

Asset Forfeiture: Selected Legal Issues and Reforms

Updated February 2, 2015

Congressional Research Service

<https://crsreports.congress.gov>

R43890

Summary

From its beginning in the First Congress, Congress has viewed asset forfeiture as an integral part of federal crime fighting: It takes contraband off the streets, ensures that “crime doesn’t pay,” and deprives criminals of their “tools of the trade.” In short, asset forfeiture is the process of confiscating money or property from a person because it is illegal to possess, it constitutes proceeds of a crime, or it was used to facilitate a crime. Asset forfeiture became a major tool in combating organized crime, drug trafficking, and other serious federal offenses throughout the mid-to-late 20th century and continues to play a major role in federal prosecutions.

In recent years, however, there has been growing opposition to the expanding scope of asset forfeiture, both civil and criminal, with objections primarily coming in two forms: procedural and structural. The procedural objections are based on the idea that the current rules pertaining to asset forfeiture heavily favor the government. With civil asset forfeiture, the property owner need not be convicted nor even prosecuted for a crime before the government can confiscate his or her property. Unlike criminal prosecutions, the property owner is not constitutionally entitled to an attorney or many other safeguards found in the Bill of Rights. The burden of proof is set at the preponderance-of-the-evidence standard, lower than the traditional criminal standard of beyond a reasonable doubt. If the property owner is claiming innocence, he has the burden of proving either that he had no knowledge of the criminal activity or that he tried to stop the activity if he did know about it. Structural objections pertain to how property and money are allocated once forfeited. The Department of Justice (DOJ) is permitted by law to keep most of the forfeited assets, creating what some view as a profit motive. Recently, DOJ stopped its practice of “adoptive forfeitures,” which allowed it to adopt property seized by state and local law enforcement as part of its “equitable sharing” program. Some saw this as a way of bypassing more stringent state forfeiture laws.

Asset forfeiture faced comparable criticism several decades ago, leading Congress to enact the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the first major overhaul in federal forfeiture law in 200 years. While this law brought about significant reform to federal forfeiture policy and procedures, some have questioned whether CAFRA went far enough to rein in what they characterize as overzealous police forfeiture tactics. Recent concerns about the current legal framework are evidenced in new reports of possible police misuse of federal forfeiture laws. Contemporaneously, reform legislation has been introduced in the 113th and 114th Congresses.

With these proposals in mind, this report will provide an overview of selected legal issues and reforms surrounding asset forfeiture, including the burden-of-proof standard and innocent-owner defense in civil asset forfeiture cases, access to counsel in both civil and criminal forfeiture cases (including a discussion of the 2014 Supreme Court asset forfeiture decision *Kaley v. United States*), allocation of profits from confiscated assets, and DOJ’s equitable sharing program.

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Introduction

Asset forfeiture has a long and storied history in Anglo-Saxon law, beginning hundreds of years ago in the common law of England and developing in the United States into a complex body of federal statutes.¹ For purposes of this report, “asset forfeiture” is the process of confiscating either property or money from a person because it is illegal to possess (contraband), constitutes the proceeds of a crime, or was used to facilitate a crime. Asset forfeiture comes in two forms, civil and criminal, each with its own set of intricate rules.

In civil asset forfeiture, the government proceeds against the offending property, not the property owner, in what is known as an *in rem* proceeding (which results in awkward case captions such as *United States v. \$52,000.00, More or Less, in United States Currency*).²

In civil forfeiture cases, the guilt of the property owner is not in question. In fact, in many cases, there is no criminal prosecution at all. Rather, these cases turn on whether the property was sufficiently connected to a federal crime.

In civil forfeiture cases, the guilt of the property owner is not in question. In fact, in many cases, there is no criminal prosecution at all. Rather, these cases turn on whether the property was sufficiently connected to a federal crime. Because these are civil proceedings, many of the constitutional safeguards accorded to criminal defendants in the Bill of Rights have been held not to apply. Criminal forfeiture, on the other hand, is an *in personam* proceeding that follows a criminal prosecution. The defendant does not forfeit his property unless he is convicted of a qualifying crime.

While civil asset forfeiture began with the very first Congress, it took on a much greater role during the War on Drugs in the 1970s and 1980s. The efficacy of the program, however, soon created concerns of overreach, prompting Congress to take up forfeiture reform in the 1990s.³ After considerable hearings and debate, Congress enacted the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the first major overhaul in federal forfeiture law in 200 years.⁴ While this law brought about significant reform to federal forfeiture policy and procedures, some have questioned whether CAFRA went far enough to rein in what they characterize as overzealous police forfeiture tactics.⁵ Others have questioned the legitimacy of the institution of civil forfeiture itself.⁶ The Department of Justice (DOJ), on the other hand, has asserted that asset forfeiture plays a “critical and key role in disrupting and dismantling illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and restoring property to victims.”⁷

¹ For a general history and analysis of federal asset forfeiture law, see CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

² *United States v. \$52,000.00, More or Less, in United States Currency*, 508 F. Supp. 2d 1036 (S.D. Ala. 2007).

³ See DAVID B. SMITH, 1-1 PROSECUTION AND DEFENSE OF FORFEITURE CASES § 1.02 (2014).

⁴ Civil Asset Forfeiture Reform Act of 2000, P.L. 106-185, 114 Stat. 202.

⁵ INSTITUTE FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 11 (2010) (hereinafter “POLICING FOR PROFIT”).

⁶ Todd Barnett, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 100 (2001) (“The lack of protection provided to forfeiture victims raises many questions about the appropriate place of forfeiture law in a just society. Both civil and criminal forfeiture laws were intended to target Mafiosi and drug kingpins, but this is not the effect these laws have had.”); Richard Rahn, *Abusive Civil Asset-Forfeiture Laws*, CATO INSTITUTE (Apr. 14, 2014) available at <http://www.cato.org/publications/commentary/abusive-civil-asset-forfeiture-laws>.

⁷ See DEP’T OF JUSTICE, NATIONAL ASSET FORFEITURE STRATEGIC PLAN 2008-2012 5 (2008), available at

Concerns about the current legal framework are evidenced in new reports of possible police misuse of federal forfeiture laws.⁸ Contemporaneously, a new round of reform proposals have been introduced, including two identical bills introduced in the 114th Congress, the Fifth Amendment Integrity Restoration Act of 2015, or FAIR Act (S. 255 and H.R. 540),⁹ and the Civil Asset Forfeiture Reform Act of 2014 (H.R. 5212), introduced in the 113th Congress.¹⁰

With these proposals in mind, this report will provide an overview of select legal issues and reforms surrounding asset forfeiture, including the burden of proof standard and innocent owner defense in civil asset forfeiture cases, access to counsel in both civil and criminal forfeiture cases (including a discussion of the 2014 Supreme Court asset forfeiture decision *Kaley v. United States*), allocation of profits from confiscated assets, and DOJ's equitable sharing program. Before addressing these issues, a brief history and overview of civil and criminal asset forfeiture will put these legal issues and reforms into context.

Overview of Civil Asset Forfeiture

Asset forfeiture comes in two forms: civil and criminal. The most significant legal distinction surrounding *civil* asset forfeiture is the principle that the defendant in the case is property—whether a vehicle, a house, or money—rather than a person. This “legal fiction” that property should be “held guilty and condemned” allows the government to proceed against people’s property without ever bringing charges against them.¹¹ This practice can be traced back to English law, which permitted the forfeiture of property that killed a person (known as a deodand), forfeitures at common law for the property of those convicted of a felony or treason, and statutory forfeitures of offending property in violation of customs laws.¹²

Whatever the original rationale,¹³ the concept of forfeiture was adopted in American customs laws beginning with the first Congress. It applied to ships and cargoes in violation of customs laws,¹⁴ vessels used to deliver slaves to other countries,¹⁵ and vessels used to deliver slaves to the United States.¹⁶ While Congress enacted various civil forfeiture statutes over the subsequent 150 years, this practice became a major part of federal law and federal law enforcement policy during

<http://www.justice.gov/criminal/afmls/pubs/pdf/strategicplan.pdf>.

⁸ See, e.g., Michael Sallah, Robert O’Harrow Jr. & Steven Rich, *Stop and Seize*, WASH. POST (Sept. 6, 2014), available at <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>; Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), available at <http://www.newyorker.com/magazine/2013/08/12/taken>.

⁹ S. 255, H.R. 540, 114th Cong. (2015).

¹⁰ H.R. 5212, 113th Cong. (2014).

¹¹ *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931).

¹² *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-82 (1974).

¹³ As Justice Holmes noted in *The Common Law*, the rationale for a law can evolve to fit the times. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Little, Brown and Co. 1938). While forfeiture may have begun as a penalty against the offending property, it has come to be rationalized under both remedial and punitive theories of punishment against the property owner, and, perhaps most importantly, as a source of government revenue. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL, *THE ATTORNEY GENERAL’S GUIDELINES ON SEIZED AND FORFEITED PROPERTY* § 9-118.010 (“The Department of Justice asset forfeiture program has three primary goals: (1) to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities; (2) to enhance cooperation among foreign, federal, state and local law enforcement agencies through the equitable sharing of assets recovered through this program; and, as a by-product, (3) to produce revenues to enhance forfeitures and strengthen law enforcement.”).

¹⁴ See Act of July 31, 1789, § 13, 1 Stat. 39, 47.

¹⁵ See Act of Mar. 22, 1794, 1 Stat. 347.

¹⁶ See Act of Mar. 2, 1807, 2 Stat. 426.

the War on Drugs, beginning with the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹⁷ This law permitted the confiscation of any substances manufactured or distributed in violation of federal drug laws and any conveyances—such as aircraft, vehicles, and vessels—used to facilitate the transportation and sale of these drugs. In 1978, civil forfeiture was extended to include the forfeiture of money, negotiable instruments, and other proceeds connected to a drug transaction.¹⁸ In 1984, Congress added real property to the list of forfeitable property.¹⁹ While drug crimes may constitute the bulk of federal forfeitures, federal law permits forfeitures in a host of other areas.²⁰

One of the major complaints of these civil asset forfeiture laws was how the procedural rules generally favored the government. The government was not required to prove guilt of the property or its owner beyond a reasonable doubt, nor even by a preponderance of the evidence. Instead, probable cause to believe that the property was connected to the prescribed federal crimes was enough to confiscate the property.²¹ If the government made this showing, the burden would shift to the property owner to prove that the property was not implicated in the alleged crime. Additionally, claimants had to file a bond with the court in order to contest a forfeiture of their property.²²

Although these statutes were a favored tool during the zenith of the War on Drugs, in the 1990s, Congress took up various legislative proposals to reform the civil forfeiture system.²³ After years of legislative debate, Congress enacted the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).²⁴ This legislation was not a comprehensive overhaul of the asset forfeiture system based upon “first principles” but instead constituted a set of discrete legislative fixes.²⁵ These changes included shifting the burden of proof to the government and raising it to the preponderance of the evidence standard,²⁶ creating a uniform innocent owner defense,²⁷ eliminating the bond requirement,²⁸ imposing stricter filing deadlines for the government and the

¹⁷ See Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, § 511, 84 Stat. 1236, 1276 (codified at 21 U.S.C. § 881(a)); see generally H.Rept. 106-192, at 3.

¹⁸ See Psychotropic Substances Act of 1978, P.L. 95-633, § 301(a), 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6)).

¹⁹ P.L. 98-473, 98 Stat 1837, 2050 (1984) (codified at 21 U.S.C. § 881(a)(7)).

²⁰ See, e.g., 18 U.S.C. § 1082 (illegal gambling); 18 U.S.C. § 1963(a) (RICO violations); 18 U.S.C. § 3666 (bribery); 18 U.S.C. § 3667 (liquor violations); 19 U.S.C. § 1453 (customs violations); 47 U.S.C. § 782 (vessels that transport contraband); see CRS Report 97-139, *Crime and Forfeiture*, *supra* note 1, at pp. 76-87, for a complete list of federal forfeiture statutes.

²¹ 19 U.S.C. § 1615 (1994).

²² 19 U.S.C. § 1623 (1994).

²³ Smith, *supra* note 3.

