



NACDL Testimony

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H.R. 1916 ("Civil Asset Forfeiture Reform Act") and the Current Federal Asset Seizure and Forfeiture Program

Written Statement by NACDL members, E.E. Edwards, III, David B. Smith, and Richard J. Troberman -- Oral testimony presented by E.E. Edwards before the United States House Committee on the Judiciary

Chairman Hyde and Members of the Committee:

The 9,000 direct and 30,000 state and local affiliated members of the National Association of Criminal Defense Lawyers are private defense lawyers, public defenders, judges and law professors. They have devoted their lives to protecting the many provisions of the Constitution and the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding the import of H.R. 1916, and the dangers of the currently unabated federal government asset seizure and forfeiture programs, are keen.

On behalf of NACDL, we thank you for inviting us to share our collective expertise on asset seizure and forfeiture programs, and for inviting one of us, E.E. Edwards, to speak on behalf of the Association at this hearing. We are also thankful that other outstanding members of NACDL will be appearing on behalf of their clients and other bar associations: Terrance G. Reed, of Washington, D.C.; and Stephen M. Komie, of Chicago, Illinois.

I. Background

A. Summary of NACDL's Position on H.R. 1916 and the DOJ's Latest "Reform" Proposal(s)

For several years now, the Department of Justice's (DOJ) asset forfeiture program and similar state and local programs, utilizing a broad array of new and expanded federal and state forfeiture statutes⁽¹⁾, have provided federal, state and local law enforcement agencies with an unduly powerful weapon with which to fight the War on Drugs. And too often, the weaponry has been deployed to abuse law-abiding Americans.

The unchecked use of over-broad civil forfeiture statutes has run amok. Law enforcement agencies, in their zeal, have turned the War on Drugs into a War on the Constitution. NACDL has long had several concerns with the federal asset forfeiture program, and the resulting denigration of constitutional protections. We thus support Chairman Hyde's much-needed bill, H.R. 1916, although we think it does not go far enough to reign in over-zealous law enforcement in this area. We also think the Department of Justice's latest "reform" proposal still fails to rise to the level of a meaningful set of corrections. Attached to this statement is our analysis of the latest DOJ proposal(s) (1994 and 1996), which we regard as taking away at least as much as they would give in terms of reform. Still, there is some common ground between DOJ and NACDL on this subject, and any provisions of their proposal left un-critiqued in the attachment are unobjectionable to us. **See Attachments A and B Available from NACDL -- Call 202-872-8600 x226.**

B. Criminal Forfeiture Versus Civil Forfeiture

For purposes of this hearing, we will distinguish between civil forfeitures and criminal forfeitures. We will focus on the former.

Criminal forfeitures are part of a criminal proceeding against a defendant. The verdict of forfeiture is rendered by a court or jury only if the defendant is found guilty of the underlying crime giving rise to the forfeiture. While defendants facing criminal forfeiture have most of the constitutional safeguards afforded persons in criminal proceedings, substantial problems nevertheless persist, particularly for third party claimants who have an interest in property subject to criminal forfeiture. Moreover, in its most recent Term, the United States Supreme Court held that Federal Rule of Criminal Procedure 11(f) does not require a trial court to make a factual inquiry at the time it accepts a guilty plea to determine that there is a factual basis for a criminal forfeiture as charged in the indictment.⁽²⁾ The Court also held in that case that criminal forfeiture is an element of the sentence imposed for violation of certain laws, and is not an element of the offense. Accordingly, the Court held that the right to a jury verdict on forfeitability of property does not fall within the Sixth Amendment's constitutional protection, but is merely statutory; and that a trial court does not have to advise a defendant of the right to a jury trial in a criminal forfeiture case at the time it accepts a guilty plea.

It is civil forfeiture law, however, which concerns us the most, due to the utter lack of constitutional safeguards and the unfair procedural advantages it affords the government at the expense of law-abiding citizens.⁽³⁾

C. Civil Forfeiture in Particular

Civil forfeitures are *in rem* proceedings. The government is technically targeting the property, as, according to a "legal fiction," the inanimate property is deemed to be guilty and condemned. Because the property itself is the defendant, the guilt or innocence of the property owner is said to be irrelevant. The "use" made of the property becomes the central issue. It is the legal fiction which allows many extremely harsh and unwarranted repercussions to flow from the use of civil forfeiture statutes.⁽⁴⁾

Civil forfeitures allow the government to impose economic sanctions on persons who are beyond the reach of the criminal law -- either because there is insufficient evidence to obtain a conviction against them; or because, while innocently supplying the material means necessary for certain criminal activity, they have broken no laws themselves.

In deciding when to seize property under these laws -- power which is largely unbridled -- law enforcement officers are influenced by provisions which often allow them to profit directly from the forfeiture. This obvious conflict of interest invites abusive practices.

Historically and traditionally, as a matter of fundamental due process, the Supreme Court has recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal laws. As Justice Antonin Scalia has well explained:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.⁽⁵⁾

The Supreme Court has also recognized that, under the forfeiture statutes, the government "has a direct pecuniary interest in the outcome of [forfeiture] proceeding[s]."⁽⁶⁾ The Court put it this way:

The extent of the Government's financial stake in drug forfeiture is apparent from the 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target: "We must significantly increase production to reach our budget target."

