CIVIL FORFEITURE REFORM: THE CHALLENGE FOR CONGRESS TO PRESERVE ITS LEGITIMACY WHILE PREVENTING ITS ABUSE

I. INTRODUCTION

In the Twentieth Century, criminal drug trafficking has grown both in size and complexity. The profits generated from selling illegal drugs have provided the incentive for small-time dealers to expand their activities. In response to this growth, drug operations have taken on business features, including pyramids of management and authority. Instead of facing simple buyer-seller relationships, law enforcement has been faced with a criminal organization which has insulated those on top and has sacrificed those dealers on the street level. The traditional method of fighting crime directed at punishment of criminal behavior through incarceration has proven ineffective. The government convicts one drug defendant only to find him replaced by someone else. Further, drug defendants have not been deterred by the threat of incarceration as the financial benefits of dealing drugs have exceeded the criminal sanctions. Thus, even though convictions have increased, the drug industry has continued to expand virtually unaffected by law enforcement efforts.

In order to achieve effective law enforcement, the federal government had to re-evaluate its methods of attacking drug crimes. It was simply not enough for the government to seek criminal convictions; it was necessary for the government to disgorge the drug dealers of their moneys and properties. By removing the properties used to facilitate drug trafficking and the profits realized from drug sales, the government sought to eliminate the illegal drug industry. However, such an attack required disgorging drug dealers not only of currency, but also facilities and equipment used to manufacture and distribute the drugs and property purchased with the proceeds of unlawful drug activity. Civil forfeiture became the primary weapon for the government to confiscate all of these forms of drug assets.[1] Thus, the government not only achieved the incarceration of drug dealers, but also through civil forfeiture found the means to financially cripple the drug industry.

This note analyzes the past, present, and future of civil forfeiture in light of legislative reform likely to occur in the next Congressional session. Part II discusses the history of civil forfeiture and its statutory development. Part III examines current civil forfeiture practices, including a discussion of the abuse of civil forfeiture. The basic constitutional protections afforded property owners facing civil forfeiture proceedings is analyzed in Part IV. These protections are the result of three seminal Supreme Court decisions: *United States v. James Daniel Good Real Property, United States v. Austin*, and *United States v. Ursery*. Part V examines the innocent owner defenses and problems associated with it. Part VI discusses the civil forfeiture reform

1. *See* JIMMY GURULE, COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME 223-24 (1996) (citing S. REP. NO. 98-225, at 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374).

proposals presented to the House Judiciary Committee last session: Rep. Hyde's bill and the Department of Justice's proposal. Reform measures beyond those addressed in these proposals are presented in Part VII. This note concludes by cautioning Congress to tread slowly in reforming civil forfeiture as this is a complex area of law where extreme action may prove disastrous to law enforcement efforts to combat crime.

II. HISTORY OF CIVIL FORFEITURE

The underlying principles of civil forfeiture find their origin in the common law of England. The English deodand provided the foundation from which American civil forfeiture evolved. A deodand was a thing forfeited to the Crown as a result of its role in the death of one of the King's subjects.[2] It was held to be a remedial action to compensate the Crown for the loss of its citizen,[3] to ensure Masses for the victim's soul, and to deter careless use of property which results in death.[4] The family of the victim did not receive compensation for their injury, as the harm was considered to be to the Crown.[5] As English society developed, the deodand came under fierce criticism and opposition. English citizens preferred using private lawsuits to recover for their injuries instead of permitting the Crown to receive compensation through the use of the deodand. By 1846, use of the deodand was abolished in England.[6] Learning from the lessons of England, the United States prohibited the use of deodand during the first session of Congress.[7]

However, the death of the deodand did not prevent its underlying principles from finding new life. The legal fiction that a thing could be guilty and forfeited to the government as a result appeared in the United States not in the form of a deodand, but rather in the statutorily created civil forfeiture.[8] Further, the principle that a deodand did not constitute punishment but instead represented a remedial measure was also incorporated into civil forfeiture. Thus, civil forfeiture resulted from an *in rem* proceeding,[9] in which the government initiated forfeiture proceedings against the property involved in the criminal activity.[10] As a consequence, the property owner's criminal guilt or innocence was irrelevant. The Constitutional protections afforded a defendant prosecuted for criminal conduct were not available to the owner whose property is the subject of the forfeiture proceedings.[11] However, the Supreme Court has extended

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2. United States v. Austin, 509 U.S. 602, 611 (1993); LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 7 (1996).

3. LEVY, *supra* note 2, at 11.

4. *Austin*, 509 U.S. at 611.

5. LEVY, *supra* note 2, at 18.

6. *Id.*

7. *Austin*, 509 U.S. at 613.

8. *Austin*, 509 U.S. at 613 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974)). The first statutorily authorized forfeitures involved violations of customs and revenue laws. *See generally* L. HARPER, THE ENGLISH NAVIGATION LAWS (1939); Jimmy Gurule, *The Ancient Roots of Modern Civil Forfeiture*, 21 J. LEGIS. 155, 157 (1995).