²⁴ P.L. 106-185, 114 Stat. 202; Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97 (2001) (providing legislative history of CAFRA).

²⁵ Smith, *supra* note 3 (“CAFRA does not replace, but is superimposed upon, the existing procedures in the customs laws, the Supplemental Rules, and the forfeiture statutes themselves.”).

²⁶ 18 U.S.C. § 983(c).

²⁷ *Id.* § 983(d).

²⁸ *Id.* § 983(a).

claimant,²⁹ creating a statutory hardship provision,³⁰ and authorizing appointment of counsel in certain cases.³¹

The civil forfeiture process generally begins when the government seizes someone's property that was connected to a criminal offense. At that point, the government must provide notice to any interested persons. If no one makes a claim on the property, the property can be forfeited under a process

The civil forfeiture process generally begins when the government seizes someone's property that was connected to a criminal offense. If no one makes a claim on the property, the property can be forfeited under a process known as "administrative" or "nonjudicial" forfeiture without the government having to file a case in district court.

known as "administrative" or "nonjudicial" forfeiture without the government having to file a case in district court (so long as it meets the statutory class of property).³² The rationale for this streamlined process is that requiring the government to obtain a default judgment for uncontested forfeitures is too time consuming and expensive.³³ If anyone makes a claim to the property, however, or if the property does not fall within the statutorily defined categories of property subject to administrative forfeiture, the case must be referred to the U.S. attorney to be handled in a judicial forfeiture proceeding.

Prior to the passage of CAFRA, administrative forfeitures were primarily governed by customs laws.³⁴ With CAFRA, Congress consolidated many of the procedural rules for administrative forfeitures in 18 U.S.C. § 983; however, the customs laws still apply as a gap filler when the new rules are silent on a particular issue.³⁵ Because CAFRA does not delineate what categories of property are subject to administrative forfeiture, this facet of forfeiture is still governed by customs laws. Under 19 U.S.C. § 1607, the government can use the administrative process to forfeit any property that does not exceed \$500,000; any vehicle or other conveyance that was involved in a drug crime, regardless of value; and all monetary instruments, including U.S. currency, regardless of value.³⁶ Real property, such as a home or business, is not subject to administrative forfeiture.³⁷

²⁹ *Id.* § 983(a).

³⁰ *Id.* § 983(f).

³¹ *Id.* § 983(b), (h), 28 U.S.C. § 2465.

³² CAFRA refers to forfeitures that do not require filing a case in a district court as "nonjudicial forfeitures." *See id.* § 983(a)(1)(A)(i).

³³ *See United States v. Ninety-Three Firearms*, 330 F.3d 414, 422 (6th Cir. 2003).

³⁴ Before CAFRA, the rules governing notice, the filing of a claim, and the cost bond requirement were provided under 19 U.S.C. §§ 1607-1609. *See, e.g.*, 19 U.S.C. § 1609 ("If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction ...").

³⁵ H.Rept. 106-192, at 21 (1999) ("To the extent these procedures are inconsistent with any preexisting federal law, these procedures apply and supercede preexisting law."); *Cassella, supra* note 24, at 103.

³⁶ 19 U.S.C. 1607. Beginning in 1844, Congress first authorized administrative forfeitures in cases where the property seized did not exceed \$100. Act of Apr. 2, 1844, ch.8, 5 Stat. 653. Over the years, this limit was sporadically raised. In 1954, it was raised to \$2,500, Tariff Act of 1930, P.L. 768, § 506, 68 Stat. 1141; in 1978, it was raised to \$10,000, Customs Procedural Reform and Simplification Act of 1978, P.L. 95-410, 92 Stat. 897; in 1984, it was raised to \$100,000, Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1837, 2053; and, in 1990, it was raised to its current limit of \$500,000. Customs and Trade Act, P.L. 101-382, § 122, 104 Stat. 629, 641. The limit on administrative forfeitures under federal tax law is \$100,000. 26 U.S.C. § 7325.

³⁷ 18 U.S.C. § 985 ("Notwithstanding any other provision of law, all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures.").

Under pre-CAFRA law, there were no strict deadlines governing when the government had to file an administrative or judicial forfeiture claim. The law required only that cases be commenced and prosecuted “without delay.”³⁸ CAFRA altered this by placing time restrictions on both the government and claimants. It requires that “in any nonjudicial civil forfeiture, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.”³⁹ This time limit is extended to 90 days in “adoptive forfeiture” cases where the property was seized by a state or local law enforcement agency and turned over to a federal law enforcement agency.⁴⁰ If the government fails to provide notice of the seizure in accordance with these rules and fails to get an extension, it must return the property to the owner “without prejudice to the right of the Government to commence a forfeiture proceeding at a later time.”⁴¹ DOJ reads this provision, and the majority of courts have accepted, that even if DOJ misses the deadline, it may still initiate a judicial or criminal forfeiture without first having to return the property.⁴²

If notice is sent to an interested party, he has 35 days after the date the letter is mailed to file a claim. If the letter is not received, he has 30 days after the date of final publication of the notice of seizure.⁴³ Filing such a claim is where the property owner gets his or her “day in court.” A claim must identify the specific property being claimed and the claimant’s interest in the property and must be made under oath, subject to penalty of perjury.⁴⁴ To simplify the process of making a claim, CAFRA mandated that each federal agency conducting administrative forfeitures make claim forms available upon request and ensure that they are “written in an easily understandable language.”⁴⁵

³⁸ 19 U.S.C. § 1604 (2000 ed.).

³⁹ 18 U.S.C. § 983(a)(1)(A)(i). Although this notice requirement explicitly applies to any “nonjudicial civil forfeiture proceeding,” the courts have held that these deadlines also apply to judicial forfeitures. *See* *United States v. 475 Martin Lane*, 545 F.3d 1134, 1141 (9th Cir. 2008); *United States v. Misc. Firearms*, 399 F. Supp. 2d 881, 882 (C.D. Ill. 2005).

⁴⁰ *Id.* § 983(a)(1)(A)(iv). The time limit for sending notice can be extended in two ways. A “supervisory official in the headquarters office of the seizing agency” may extend the period for sending notice up to 30 days if there is reason to believe notice might have adverse consequences such as endangering human life or risking flight from prosecution. *Id.* § 983(a)(1)(B). Any further extension of the notice period must be extended by the court. *Id.* § 983(a)(1)(C).

If the seizure imposes a hardship on the owner, a claimant may file for immediate release of the property if the claimant can demonstrate a possessory interest in the property; sufficient ties with the community to provide assurance that the property will be available at the time of the trial; that the continued possession by the government will cause substantial hardship to the claimant; and the hardship outweighs the risk that the property will not be available if forfeiture is ultimately granted. 18 U.S.C. § 983(a)(3)(B).

⁴¹ *Id.* § 983(a)(1)(F).

⁴² *See* Smith, *supra* note 3, at § 6.02; *see, e.g., Return of Seized Prop. v. United States*, 625 F. Supp. 2d 949, 954 (C.D. Cal. 2009) (“Release of the seized motorcycles to Claimants would therefore be academic. The Government’s properly-filed civil forfeiture action would allow it to immediately re-seize the property.”); *United States v. \$ 114,031.00 in United States Currency*, No. 06-21820, 2007 U.S. Dist. LEXIS 74362, *9 (S.D. Fla. Oct. 4, 2007) (“The plain language of the statute says that returning the property would not prevent the Government from later bringing a forfeiture proceeding. It does not say that the Government is required to return the property before it can bring a forfeiture proceeding.”); *but see United States v. Assorted Jewelry with an Approximate Value of \$ 219,860.00*, 386 F. Supp. 2d 9, 13 (D.P.R. 2005) (dismissing forfeiture action with prejudice for failing to meet notice deadline).

⁴³ *Id.* § 983(a)(2)(B).

⁴⁴ *Id.* § 983(a)(2)(C).

⁴⁵ *Id.* § 983(a)(2)(D).

If no one makes a claim to the property within the time specified,⁴⁶ the government can issue a declaration of forfeiture and sell the property at public auction.⁴⁷ While claimants cannot seek judicial review of the merits of the administrative forfeiture,⁴⁸ CAFRA created a mechanism to ensure that the government followed the required procedural safeguards. Under Section 983(e), a property owner can file a motion in district court to have the court set aside an administrative forfeiture on the grounds that he or she was not provided notice of the forfeiture proceeding.⁴⁹ To satisfy the Due Process Clause, the government need not provide actual notice, but its efforts must be “reasonably calculated” to provide notice to interested parties.⁵⁰ Section 983(e) is the “exclusive remedy” to set aside a declaration of forfeiture, and it must be filed within five years of the date of final publication of the seizure.⁵¹ If the court sets aside the forfeiture, the government is permitted to commence a subsequent forfeiture proceeding against that person.⁵² It has 60 days to file an administrative action or six months to file a judicial action.

If a claim is filed, the administrative forfeiture process is terminated and the case is referred to the U.S. attorney’s office for initiation of judicial forfeiture proceedings.⁵³ The government has 90 days to file its complaint.⁵⁴ At this point, any person claiming an interest in the property may file a claim pursuant to the Supplemental Rules for Certain Admiralty Claims not later than 30 days after the date of service of the government’s complaint or, if applicable, not later than 30 days after the date of final publication of the filing of the complaint.⁵⁵ The claimant then has an additional 20 days after filing the claim to file an answer to the government’s complaint.⁵⁶

As will be discussed in detail below, the burden of proof is on the government to prove that the property is forfeitable by a preponderance of the evidence.⁵⁷ If the government meets its burden, the property owner can then raise an affirmative defense, such as the innocent owner defense, again, discussed more thoroughly below.⁵⁸ Under the Seventh Amendment, claimants have a constitutional right to a jury trial as to any issue of fact.⁵⁹ At this point, the case will proceed like other civil suits: Both sides will conduct discovery under the Federal Rules of Civil Procedure,

⁴⁶ There has been some debate on when a case is considered “filed” with the appropriate agency.

⁴⁷ 19 U.S.C. § 1609.

⁴⁸ See *Mesa Valderrama v. United States*, 417 F.3d 1189, 1196 (11th Cir. 2005).

⁴⁹ *Id.* § 983(e).

⁵⁰ *Taylor v. United States*, 483 F.3d 385, 388 (2007) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

⁵¹ *Id.* § 983(e)(3).

⁵² *Id.* § 983(e)(2)(B).

⁵³ *Id.* § 983(a)(3)(A). As an alternative to filing a judicial claim, the government can proceed against the property by obtaining a criminal indictment and taking the steps necessary to preserve its right to maintain custody of the property. *Id.* § 983(a)(3)(B)(ii). If the government does not file a complaint for judicial forfeiture as required, the government must promptly release the property and “may not take further action to effect the civil forfeiture of such property in connection with the underlying offense.” § 983(a)(3)(B)(ii).

⁵⁴ *Id.* § 983(a)(3)(A).

⁵⁵ *Id.* § 983(a)(4)(A).

⁵⁶ *Id.* § 983(a)(4)(B).

⁵⁷ See 18 U.S.C. § 983(c); see “Burden of Proof,” *infra* p. 9.

⁵⁸ § 983(d); see “Innocent Owner Defense,” *infra* p.14.