* * *

". . . Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990." -- Executive Office of the U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin 180 (Aug. 15, 1990).⁽⁷⁾

Likewise recognizing that the practical implications of this inherent conflict, a federal district court recently explained well the unintended consequences of the current civil forfeiture statutes so in need of congressional reform:

Failure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain to the government.⁽⁸⁾

Indeed, this inherent conflict of interest can and does lead to serious law enforcement problems. For example, assume that law enforcement agents receive information from an informant that a shipment of 20 kilos of cocaine, worth an estimated \$500,000, is to arrive at a stash house on Monday; that it is to be "fronted" to mid-level dealers once it arrives; and that those mid-level dealers are to deliver \$500,000 to the stash house on Friday. If the agents make the arrests on Monday, they can confiscate the cocaine. If, on the other hand, they wait until Friday to make arrests, they can seize the \$500,000, which they can forfeit for their use. Which do you think they will choose, the money or the cocaine? Again and again, the money is too enticing to pass up.

The incentive structure under current law is actually *debilitating* to effective law enforcement. And all too often is the root of outright abuse of entirely *innocent, but property-holding*, Americans.

The presumption of innocence is fundamental to the American criminal justice system. This basic tenet is compromised whenever assets are confiscated, as they are under federal and many state civil forfeiture statutes, without any proof of wrongdoing.⁽⁹⁾

Under these unconscionable laws, after confiscation it is up to the person whose assets have been seized to prove that he or she, and the "suspect" property, is innocent, and thus that the Government should give the property back to the owner. This turns our precious justice system "on its head."

Although these forfeiture laws *can*, as Congress intended, serve legitimate law enforcement purposes, they are currently susceptible to (and arguably *invite*) unwise, unjust, or unconstitutional abuse. The current forfeiture laws are being used to forfeit property of persons who have no responsibility for its criminal misuse -- for instance, as occurs with the forfeiture of currency due to cocaine "traces" found on it (a very, very large percentage of all the currency in America). This "police practice" has funneled millions of dollars into local police and federal agency coffers, with most of the seizures -- between 80% to 90% -- *never challenged*. The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle. As

in Witness Willie Jones' case, authorities unbridled in their handling of the current, unrestrained civil forfeiture laws routinely seize large amounts of cash at airports and roadblocks without establishing any connections to drug dealing other than the money itself (and perhaps, even more perniciously, the racial "profile" of the money-holder).

The policy of allowing the seizures of large sums of cash simply because it is currency, must be re-evaluated for comportment with sound policy as well as constitutional protections. Studies have shown that between 80% and 90% of the currency available today will test positive for some kind of drug; therefore, the practice of having drug dogs "alert" on the money is meaningless.⁽¹⁰⁾ The frequent practice of targeting minorities in airports and along interstate highways for search and seizure⁽¹¹⁾ is based on nothing more than blatant racism. It is morally (and should be legally) bankrupt.

Statistics on seizures document the use of racially based "profiles" to determine law enforcement targets. Willie Jones' case is but one example. There is also the infamous, but not unique, case of Volusia County, Florida. Armed with "anything goes" asset forfeiture laws patterned after the federal statutes, Sheriff Bob Vogel's "elite drug squad" has seized well over \$8 million in the past few years from motorists exercising their constitutional right to travel peacefully along the Nation's highway system, on "I-95."

Out of 262 seizure cases, only 63 even resulted in criminal charges. Of the 199 cases in which there was no evidence to support criminal charges, **90%** of the drivers were minorities. Though neither arrested nor charged with a crime, these individuals had their money seized. When confronted with the facts of his lucrative operation, Sheriff Vogel said: "What this data tells me is that the majority of money being transported for drug activity involves blacks and Hispanics."⁽¹²⁾

Similarly, a 10-month Pittsburgh Press investigation of drug law seizure and forfeiture included an examination of court records on 121 "drug courier" stops where money was seized and no drugs were discovered. The Pittsburgh Press found that African-American, Latino, and Asian people accounted for 77% of the cases.⁽¹³⁾

Wherever these unrestrained asset forfeiture statutes exist, in the state or the federal system, they invite, and have borne, abuse of the Nation's citizenry. This is true, be it by state and local officers, federal agents, or some combination of the two in ever-more-frequent joint "task force" operations.

H.R. 1916 is an important first step toward ensuring that federal agents, and those with whom they work in joint task force operations, do not wreak havoc upon the People's rights in the name of "asset forfeiture" and for their own financial benefit. Moreover, many state civil asset forfeiture statutes are patterned on the federal scheme. Thus, congressional correction of the federal asset forfeiture will also provide the states with a better, more just model to follow.

D. Case Study

A prime example of forfeiture "justice" in America is the Volusia County, Florida case study. In the absence of any evidence of criminal complicity, and with the Sheriff's knowledge that the currency would have to be returned, the law enforcement agency offers "settlement" to asset forfeiture victims who seek to (or who for economic reasons, must) avoid undue delay and unnecessary legal fees.⁽¹⁴⁾ Rather than go to court to defend seizures, the agency cuts "deals" with the drivers.

Motorists can get some of their money back if they agree not to sue the abusive agency. For example, Sheriff's Deputies seized \$19,000 from a Massachusetts paint shop owner. They returned \$14,250 and kept \$4750. They seized \$38,923 from a Miami lawn care business owner; returned \$28,923 and kept \$10,000. They seized \$31,000 from a Virginia car salesman; returned \$27,250 and kept \$3750. None of these people were charged with a crime. All were offered out-of-court settlements with no judicial supervision of the process. Indeed, Volusia County judges expressed surprise at these settlements.⁽¹⁵⁾

Volusia County is just one especially well documented case study. Its fact pattern is neither anomalous nor confined to state and local authorities. If anything, the federal government's civil asset arsenal is even more ripe for abuse, more troubling, and pervasive. Federal law enforcement's jurisdictional reach, funding and equipment grows ever-more expansive and sophisticated (even militaristic).⁽¹⁶⁾

Although DOJ professes in its public documents to abide by the principle that "[n]o property may be seized unless the government has probable cause to believe that it is subject to forfeiture,"⁽¹⁷⁾ the reality is very different. Federal agents routinely seize people's property based on nothing more than otherwise inadmissible "hearsay" evidence, frequently from notoriously suspect "informants" who stand to profit from production of such "tips." DOJ gives monetary rewards to individuals who "report" information leading to a forfeiture. These contingency bounties can be as much as 25% of the forfeiture proceeds. That kind of money can buy a lot of "tips."