9. An *in rem* proceeding means that property, as opposed to a person, is considered the offender and the guilt or innocence of the property is being determined. Whereas, an *in personam* proceeding occurs when the person is considered the offender and that person's guilt or innocence is being determined. *See* Michael F. Zeldin and Roger G. Weiner, *Innocent Third Parties and Their Rights in Forfeiture Proceedings*, 28 AM. CRIM. L. REV. 843, 843-44 (1991).

10. LEVY, *supra* note 2, at 19-20.

11. *See generally id.* at 22-23; Terrence G. Reed, *On the Importance of Being Civil*, 39 N.Y. L. SCH. L. REV. 255, 265-68 (1994); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*,

certain constitutional protections to property owners, even though the action is civil not criminal in nature.

Originally, civil forfeiture was only authorized for violations of customs and revenue laws. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act,[12] which authorized the use of civil forfeiture in the "war on drugs." Section 551 of this Act "was limited in scope and authorized forfeiture of only the illegal substances themselves, the instruments by which they were manufactured and distributed, and conveyances used to transport, or in manner facilitate the transportation, sale, receipt, possession or concealment of illegal controlled substances."[13] The Act was amended in 1978 to permit the forfeiture of proceeds derived from illegal drug activities.[14] However, this amendment also provided for an innocent owner defense. Under this defense, the owner whose property is guilty may prevent the forfeiture by proving that he or she was without knowledge and did not consent to the illegal use of the property.[15] Finally in 1984, section 881 was amended when Congress enacted the Comprehensive Forfeiture Act ("CFA.")[16] The CFA expanded civil forfeiture to include all real properties used or intended to be used to commit or facilitate the commission of a federal narcotics felony. Further, the CFA established the relation-back doctrine in the realm of civil forfeiture.[17] Under this doctrine, "all right, title, and interest in property . . . vest in the United States upon commission of the act giving rise to forfeiture."[18] This prevents the government from losing property subject to forfeiture simply because the property owner transfers the property to another party after the commission of the crime but before the government institutes civil forfeiture proceedings.

III. CIVIL FORFEITURE IN PRACTICE

A. Civil Forfeiture Proceedings

Under current civil forfeiture laws, neither the property owner nor the person who used the property for a criminal purpose needs to be charged or convicted of a crime before civil forfeiture proceedings may be instituted by the government.[19] Most civil forfeitures are initially administrative and non-adversarial, whereby the agency is authorized by regulations to seize and forfeit the property. Notice of the forfeiture

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42 HASTINGS L.J. 1325 (1991) [hereinafter *Constitutional Limits*].

12. Pub. L. No. 91-513, 84 Stat. 1276 (codified at 21 U.S.C. §§ 880-881 (1994)). Civil forfeiture is authorized under 21 U.S.C. § 881(a). While the majority of civil forfeitures occur under 21 U.S.C. § 881(a) in relation to drug offenses, forfeiture is authorized under other statutes. *See* Katz, James V., Asset Forfeiture: Compilation of Civil Statutes, Asset Forfeiture Office Criminal Division, U.S. Department of Justice (Sept. 1987); LEVY, *supra* note 2, at 31.

13. GURULE, *supra* note 1, at 226.

14. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1994)).

15. 21 U.S.C. § 881(a)(6) (1994) provides:

> [N]o property shall be forfeited under this paragraph, to the extent of the interest of the owner, by reason of any act or omission established by the owner to have been committed or omitted without knowledge or consent of the owner.

See also 18 U.S.C. § 981(a) (1994) (innocent owner defense).

16. Pub. L. No. 98-473, 98 Stat. 2050 (codified at 21 U.S.C. § 853 (1994)).

17. 21 U.S.C. § 881(h) (1994); *see also* 18 U.S.C. § 981(f) (1994) (relation-back provision).

18. *Id.*

19. GURULE, *supra* note 1, at 224. See 19 U.S.C. §§ 1600-1615 (1994) outlining the substantive and procedural statutes in civil forfeiture.

proceedings must be given to the property owner setting out the proper procedures for the owner to follow if the owner wishes to contest the forfeiture.[20] If the property owner does nothing, the property is declared forfeited by the seizing agency. This declaration has the same force and effect of a judicial order.[21] However, if the property owner wishes to challenge the forfeiture, the owner must claim an interest in the property and file a cost bond.[22] Once the property owner has complied with these two requirements, the forfeiture is no longer administrative and the forfeiture complaint is then transferred to the prosecuting office to be pursued as a judicial forfeiture.[23]

In a judicial forfeiture, the court conducts a forfeiture trial in which the government and the claimant are given an opportunity to present evidence. At the trial, the initial burden is on the government to establish that probable cause exists[24] to believe the property seized is subject to forfeiture.[25] The burden then shifts to the property owner to prove by the preponderance of the evidence that either the property was not used for illegal purposes, the property is innocent, or that he or she is an innocent owner.[26] If the property owner is successful in challenging the forfeiture, then the property is returned. However, despite the owner's success, there is no statute providing a right to damages for loss of income from the property during the period of deprivation, nor reimbursement for attorneys fees incurred by the owner in contesting the forfeiture.[27]