⁵⁹ *United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 469 (7th Cir. 1980).

one or both sides will move for summary judgment, and, like many forfeiture cases, it is likely to be resolved without a full-blown trial.⁶⁰

Overview of Criminal Forfeitures

Unlike civil forfeitures, which are *in rem* actions brought directly against the offending property, criminal forfeitures are *in personam* actions in which the government proceeds against the person as part of a criminal prosecution,⁶¹ and only property owned by the defendant—and not third parties—is subject to forfeiture. Until 1984, there were only two criminal forfeiture statutes on the books: the Racketeer Influenced and Corrupt Organizations Act (RICO)⁶² and Continuing Criminal Enterprise (CCE) statutes.⁶³ Congress expanded criminal forfeitures as part of the Comprehensive Crime Control Act of 1984 to cover all federal drug crimes, not just CCE violations.⁶⁴ And in an effort to shift more forfeiture cases from the civil to the criminal side, Congress enacted 28 U.S.C. § 2461(c) as part of CAFRA. This so-called “bridge statute” allows the government to confiscate any property in a criminal proceeding that is forfeitable under the civil forfeiture provisions.⁶⁵

As with the civil forfeitures, the first task of the government in criminal forfeitures is generally to secure the property subject to confiscation. The government can seek a pretrial restraining order by alleging that the property sought to be restrained would be subject to forfeiture upon conviction.⁶⁶ As will be discussed in more detail below,⁶⁷ the Supreme Court has held that probable cause is the appropriate standard for such a pretrial restraining order and that this determination can conclusively be made by the grand jury.⁶⁸ If the government seeks a pretrial restraining order *before* obtaining an indictment, it must meet the more stringent standard of demonstrating that there is a “substantial probability” that the government will prevail on the issue of forfeiture, that failure to issue the restraining order will result in the destruction or removal of the property, and that the need to preserve the availability of the property outweighs the hardship on the property owner.⁶⁹ Alternatively, under Section 853(f), the government can request the issuance of a warrant authorizing the seizure of the property in question.⁷⁰ To issue a warrant, the court must find that there is probable cause that the property will be subject to forfeiture in the event of a conviction and that a pretrial restraining order as provided under Section 853(e) would be insufficient to assure the availability of the property.

In criminal forfeiture proceedings, the majority of courts apply the preponderance standard of proof, not the reasonable-doubt standard, reasoning that

⁶⁰ See Smith, *supra* note 3, at § 2.05.

⁶¹ See *United States v. Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989).

⁶² 18 U.S.C. § 1961.

⁶³ 21 U.S.C. § 848.

⁶⁴ Comprehensive Crime Control Act of 1984, P.L. 98-47, 98 Stat. 1976, 2044.

⁶⁵ 28 U.S.C. § 2461(c).

⁶⁶ 21 U.S.C. § 853(e)(A).

⁶⁷ See “Challenging Asset Freeze to Pay Legal Fees in Criminal Prosecution,” *infra* pp. 20-22.

⁶⁸ See *United States v. Monsanto*, 491 U.S. 600, 616 (1989); *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014).

⁶⁹ 21 U.S.C. § 853(e)(B).

⁷⁰ 21 U.S.C. § 853(e).

In addition to securing the property, the government must provide notice to the defendant. Prior to 2000, the Federal Rules of Criminal Procedure required that an indictment state with specificity “the extent of the interest or property subject to forfeiture.”⁷¹ Rule 32.2 was amended in 2000 to require only that the government inform the defendant that it will seek forfeiture generally but “need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.”⁷² Today, instead of listing the specific property to be forfeited in an indictment, the defendant can seek a bill of particulars from the prosecutor listing the property subject to forfeiture.⁷³ The courts that have addressed this issue disagree about the appropriate timing and scope of the government’s disclosure.⁷⁴

forfeiture is part of the criminal sentence and not the substantive offense

Like any other criminal prosecution, at the guilt phase of the trial the elements of the offense must be proven beyond a reasonable doubt.⁷⁵ Upon securing a conviction, the court will then proceed to the forfeiture phase of the trial.⁷⁶ The majority of courts apply the preponderance standard of proof in these proceedings, reasoning that forfeiture is part of the criminal *sentence* and not the substantive offense.⁷⁷ For federal narcotics crimes, property will be presumed forfeitable if the government proves by a preponderance of the evidence that the property was acquired during the time of the violation (or within a reasonable time after) and there was not a lawful source for such property.⁷⁸ If the government meets its burden, the court will issue a preliminary order of forfeiture.⁷⁹ Any third party alleging claim to an interest in the property is resolved through a post-judgment ancillary hearing.⁸⁰

⁷¹ FED. R. CRIM. P. 7(c)(2) (1).

⁷² FED. R. CRIM. P. 32.2(a).

⁷³ *United States v. Galestro*, No. 06-285, 2008 U.S. Dist. LEXIS 53834, *31 (E.D.N.Y. July 15, 2008) (“Although item-specific notice need not be provided in the indictment itself, the defendant is nonetheless entitled to have the government identify the particular assets that it is seeking to forfeit so that the defendant can prepare his defense.”) (citation and internal quotation marks omitted).

⁷⁴ *See, e.g., United States v. Palfrey*, 499 F. Supp. 2d 34, 52 (D.D.C. 2007) (ordering government to disclose to defendant within 30 days of trial details regarding the nexus between the property sought and the crimes alleged and to identify within 60 days the proceeds of specified unlawful activity); *United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941, 944 (N.D. Ill. 2001) (ordering government to disclose within 30 days of trial a bill of particulars “identifying the specific items of property ... that it claims are subject to forfeiture.”); *United States v. Diaz*, 190 F.3d 1247, 1258 (11th Cir. 1999) (holding that no bill of particulars needed where defendant had actual knowledge of government’s intent to confiscate defendant’s interest in home).

⁷⁵ *United States v. Sandini*, 816 F.2d 869, 873 (3d Cir. 1987).

⁷⁶ FED. R. CRIM. P. 32.2(b)(1)(A) (“As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute.”).

⁷⁷ *See, e.g., United States v. Cherry*, 330 F.3d 658, 670 (4th Cir. 2003); *United States v. Gasanova*, 332 F.3d 297, 301 (5th Cir.); *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002); *United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001); *but see United States v. Pelullo*, 14 F.3d 881, 906 (3d Cir. 1994).

⁷⁸ 21 U.S.C. § 853(d).

⁷⁹ Fed. R. Crim. P. 32.2(b).

⁸⁰ 18 U.S.C. § 1963(l); 21 U.S.C. § 853(n).

Select Legal Issues

Standing

One legal issue that frequently arises in civil forfeiture cases is whether the claimant has sufficient legal standing to challenge the forfeiture of the property. The federal courts have held that a claimant must have constitutional, statutory, and prudential standing to mount a challenge to the forfeiture of his property.⁸¹ It must be noted from the outset that while Congress has the authority to alter the statutory requirements for filing a forfeiture claim—including which party bears the burden of proof and what standard should apply—it cannot alter the constitutional requirement of standing.⁸² Nonetheless, standing has become a major issue in asset forfeiture cases, especially when the property being seized is cash.

The federal courts have developed a set of rules to determine whether a claimant has constitutional standing to challenge the forfeiture of his assets. The claimant bears the burden to establish standing by a preponderance of the evidence.⁸³ To establish standing under Article III of the Constitution,⁸⁴ the claimant must demonstrate a “legally cognizable interest in the property that will be injured if the property is forfeited to the government.”⁸⁵ This can be established by demonstrating a “colorable ownership, possessory or security interest in at least a portion of the defendant property.”⁸⁶ If the claimant fails to establish standing, there is no case or controversy. Statutory standing is met through compliance with the applicable asset forfeiture statutes and rules, and prudential standing is established if the claimant’s legal interest is within the zone of interests to be protected by the forfeiture statutes.⁸⁷

The issue of standing frequently arises in forfeiture cases when the ownership of cash is in question. Beyond the technical requirements of the forfeiture statutes, many of these cases resort to complicated state property and gift laws. The lower courts are generally in agreement that the “unexplained naked possession [of cash] does not constitute a sufficient possessory interest to confer standing on a claimant.”⁸⁸ A few representative cases can demonstrate how this standing requirement is applied in cash confiscation cases.

In *United States v. \$119,030.00 in U.S. Currency*, a Virginia state trooper stopped Jonte Hamilton and two passengers in his car for speeding.⁸⁹ Upon questioning by the trooper, Hamilton stated that they were traveling to Houston, Texas, to attend a rap concert and shoot a music video. The

⁸¹ *United States v. \$119,030.00 in U.S. Currency*, 955 F. Supp. 2d 569, 576 (W.D. Va. 2013).

⁸² See *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”).

⁸³ *United States v. 7,000.00 in U.S. Currency*, 583 F. Supp. 2d 725, 729-30 (M.D.NC. 2008).

⁸⁴ The Supreme Court has interpreted Article III to require three elements to establish standing: (1) an injury in fact that is concrete and particularized; (2) the injury is caused by defendant’s conduct; and (3) the injury is redressable by court action. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁸⁵ *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998).

⁸⁶ *Id.*

⁸⁷ *United States v. \$500,000.00 in U.S. Currency*, 591 F.3d 402, 404 (5th Cir. 2009); see generally SUPP. RULE FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS RULE G.

⁸⁸ *Munoz-Valencia v. United States*, 169 F. App’x 150, 152 (3d Cir. 2006); *United States v. \$321,470.00, U.S. Currency*, 874 F.2d 298, 304 (5th Cir. 1989); *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998).

⁸⁹ *\$119,030.00 in U.S. Currency*, 955 F. Supp. 2d at 572.

trooper became suspicious because the rental car was due back in two days, clearly a short time to make it from Virginia to Texas and back. After giving Hamilton a verbal warning and telling Hamilton he was free to leave, the trooper then asked if there were weapons or drugs or large amounts of currency in the vehicle. One of the passengers said no. The trooper then asked to search the car, and the passenger again said no. After this refusal, the trooper did an exterior scan with a drug-sniffing dog that made a positive alert. Upon searching the car, the trooper found no drugs but did find \$119,030.00 in U.S. currency (hence, the case name). Although Hamilton and the passengers denied ownership of the cash at the scene of the search and later signed affidavits to this effect, Hamilton later claimed ownership upon receiving a DEA forfeiture notice. Hamilton claimed that the money was a gift from a family friend that was being held by his mother until his 30th birthday. (He was 28 at the time of the seizure.)

Because possession alone is insufficient to demonstrate dominion and control, the district court assessed other indicia of an ownership or possessory interest.⁹⁰ Looking to the law concerning *inter vivos* gifts, the court rejected the idea that this was a valid gift, as it was conditioned on a future event (Hamilton turning 30 years old). The court also rejected the argument that he had a possessory interest in the cash, as he was not entitled to possess it until his 30th birthday. Based on the lack of either an ownership or possessory interest, coupled with his initial disclaimer of ownership at the time of seizure, the court held that Hamilton did not have Article III standing to contest the forfeiture of the money.⁹¹ As an alternative theory, the court assessed but rejected the theory that Hamilton's mother was the owner of the money. She claimed to have been holding the money in trust for her son, but the court found that she had not met the clear and convincing burden of proving a valid oral trust.⁹²

In a similar case, *United States v. \$39,557.00, More or Less, in U.S. Currency*, a patrolman pulled over a van for allegedly traveling above the speed limit and appearing to not have valid registration.⁹³ After smelling burnt marijuana, the officer searched the vehicle, where he found a bag beneath the passenger seat that contained "a black bag with a large quantity of United States currency bundled in black rubber bands" and a purse under the back seat that also contained a large amount of money. The officer questioned the occupants of the van about the origins of the money. The driver refused to answer any questions, and the passenger, Richard Harold, claimed that he "was unaware of any money in the van."⁹⁴ Although originally disclaiming ownership, Harold filed a claim for the money after the government initiated forfeiture proceedings. The district court concluded that Harold did not have Article III standing to bring this claim. The court reasoned that he did not have a possessory interest in the cash, as it was not found on his person and he did not have an ownership interest in the van.⁹⁵ The court likewise rejected Harold's claim that the money was an inheritance from his deceased grandmother, finding that he had not overcome his initial renouncement of the money by a preponderance of the evidence. Thus, without Article III standing, Harold was precluded from proceeding with his claim for the money.

⁹⁰ *Id.* at 579.

⁹¹ *Id.* at 581.

⁹² *Id.* at 582.

⁹³ *United States v. \$39,557.00, More or Less, in U.S. Currency*, 683 F. Supp. 2d 335, 337 (D.N.J. 2010).

⁹⁴ *Id.* at 337-38.

⁹⁵ *Id.* at 341.