The DOJ's internal documents read a little different from their public ones. A September 1992 DOJ newsletter noted: "Like children in a candy shop, the law enforcement community chose all manner and method of seizing and forfeiting property, gorging themselves in an effort which soon came to resemble one designed to raise revenues."⁽¹⁸⁾ Nevertheless, Cary Copeland, Director of the DOJ's Executive Office for Asset Forfeiture, declared at a June 1993 congressional hearing: "Asset forfeiture is still in its relative infancy as a law enforcement program."⁽¹⁹⁾ The darling of a federal police state's nursery? And the Federal Bureau of Investigation announced in 1992 that it anticipated its total seizures of private property would increase 25% each year for the following three years.⁽²⁰⁾

Most courts have recognized the problem is the law; that **any real relief from asset forfeiture abuse must come from Congress**, through meaningful legislative reform. For example, as the United States Court of Appeals for the Second Circuit recently put it:

We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes **and the disregard for due process that is buried in those statutes.**"⁽²¹⁾

In short, an utter tide of abuse of innocent citizens is sweeping the Nation, which has led to widespread awareness that the forfeiture law must be reformed to stop the abuse. This Committee's hearing, and H.R. 1916, should go some distance toward alerting the rest of the public and the rest of the Congress to the grave reality of the current laws, and toward correcting this egregious state of "justice" in America. We encourage you Mr. Hyde, and the rest of this Honorable Committee, to forge ahead on the road to real reform of the federal asset forfeiture regime.

II. H.R. 1916: Achieves Much; Should be Strengthened to Finish the Journey to Reform

A. Notice of Seizure and Cost Bond

H.R. 1916 would correct the unfairness spawned by the currently unconscionable "cost bond" requirements for access to justice. The bill would eliminate the requirement of the cost bond, and it would extend the time limits under which a person whose property is seized may file a claim after the government files a forfeiture action in court against the property.

Now, many claimants are losing their right to contest the forfeiture of their property due to procedural defaults. For example, they may lose their rights because of a failure to meet the extremely short time deadlines for filing a claim and cost bond with the seizing agency under 19 U.S.C. Sec. 1608 (20 days from the date of the first publication of the notice of seizure), and for filing a second verified claim (this one in federal district court), under "Supplemental Admiralty Rule c (6)" (10 days from the date of which the warrant of arrest *in rem* is executed).

Shockingly, the application of the Supplemental Rules allows warrantless seizures where there are no recognized exceptions to the constitutionally mandated warrant requirement. These rules are often ignored in order to comply with due process, but they nevertheless remain on the books, ready for abuse.

When the DEA or the FBI seizes property, a claimant is required to post a bond in the amount of 10% of the value of the property to preserve the right to contest in court the forfeiture (not less than \$250, up to a maximum of \$5,000). The claimant has up to 30 days to post the bond after receipt of the notice of forfeiture. Frequently, the government seizes several items, and requires that a separate bond be posted for each item. Many people lose their property at this stage because they are unable to post the cost bond within the time limit.

This administrative forfeiture proceeding was designed to resolve **uncontested** forfeitures. Under this process, a post-seizure probable cause determination is waived. The property is

forfeited without benefit of court intervention. The cost bond is the antiquated, perfunctory mechanism through which contested seizures are supposed to be able to proceed to judicial resolution.

However, the requirement of posting a cost bond eliminates through attrition many claims which would otherwise be contested. Adding insult to injury, the cost bond is used to pay the *government's* costs of litigating the forfeiture. This is an absurdly unjust arrangement -- letting the government take property away from someone without having to prove anything, then making the owner pay in advance the government's costs of trying to take it away from him permanently. Furthermore, unlike criminal cases, the bond is imposed without any independent determination of probable cause.

The cost bond would be abolished by H.R. 1916, as it should be.

B. Court-Appointed Counsel for Indigents

Another extremely important reform that would be accomplished by H.R. 1916 is allowance for appointment of counsel in cases in which the claimant satisfactorily demonstrates to the court that he or she is financially unable to retain counsel to fight for the return of the seized property. The standards to be applied are the same, well-established ones applicable to the appointment of counsel for indigent criminal defendants. But the money would come directly from the Justice Assets Forfeiture Fund, so no new money would need to be budgeted for this just cause.

Contesting a forfeiture case can be an expensive proposition for one seeking the return of his or her property. Many forfeitures go uncontested due to the high cost of litigating these cases. For example, often an owner cannot economically hire counsel to defend against forfeiture of a \$10,000-\$20,000 automobile if the government is intent on proceeding to trial. Legal fees in such a case might well eat up the value of this seized property in short order.

If a property owner has no money with which to retain counsel (either because he is too poor, or because the government has rendered him indigent by taking or restraining his property), he does not have a right to appointed counsel. He must defend the action without aid of counsel.