If the property owner fails to prove the property is not subject to forfeiture, then the court will enter judgment for the government, and as a result the property is forfeited. The forfeited property then becomes part of the Federal Asset Forfeiture Fund ("Fund").[28] While seized currency is normally deposited directly into the Fund, real property is generally sold and the proceeds deposited into the Fund. Personal property, such as vehicles and weapons, is either returned to the seizing agency for its own use or sold and the proceeds deposited into the Fund. These moneys and assets are then redistributed according to congressional appropriation. If the crime for which the prop-

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20. See Muhammed v. Drug Enforcement Agency, 92 F.3d 648 (8th Cir. 1996), for a discussion of the adequacy of the Notice of Forfeiture to explain the proper procedures to follow in contesting a forfeiture, as well as the degree to which an owner must comply with these procedures. *See also* 19 U.S.C. § 1607 (1994).

21. *See* 19 U.S.C. § 1609 (1994).

22. *Muhammed*, 92 F.3d at 651. United States v. Two Parcels of Real Property Located in Russell County, Alabama, 92 F.3d 1123, 1126 (11th Cir. 1996). The cost bond is generally 10% of the value of the property, 19 U.S.C. § 1608 (1994).

23. *See* 19 U.S.C. § 1610 (1994).

24. While most civil actions require a preponderance of the evidence, the federal circuits only require the government to meet the probable cause standard, 19 U.S.C. § 1615 (1994). *See* United States v. $87,118.00, 95 F.3d 511 (7th Cir. 1996) (the government must initially establish probable cause exists to believe the property is subject to forfeiture); United States v. One Parcel of Property 194 Quaker Farms Road, 85 F.3d 985, 987 (2d Cir. 1996) (the government must show probable cause that the property is subject to forfeiture); *Two Parcels*, 92 F.3d at 1126 (same).

25. *$87,118.00*, 95 F.3d at 518 (citing United States v. All Assets & Equipment of West Side Building Corp., 58 F.3d 1181, 1188 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996)) ("Probable cause for forfeiture exists if the government demonstrates a nexus between the seized property and the illegal drug activity.")

26. *Two Parcels*, 92 F.3d at 1126.

27. *See* Damon G. Saltzburg, *Real Property Forfeiture as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 230-34 (1992) (discussing split in the circuits on awarding pre-judgement interest, damages, and attorneys fees, even though not statutorily required).

28. 28 U.S.C. § 524 (1994) creates and governs the Federal Asset Forfeiture Fund.

erty was forfeited involves a victim, all of the proceeds are used for victim restitution. However, as only a small amount of the drug cases involve victims, most of the proceeds go back to law enforcement agencies in proportion to their efforts in seizing the property. These amounts cover daily overhead costs in these agencies, as well as providing resources for future law enforcement efforts to combat crime.

B. Civil Forfeiture Abuse

As the full potential of civil forfeiture in combating the illegal drug industry becomes apparent, so to does its potential for abuse.[29] In fact, probably the most publicized aspect of civil forfeiture has been its abuse. Some extreme critics believe that civil forfeiture amounts to an unconstitutional taking of property without compensation, without a prior criminal conviction of the owner, and without adequate constitutional protections.[30] They believe that civil forfeiture should be abolished. Meanwhile, most critics believe that civil forfeiture abuses can be adequately redressed through reform. In identifying these abuses, there are two primary sources: the statutory provisions and the law enforcement agencies. First, many of the statutory provisions, especially the innocent owner defense, are sharply criticized for being poorly drafted and failing to adequately protect the owner's rights.[31] Second, abuse results from improper governmental use of civil forfeitures. This occurs when there is no probable cause to seize the property. It also happens when the government attempts to bargain with the owner, whereby the owner consents to the forfeiture of some of the property to avoid litigation costs and to guarantee the return of some of the property. This forfeiture is unjust if the property is not subject to forfeiture in the first place.

While some abuses can be remedied by legislative reform of civil forfeiture, further reform of the internal guidelines, regulations, and policies of the seizing agencies and the government must complement any legislative reform. A certain amount of abuse is inevitable as an incredible amount of power is given to the government through civil forfeiture. However, the solution to the problem is not to terminate the use of civil forfeiture which serves legitimate purposes, such as removing property used to commit criminal activity and disgorging proceeds derived from illegal activity.[32] Instead, measures must be taken to eliminate abuse through constitutional protections, legislative reform, and internal regulations and policies. Civil forfeiture has a vital role to play in the war on drugs; however, its role must not be manipulated in such a manner that it creates injustice by depriving legitimate owners of their property.

IV. CONSTITUTIONAL PROTECTIONS AND CIVIL FORFEITURE

As civil forfeiture became the weapon of choice in the government's war on drugs, the Supreme Court became concerned that property owners were not adequately protected under current civil forfeiture statutes. In the absence of statutory safeguards, the Supreme Court analyzed the Constitutional protections available to property owners

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29. *See* Symposium: *What Price for Civil Forfeiture? Constitutional Implications and Reform Initiatives*, 39 N.Y. L. SCH. L. REV. 1 (1994) (general discussion of background of civil forfeiture, its abuse, and reform); Symposium: *Federal Asset Forfeiture Reform*, 21 J. LEGIS. 1 (1995) (same).