Burden of Proof in Civil Forfeitures

In large measure, debate surrounding possible civil asset forfeiture reform has centered on the burden of proof standard. Beginning with the first federal statutes, and for the first 200 years of civil forfeitures, the burden of proof was on the property owner to prove the “innocence” of the seized property.⁹⁶ CAFRA shifted the burden to the government based upon a preponderance of the evidence standard, but some have questioned whether it is sufficiently rigorous in relation to the substantial property interests at stake.⁹⁷ All the bills introduced in the 113th and 114th Congresses—S. 255, H.R. 540, and H.R. 5212—would raise the government’s burden to “clear and convincing evidence.” Whether for legal or policy reasons, some have called for raising the standard to beyond a reasonable doubt,⁹⁸ a standard currently employed by four states.⁹⁹

Pre-CAFRA Standard

Prior to CAFRA, the government needed only prove probable cause that there was a nexus or substantial connection between the seized property and the underlying criminal activity.¹⁰⁰ This was the same probable cause standard found in other criminal law settings.¹⁰¹ Probable cause was established if the government could show that it had “reasonable grounds, more than mere suspicion, to believe that property [was] subject to forfeiture.”¹⁰² The government was not required to prove that a crime actually occurred but needed only to demonstrate the “probability or substantial chance” of such activity.¹⁰³ In addition to posing a low evidentiary threshold, probable cause could be demonstrated by inadmissible hearsay evidence.¹⁰⁴ Moreover, some cases held that the government was not required “to show a relationship between the property and a *particular* drug transaction—only that the property was related to some illegal drug transaction.”¹⁰⁵

Once the government met its burden, the burden would shift to the property owner to rebut the government’s evidence and show that the property seized was not used to facilitate the crime¹⁰⁶ or that he did not consent to the illegal use,¹⁰⁷ the latter known as the innocent owner’s defense,

⁹⁶ Act of July 31, 1789, 1 Stat. 29, 43–44.

⁹⁷ See *infra* note 76.

⁹⁸ See, e.g., David Pimental, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L. J. 1, 55 (2012); Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—the Righteous Hunt for Reform Is on*, 46 TEX. TECH L. REV. 1169, 1200 (2014).

⁹⁹ POLICING FOR PROFIT, *supra* note 5, at 22.

¹⁰⁰ See 18 U.S.C. § 981 (cross-referencing 19 U.S.C. § 1615) (1996); *United States v. \$3,000 in Cash*, 906 F. Supp. 1061, 1065 (E.D. Vir. 1995).

¹⁰¹ *United States v. \$506,231 in U.S. Currency*, 125 F.3d 442, 451 (7th Cir. 1997).

¹⁰² *In re Seizure of All Funds in Accounts in Names Registry Pub. Inc.*, 68 F.3d 577, 580 (2d Cir. 1995) (quoting *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119, 1124 (2d Cir. 1993)).

¹⁰³ *United States v. Certain Real Prop., Commonly Known as 6250 Ledge Rd., Egg Harbor, Wis.*, 943 F.2d 721, 725 (7th Cir. 1991) (quoting *United States v. Edwards*, 885 F.2d 377, 389–390 (7th Cir. 1989)).

¹⁰⁴ *United States v. \$3,000 in Cash*, 906 F. Supp. 1061, 1065 (E.D. Vir. 1995).

¹⁰⁵ *United States v. \$242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) (emphasis added); see also *United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Counties in State of Ala.*, 941 F.2d 1428, 1440 (11th Cir. 1991).

¹⁰⁶ *United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars (\$364,960.00) in United States Currency*, 661 F.2d 319, 325 (5th Cir. 1981).

¹⁰⁷ *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane Summerfield, N.C.*, 906 F.2d 110, 111

which will be explored below.¹⁰⁸ The claimant's burden was by a preponderance of the evidence—that is, whether it was more probable than not that the alleged facts were true.¹⁰⁹ If the claimant failed to rebut the government's case, the property was subject to forfeiture.¹¹⁰

While constitutional challenges to placing the burden of proof on the claimant were wholly unsuccessful,¹¹¹ some federal judges voiced concern about the fairness of this standard. For instance, in a dissenting opinion, Judge Beam of the Eighth Circuit Court of Appeals analyzed the probable cause standard under the *Mathews v. Eldridge* balancing test used to assess the adequacy of procedural rules under the Due Process Clause.¹¹² Noting the importance of property rights in the American constitutional structure, he argued that placing the burden of proof on the claimant was a denial of due process:

[T]he current allocation of burdens and standards of proof requires that the claimant prove a negative, that the property was not used in or to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of an erroneous, irreversible deprivation. The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The allocation of burdens and standards of proof implicates similar concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.¹¹³

Likewise, Judge Kozinski, writing for a majority in a Ninth Circuit Court of Appeals forfeiture case, observed, albeit in dicta, that allowing the government to confiscate property based on probable cause was a “constitutional anomaly.”¹¹⁴ He noted that a burden of proof is indicative of the importance society places on a certain legal decision. Because the “stakes are exceedingly high” when a person is threatened with the loss of property, he found it “surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause.”¹¹⁵

(4th Cir. 1990).

¹⁰⁸ See “Innocent Owner’s Defense,” *infra* p. 9.

¹⁰⁹ *United States v. \$52,000.00, More or Less, in United States Currency*, 508 F. Supp. 2d 1036, 1040 (S.D. Ala. 2007).

¹¹⁰ *United States v. Certain Real Prop. 566 Hendrickson Blvd., Clawson, Oakland Cnty., Mich.*, 986 F.2d 990, 995 (6th Cir. 1993) (“It is well settled that the government is entitled to a judgment of forfeiture upon an un rebutted showing of probable cause.”).

¹¹¹ See, e.g., *United States v. One Beechcraft King Air 300 Aircraft*, 107 F.3d 829, 829 (11th Cir. 1997); *United States v. \$94,000.00 in U.S. Currency, Along With Any Interest Earned Thereon in First Fin. Sav. Ass’n Account No. 79-70063411*, 2 F.3d 778, 783 (7th Cir. 1993); *United States v. 228 Acres of Land & Dwelling Located on Whites Hill Rd. in Chester, Vt.*, 916 F.2d 808, 814 (2d Cir. 1990).

¹¹² *United States v. Twelve Thousand, Three Hundred Ninety Dollars (\$12,390)*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹¹³ 956 F.2d at 811 (Beam, J., dissenting) (internal quotation marks and citations omitted).

¹¹⁴ *United States v. \$49,576.00 United States Currency*, 116 F.3d 425, 429 (9th Cir. 1997).

¹¹⁵ *Id.*

Legislative History and CAFRA Standard

Whether the standard of proof should be raised to preponderance of the evidence or clear and convincing evidence was “one of the most hotly contested issues as CAFRA moved through Congress.”¹¹⁶ H.R. 1916, introduced by Representative Hyde in the 104th Congress, proposed the clear and convincing standard¹¹⁷; however, a compromise bill introduced by Representatives Hyde and Conyers in the 105th Congress lowered it to the preponderance standard.¹¹⁸ The following Congress, Representative Hyde reintroduced his bill, reverting to the clear and convincing standard.¹¹⁹ The House Judiciary Committee noted in its report accompanying this bill that civil asset forfeiture, in the view of the committee, “did not merely serve a remedial function,” as was previously asserted by DOJ, but rather was sufficiently punitive to warrant raising the standard to the intermediate clear and convincing evidence standard.¹²⁰ In June 1999, the House debated and passed Representative Hyde’s bill, which contained the clear and convincing standard.¹²¹ However, the two bills introduced in the Senate later that year, which were ultimately enacted into law, settled on the preponderance standard.¹²²

Under this standard, found at 18 U.S.C. § 983(c), the government now bears the burden of proving that the property is subject to forfeiture by a preponderance of the evidence. This means that the government, and not the claimant, must proffer sufficient facts at trial to connect the property to the crime. While CAFRA elevated the burden of proof, courts continue to look to pre-CAFRA cases for guidance when deciding whether to approve the forfeiture.¹²³ In reviewing the evidence, courts apply a totality-of-the-circumstances approach to determine if there is a sufficient connection between the property and the crime.¹²⁴ The property need not actually be used in the crime, but merely intended to be used.¹²⁵ Moreover, the property’s role in the crime need not be “integral, essential or indispensable.”¹²⁶ For forfeiture under the federal drug laws, property “facilitates” a crime when it makes the crime “less difficult or more or less free from obstruction or hindrance.”¹²⁷ And although CAFRA shifted the burden of proof to the government, the courts still find that the claimant’s failure to explain a legitimate source of the money as probative of illegal drug activity.¹²⁸

¹¹⁶ Cassella, *supra* note 24, at 108.

¹¹⁷ H.R. 1916, 104th Cong. (1st Sess. 1995).

¹¹⁸ H.R. 1965, 105th Cong. (2^d Sess. 1998).

¹¹⁹ H.R. 1658, 106th (1st Sess. 1999).

¹²⁰ H.Rept. 106-192, at 12-13.

¹²¹ H.R. 1658 (engrossed in H.R.).

¹²² S. 1701, 106th Cong. (1st Sess. 1999); S. 1931, 106th Cong. (1st Sess. 1999); P.L. 106-185 (codified at 18 U.S.C. § 983(c)).

¹²³ *United States v. Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d 448, 469 (7th Cir. 2005) (“The government’s burden may have increased in the wake of CAFRA, but it did not become insurmountable. Factors that weighed in favor of forfeiture in the past continue to do so now—with the obvious caveat that the government must show more or stronger evidence establishing a link between forfeited property and illegal activity.”); *United States v. \$21,510.00 In U.S. Currency*, 144 F. App’x 888, 890 (1st Cir. 2005).

¹²⁴ *United States v. \$242,484*, 389 F.3d 1149, 1160 (11th Cir.2004); *United States v. One 2005 Dodge Magnum*, 845 F. Supp. 2d 1361, 1370 (N.D. Ga. 2012).

¹²⁵ *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990).

¹²⁶ *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990).

¹²⁷ *United States v. Premises Known as 3639-2nd St., N.E., Minneapolis, Minn.*, 869 F.2d 1093, 1096 (8th Cir. 1989); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3^d Cir. 1981).

¹²⁸ *United States v. \$252,300.00 in U.S. Currency*, 484 F.3d 1271, 1275 (10th Cir. 2007); *United States v. \$11,320.00 in*

If the government is proceeding under a facilitating theory, Section 983(c)(3) requires the government to demonstrate a “substantial connection” between the property and the offense.¹²⁹ This resolved a prior split in the circuit courts as to whether the government had to show a “substantial connection” or a more limited “nexus” between the seized property and the criminal activity.¹³⁰ Courts have found the following as factors in determining whether there is a substantial connection between the property and the alleged federal crime: large sums of cash,¹³¹ inconsistent statements,¹³² bundling and hiding cash,¹³³ drug odor on cash,¹³⁴ and one-way flight purchased with cash and containing a different passenger’s name.¹³⁵ In some cases, even where no money or drugs were transported in a vehicle, it was enough that the vehicle transported a “pivotal figure in the transaction.”¹³⁶ In one case, the circuit court upheld the forfeiture of a vehicle that was used to drive to the scene of an anticipated drug deal, not the actual drug deal.¹³⁷

However, some courts have required a stricter connection between the property and the crime. For instance, the New Hampshire District Court rejected the forfeiture of several thousand dollars in cash that was found in a lockbox with several grams of cocaine, holding that the government failed to specify under which of the three theories described in Section 881(a) it was relying: money used to facilitate the drug crime, money to purchase drugs, or money as the proceeds of a drug crime.¹³⁸ Likewise, the District Court for the District of Nebraska held that the possession of “lots of money” and an alert by a drug dog alone were not enough to find a substantial connection between the seized money and alleged drug activity, especially where the claimant claimed a legitimate business purpose for the money.¹³⁹

Reform Proposals

Many observers have argued that the clear and convincing standard would be the appropriate burden of proof in civil forfeiture cases.¹⁴⁰ Following this approach, all three reform bills—S. 255

U.S. Currency, 880 F. Supp. 2d 1310, 1325 (N.D. Ga. 2012).

¹²⁹ 18 U.S.C. § 983(c)(3) (emphasis added).

¹³⁰ *Compare* United States v. One 1986 Ford Pickup, 56 F.3d 118, 1187 (9th Cir. 1995), *with* United States v. Daccarett, 6 F.3d 37, 56 (2d Cir. 1993).

¹³¹ United States v. \$124,700 in U.S. Currency, 458 F.3d 822, 826 (8th Cir. 2006); United States v. \$84,615 in U.S. Currency, 379 F.3d 496, 501 (8th Cir. 2004); United States v. \$93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984).