Claimants in civil forfeiture cases are not entitled to counsel as a matter of right, because the Sixth Amendment does not apply to "civil" proceedings, including effectively punitive forfeitures. Nor are federal defenders and Criminal Justice Act "panel" lawyers authorized to represent claimants in civil forfeitures. There is not even a provision in the law to allow a person to recoup his or her fees if a costly fight is undertaken and the property is ultimately shown to have been wrongly seized. Consequently, many people lose their property simply because they cannot afford to hire a lawyer and have no idea how to battle the government through the complex statutory terrain without one.

The indigent counsel provision in H.R. 1916 at least provides the indigent person a legally trained champion in his or her fight to get a seized property back, and is a first step toward

bringing fundamental due process into this legal twilight zone of asset forfeiture law.

C. Burdens and Standards of Proof

H.R. 1916 puts the burden of proof, and sets the standard of proof, where they should be according to fundamental principles of due process. Current statutory law gives the government many unfair procedural advantages over citizens, especially as regards the burden and the standard of proof.

Who Should Bear the Burden of Proof?

H.R. 1916 rightly places the burden of proof with the government so that the government must prove its case before it can permanently deprive a citizen of his or her property.

One of the gravest problems with the current statutory framework is the burden of proof provision, at 19 U.S.C. 1615. The statute places the burden of proof on the claimant to show that the property is not subject to forfeiture. This is fundamentally unfair and constitutionally anomalous in view of the quasi-criminal character of the proceedings and the important interest at stake. It is extremely difficult to prove a negative.

For example, when the government offers testimony that an unidentified informant claims to have participated in, or witnessed, a drug transaction at a claimant's residence, the claimant bears the burden of proof that it did not occur. This turns the criminal presumption of innocence on its ear.

The reversal of the normal burden of proof is unique to civil forfeiture. In all other cases, the party trying to change the *status quo* has the burden of proof, by at least "a preponderance of the evidence."

What Should the Burden Be?

In addition to placing the burden of proof with the government, H.R. 1916 also rightly ensures that the government can deprive one of property only upon proof by "clear and convincing" evidence that the property is forfeitable. This is much less than the standard applicable in quite similar criminal proceedings, in which the punishment can likewise be the taking of one's property, but it is still better than "probable cause." At least the clear and convincing standard recognizes that deprivation of property on allegation of criminality is fundamentally akin to a criminal matter, and not a mere "civil" one.

Moreover, Congress should clarify that the evidence allowed to meet the standard of proof must be that which existed at the time of the proceeding's commencement. Evidence acquired after the fact should not be allowed to "cure" the lack of cause at the time of the government's filing for the property. After-acquired evidence should be excluded and cases lacking cause at the time of filing should be barred.⁽²²⁾

D. The Need for a Meaningful Innocent Owner Defense

H.R. 1916 provides important clarification of the drug forfeiture law's innocent owner provisions.

Presently, many innocent people lose valuable property rights because of something someone else has done which was beyond their control. The system treats a criminal defendant better than an innocent third party. In criminal forfeitures brought under 21 U.S.C. 853 and the "RICO" statutes, the criminal defendant is entitled to many criminal procedure safeguards.⁽²³⁾

Innocent third parties in civil forfeiture proceedings should receive at least the same, and probably more rights. Instead, they are required to bear the burden of proof and overcome the government's routine use of otherwise inadmissible hearsay.

In his Annual Report of the Department of Justice Asset Forfeiture Program (1990), the Attorney General claimed:

The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, primarily to innocent lienholders and innocent family members. It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Although this statement sounds good, it is not accurate. Experienced defense attorneys rarely file such petitions, because far from being "routinely grant[ed]," they are routinely denied.

For two centuries, 19 U.S.C. 1618, the statute governing remission, has provided for the grant of remission to petitioners who establish that they acted "without willful negligence." Historically, DOJ had granted remission based upon a showing that the petitioner was not negligent in the care and use of the property. But on August 31, 1987, DOJ issued new regulations abandoning the statutory negligence standard and requiring petitioners to meet a more stringent standard of care.⁽²⁴⁾

To get relief through the remission process, a petitioner now must prove that forfeiture of his property would violate due process, a very high threshold. This policy is not only in conflict with the report of the Attorney General. It cannot be reconciled with the negligence standard adopted by Congress in Section 1618.

Moreover, DOJ does not make remission decisions public and typically does not even explain to the petitioner its reasons for denying a petition. Remission policies and procedures are intended to function as a check on unbridled prosecutorial discretion and to avoid unfair and unjust results. As implemented under current law, remission is totally left to the discretion of the DOJ, with virtually no review or appeal of its decisions.

This lack of oversight often results in harsh, unwarranted, and arbitrary forfeiture decisions. The examples cited in the Orlando Sentinel, in the Pittsburgh Press, in Chairman Hyde's book, **Forfeiting Our Property Rights**, and in the book, **License to Steal**, all exemplify the harm to

innocent citizens that results from the abuse of unbridled prosecutorial discretion.⁽²⁵⁾ Congress should reign in the DOJ with respect to innocent parties, and return the law to its rightful place -- as it was before DOJ issued its August 31, 1987, self-interested, self-regulation.

21 U.S.C. 881, the federal drug forfeiture statute, currently provides a defense from government forfeiture to an innocent owner of the property. Section 881 provides:

". . . Except that no property shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner."