30. LEVY, *supra* note 2.

31. *See* Sandra Guerra, *Family Values: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 370-72 (1996) (quoting United States v. One 1973 Rolls Royce, 43 F.3d 794, 815 (3rd Cir. 1994)).

32. United States v. Ursery, 116 S.Ct. 2135, 2145 (1996).

in civil forfeiture proceedings under the Due Process Clause, the Excessive Fines Clause, and the Double Jeopardy Clause. The Court eventually concluded that the Due Process and Excessive Fines Clauses applied to civil forfeiture proceedings and offered protections to the property owner. However, the Court refused to extend the protections found in the Double Jeopardy Clause to civil forfeiture proceedings.

A. The Due Process Clause of the Fifth Amendment

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law. . . . "[33] While this Amendment clearly states that a person's property cannot be taken without due process, it fails to define the procedural due process protections that must be afforded a property owner in civil forfeiture. As a result, many courts permitted the seizure of real property without giving notice or providing a hearing to the owner.[34] These courts held that a post-seizure hearing afforded the owner adequate opportunity to contest the forfeiture and did not violate the Due Process Clause. Thus, homes and business offices could be seized without notice or a hearing, and the owner could be deprived of the property until the post-seizure forfeiture hearing.

United States v. James Daniel Good Real Property[35]

In July of 1985, James Daniel Good pled guilty to promoting a harmful drug in the second degree in violation of Haw. Rev. Stat. § 712-1245(b) (1985). His conviction was the result of a legal search of his residence which led to the seizure of eighty-nine pounds of marijuana, marijuana seeds, vials containing hashish oil, drug paraphernalia, and $3,187.00. Good was sentenced to one year in jail and five years probation, fined $1,000.00, and required to forfeit the money seized.[36] In August of 1989, the United States instituted civil forfeiture proceedings against Good's home and the four acres upon which it was situated, claiming this property was subject to forfeiture as it was used to facilitate the commission of a drug offense.[37] On August 18th, in an *ex parte* proceeding, the District Court found the government had established probable cause to believe the property was subject to forfeiture based upon Good's conviction in 1985. The judge issued a warrant of arrest *in rem*, authorizing the seizure of Good's property. On August 21st, the government seized the property without prior notice to Good or an adversary hearing.[38]

Good filed a claim and cost bond contesting that the forfeiture of the property without notice or a hearing violated the Due Process Clause of the Fifth Amendment. The District Court granted summary judgment in favor of the government. The Ninth Circuit reversed and held that the seizure of Good's real property without notice or a

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33. U.S. CONST. amend. V.

34. *See* United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992); Richmond Tenants Org., Inc., v. Kemp, 956 F.2d 1300, 1306-08 (4th Cir. 1992).

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

36. *Id.* at 46.

37. 21 U.S.C. § 881(a)(7) (1994) provides:

> The following shall be subject to forfeiture . . . All real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . . .

38. *James Daniel Good Real Property*, 510 U.S. at 47.

hearing violated the Due Process Clause.[39] The Supreme Court granted certiorari to decide the issue of "whether, in absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibited the [g]overnment in a civil forfeiture case from seizing the real property without first affording the owner notice and an opportunity to be heard."[40]

The government argued that seizures of property were governed under the Fourth Amendment, not the Fifth Amendment. The government contended that the prohibition against unreasonable seizures, such as the seizure of property without probable cause, was sufficient constitutional protection. The Supreme Court rejected this argument explaining that civil forfeitures sought not only to seize the property but also to divest the owner of title. Thus, the Fourth Amendment did not afford adequate constitutional protection for the property owner. Furthermore, the Court held that the Fourth Amendment protection did not preclude other constitutional provisions, such as the Fifth Amendment Due Process Clause, from providing additional protection. Thus, the Court addressed the due process requirements in civil forfeiture proceedings.

Initially, the Supreme Court acknowledged its holding in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[41] that the seizure of personal property without notice or a hearing did not violate due process. As personal property "could be removed from the jurisdiction, destroyed, or concealed, if advance warning of the confiscation"[42] was given, the Court concluded that "'a special need for very prompt action' justified the postponement of notice and hearing until after the seizure."[43] The Court distinguished *Calero-Toledo* from *Good*, noting that the real property involved in *Good* "by its very nature [could] be neither moved nor concealed."[44] Thus, the "special need" inherent in personal property is not generally present in seizures involving real property and the property owner had to be afforded both notice and a hearing under the Due Process Clause. However, the Court recognized the possibility that exigent circumstances might exist requiring seizure prior to notice or a hearing.[45] The Court declared that exigent circumstances would be fact specific. Further, in determining whether exigent circumstances existed, the *Mathews*[46] factors should be applied: (1) the private interests affected by the action, (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probative value of additional safeguards, and (3) the government's interest, including the administrative burden that additional procedural requirements would impose.[47] Applying the *Mathews* factors to *Good*, the Court found "Good's right to maintain control over his home, and to be free form governmental interference [to be] a private interest of historic importance."[48] As to the potential risk of error, the Court concluded that the "ex parte preseizure proceeding afford[ed] little or no protection to the innocent owner."[49] Further, the Court explained that the post-