¹³² United States v. \$252,300.00 in U.S. Currency, 484 F.3d 1271, 1274 (10th Cir. 2007).

¹³³ *\$124,700 in U.S. Currency*, 458 F.3d at 826.

¹³⁴ United States v. U.S. Currency, in Amount of \$150,660.00, 980 F.2d 1200, 1206 (8th Cir. 1992); United States v. Ninety One Thousand Nine Hundred Sixty Dollars (\$91,960.00), 897 F.2d 1457, 1463 (8th Cir. 1990).

¹³⁵ United States v. Ninety One Thousand Nine Hundred Sixty Dollars (\$91,960.00), 897 F.2d 1457, 1463 (8th Cir. 1990).

¹³⁶ United States v. One 1979 Porsche Coupe, Vin 9289200514, 709 F.2d 1424, 1427 (11th Cir. 1983); United States v. One 1977 Cadillac Coupe DeVille VIN: 6D47S7Q234771, 644 F.2d 500, 503 (5th Cir. 1981).

¹³⁷ United States v. One 1974 Cadillac Eldorado Sedan, Serial No. 6L47S4Q407966, 548 F.2d 421, 426 (2d Cir. 1977).

¹³⁸ United States v. Ten Thousand Six Hundred Forty-Eight, 975 F. Supp. 2d 163, 169 (D.N.H. 2013); 21 U.S.C. § 881(a)(6).

¹³⁹ United States v. \$1,074,900.00 in U.S. Currency, 932 F. Supp. 2d 1053, 1064 (D. Neb. 2013).

¹⁴⁰ *See, e.g.,* POLICING FOR PROFIT, *supra* note 5, at 14; Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009) (“While the increased burden has not had the intended effect, a standard of clear and convincing evidence would require the government to present a stronger case before depriving citizens of their property.”); Barclay Thomas Johnson, *Restoring Civility—the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1079 (2002) (“[T]he changes to the Act

and H.R. 540, introduced in the 114th Congress, and H.R. 5212, introduced in the 113th Congress—would raise the burden of proof on the government to the clear and convincing standard.¹⁴¹ Additionally, S. 255 and H.R. 540 would add an element to the government’s case-in-chief when it proceeds on a facilitating theory by requiring it to prove by clear and convincing evidence that “(A) there was a substantial connection between the property and the offense,” (B) the owner of any interest in the seized property—(i) used the property with the intent to facilitate the offense; or (ii) knowingly consented or was willfully blind to the use of the property by another in connection with the offense[.]”

Beyond policy considerations, some have contended that a heightened standard beyond the current preponderance standard is constitutionally compelled. In a pre-CAFRA case concerning the forfeiture of a public housing unit, District Court Judge Jack Weinstein of the Southern District of New York argued that:

on constitutional as well as policy grounds there is doubt about the propriety of shifting the burden of proof in quasi-criminal proceedings to leaseholders. Characterizing this action as civil by statute does not negate its essentially punitive nature as part of the broad initiatives taken to combat drugs. The law would be much more comfortable with a forfeiture scheme that, at least in the case of homes, placed the entire burden on the Government to establish that forfeiture is warranted *with a standard that is higher than a preponderance*.¹⁴²

Although this statement was dicta, as the case was resolved on other grounds, Judge Weinstein argued that, similar to other quasi-criminal contexts—such as parental rights proceedings and deportation proceedings—this higher standard “may be constitutionally mandated” for certain civil asset forfeiture proceedings, particularly when a person’s home is at stake.¹⁴³

DOJ, on the other hand, took the position during debates on CAFRA that the burden of proof in civil forfeiture cases should be treated like any other civil case in federal court—that is, under the preponderance standard.¹⁴⁴ Speaking through then-Deputy Attorney General Eric Holder, DOJ argued that raising the standard to clear and convincing evidence “would have a devastating effect on the government’s ability to establish the forfeitability of the property in complex money laundering and drug cases. We are concerned that too high a burden of proof will result in inappropriate losses of cases by the government, leading to a windfall for undeserving criminals.”¹⁴⁵

Straddling these competing views, one commentator recommends applying alternative burdens of proof depending on the

The innocent owner defense applies when the property may have been connected to a federal crime, but the owner had no knowledge of such use, or if he did have knowledge, attempted to prevent such use.

remedy the most glaring inequities, but do not go far enough. In a country based on the cry of life, liberty, and property, it is surprising that, barely two centuries after its founding, the government should be able to deprive its citizens of their core constitutional right to property based on a mere preponderance of the evidence.”)

¹⁴¹ S. 255, H.R. 540, 114th Cong. (2015); H.R. 5212, 113th Cong. (2014).

¹⁴² *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y.1991) (emphasis added).

¹⁴³ *Id.*

¹⁴⁴ *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime, Hearing before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 23 (July 21, 1999) (prepared statement of Deputy Attorney General Eric Holder).

¹⁴⁵ *Id.*

nature of the property seized.¹⁴⁶ He suggests that contraband could be confiscated under the lower probable cause standard due to its inherent illegality.¹⁴⁷ Discerning the criminal origins of proceeds, on the other hand, is a more difficult endeavor, so he maintains that proceed forfeitures should remain at the preponderance standard.¹⁴⁸ However, property that the government claims was used to facilitate a crime would be forfeited only under the reasonable-doubt standard. He argues that unlike contraband and proceeds—property to which the owner never had a legal right—forcing forfeiture of facilitating property “is particularly grave because it involves depriving individuals of their hard-earned and legally acquired property.”¹⁴⁹

Innocent Owner Defense

If the government meets its burden of proof, the property owner then has the opportunity to present an affirmative defense, such as the innocent owner defense.¹⁵⁰ Generally speaking, the innocent owner defense applies when the property may have been connected to a federal crime, but the owner had no knowledge of such use or, if he did have knowledge, attempted to prevent such use. Prior to CAFRA, an innocent owner defense could be found in several federal statutes, but the scope of these statutes was ambiguous and created confusion in the lower courts.¹⁵¹ CAFRA resolved this by creating a uniform innocent owner defense that applies to all forfeitures except customs violations. Some have called for overhauling this provision once again by placing the burden on the government to prove that the owner knew of the illegal activity or that he had consented to its use.¹⁵²

Pre-CAFRA Rule

Prior to CAFRA, several federal statutes contained innocent owner defenses. Under 21 U.S.C. § 881(a)(6) and (7), no money or real property could be forfeited “by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”¹⁵³ Similarly, conveyances were not subject to forfeiture “by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.”¹⁵⁴

Characterized in one decision as being “[f]illed with negatives” and “nearly impenetrable” language,¹⁵⁵ courts disagreed as to whether these statutes should be read in the conjunctive (requiring a claimant to demonstrate both a lack of knowledge and consent) or in the disjunctive (permitting a showing of one or the other).¹⁵⁶ Under the majority approach, a claimant had to

¹⁴⁶ Pimental, *supra* note 98, at 55.

¹⁴⁷ *Id.* at 55.

¹⁴⁸ *Id.* at 56.

¹⁴⁹ *Id.* at 57.

¹⁵⁰ *United States v. Real Prop. Located at 3234 Washington Ave. N., Minneapolis, Minn.*, 480 F.3d 841, 843 (8th Cir. 2007).

¹⁵¹ *See United States v. One 1973 Rolls Royce by & Through Goodman*, 43 F.3d 794, 815 (3d Cir.1994); Smith, *supra* note 3, at § 4.02.

¹⁵² S. 255, H.R. 540, 114th Cong. (2015); H.R. 5212, 113th Cong. (2014); POLICING FOR PROFIT, *supra* note 5, at 14.

¹⁵³ 21 U.S.C. § 881(a)(7) (1994).

¹⁵⁴ *Id.* § 881(a)(4).

¹⁵⁵ *One 1973 Rolls Royce by & Through Goodman*, 43 F.3d at 815

¹⁵⁶ *Compare id.* (conjunctive), *with United States v. One Parcel of Land at Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (disjunctive).

prove by a preponderance of the evidence “either a lack of knowledge of the activity or the lack of consent to it.”¹⁵⁷ Where the claimant had knowledge of the crime, consent was “inferred unless the claimant [could] prove that he took all reasonable measures to rid the property of the illegal conduct.”¹⁵⁸

CAFRA Rule

CAFRA created a uniform innocent owner defense providing that “an innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute.”¹⁵⁹ Like affirmative defenses in other contexts, the “claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.”¹⁶⁰ This defense was bifurcated, with different rules applying to property interests existing when the offense was committed and those interests arising after the offense was committed.

With respect to a property interest in existence at the time the crime took place, an innocent owner is someone who “(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”¹⁶¹ This was an adoption of the disjunctive test in which a claimant could show either lack of knowledge *or* consent. Congress clarified that claimants could show that “they did all they reasonably could” to terminate such use by demonstrating that they “(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; *and* (II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.”¹⁶² Notice that it is not sufficient to merely report the activity to the police. The claimants must also take additional steps to revoke or discourage such further illegal use, unless they reasonably believe such actions will put them or others in danger.¹⁶³

With respect to property interests that arise after the illegal activity, an “innocent owner” is someone who “(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.” There is a carve out of this “purchaser” requirement for residences obtained through marriage, divorce, or inheritance if the following elements are met:

- (i) the property is the primary residence of the claimant;
- (ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
- (iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

¹⁵⁷ *United States v. 121 Allen Place*, 75 F.3d 118, 121 (2d Cir. 1996).

¹⁵⁸ *Id.*

¹⁵⁹ 18 U.S.C. § 983(d)(1).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* § 983(d)(2)(A).

¹⁶² 18 U.S.C. § 983(d)(2)(B) (emphasis added).

¹⁶³ *See, e.g., United States v. 19 & 25 Castle St.*, 31 F.3d 35, 40-41 (2d Cir. 1994); *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1504-05 (11th Cir. 1992).

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate, except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.¹⁶⁴

Reform Proposals

While CAFRA extended the innocent owner defense to most civil forfeitures, it has been critiqued mainly for leaving the burden on the alleged innocent owner. All of the reform proposals introduced in the 113th and 114th Congresses would have amended the innocent owner provision. H.R. 5212 would have amended Section 983(d) to shift the burden of proof to the government:

(1) The innocent owner defense should be available to a claimant. Where a prima facie case is made for such a defense, the Government has the burden of proving that the claimant knew or reasonably should have known that the property was involved in the illegal conduct giving rise to the forfeiture.¹⁶⁵

Several interpretative issues should be noted concerning this language. First, the term “prima facie case” is somewhat ambiguous in this context. In the general forfeiture context, the courts have used the term “prima facie” to describe the burden of proof: “Probable cause refers to ‘reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.’”¹⁶⁶ The Eleventh Circuit acknowledged that it did not know what “prima facie proof” meant in that context.¹⁶⁷ The court noted that traditionally “prima facie proof” is that proof “sufficient to establish a fact or raise a presumption unless disproved or rebutted.”¹⁶⁸ But, as the court and others have noted, “probable cause *is* prima facie proof” because the government can prevail in an uncontested forfeiture case based on probable cause.¹⁶⁹ The court then assumed that this usage of prima facie proof presumably meant that the government need not meet the traditional civil standard of preponderance but instead need only satisfy the lesser probable cause standard. However, the court finished by noting that “such usage of the term ‘prima facie proof’ seems to be an unfortunate misuse of legal terminology with no significance.”¹⁷⁰

Based on this understanding of the use of the term “prima facie proof,” it appears that H.R. 5212 attempted to create a burden shifting scheme in which the claimant must make some initial showing for the defense but need not prove it by a preponderance of the evidence. If this showing is made, the burden would shift to the government to prove that the claimant knew or reasonably should have known that the property was involved in the illegal conduct.

Second, under H.R. 5212, the government would have been permitted to demonstrate that the claimant “*reasonably should have known* that the property was involved in the illegal conduct.” Prior to CAFRA, there was some disagreement in the lower courts concerning the willful

¹⁶⁴ 18 U.S.C. § 983(d)(3).

¹⁶⁵ H.R. 5212.