The majority of federal circuits have held that an owner may avoid forfeiture by establishing either lack of knowledge or lack of consent.⁽²⁶⁾ However, a minority of circuits have held that congressional use of the word "or" really means "and." They have held that in order to prevail, an owner must establish both lack of knowledge and lack of consent.⁽²⁷⁾ Although these decisions have been heavily criticized, they unfortunately persist as binding authority in their respective circuits.⁽²⁸⁾

The requirement of establishing both lack of knowledge and lack of consent presents a particularly harsh problem for innocent spouses. The innocent spouse may have knowledge that the other spouse is engaging in unlawful activity in the home, but does not consent to it and is indeed powerless to do anything to stop it. Battered spouses are especially hurt by the predicament. The no-win situation presented is either: (1) leave the family home; or (2) report the activity to law enforcement, perhaps risking physical danger, and at least, the arrest and prosecution of the spouse (whose financial support may well be essential to the family's survival).⁽²⁹⁾

H.R. 1916 would clarify this statute, to confirm the existence of a defense when the innocent owner can establish *either* lack of knowledge *or* lack of consent.

E. Contested Property Possession Reforms

H.R. 1916 would reform the law to ensure that contested property is not abused or destroyed by the government during the time it holds it. The bill provides for cases in which the government's holding of the property under dispute would create a substantial hardship on the person from whom the government seeks to permanently deprive the person of her property.

Victim's Right to Restitution for Wrongful Destruction of Property by the Government

H.R. 1916 would make an important, narrow amendment to the federal Tort Claims Act, to allow an action for damages against the government should it wrongfully, intentionally, or negligently destroy the individual's property while it holds it in seizure.

The federal government now does an inadequate job of maintaining seized property. And currently, innocent owners have no recourse if their property is damaged or otherwise allowed to deteriorate in value while in the custody of the government.

The government often takes two years or more after seizure to bring a forfeiture case to trial. By the time a case is resolved, the asset has often depreciated to a fraction of its seized value.

When the government wins, the depreciated asset is auctioned off for a fraction of its seized value and innocent lienholders often lose part of their equity. If the owner wins the forfeiture case, it is a pyrrhic victory -- and an absolute travesty to the citizen who has been forced to spend money and time fighting the forfeiture case. The government raises its undeserved shield of sovereign immunity as a defense to any claims for depreciation and property damage. Therefore, even when the government cannot prove its case, the owner often still loses.

The United States should be liable for the loss of value and loss of use of any property it seizes if the claimant prevails, regardless of whether the government's care of the property was negligent. This should certainly be the case when a court later determines that the seizure was illegal. Yet, under current law, it is unclear whether a claimant has a right of action against the government for losses occasioned by an illegal seizure and wrongful handling of property. H.R. 1916 would clarify the law.

Substantial Hardship Temporary Relief Provision

H.R. 1916 recognizes that often a seizure can deprive someone of their very home or livelihood before the property is returned to its rightful, private owner through the arduous asset forfeiture procedures. Accordingly, the bill provides for the temporary release of property where a claimant can demonstrate that a substantial hardship will result if property is not released during pendency of the action.

For example, where the government seizes a truck belonging to a trucker, the trucker is effectively out of business during the time it takes to resolve the forfeiture (which unfortunately, can take years, at least absent a "speedy trial"-type reform). Even if the claimant ultimately prevails, by the time he gets his truck back (even assuming it is in the same, undamaged shape it was in before the government took it), he could be out of business. H.R. 1916 would allow the trucker to continue using his truck, *under conditions imposed by the court (to safeguard the truck)*, while the action is pending and unless and until the government proves it is entitled to permanently deprive him of the truck. Meanwhile, the trucker, still employed, could continue contributing to the economy and the tax system. Other cases that come to mind in which this provision might prove essential are cases involving one's only place of residence; or a business, which, if seized, might put not only the proprietor, but all of his or her employees, out of work.

III. Other Reform Suggestions

A. Governmental Use of Hearsay Must be Curbed

One of the most egregious problems in this area is the government's ability to meet its probable cause showing through the use of hearsay. Congress needs to curb this practice.

The courts allow the government to meet its threshold, probable cause showing, through otherwise inadmissible hearsay testimony.⁽³⁰⁾ But the cases offer virtually no discussion or rationale for their holdings. They seem to reflect nothing but a judicial tradition from an inapt context: the allowance of hearsay to establish probable cause for arrest and search warrants. The judicial analogy to cases allowing hearsay to support the issuance of warrants fails, because with regard to warrants other safeguards are in place. For instance, the government has the highest burden of proof in criminal cases spawned by the issuance of warrants. Whereas, in civil forfeiture proceedings, the government has no burden of proof at all once probable cause is satisfied.

If H.R. 1916 is passed, the burden of proof will rest with the government and the hearsay problem will no longer exist. But in the absence of H.R. 1916, Congress should immediately clarify that, subject to the Rules of Evidence, hearsay is not admissible by the government to establish probable cause to forfeit property. One way or another, Congress should forbid the use of hearsay to establish cause for forfeiture.

Rule 1101 of the Federal Rules of Evidence provides that the rules "apply generally to civil actions and proceedings including admiralty and maritime cases. . . .". Rule 1101(d) exempts the issuance of search and arrest warrants from the scope of the Rules. Significantly, Rule 1101(e) provides that, absent statutory provisions to the contrary, the Rules apply to a list of enumerated proceedings, including "actions for fines, penalties, or forfeitures" under 19 U.S.C. 1581-1624.⁽³¹⁾

B. Need for Statutory Time Limits on the Government: Speedy Trial Act for Forfeiture Cases

H.R. 1916 should be strengthened to place time limits on the government's ability to hold property without moving the process along for resolution of the contested possession.

Under the present forfeiture scheme, there are inadequate statutory deadlines placed on the government to keep the process moving. For example, except in the case of conveyances seized for violation of the drug laws, there is no time limit within which the seizing agency must give notice to the owner of the property, of the government's intention to seek forfeiture of the property.