39. *Id.* at 47-48.
40. *Id.*
41. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).
42. *James Daniel Good Real Property*, 510 U.S. at 52 (quoting *Calero-Toledo*, 416 U.S. at 679)).
43. *Id.* at 52 (quoting *Calero-Toledo*, 416 U.S. at 678).
44. *Id.* at 52-53.
45. *Id.* at 53.
46. Mathews v. Eldridge, 424 U.S. 319 (1976).
47. *Id.* at 335.
48. *James Daniel Good Real Property*, 510 U.S. at 53-54.
49. *Id.* at 55.

seizure hearing was not sufficient to compensate the innocent owner for losses suffered because the hearing may not be held for several months.[50] In considering the government's interests, the Court declared that the government's interest in seizing the real property did not require immediate or prompt action, as was the case with personal property. The Court recognized the government's interest in preventing the destruction or disposition of the property; however, the Court explained that this interest could be protected by other procedures, such as pretrial restraint or lis pendens.[51] After applying the *Mathews* factors, the Court concluded that exigent circumstances did not exist and that notice and a hearing should have been offered to Good.[52]

Although the Court held that absent a showing of exigent circumstances, the Due Process Clause requires that a property owner be given notice and a hearing prior to the seizure of real property, the Court did not address what the appropriate remedy for a violation of *Good* should be. While only a few circuits have addressed the issue, the Eighth Circuit concluded that the proper remedy for this violation is the dismissal of the forfeiture action without prejudice.[53] Thus, the government is permitted to start all over again, this time affording the owner notice and a hearing as required by the Due Process Clause.

B. The Excessive Fines Clause of the Eighth Amendment

The Eighth Amendment Excessive Fines Clause clearly declares that no excessive fines shall be imposed.[54] However, its application in civil actions, specifically in civil forfeitures, is less than obvious. Couched between the clauses prohibiting excessive bail and cruel and unusual punishment, the Excessive Fines Clause arguably applied only in criminal prosecutions. As civil forfeiture by definition is not criminal, there was doubt as to whether the scope of this Clause encompassed civil forfeiture.[55] If the Clause extended to civil forfeitures, owners could then argue the forfeiture of their property was excessive and violated the Eighth Amendment. If, however, the Clause's scope did not reach civil forfeitures, property owners must rely on other constitutional provisions to safeguard their property interests.

United States v. Austin[56]

Richard Lyle Austin met with Keith Engebretson, a federal undercover agent, at Austin's autobody shop. Austin agreed to sell Engebretson two grams of cocaine. Austin ran to his home, returned to the shop, and sold Engebretson the cocaine. The following day, South Dakota state authorities executed a search warrant on Austin's shop and mobile home. The authorities seized small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700.00.[57] Austin plead guilty to one count of possession of cocaine with the intent to distribute in violation of

50. *Id.* at 56.
51. *Id.* at 57-59.
52. *Id.* at 62.
53. United States v. 9638 Chicago Heights, 27 F.3d 327, 330 (8th Cir. 1994). *But see* United States v. 51 Pieces of Real Property, 17 F.3d 1306 (10th Cir. 1994) (the proper remedy for a violation of *Good* is application of the exclusionary rule not dismissal).
54. U.S. CONST. amend. VIII.
55. *See* Cheh, *Constitutional Limitations*, *supra* note 11, at 1381.
56. United States v. Austin, 509 U.S. 602 (1993).
57. *Id.* at 605.

South Dakota drug laws. Subsequently, the federal government initiated in rem civil forfeiture proceedings against Austin's autobody shop and mobile home under 21 U.S.C. § 881(a)(4) & (7). Austin filed a claim and cost bond, and contested the forfeiture arguing it violated the Excessive Fines Clause of the U.S. Constitution.[58] The District Court granted summary judgment in favor of the government, holding that the Eighth Amendment did not apply to civil forfeiture. The Eighth Circuit reluctantly affirmed the judgment, but stated "we are troubled by the Government's view that any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the Government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."[59] The court felt constrained to affirm the judgment based upon precedent which established that the Eighth Amendment Excessive Fines Clause did not apply to civil forfeitures.

The Supreme Court granted certiorari to determine whether the Excessive Fines Clause of the Eighth Amendment applied to civil forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7). In concluding that these civil forfeitures were subject to the Excessive Fines Clause, the Court "signaled that the civil nature of a forfeiture proceeding [would] not insulate forfeiture from the protections of [the Bill of Rights].[60] The Supreme Court advanced three reasons for its holding. First, as 21 U.S.C. § 881(a)(4) and (a)(7) provided an innocent owner defense, the Court concluded that this emphasis on the guilt or innocence of the property owner indicated that forfeiture was intended to punish those persons involved in illegal drug trafficking.[61] Second, upon examining the legislative history of forfeiture, the Court found that Congress intended for civil forfeitures to correspond to the commission of drug offenses.[62] Third, the Court opined that the language in the legislative history of 21 U.S.C. § 881 implied "that Congress intended forfeiture to serve as 'a powerful deterrent' or punishment against those dealing in illicit drugs."[63] Furthermore, the Court declared that any civil forfeiture provision that did not serve a solely remedial purpose but also served deterrent or retributive purposes constituted punishment for purposes of the Excessive Fines Clause.[64] The Court then went on to conclude "that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."[65] The Court remanded to the Court of Appeals to analyze the forfeitures under the Excessive Fines Clause.