¹⁶⁶ *United States v. \$4,255,625.39*, 762 F.2d 895, 903 (11th Cir. 1985) (quoting *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980)).

¹⁶⁷ *United States v. \$242,484.00*, 351 F.3d 499, 504 n.8 (11th Cir. 2003).

¹⁶⁸ *Id.* (citing BLACK’S LAW DICTIONARY 1209 (7th ed. 1999)).

¹⁶⁹ *Id.*; see also PROSECUTION AND DEFENSE OF FORFEITURE CASES, *supra* note 3, at § 11.03.

¹⁷⁰ 351 F.3d at 504 n.8.

blindness standard in the prior innocent owner defense provided under Section 881(a)(4)(c). Some courts applied an objective standard, in which the claimant not only had to prove he was actually unaware of the activity but also that he did everything he reasonably could to prevent the unlawful activity.¹⁷¹ Under this objective approach, willful blindness existed when the owner failed to exercise due care to ensure that the property was not being used for an illegal purpose—in effect, a negligence standard.¹⁷² Other courts applied a subjective approach where willful blindness would be found if the owner was aware of a high probability that the property was being used for criminal activity and failed to make reasonable inquiries to determine if the property was so used.¹⁷³ It appears that by employing the “reasonably should have known language,” H.R. 5212 would employ the objective, negligence approach.

Under current law, Section 983(d)(2)(B) illustrates the types of evidence claimants can offer to demonstrate that, *upon learning of the illegal conduct*, they did all they reasonably could to prevent the illegal use of the property:

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and (II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.¹⁷⁴

Because H.R. 5212 would have shifted the burden to the government, it would amend subsection (B) to permit the government to show “that the property owner should have had knowledge of the criminal activity by showing that the property owner did not” fulfill the requirements of subsection (d)(2)(B)—that is, inform the police and revoke use of the property. Unlike the current version which uses these factors as proof of steps taken once the claimant *learns* of the illegal activity, H.R. 5212 would have used these factors to demonstrate that the claimant *should have known* of the illegal activity. It is uncertain, however, how demonstrating that a person did not inform the police or take steps to prevent the illegal use of their property necessarily proves that he should have *known* of the illegal use of the property. The fact that a person did not notify the police of the illegal use or take actions to stop such use could, to the contrary, indicate that the person simply had no knowledge of such illegal use. In any event, subsection (d)(2)(B) indicates that these two factors are ways in which the government “may” demonstrate that the owner should have known of the illegal conduct. Other proof of this requirement would be permissible.

S. 255 and H.R. 540 appear to convert the innocent owner defense from an affirmative defense into an element of the government’s case-in-chief by requiring the government to prove by clear and convincing evidence that “(A) there was a substantial connection between the property and the offense,” (B) the owner of any interest in the seized property—(i) used the property with the intent to facilitate the offense; or (ii) knowingly consented or was willfully blind to the use of the property by another in connection with the offense[.]” It appears that it would apply only to interests in existence at the time of illegal conduct, as an owner with an after-acquired interest could not have intentionally used the property or given consent for another to use the property. S. 255 and H.R. 540 would not strike out the existing innocent owner defense at Section 983(d)(2)(A) but instead would amend the language to redefine an innocent owner as “an owner

¹⁷¹ *United States v. One 1980 Bertram 58’ Motor Yacht, Known as the M/V Mologa*, Serial No. 138M80587-80, VIN: Berro 138M80B, 876 F.2d 884, 888 (11th Cir. 1989).

¹⁷² *One 1973 Rolls Royce by & Through Goodman*, 43 F.3d at 806.

¹⁷³ *Id.* at 806; *United States v. One 1989 Jeep Wagoneer*, V.I.N. 1J4GS5874KP105300, 976 F.2d 1172, 1175 (8th Cir. 1992) (“[W]illful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts or omissions show a conscious purpose to avoid knowing the truth.”).

¹⁷⁴ 18 U.S.C. § 983(d)(2)(B).

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

Access to Counsel

Another recurring issue surrounding asset forfeiture is the extent to which property owners should be accorded access to counsel to contest confiscation of their property. This issue has arisen in both the criminal context, in which a defendant’s assets are frozen pretrial and he cannot use them to pay for counsel of his choice, and in civil asset forfeitures, in which indigent property owners cannot afford to contest the government’s confiscation of their property.

Challenging Asset Freeze to Pay Legal Fees in Criminal Prosecution

Under the federal criminal forfeiture statute, 21 U.S.C. § 853, the government may seek to freeze the assets of a criminal defendant pending trial if it can demonstrate that those assets will be forfeitable upon conviction.¹⁷⁵ There have been a series of Supreme Court and lower court cases assessing what constitutional protections must be accorded to a defendant whose property is subject to this restraint. The most recent case, *Kaley v. United States*, rejected the claim that defendants are entitled to an independent judicial evaluation of probable cause upon which a Section 853(e) restraining order is based.¹⁷⁶

Prior to *Kaley*, the Supreme Court issued two key rulings relating to Section 853(e)’s pretrial restraining order. In the 1991 case *Caplin & Drysdale, Chartered v. United States*, the Court assessed whether the Fifth and Sixth Amendments require an exemption from forfeiture for assets that a defendant wishes to use to pay for an attorney—essentially, a constitutional carve out of Section 853(e) for legal fees.¹⁷⁷ Acknowledging that “there will be cases where a defendant will be unable to retain the attorney of his choice,” the Court nonetheless rejected this claim, finding that “a defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.”¹⁷⁸ And handed down that same day, the Court in *United States v. Monsanto* held that the government can constitutionally freeze assets under Section 853(e) before trial based upon a finding of probable cause: “[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial.”¹⁷⁹ In a footnote, the *Monsanto* Court reserved the question that was ultimately addressed in *Kaley*—that is, whether a judicial hearing was required to assess the grand jury’s probable cause determination before a restraint of property can be effectuated.¹⁸⁰

Both before and after the *Monsanto* ruling, the majority of lower courts held that the combination of the Fifth and Sixth Amendments requires a post-seizure, pretrial hearing as to probable cause that “(a) the defendant committed the crimes that provide a basis for forfeiture, and (b) the

¹⁷⁵ 21 U.S.C. § 853(e).

¹⁷⁶ *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014).

¹⁷⁷ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619 (1989).

¹⁷⁸ *Id.* at 626.

¹⁷⁹ *United States v. Monsanto*, 491 U.S. 600, 616 (1989).

¹⁸⁰ *Id.* at 615 n.10.

properties specified as forfeitable in the indictment are properly forfeitable.”¹⁸¹ These cases relied primarily on the three-part balancing test from *Mathews v. Eldridge*, which assesses (1) the private interest at stake; (2) “the risk of an erroneous deprivation” of this interest and the value of additional procedural protections; and (3) the government’s interest and the burdens of providing these additional protections.¹⁸² Unlike the Court in *Kaley*, these courts held that the *Mathews* balance tipped in favor of the defendant. In assessing the defendant’s interest, the Second Circuit in *Monsanto*, echoed by the D.C. Circuit, noted that the private interest at stake is “not merely a defendant’s wish to use his property in whatever manner he sees fit,” but “that interest is augmented by an important liberty interest: the qualified right, under the sixth amendment, to counsel of choice.”¹⁸³ Put more directly by the Seventh Circuit, “[t]he defendant needs the attorney *now* if the attorney is to do him any good.”¹⁸⁴ As to the value of this added process above and beyond the grand jury determination, the D.C. Circuit acknowledged that it was not sure what evidence a defendant may offer at such a hearing. However, it was “precisely that lack of knowledge on the part of the court and the prosecution that makes it apparent that there is ‘considerable worth in a post-indictment, pre-trial adversarial hearing’ on the issue of the restraint of the seized property.”¹⁸⁵ Finally, while the government’s interest in maintaining the secrecy of the grand jury proceedings was considered weighty, the courts found that there were sufficient procedural mechanisms in place—such as *in camera* review and the admission of hearsay evidence—that softened this concern.¹⁸⁶ Recognizing the government’s interest in grand jury secrecy, they found nothing that outweighed the defendants’ constitutional rights to due process and counsel under the Fifth and Sixth Amendments. The Eleventh Circuit, on the other hand, has applied the four-part speedy trial test from *Wingo v. Barker* to hold that the district courts may decide on a case-by-case basis whether a hearing is warranted.¹⁸⁷ However, at this hearing, a defendant is entitled to challenge only “the nexus between those assets and the charged crime, but not the sufficiency of the evidence supporting the underlying charge.”¹⁸⁸

The Supreme Court granted review in *Kaley* to resolve the split in the circuits and to address the question left open by the *Monsanto* footnote: whether the criminally accused are entitled to judicial review of a grand jury’s determination of probable cause prior to full restraint of their property.¹⁸⁹ In *Kaley*, the government secured a grand jury indictment charging Kerry Kaley and her husband Brian with transporting stolen medical devices across state lines and laundering the proceeds of that activity.¹⁹⁰ Upon obtaining the indictment, the government sought a restraining

¹⁸¹ See, e.g., *United States v. E-Gold, Ltd.*, 521 F.3d 411, 421 (D.C. Cir. 2008); *United States v. Monsanto*, 924 F.2d 1186, 1198 (2d Cir. 1991); *United States v. Moya-Gomez*, 860 F.2d 706, 730 (7th Cir. 1988); but see *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989).

¹⁸² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁸³ *Monsanto*, 924 F.2d at 1193; *E-Gold, Ltd.*, 521 F.3d at 417.

¹⁸⁴ *Moya-Gomez*, 860 F.2d at 726 (emphasis in original).

¹⁸⁵ *E-Gold, Ltd.*, 521 F.3d at 418 (quoting *Monsanto*, 924 F.2d at 1195).

¹⁸⁶ *E-Gold, Ltd.*, 521 F.3d at 418-19; *Monsanto*, 924 F.2d at 1197-98.

¹⁸⁷ See *United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989); *Wingo v. Barker*, 407 U.S. 514 (1972). “The four *Bissell/Barker* factors are: ‘(1) the length of the delay before the defendants received their post-restraint hearing; (2) the reason for the delay; (3) the defendants’ assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States’s interest in the subject property.’” *United States v. Kaley*, 677 F.3d 1316, 1321 (11th Cir. 2012) (quoting *United States v. Kaley*, 579 F.3d 1246, 1254 (11th Cir. 2009)).

¹⁸⁸ *United States v. Kaley*, 677 F.3d 1316, 1327 (11th Cir. 2012).

¹⁸⁹ *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014).

¹⁹⁰ *Kaley*, 134 S. Ct. at 1095.

order under 21 U.S.C. § 853(e)(1) to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses.¹⁹¹ Included in the Kaleys' seized assets was a \$500,000 certificate of deposit that they intended to use to pay for an attorney. The district court denied the Kaleys' request for a hearing to challenge the grand jury's determination of probable cause, and the Eleventh Circuit affirmed.¹⁹²

Writing for a six-member majority, Justice Kagan posited that the Court's holdings in *Caplin & Drysdale* and *Monsanto* all but resolved the question before it.¹⁹³ The Kaleys, the Court noted, were not contesting *Monsanto*'s holding that probable cause was sufficient to effectuate a pretrial seizure of assets. Instead, their challenge was about who should make the probable cause determination—the grand jury or a judge. The Kaleys argued that the Due Process Clause entitled them to an independent judicial determination of probable cause beyond that of the grand jury.¹⁹⁴ Justice Kagan wrote that the resolution to this question “has a ready answer, because a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries.”¹⁹⁵ Applying the theory that the greater includes the lesser, because a grand jury determination of probable cause is constitutionally sufficient to support the pretrial restraint of a person's liberty, the Court found that it should also support the lesser interest of temporarily freezing a defendant's assets. A different result, Justice Kagan wrote, could have “strange and destructive consequences” on the criminal justice system by permitting opposite conclusions from the grand jury and judge on this probable cause determination. The majority reserved the question of whether *Mathews* was the appropriate test to apply in this criminal setting. Nonetheless, the majority applied *Mathews* and held that the balance weighed against permitting a judicial hearing to contest the seizure of a defendant's assets.¹⁹⁶

In a somewhat unusual lineup, Chief Justice John Roberts, joined by Justices Breyer and Sotomayor, dissented, arguing that “few things could do more to undermine the criminal justice system's integrity than to allow the Government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of counsel of his choice—without even an opportunity to be heard.”¹⁹⁷ The Chief Justice challenged the majority's greater-includes-the-lesser argument by noting that it is “far from clear” which interest is greater when a defendant is subject to serious federal charges: “the interest in temporary liberty pending trial, or the interest in using one's available means to avoid imprisonment for many years after trial.”¹⁹⁸ Responding to the argument that permitting possibly differing probable cause determinations would create “legal dissonance,” Chief Justice Roberts observed that such a hearing would not disrupt the traditional role of the grand jury to decide whether a defendant should be required to stand trial and the role of the judge to decide pretrial matters.¹⁹⁹ Unlike the majority, the dissenters concluded that *Mathews* was the appropriate Due Process test to apply to this “collateral issue of

¹⁹¹ 21 U.S.C. § 853(e).