Notice

On January 15, 1993, Deputy Attorney General Cary Copeland, Director and Chief Counsel of the Executive Office for Asset Forfeiture, issued Directive 93-4, which recognizes that "a fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard."

Directive 93-4 orders that written notice to owners and other interested parties (property stakeholders) known at the time of the seizure "shall occur not later than sixty (60) days from the date of the seizure." It further provides that "where a reasonable effort of notice has not been made within the 60-day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated." This policy became effective March 1, 1993. Of course, this is merely a matter of DOJ policy, and not law, and thus a claimant does not enjoy standing to enforce it in court, or to contest a seizure based on a dilatory government practice with regard to the notice. Directive 93-4 should become law, not just policy, through an amendment to H.R. 1916.

Government Commencement of Proceedings

A second, related matter, has also created problems for owners of seized property. There is no time limit governing the government's initiation of suit in federal court after receiving notice of an owner's claim and cost bond. Indeed, although the law requires that a property owner must file a claim and cost bond within 20 days of the date of first publication, there is no similar deadline placed on the government for commencing a judicial forfeiture action in district court. Governmental delay in filing an action after receipt of a claim creates a severe hardship for property owners and other stakeholders in the property (e.g., investors). Not only does delay deprive owners the use of their property for an indefinite period of time, but it also puts them in the untenable position of having to either (1) continue making payments on the seized property, thereby possibly providing a windfall to the government and creating additional loss for themselves should the government prevail, or (2) risk destroying their credit. This Hobson's Choice can result in a substantial loss to the property owner and other stakeholders.

One has virtually no remedy in this situation. Most courts have held that once the government serves Notice of Seizure and Intended Forfeiture, the court is divested of jurisdiction under the Rules of Criminal Procedure.⁽³²⁾

In the interests of justice, and in the interest of the economy, Congress should require the government to commence an action for forfeiture in district court within 60 days of receipt of the notice of claim. This time frame is already in effect in forfeitures involving seized conveyances under 21 U.S.C. 888.⁽³³⁾ This provision should simply be extended to all forfeitures. By giving the seizing agency 60 days to file a Notice of Intent to Forfeit, and another 60 days to file the action once a claim is received, the government would still have a total of at least 120 days from the date of seizure in which to initiate action in district court.

C. Need for a Substantial Nexus Requirement

Federal forfeiture statutes do not explicitly require that there be a substantial nexus between the alleged unlawful activity and the property seized. They should. Although the legislative history certainly suggests such a requirement, the courts are unfortunately split as to whether there need be such a substantial nexus and what it means.⁽³⁴⁾

Absent explicit statutory guidance to the contrary, the courts have expanded the situations in which real property can be forfeited; in many cases, doing away with the requirement that there be a substantial connection to alleged criminality. In one of the most egregious cases, the court affirmed the forfeiture of a residence based on two telephone calls made *from the informant* to the homeowner at the residence, during which the sale of cocaine was said to have been negotiated.⁽³⁵⁾ This is all the evidence the government had, but it was deemed enough to allow a forfeiture of the residence. No drugs were ever stored at the residence and no sales took place there.

Congress could not have intended such an unfair result. Congress should modify the statute to require that a court must find that a substantial connection exists between the alleged unlawful activity and the property desired by the government before the property can be lawfully forfeited. Congress should also give some examples in the legislative history, in order to guide courts as to what "substantial nexus" means under this congressional revision. H.R. 1916 should be amended to provide this explicit statutory clarification on the need for a substantial connection nexus.

D. Economic Conflict of Interest Must Be Eliminated

The incentive scheme for law enforcement's direct profiteering from the forfeiture statutes must be addressed. H.R. 1916 should be amended to address this core problem with the current forfeiture laws.

We can no longer ignore the conflicts of interest and policy problems which arise when law enforcement and prosecutorial agencies reap financial bounty from the forfeiture decisions they make. 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 the seizures.

State and local law enforcement agencies frequently work with federal agencies on forfeiture cases and share the proceeds of the forfeiture. This procedure thwarts state law, which may require forfeited assets to be deposited into the general treasury. It also allows states to take advantage of broader federal statutes. The types of cases the state and local agencies choose to pursue together are often influenced by the state's knowledge that the federal government will share the proceeds from the forfeited assets they acquire together. The federal government's participation in this preemption of state priorities should be eliminated by Congress.

In short, the inherent conflict of interest and unbridled discretion sanctioned by the current forfeiture law invites abuse. The opportunities for abuse are legion. For example, local police may cut deals with federal agencies to target individuals whose assets can best benefit both agencies. Joint forfeitures allow local police and federal agencies to avoid state statutory and constitutional law. Law enforcement officers and prosecutors have come to rely on forfeitures as sources of extra revenue. Congress should especially investigate the conflict of interest created when prosecutors and law enforcement agencies set quotas for forfeited assets and use the money to create additional positions and buy "informants" (to help generate still more forfeitures, for

still more revenue).

IV. Recap: Congress Must Act to Reform the Abusive Asset Forfeiture Laws

In August of 1991, NACDL's Board of Directors adopted the following resolution regarding asset forfeiture:

It is the policy of the National Association of Criminal Defense Lawyers that the seizure of a person's assets by the government should be treated in exactly the same way as the seizure of a person, and all the protection afforded by the Bill of Rights should apply.