From the Court's language in the *Austin* opinion, it is clear that most civil forfeitures are subject to the Excessive Fines Clause.[66] However, the Supreme Court re-

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58. U.S. CONST. amend. VIII.

59. United States v. 508 Depot Street, 964 F.2d 814, 818 (1992).

60. Mary M. Cheh, *Can Something this easy, quick, and profitable also be fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y. L. SCH. L. REV. 1, 41-47 (1994) (discussing problems surrounding direct pay-back to law enforcement of forfeited assets) [hereinafter *Runaway Civil Forfeiture*].

61. *Austin*, 509 U.S. at 619.

62. *Id.* at 620.

63. *Id.*

64. *Id.* at 621 (quoting *Halper*, 490 U.S. at 448).

65. *Id.* at 618. Furthermore, the majority of the Supreme Court declared:

> Furthermore, as we have seen, forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence.

Id. at 622 n.14.

66. *But see* United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) (holding that the forfeiture of drug proceeds is remedial, not punitive for purposes of the Double Jeopardy Clause).

fused to explain the proper test courts should apply in determining whether a civil forfeiture violates the Excessive Fines prohibition. The courts have developed various tests, but they have primarily focused on either the relationship between the property forfeited and the drug activity giving rise to the forfeiture or the proportionality between the gravity of the drug offense and the value of the property being forfeited. Some courts have applied a hybrid of the relationship test and the proportionality test, while also considering other factors.[67]

Regardless of which test is ultimately applied, the effect of *Austin* is to limit the government's ability to forfeit property where the value of the property is disproportionate to the harm caused by the underlying criminal offense. In light of *Austin*, controversy erupted over whether the Double Jeopardy Clause of the Fifth Amendment necessarily applied to civil forfeiture in light of the fact that it also placed constitutional limits on the ability of the government to "punish."[68]

C. The Double Jeopardy Clause of the Fifth Amendment

The Fifth Amendment Double Jeopardy Clause[69] has been interpreted by the Supreme Court to protect individuals from three abuses. First, an individual may not be prosecuted for the same offense after an acquittal. Second, an individual may not be prosecuted for the same offense after a conviction. Third, an individual may not be subject to multiple punishments for the same offense.[70] The last situation has far-reaching consequences if civil forfeitures are considered punishment under the Double Jeopardy Clause. Holding that civil forfeiture may constitute punishment would preclude the government from seeking both a criminal conviction and a civil forfeiture in separate proceedings. As many civil forfeitures are the result of an administrative forfeiture by the seizing agency, without knowledge of the prosecuting office, rarely would a criminal prosecution and a civil forfeiture be pursued in the same proceeding.

The Supreme Court decisions in *Austin* and two other recent cases led to the controversial application of the Double Jeopardy Clause to civil forfeitures which resulted in the vacating of criminal convictions that followed a civil forfeiture, and the return of property civilly forfeited after a criminal conviction. In *United States v. Halper*,[71] the Supreme Court held that a civil penalty constituted punishment if the amount of the penalty was sufficiently disproportionate to the injury or harm to the government.[72] In *Halper*, the defendant was convicted of submitting false Medicare claims and sentenced to prison and fined $500.00. The federal government then brought a civil suit against Halper under the False Claims Act which authorized a civil penalty of $130,000.00. The actual amount of money Halper obtained through the false claims was $585.00.[73] The District Court granted summary judgment in favor of the government but limited the penalty to double damages and costs totaling

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67. *See generally* GURULE, *supra* note 1, at 256-64 (discussing the various excessive fines tests applied by the circuits after *Austin*); *See* Steven Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights*, 39 N.Y. L. REV. 205, 213-36 (same).

68. Stefan D. Cassella, *Status of Double Jeopardy and Forfeiture Law in the Sixth Circuit*, 84 KY. L.J. 553 (1996).

69. U.S. CONST. amend. V.

70. *See* United States v. Ursery, 116 S.Ct. 2135 (1996).

71. United States v. Halper, 490 U.S. 435 (1989).

72. *Id.* at 449.

73. *Id.* at 437-38.

$16,000.00.[74] The Supreme Court declared that a case-by-case balancing of the injury caused to the government against the amount of the civil penalty should be used to determine whether a civil penalty constituted punishment under the Double Jeopardy Clause.[75] However, the Supreme Court warned that "[w]hat we announce now is the rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[76] In *Department of Revenue of Montana v. Kurth Ranch*,[77] the Supreme Court addressed whether a tax penalty imposed upon a defendant only after his drug conviction constituted punishment for purposes of double jeopardy. Relying on the language in *Halper*, the Court concluded that a tax penalty that was punitive in nature would constitute punishment.[78] As this tax penalty required a prior drug conviction before the tax could be imposed and taxed an individual for illegal drugs no longer possessed or owned, the Court found that it constituted punishment and violated the prohibition against a second punishment for the same offense.[79]

Applying the broad language in *Austin*, coupled with the Supreme Court's decisions in *Halper* and *Kurth Ranch*, the courts began to expand double jeopardy analysis to civil forfeitures.[80] As a result, a myriad of interpretations followed trying to come to grips with civil forfeitures and criminal prosecutions based upon the same offense. The Supreme Court finally consolidated two cases and granted certiorari to determine whether civil forfeitures could constitute punishment under the Double Jeopardy Clause.