¹⁹² *United States v. Kaley*, 677 F.3d 1316, 1330 (2012).

¹⁹³ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600, 615 (1989).

¹⁹⁴ *Kaley*, 134 S. Ct. at 1097.

¹⁹⁵ *Id.* at 1097.

¹⁹⁶ *Id.* at 1100.

¹⁹⁷ *Id.* at 1111 (Roberts, C.J., dissenting).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1109 (Roberts, C.J., dissenting).

the pretrial deprivation of property” and would have held that the balance weighed in favor of permitting a pretrial hearing.

Proposed Amendments

If Congress decided to craft a legislative response to the *Kaley* decision, the question then becomes what procedures and standards should govern such a hearing. There do not appear to be any existing legislative proposals to create this type of hearing, but the pre-*Kaley* circuit decisions offer some guidance:

- The proposal might establish what is required to initiate this judicial hearing. In several of the circuits, it appears that a preliminary showing that the defendant is otherwise without assets to hire an attorney is sufficient to trigger a full adversarial hearing before the district court.²⁰⁰ Others have applied more stringent requirements, noting that “Due process does not automatically require a hearing and a defendant may not simply ask for one.”²⁰¹ The Tenth Circuit has required that a defendant make “a prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets” were traceable to the alleged criminal activity.²⁰²
- The proposal might address *when* a defendant would be entitled to a hearing. The Second Circuit in *Monsanto* held that the government’s interest in protecting potentially forfeitable property justified the absence of a *pre*-restraining order hearing under Section 853(e)(1)(A).²⁰³ The D.C. Circuit agreed, noting that “[i]t may well be that in the case of criminal proceeding in which the government may ultimately have rights in the property at issue, immediate protective measures must be taken in order to prevent dissipation or deterioration of the assets before the time of trial is reached.”²⁰⁴ Thus, the government could be allowed to secure an initial seizure of the property with a post-restraint hearing to follow.
- The proposal could include provisions addressing concerns by the Supreme Court and several of the lower courts that permitting such a hearing might jeopardize the government’s case and trial strategy.²⁰⁵ Moreover, there is some fear that requiring the government to announce its witnesses before trial might lead to “witness tampering or jeopardize witness safety.”²⁰⁶ Following the suggestion of the Second Circuit’s *Monsanto* ruling,²⁰⁷ this concern could arguably be alleviated by ensuring that, like other procedures under Section 853, the Rules of

²⁰⁰ See *E-Gold, Ltd.*, 521 F.3d at 421; *Monsanto*, 924 F.2d at 1198.

²⁰¹ *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 647 (10th 1998).

²⁰² *Jones*, 160 F.3d at 647.

²⁰³ *Monsanto*, 924 F.2d at 1192.

²⁰⁴ *E-Gold, Ltd.*, 521 F.3d at 415-16.

²⁰⁵ *Kaley*, 134 S. Ct. at 1101 (“Still more seriously, requiring a proceeding of that kind could undermine the Government’s ability either to obtain a conviction or to preserve forfeitable property. To ensure a favorable result at the hearing, the Government could choose to disclose all its witnesses and other evidence. But that would give the defendant knowledge of the Government’s case and strategy well before the rules of criminal procedure—or principles of due process—would otherwise require.”) (internal citation omitted).

²⁰⁶ *Id.* at 1101-02.

²⁰⁷ *Monsanto*, 924 F.3d at 1198 (“As indicated hereinabove, however, the Federal Rules of Evidence would not be followed in the pretrial hearings that this opinion would require, thus allowing the use of hearsay testimony and precluding unwarranted exposure of government witnesses.”).

Evidence will not apply, allowing hearsay evidence to be admitted. Additionally, permitting *in camera* review of sensitive material could assuage concerns that a prosecutor's trial strategy will be jeopardized.

- The proposal could address which party should bear the burden of proof and what exactly that party must prove. In earlier rulings, the Second Circuit held that the government should bear the burden and that it must demonstrate “by evidence independent of the indictment, a probability of convincing a jury beyond a reasonable doubt both that the defendant has violated the statute and that the assets are subject to forfeiture[.]”²⁰⁸ However, in its more recent ruling, it held that government need only establish probable cause as to the defendant's guilt and the forfeitability of the specified assets.²⁰⁹ This approach was followed by other circuits, including the Ninth²¹⁰ and the D.C. Circuit.²¹¹ The Fourth Circuit placed the burden on the defendant, requiring him to prove “by a preponderance of the evidence that the government seized untainted assets without probable cause and that he needs those same assets to hire counsel.”²¹² As described above, the Tenth Circuit provided that once the defendant makes a *prima facie* showing that the grand jury erred, the burden then shifts to the government to demonstrate that there is probable cause to believe that the assets are traceable to the alleged offense.²¹³

In certain instances, the government may determine that engaging in a pretrial hearing is inadvisable. The Seventh Circuit has stated that in this instance, the government could be required to “consent to the exemption of reasonable attorneys' fees, as determined by the district court in its supervisory role, from the property otherwise subject to forfeiture.”²¹⁴ Alternatively, the Second Circuit has stated that the government can simply forgo restraint and obtain forfeiture after the conviction.²¹⁵

While the Court rejected an outright exemption from forfeiture for a certain amount of funds for an attorney as a constitutionally compelled requirement in *Caplin & Drysdale*,²¹⁶ Congress could create such an exemption.²¹⁷ Similar to the limitation of assets a defendant could contest in the post-restraint, pretrial hearing, this proposal could limit the amount of seized assets the defendant

²⁰⁸ *United States v. Monsanto*, 836 F.2d 74, 83 (2d Cir. 1987).

²⁰⁹ *Monsanto*, 924 F.3d at 1195.

²¹⁰ *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990).

²¹¹ *E-Gold, Ltd.*, 521 F.3d at 419.

²¹² *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001).

²¹³ *Jones*, 160 F.3d at 647.

²¹⁴ *See United States v. Moya-Gomez*, 860 F.2d 706, 731 (7th Cir. 1988); *United States v. Michelle's Lounge*, 39 F.3d 684, 696 (7th Cir. 1994).

²¹⁵ *Monsanto*, 924 F.2d at 1198.

²¹⁶ *Caplin & Drysdale*, 491 U.S. at 632.

²¹⁷ *Contra United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989) (“The appellants contend that the Sixth Amendment requires that enough funds be exempt from pretrial restraints and forfeiture to pay for counsel of choice and other litigation expenses. Specifically, they argue that the Sixth Amendment protects the individual's right to select and be represented by his preferred attorney with assets in his possession at the time of arrest.... Thus, the appellants urge that to protect a Sixth Amendment interest in a vigorous adversarial process, as well as an individual's interest in selecting counsel of choice, the Constitution requires the exemption of funds which are sufficient to allow defendants to retain their preferred counsel. We disagree.”).

can unfreeze to an “amount necessary to pay reasonable attorneys’ fees for counsel of sufficient skill and experience to handle the particular case.”²¹⁸

Indigent Access to Counsel in Civil Asset Forfeitures

The issue of adequate access to counsel has also arisen in the context of civil forfeitures. There are two provisions of federal law providing for the appointment of counsel in civil asset forfeiture proceedings. Section 983, Title 18, provides that indigent claimants are entitled to counsel in cases involving residences and permits attorneys who are representing defendants in criminal cases to also represent them in the civil forfeiture cases.²¹⁹ Section 2465(b), Title 28, provides that in any civil forfeiture proceeding in which the claimant “substantially prevails,” the United States shall be liable for “reasonable attorney fees and other litigation costs reasonably incurred by the claimant.”²²⁰ These provisions were scaled back from the version that passed the House in 1999, which would have provided for appointment of counsel in any case in which the claimant was indigent.²²¹ S. 255 and H.R. 540 would mirror this approach by expanding the current access to indigent counsel to any civil proceeding in which a claimant has standing to contest the forfeiture, not only when his primary residence is in jeopardy of being forfeited. They would also place the responsibility on appointing counsel on the court rather than requiring the claimant to request counsel himself. H.R. 5212 would have amended Section 983(a)(1)(A)(i) to require the government to inform recipients of a forfeiture notice that they “may be able to obtain free or reduced rate legal representation under subsection(b).”

Structural Reforms

In addition to procedural reforms, considerable attention has been given to the structural aspects of civil asset forfeiture. One issue in this context is what some perceive as the misallocation of forfeiture revenues directly back to law enforcement agencies rather than into the general fund of the United States.²²² Another issue is the program referred to as “equitable sharing,” in which the federal government either assists state and local law enforcement in seizing assets or “adopts” a seizure made solely by local entities and remits up to 80% of the revenue upon completion of a federal forfeiture proceeding.

Allocation of Forfeiture Revenues

In its 2010 report *Policing for Profit: The Abuse of Civil Asset Forfeiture*, the Institute for Justice stated its view that “the most troubling aspect of modern civil asset forfeiture laws is the profit incentive at their core.”²²³ Part of the concern is that law enforcement agencies are utilizing

²¹⁸ *Moya-Gomez*, 860 F.2d at 730.

²¹⁹ 18 U.S.C. § 983.

²²⁰ 28 U.S.C. § 2465(b).

²²¹ H.R. 1658 (engrossed in H.R.).

²²² See *Policing for Profit*, *supra* note 5, at 9; *Civil Asset Forfeiture Reforms: Hearing on H.R. 1916 before the H. Jud. Comm.*, 104th Cong., 2d Sess. 310 (1996) (prepared statement of E.E. Edwards, et al., Co-Chairs of the National Association of Criminal Defense Lawyers Asset Forfeiture Abuse Task Force) (“Decisions regarding whose property to seize, and how to deal with citizens whose property has been seized is too often dictated by the profit the agencies stand to realize from their seizures.”). William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered—Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1310 (1992).

²²³ See *POLICING FOR PROFIT*, *supra* note 5, at 9.

revenues from asset forfeiture to supplement their shrinking budgets,²²⁴ a power that is somewhat anomalous for a government agency.²²⁵ Another concern is that the government has been subsuming other law enforcement priorities in an “overzealous pursuit of forfeiture.”²²⁶ Some federal courts have also expressed concern about the “corrupting incentives” that arise from the current arrangement.²²⁷ By contrast, the Treasury Department noted during debate on CAFRA that allowing law enforcement agencies to keep the profits of asset forfeiture helps pay for its own property management costs, relieves burdens that would otherwise fall on taxpayers, and overall “strengthens law enforcement by rechanneling forfeited value back into this most fundamental societal purpose....”²²⁸

Prior to 1984, this issue of profit motive was largely nonexistent or, at best, indirect, since the proceeds from forfeited assets were deposited directly in the general fund of the United States Treasury.²²⁹ However, as part of the Comprehensive Crime Control Act of 1984, codified at 28 U.S.C. § 524, Congress diverted these funds into the newly created Department of Justice Assets Forfeiture Fund.²³⁰ As initially established, any amount in the fund in excess of \$5 million not appropriated that fiscal year was required to be deposited in the Treasury’s general fund.²³¹ However, in 1986 this cap was eliminated.²³²

Funds are deposited into the Assets Forfeiture Fund via several statutes. Section 524(c)(4) of Title 28 provides that “all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice” (except for several limited carve outs) and all funds received through the federal equitable sharing program shall be deposited into the Assets Forfeiture Fund.²³³ Section 881(e) of Title 21 provides that the proceeds of any sale of forfeited property and forfeited moneys must also be deposited in the Assets Forfeiture Fund.²³⁴

Section 524 of Title 28 establishes how money from the Assets Forfeiture Fund can be spent. Section 524(c) provides that money in the fund is available to the attorney general for the following purposes:

- Forfeiture-related expenses
- Payment to informants in drug-related cases
- Awards for information leading to civil or criminal forfeitures
- Payment of liens or mortgages against property that has been forfeited
- Remission and mitigation payments related to forfeited property

²²⁴ Sallah, et al., *supra* note 8.