Several basic safeguards should be incorporated into all forfeiture schemes, especially the federal one, after which so many states pattern their own:

- The burden of proving that forfeiture law applies should always be on the government just as it is in criminal prosecutions. The degree of proof required should be proof beyond a reasonable doubt. At the very least, it must be higher than the current mere probable cause standard.
- Hearsay should not be allowed in the government's case.
- In the absence of exigent circumstances, the government should be required to justify a seizure of property to a court before, not after, the seizure is made.
- The cost bond should be eliminated.
- Post-seizure probable cause determinations on demand should be instituted.
- Deadlines for property owners to comply with procedural requirements should be longer.
- The government should be required to promptly notify owners of the government's intent to forfeit property, and should be required to promptly commence a judicial forfeiture proceeding upon receipt of a claim -- in a manner similar to the requirement under the Speedy Trial Act.
- Provision should be made for the temporary release of seized property to the owner, where the claimant can demonstrate to a court that a substantial hardship will result if the property is not so released during the pendency of the action.
- Forfeiture laws should recognize that innocent people often incur huge expenses in defending their property against wrongful seizure. Forfeiture laws should include an "early exit," innocent owner provision. This would allow a case to be dismissed when an innocent party shows that he has an ownership interest in the property, and the government has no proof that the person was involvement in the alleged criminal conduct.
- Forfeiture of real property should always require that there be a substantial nexus between the alleged unlawful activity and the property seized.

- Congress must acknowledge that forfeiture is a quasi-criminal action. Most people do not realize that, under current laws, a citizen can be found not guilty (indeed, may not even be charged with a crime), and nevertheless have her property taken by the government.
- The United States government should be liable for the loss of use, and any deterioration of an asset in cases where the claimant prevails.

H.R. 1916 incorporates many of these essential safeguards, and NACDL supports the effort reflected in the bill.

V. Conclusion

We look forward to working with you, Chairman Hyde, and with the Committee, to achieve meaningful reform through H.R. 1916. We thank you again for affording us this opportunity to participate in this hearing on the need for civil asset forfeiture reform.

Footnotes:

1. There are over two hundred federal civil forfeiture statutes, encompassing crimes from gambling and narcotics violations to child pornography profiteering.
2. **Libretti v. U.S.**, -- U.S. --, 116 S.Ct. 356 (1995). NACDL recommends that Congress amend Rule 11(f) to require a trial judge to determine whether there is a factual basis for a criminal forfeiture included in a plea agreement. The Supreme Court in **Libretti** recognized the desirability of such a congressionally clarified requirement, but felt bound by the current text of 11(f), which was not changed after Congress enacted the criminal forfeiture statutes in 1970. This oversight should be corrected.
3. The abuse of the civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. *See e.g.*, Honorable Henry J. Hyde, **Forfeiting Our Property Rights: Is Your Property Safe From Seizure?** (Cato Inst. 1995); Leonard L. Levy, **A License to Steal, The Forfeiture of Property** (Univ. of N. Car. 1996); Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 Hastings L.J. 1325 (1991); George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 New York L.S.L.R. 121 (1994); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L. Rev. 369 (1994); Brazil & Berry, "Tainted Cash or Easy Money?," Orlando Sentinel Tribune (June 14-15, 1992 expose); Schneider & Flaherty,

"Presumed Guilty: The Law's Victims in the War on Drugs," Pittsburgh Press (Aug. 11-Sept. 6, 1991 expose).

4. In a 1993 decision, the United States Supreme Court in **Austin v. U.S.**, 509 U.S. 602, all but laid to rest the legal fiction that the guilt or innocence of the property owner is irrelevant because it is the property that is the "wrongdoer" in an *in rem* forfeiture. However, during its most recent Term, the Court breathed new flames into this fiction, in **Bennis v. Michigan**, -- U.S. --, 116 S.Ct. 994 (1996); and then completely retreated from logic and fundamental fairness in **United States v. Ursery**, and **United States v. \$405,089.23 U.S. Currency**, 516 U.S. --, 116 S.Ct. -- (1996).

5. **Harmelin v. Michigan**, 111 U.S. 2680, 2693 n.9 (1991) (Scalia, J., concurring) (citing cases).

6. **United States v. James Daniel Good Real Property**, 510 U.S. 43 (1993).

7. **Id.** at 502, n.2.

8. **United States v. Real Property Located at 6625 Zumeriz Drive**, 845 F. Supp. 725, 735 (C.D. Cal. 1994).

9. For example, the Orlando Sentinel investigation found that no charges were filed in three out of every four cases lodged by Volusia County Sheriff's Deputies. And the Pittsburgh Press investigation found that Americans fared even worse when encountering federal law enforcement agents: **80% of the people who lost property to the federal government were never charged.**

10. *See e.g.*, **United States v. \$639,558 U.S. Currency**, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992); **United States v. \$53,082.00 U.S. Currency**, 985 F.2d 245, 250-251 n.5 (6th Cir. 1993); **United States v. \$30,060.00**, 39 F.3d 1039, 1042 (9th Cir. 1994). *See also* David B. Smith, **Prosecution and Defense of Forfeiture Cases** (Matthew Bender) at para. 4.03, 4-79-84.

11. *See* "Tainted Cash or Easy Money", Orlando Sentinel Tribune (Jun.-Aug. 1992); "Presumed Guilty: The Law's Victims in the War on Drugs", The Pittsburgh Press (Aug. 11-16, 1991).

12. *See id.*

13. *See id.*

14. Note that there is no "speedy trial" right to assist a citizen in getting back her wrongfully seized property, although we strongly encourage this as an amendment to H.R. 1916.

15. *See* authorities cited *supra* note 3.