United States v. Ursery[81]

In the first of the consolidated cases, *United States v. Ursery*,[82] the government instituted a civil forfeiture proceeding against Ursery's home which he allegedly used to facilitate illegal drug transactions. Following the judgment forfeiting the property, the government brought criminal charges and Ursery was convicted of violating 21 U.S.C. § 841(a)(1), manufacturing marijuana. The Sixth Circuit reversed Ursery's conviction claiming it violated the Double Jeopardy Clause prohibition against multiple punishments. The Court categorically declared all civil forfeitures constituted punishment for purposes of double jeopardy.[83] In the second consolidated case, *United States v. $405,089.23*,[84] Charles Arlt and James Wren were convicted of conspiracy to aid and abet in the manufacture of methamphetamine in violation of 21 U.S.C. § 846, conspiracy to launder money instruments in violation of 18 U.S.C. § 371, and numerous counts of money laundering in violation of 18 U.S.C. § 1956. Defendant Arlt was sentenced to life in prison and fined $250,000.00. Following the criminal conviction, the District Court granted summary judgment in favor of the government in the civil

74. *Id.* at 439.
75. *Id.* at 449-50.
76. *Id.* at 449.
77. Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994).
78. *Id.* at 1945-46.
79. *Id.* at 1947-48.
80. *See generally* GURULE, *supra* note 1, at 264-81 (discussing how the federal circuits approach double jeopardy claims prior to *Ursery*).
81. United States v. Ursery, 116 S. Ct. 2135 (1996).
82. United States v. Ursery, 59 F.3d 568 (6th Cir. 1995).
83. *Id.* at 573.
84. United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994).

forfeiture proceedings brought under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) against the money seized which totaled $405,089.23. The Ninth Circuit reversed the forfeiture order holding that it violated the Double Jeopardy Clause as forfeitures under 18 U.S.C. § 981 and 21 U.S.C. § 881 always constitute punishment.[85] The Supreme Court granted certiorari to determine whether these particular forfeiture provisions constituted punishment for purposes of double jeopardy. The Court held "[t]hese civil forfeitures (and civil forfeitures generally) . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause."[86]

The Supreme Court began its analysis by examining case law considering the relationship between the Double Jeopardy Clause and civil forfeitures. The Court began by examining its 1931 decision in *Various Items of Personal Property v. United States*.[87] In *Various Items*, a distilling corporation that had been convicted of criminal violations was forced to forfeit a distillery, warehouse, and denaturing plant. The Supreme Court held that "[t]he forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect to double jeopardy does not apply."[88] Further, the Court "drew a sharp distinction between *in rem* civil forfeitures and *in personam* civil penalties such as fines: Though the latter could, in some circumstances, be punitive, the former could not."[89] The holding in *Various Items* was reaffirmed in *One Lot of Emerald Cut Stones v. United States* [90]and *One Assortment of 89 Firearms*. [91]In *89 Firearms*, the Supreme Court enunciated a two-step test to determine whether a civil forfeiture constituted punishment. The first step required an examination of the legislative history to determine whether Congress intended the civil forfeiture to serve a remedial purpose or a punitive purpose.[92] The second step involved an analysis of the nature and effect of the civil forfeiture to resolve whether the forfeiture was "so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism."[93]

The Supreme Court then addressed whether its decisions in *Halper, Austin*, and *Kurth Ranch* altered or supplanted the *89 Firearms* two-step test. In concluding that these decisions did not, the Court distinguished between the civil fines or tax penalties and civil forfeitures, and between punishment for purposes of the Excessive Fines Clause and punishment for purposes of the Double Jeopardy Clause. With regard to *Halper's* holding that an arbitrary fixed-penalty provision overwhelmingly disproportionate to the harm caused to the government violated the Excessive Fines Clause, the Court found this civil penalty easily distinguishable from a civil forfeiture in which property directly related to criminal activity is forfeited not only to compensate the government but also to prevent illicit use of the property and to disgorge the owner of the unlawful fruits.[94] As to the holding in *Kurth Ranch* that a tax penalty constituted punishment for purposes of the Double Jeopardy Clause, the Court limited its holding

85. *Id.* at 1219.
86. *Ursery*, 116 S. Ct. at 2138 (1996).
87. Various Items of Personal Property v. United States, 282 U.S. 577 (1931).
88. *Ursery*, 116 S.Ct. at 2140 (quoting *Various Items*, 282 U.S. at 581).
89. *Id.* at 2141 (emphasis in original).
90. One Lot of Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (*per curiam*).
91. One Assortment of 89 Firearms, 465 U.S. 354 (1984).
92. *Id.* at 363-65.
93. *Id.* at 365 (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).
94. *Ursery*, 116 S.Ct. at 2144-45.

to tax penalties not aimed at revenue gathering, rejecting its application to civil forfeitures.[95] Finally, the Court distinguished its decision in *Austin* which held that civil forfeitures could constitute punishment for purposes of the Excessive Fines Clause from the cases at bar by declaring that punishment under the Double Jeopardy Clause was not the same as punishment under the Excessive Fines.[96] Thus, *Halper, Austin,* and *Kurth Ranch* did not displace or alter the *89 Firearms* analysis.