²²⁵ Nelson, *supra* note 159.

²²⁶ PROSECUTION AND DEFENSE OF FORFEITURE CASES § 1.01, *supra* note 3, at § 1.01.

²²⁷ *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000).

²²⁸ *Hearing on H.R. 1916, supra* note 154, at 240 (prepared statement of Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Department of the Treasury).

²²⁹ See CRS Report 97-139, *Crime and Forfeiture*, *supra* note 1, at 21.

²³⁰ Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1837, 2052 (codified at 28 U.S.C. § 524(c)(4)).

²³¹ 98 Stat. 2053.

²³² Department of Justice Assets Forfeiture Fund Amendments Act of 1986, P.L. 99-570, § 1152, 100 Stat. 3207, 3207-12.

²³³ 28 U.S.C. § 524(c).

²³⁴ 21 U.S.C. § 881(e).

- Equipping vehicles, vessels, or aircrafts of federal agencies participating in the fund, or state or local law enforcement agencies engaged in a joint law enforcement operation with a federal agency
- Payments for other equipment directly related to seizure or forfeiture, including laboratory equipment, protective equipment, communications equipment, and the operation and maintenance costs of such equipment
- Purchase evidence of federal drug or money laundering offenses
- Payment of state and local real estate taxes on forfeited property
- Payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of state and local law enforcement officers that are incurred in a joint law enforcement operation with a federal law enforcement agency participating in the fund
- Federal correctional construction costs²³⁵

Additionally, Section 524(c)(8) provides that any excess unobligated balance remaining in the fund “shall be available to the Attorney General, without fiscal year limitation, for any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the Department of Justice.”²³⁶

Also established in the Comprehensive Crime Control Act of 1984 is the Department of the Treasury Forfeiture Fund, then called the “Customs Forfeiture Fund.”²³⁷ This fund is administered by the Secretary of the Treasury and receives deposits of currency and proceeds from forfeitures under laws enforced or administered by the Treasury or the Coast Guard, amounts received by the Treasury or the Coast Guard as an equitable share of a forfeiture conducted by other authorities, or income realized from investments on behalf of the fund.²³⁸ Similar to DOJ’s fund, this statute establishes how these funds can be used.²³⁹

Proposed Legislative Amendments

Some have suggested that the most appropriate method of removing the profit motive from forfeiture cases would be to stop diverting assets to the very law enforcement agencies conducting the seizures.²⁴⁰ S. 255 and H.R. 540 would take this general approach by requiring confiscated funds to be deposited back into the Treasury’s General Fund and would eliminate the various provisions that allow property to be transferred to another federal agency or to any state and law enforcement agency that participated directly in the seizure of the property. Congress may also consider allocating such funds for a specific program. During the debates on asset forfeiture reform in the 1990s, Representative John Conyers introduced H.R. 3347, which would have required that not less than 50% of funds disbursed from the Assets Forfeiture Fund be spent on a “community-based crime control program (including private, nonprofit programs) for drug

²³⁵ 28 U.S.C. § 524(c).

²³⁶ 28 U.S.C. § 524(c)(8).

²³⁷ P.L. 98-473, § 317, 98 Stat. 1837, 2054.

²³⁸ 31 U.S.C. § 9703.

²³⁹ *Id.*

²⁴⁰ POLICING THE POLICE, *supra* note 5, at 14; Shamoil Shipchandler, *Asset Forfeiture: Knock it Off or I’m Stopping this Car!*, NATIONAL LAW REVIEW (Dec. 9, 2014), available at <http://www.natlawreview.com/article/asset-forfeiture-knock-it-or-i-m-stopping-car>.

education, prevention, and treatment.” Various states have employed a similar approach of diverting funds to specific programs, such as substance abuse programs²⁴¹ or public education.²⁴²

Equitable Sharing

In addition to the issue of allocation of forfeiture revenues, some have voiced concern about the appropriateness of the “equitable sharing” program.²⁴³ Equitable sharing is a policy in which federal law enforcement

“Equitable sharing” is a policy in which federal law enforcement agencies can share forfeiture revenues with participating state and local law enforcement agencies.

agencies can share forfeiture revenues with participating state and local law enforcement agencies. Some federal courts and commentators had expressed concern that this policy allows law enforcement agencies to circumvent local laws that might impose more stringent procedural requirements, such as higher burdens of proof, or laws that do not funnel assets directly into law enforcement budgets.²⁴⁴ DOJ has lauded equitable sharing generally for “fostering cooperation among federal, state, and local law enforcement agencies” and allowing the federal government “to provide valuable additional resources” to local police.²⁴⁵ On January 16, 2015, Attorney General Holder issued new guidelines pertaining to one of the more controversial aspects of equitable sharing known as “adoptive seizures,” which might alleviate some apprehensions about this program.²⁴⁶

Equitable sharing is authorized and regulated by several federal statutes. Section 881(e)(1)(A) of Title 21 provides that “[w]henever property is civilly or criminally forfeited under this subchapter the Attorney General may ... transfer the property ... to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property.”²⁴⁷ Subsection (e)(3) provides that:

Attorney General shall assure that any property transferred to a State or local law enforcement agency ... has a value that bears a reasonable relationship to the degree of

²⁴¹ See, e.g., CONN. GEN. STAT. § 54-361.

²⁴² See, e.g., N.C. GEN. STAT. ART. IX, § 7; NEB. CONST. ARTICLE VII-5.

²⁴³ POLICING THE POLICE, *supra* note 5, at 14.

²⁴⁴ See *Scarabin v. Drug Enforcement Admin.*, 966 F.2d 989, 991 (5th Cir. 1992) (noting that it did not quarrel with claimant’s description of adoptive seizures as a “scam,” “shell game,” and “money laundering”); *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120, 122 (7th Cir. 1991) (calling adoptive seizures a “questionable practice”); INSTITUTE FOR JUSTICE, HOW FEDERAL EQUITABLE SHARING ENCOURAGES LOCAL POLICE AND PROSECUTORS TO EVADE STATE CIVIL FORFEITURE LAW FOR FINANCIAL GAIN 1 (2011) (“[W]ith equitable sharing, state and local law enforcement can take profit from property they might not be able to under state law. If a state provides greater protections or bars law enforcement from directly benefitting from forfeitures, agencies can simply turn to federal law.”); *Stuteville*, *supra* note 34, at 1185 (2014) (“Equitable sharing provides a way to get around state laws regarding forfeiture proceeds and, thus, is a scapegoat for states with stringent forfeiture laws.”); *Moore*, *supra* note 74, at 794 (“While CAFRA applies to federal law enforcement agencies, states retain the power to control their own state and local law enforcement agencies pursuant to their police power. Federal law, however, has undermined this power through a process called ‘equitable sharing,’ which allows state and local police to bypass their own laws when federal forfeiture terms are more favorable. This results in even less political accountability, as equitable sharing permits state and local police to bypass state legislation mandating how forfeiture money can be spent.”).

²⁴⁵ U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2009).

²⁴⁶ U.S. DEP’T OF JUSTICE, PROHIBITION OF CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES, *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf.

²⁴⁷ 21 U.S.C. § 881(e)(1)(A).

direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and (B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.²⁴⁸

Likewise, 18 U.S.C. § 981(e)(2) provides that “notwithstanding any other provision of the law, except Section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine to ... to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.” Under 19 U.S.C. § 1616a, the Secretary of the Treasury may “transfer any of the [forfeited] property to ... any State or local law enforcement agency that participated directly or indirectly in the seizure or forfeiture of the property.”²⁴⁹

Presumably based on this statutory authority, the Attorney General has issued guidelines to regulate the equitable sharing program. These guidelines were first issued in 1985 as part of the U.S. Attorneys Manual entitled “Guidelines on Seized Forfeited Property”²⁵⁰ and were recently updated in 2009 as the “Guide to Equitable Sharing for State and Local Law Enforcement Agencies.”²⁵¹

Prior to Attorney General Holder’s announcement, agencies participated in the equitable sharing program in two ways. The first is “joint investigations,” in which federal agencies work with state or local agencies to enforce federal law.²⁵² A state or local agency’s share is based on “a reasonable relationship to the agency’s direct participation in the investigation or law enforcement effort resulting in the forfeiture.”²⁵³ In some instances, joint task forces involving federal, state, and local law enforcement agencies have written equitable sharing agreements based upon numbers of personnel and other contributions to the task force.²⁵⁴ DOJ’s new rules do not alter this part of equitable sharing—the sharing of proceeds when both federal and local law enforcement agencies are involved. The second method, called “adoptive forfeitures,” which has been curtailed by the new DOJ guidelines, allowed federal authorities to “adopt” assets that were seized *solely* by a local law enforcement agency.²⁵⁵

DOJ’s new order prohibits “the federal adoption of property seized by state or local law enforcement under state law in order for the property to be forfeited under federal law.”²⁵⁶ While generally ending the practice of adoptive forfeitures, the new order creates an exception for property “that directly relates to public safety concerns, including firearms, ammunition, explosives, and property associated with child pornography.” It also creates three additional exceptions: “(1) seizures by state and local authorities working together with federal authorities in

²⁴⁸ *Id.* § 881(e)(3).

²⁴⁹ 21 U.S.C. § 1616a(c).

²⁵⁰ 7 Smith, *supra* note 3, at § 7.02.

²⁵¹ GUIDE TO EQUITABLE SHARING, *supra* note 246, at fwd., 1.

²⁵² *Id.* at 6.

²⁵³ *Id.* at 12.

²⁵⁴ *Id.* at 13.

²⁵⁵ *Id.* at 6.

²⁵⁶ PROHIBITION OF CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES, *supra* note 250.

a joint task force; (2) seizures by state and local authorities that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations; or (3) seizures pursuant to federal seizure warrants, obtained from federal courts to take custody of the assets originally seized under state law.”²⁵⁷ Notably, the first two exceptions allow the continued practice of sharing assets that are the result of joint participation between federal and state/local authorities.

Reform Proposals

Notwithstanding DOJ’s new policy, the three recent bills addressing asset forfeiture would amend the various equitable sharing provisions. If enacted, S. 255 and H.R. 540 would appear to completely end equitable sharing—both adoptive forfeitures and forfeitures obtained through joint investigations. H.R. 5212 would not have eliminated equitable sharing altogether but would have instead prohibited the use of federal forfeiture laws to circumvent state or local laws: “The Attorney General shall assure that any equitable sharing between the Department of Justice and a local or state law enforcement agency was not initiated for the purpose of circumventing any State law that prohibits civil forfeiture or limits use or disposition of property obtained via civil forfeiture by State or local agencies.” Based on comments by incoming Senate Judiciary Committee chairman Chuck Grassley and other lawmakers, it is apparent that asset forfeiture, including equitable sharing, will remain on the congressional radar in the 114th Congress.²⁵⁸

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²⁵⁷ *Id.* at 2.

²⁵⁸ See Commentary from Senator Chuck Grassley, *The Scoop: Asset Forfeiture Reforms Move Forward* (Jan. 26, 2015), available at <http://www.grassley.senate.gov/news/commentary/scoop-asset-forfeiture-reforms-move-forward>; Robert O’Harrow Jr., *Defense lawyers, lawmakers and civil libertarians press for asset seizure reform*, WASH. POST (January 27, 2015), available at http://www.washingtonpost.com/investigations/defense-lawyers-lawmakers-and-civil-libertarians-press-for-asset-seizure-reform/2015/01/27/63bcf368-a66f-11e4-a7c2-03d37af98440_story.html.