16. *See generally e.g.*, James Bovard, **Lost Rights: The Destruction of American Liberty** 13 (St. Martin's 1994), chronicling the fatal case of the unfortunately property-rich, Donald Scott:

Early in the morning of October 2, 1992, a small army of thirty-one people [from several law enforcement agencies, including the federal Drug Enforcement Agency (DEA)] smashed their way into sixty-one-year-old Donald Scott's home on his 200-acre Trails' End Ranch in Malibu, California. The raiders were equipped with automatic weapons, flak jackets, and a battering ram. * * * After killing Scott, the agents thoroughly searched his house and ranch but failed to find any illicit drugs [One of the claimed objectives; they then said they were looking for undocumented aliens]. Ventura County [California] district attorney Michael Bradbury investigated the raid and issued a report in 1993 that concluded that a "primary purpose of the raid was a land grab [by the agencies]."

See also Edwin Meese III & Rhett DeHart, "How Washington Subverts Your Local Sheriff," Policy Review (Jan./Feb. 1996) (explaining dangers of current over-federalization of the criminal law, with federal criminal jurisdiction now spanning over 3,000 "federal" crimes).

17. U.S. Department of Justice, **Annual Report of the Department of Justice Asset Forfeiture Program 1991** (Washington, D.C.: Government Printing Office, 1992), at 7.

18. U.S. Department of Justice, "Message From the Director: 'Do the Right Thing,'" *Asset Forfeiture News* (Sept./Oct. 1992), at p. 2.

19. Statement of Cary H. Copeland before the Subcommittee on Legislation and National Security, United States House of Representatives Government Operations Committee (Jun. 22, 1993), at 4.

20. U.S. Department of Justice, **Annual Report of the Department of Justice Asset Forfeiture Program 1991** (Washington, D.C.: Government Printing Office, 1992), at p. 27.

21. **United States v. All Assets of Statewide Auto Parts**, 971 F.2d 896, 905 (2nd Cir. 1992).

22. *See e.g.*, **United States v. \$191,910.00 in U.S. Currency**, 16 F.3d 1051 (9th Cir. 1994) ("Without such a rule, government agents might be tempted to bring proceedings (and thereby seize property) on the basis of mere suspicion or even enmity and then engage in a fishing expedition to discover whether . . . cause exists."). *See also* **United States v. \$31,990, 982 F.2d 851, 856** (2nd Cir. 1993) ("The institution of a forfeiture can have serious effects on an owner's right to use and control his property. It should not be undertaken without a demonstrably good reason.").

23. However, most circuits have misinterpreted Section 853 (d)'s rebuttable presumption to mean that any property of a person convicted of a Title 21 drug felony is subject to forfeiture under section 853 if the government establishes its case by a preponderance of the evidence. Congress should clarify its intent that the standard under Section 853 is **beyond a reasonable doubt**.

24. *See* 28 C.F.R. Section 9.5(b)(5)

25. *See supra* note 3.

26. *See e.g.*, **United States v. 6109 Grubb Road**, 886 F.2d 618, 625 (3d Cir. 1989); **United States v. 141st Street Corp.**, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, -- U.S. --, 111 S.Ct. 1017 (1991); **United States v. One Parcel of Real Estate at 1012 Germantown Road**, 963 F.2d 1496 (11th Cir. 1992).

27. *See e.g.*, **United States v. One Parcel of Land Known as Lot III-B**, 902 F.2d 1443 (9th Cir. 1990).

28. And in its most recent Term, the Supreme Court expressly held that in the absence of an "innocent owner" statutory provision, due process is not offended by deployment of the "guilty property" fiction to the property of an actually innocent owner. **Bennis v. Michigan**, -- U.S. --, 116 S.Ct. 994 (1996). Clearly, Congress must act.

29. Such a "choice" also arguably infringes upon the concept of spousal privilege.

30. *See e.g.*, **United States v. \$91,960.00**, 897 F.2d 1457, 1462 (8th Cir. 1990). *But see United States v. One Pontiac Sedan*, 194 F.2d 756, 760 (7th Cir.), *cert. denied*, 343 U.S. 966 (1952).

31. Judge Beam of the Eighth Circuit has written persuasively that due process is offended by the permitting the government to forfeit a person's property on the basis of the notoriously unreliable basis of hearsay. *See United States v. \$12,390.00*, 956 F.2d 801, 812 (8th Cir. 1992) (Beam, J., dissenting).

32. *See e.g.*, **Shaw v. United States**, 891 F.2d 602 (6th Cir. 1989); **United States v. Elais**, 921 F.2d 870 (9th Cir. 1990); **United States v. U.S. Currency**, 851 F.2d 1231 (9th Cir. 1988); **United States v. Castro**, 883 F.2d 1018 (11th Cir. 1989); **United States v. Price**, 914 F.2d 1507 (D.C. Cir. 1990).

33. *See* 21 U.S.C. 888(c).

34. The Senate Report accompanying the amendment adding subsection (a)(7) to 21 U.S.C. 881 noted that the proposed amendment adding real property to the categories of property that could be forfeited would lead to the seizure and forfeiture of property "indispensable to the commission of a crime." S. Rep. No. 225, 98th Cong. 1st Sess. 195, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3378. The Senate Report explained Congress' motivation in passing 21 U.S.C. 881 (a)(7) as follows:

Under current law, if a person uses a boat or a car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses **a secluded barn to store tons of marijuana**, or uses his house **as a manufacturing laboratory for methamphetamine**, there is no provision to subject his real property to civil forfeiture even though its use was **indispensable to the commission of a major drug offense** and the prospect of forfeiture of the property would have been a powerful deterrent.(emphasis added here)

35. **United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue**, 903 F.2d 490 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1090 (1991).

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