions that continue to authorize money judgments makes the slightest effort to explain what authority the courts have to engage in judicial lawmaking in this criminal area, in which Congress has created a comprehensive remedial scheme.

conviction. These estimates can be wildly exaggerated by the use of faulty extrapolation techniques.[15]

(e) Joint and several liability.

The imposition of joint and several liability on co-conspirators and co-schemers is another improper judicial invention that has grown progressively more oppressive. As in the case of the money judgment, the first court to legislate this harsh additional punishment was the Eleventh Circuit, in 1986.[16] Employing the same result-oriented analysis as in *Conner*, the money judgment case, the court of appeals declared that joint and several liability was necessary --- at least in some cases --- to carry out the purpose of RICO's criminal forfeiture provision. Without delving into their authority for imposing joint and several liability absent any statutory basis to do so, other circuits have authorized this remedy in the mill-run criminal forfeiture merely by citing prior decisions that have done so. That is also the way in which money judgments have been judicially legislated. While this remedy was initially thought of as discretionary, a few of the later decisions appear to treat joint and several liability as something that a court **must** impose on all co-conspirators and co-schemers, regardless of the facts or the unfairness of doing so.[17] This is what the prosecutors tell district court judges and few of the courts or defense counsel know enough to resist the prosecutor's demand for full and automatic joint and several liability. Some courts hold that the actions of co-schemers generating the proceeds must be reasonably foreseeable to the defendant

[15] *E.g., United States v. Morrison*, 656 F. Supp.2d 338 (E.D.N.Y. 2009) (government sought $172 million money judgment from wholesale marketer of untaxed cigarettes based on erroneous extrapolation from unrepresentative same and erroneous theory that all proceeds generated by enterprise were subject to forfeiture, whether or not they were derived from racketeering activity; court awarded forfeiture of only $6,120,268, a tiny fraction of the amount sought by the government, which claimed that its estimate was "conservative.").

[16] *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986).

[17] Few defense counsel or courts realize that the restitution statute, 18 U.S.C. § 3664(h), **does** have a joint and several liability provision but it sensibly makes the remedy discretionary and allows the court to "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant."

in order to hold him jointly and severally liable for all of the proceeds obtained; other courts reject even that limitation.[18]

(f) Fee-shifting provision for prevailing owners.

The original version of the CAFRA, which was approved by the House overwhelmingly in 1999, had a very important provision requiring the appointment of counsel, under the Criminal Justice Act, for indigent claimants in every civil forfeiture case. This provision was anathema to the Department of Justice, as it would have leveled the playing field, so it was removed by the Senate in order to reach a compromise with the Department of Justice that could be adopted by unanimous consent in 2000, an election year. The Senate crafted a good fee-shifting provision as a substitute for Chairman Henry Hyde's much more effective appointment of counsel provision. The fee-shifting provision, like the CAFRA as a whole, only applies to *in rem* civil forfeiture cases. 28 U.S.C. § 2465(b). It has been held not to apply to third party claims in the ancillary hearing, which is treated as a civil proceeding. But the unsatisfactory and ineffective Equal Access to Justice Act fee-shifting provision (28 U.S.C. § 2412(d)) still applies to third party claims in criminal forfeiture cases.

(g) Damage remedy for prevailing owners.

The CAFRA also amended 28 U.S.C. § 2680(c), a provision of the Federal Tort Claims Act, to provide a damage remedy for property owners who prevail in a civil forfeiture case where the law enforcement agency has lost, destroyed or damaged the property.

There is no such remedy in criminal forfeiture cases. Even the civil forfeiture remedy has been rendered nugatory by absurd court decisions holding that the damage remedy is available only if the property was seized **solely** for the

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[18] *E.g., United States v. Browne*, 505 F.3d 1229, 1277-82 (11th Cir. 2007); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (declining to impose any reasonable foreseeability limitation); *but see United States v. Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012) (actions generating the proceeds must be reasonably foreseeable to the defendant); *United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) (same).

purpose of civil forfeiture and not as possible evidence of a crime or for some other reason.[19]

Conclusion

Both civil and criminal forfeiture need many reforms. The most critical reform --- and the one that is the most difficult to get through Congress due to the vested interests of law enforcement agencies --- is the abolition of the notorious bounty-hunting system that provides an irresistible incentive for law enforcement to pursue unjust and frequently unlawful seizures of property. It would be a mistake to enact reforms of the federal civil forfeiture laws while leaving our criminal forfeiture laws untouched. That would merely shift the abuse further into the criminal forum. Although the requirement of a criminal conviction and the right to appointed counsel are very important procedural safeguards lacking in civil forfeiture, federal criminal forfeiture is otherwise less protective of property rights than civil forfeiture.

[19] *E.g., Foster v. United States,* 522 F.3d 1071, 1075 (9th Cir. 2008); *Smoke Shop, LLC v. United States,* 2014 U.S. App. LEXIS 14990 (7th Cir. Aug. 4, 2014).