Applying the *89 Firearms* test to the cases at bar, the Supreme Court held that these forfeitures were intended by Congress to be remedial, as opposed to criminal. Further, the Court explained that nothing in their nature or effect is "so punitive . . . as to render them criminal despite Congress' intent to the contrary."[97] The Court acknowledged that the presence of the innocent owner defense appears to limit forfeiture to situations where a relationship exists between the property and the criminal activity, but concluded that without more indication of an intent to punish, the innocent owner defense is not dispositive in determining whether a statute is punitive.[98] The Court, however, went beyond simply holding these forfeiture provisions to be remedial and declared that all civil forfeitures normally will not constitute punishment for double jeopardy purposes.

In rebuking the Courts of Appeals, the Supreme Court surmised "[i]t would have been quite remarkable for this Court to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so."[99] The judgments of the Courts of Appeals were reversed.

D. Summary of the Constitutional Protections

After all is said and done, procedurally, the Due Process Clause protects a real property owner from governmental seizure without prior notice and a hearing. Substantively, civil forfeitures generally constitute punishment under the Excessive Fines Clause. However, they are not considered punishment for purposes of the Double Jeopardy Clause. Therefore, the property owner is afforded some constitutional protections, but not nearly the degree of protections a property owner is afforded if prosecuted for the crime giving rise to the civil forfeiture.

V. THE INNOCENT OWNER DEFENSE

Once the government establishes probable cause to believe the property is subject to forfeiture, the burden then shifts to the property owner to prove either the property's innocence or his innocence as the owner. In regard to forfeitures under the drug provisions, the innocent owner defense provides that "no property shall be forfeited . . . to the extent of the interest of an owner by reason of any action or omission . . . committed or omitted without the knowledge or consent of that owner."[100] Thus, a property owner may qualify as an innocent owner if he or she lacks knowledge of the criminal use of the property or did not consent to the criminal use of the property. Congress

95. *Id.* at 2146.
96. *Id.* at 2146-47.
97. *Id.* at 2148.
98. *Id.* at 2149.
99. *Id.* at 2147.
100. 21 U.S.C. § 881 (a)(4), (a)(6), and (a)(7) (1994). See 18 U.S.C. § 981(a)(2) (1994) which provides an innocent owner defense based upon a lack of knowledge with no mention of a lack of consent.

enacted this provision to ensure that criminals were punished while preventing innocent owners from losing their property simply by "unwitting association with wrongdoers."[101] At first glance, this provision appears to provide protection for owners who are unaware of the criminal use to which the property is being put. However, in reality, the innocent owner defense is anything but simple and straight-forward.[102]

United States v. Buena Vista Avenue[103]

In *Buena Vista*, the Supreme Court faced the task of defining the proper application of the innocent owner defense. The government instituted forfeiture proceedings against a home bought by Joseph Brenna for his girlfriend who had title to the property. Brenna had been involved in several drug transactions and the government alleged that the money used to purchase the home was the proceeds of these unlawful drug transactions. Brenna's girlfriend filed a claim and contested the forfeiture arguing that she had "no knowledge of the origin of the funds" and was an innocent owner.[104] The District Court rejected her innocent owner defense declaring: (1) the defense was only available to *bona fide* purchasers for value, and (2) only owners of the property at the time of the offense giving rise to the forfeiture could invoke the defense. The Third Circuit reversed the District Court on both grounds.[105]

The Supreme Court granted certiorari in order to resolve: (1) whether the innocent owner defense only applied to bona fide purchasers for value, and (2) whether the relation-back doctrine takes priority over the innocent owner defense.[106] In deciding that the innocent owner defense applied beyond *bona fide* purchasers for value, the Court concluded that nowhere in the text of the statute did Congress attempt to restrict the application of the defense only to bona fide purchasers for value.[107] Therefore, even though Brenna's girlfriend received the home as a gift, she was eligible for protection under the innocent owner defense. Further, the Court found that the relation-back doctrine did not trump an innocent owner who obtained an interest in the property after the criminal use occurred.[108] The Court recognized that allowing the relation-back doctrine to supersede the innocent owner defense would render the defense meaningless, especially in regard to the proceeds of drug activity subsequently used to pay for legitimate goods and services. Having concluded that the innocent owner defense applies beyond *bona fide* purchasers for value and is not trumped by the relation-back

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101. United States v. 6640 SW 48th Street, 41 F.3d 1448, 1452 (11th Cir. 1995) (quoting United States v. 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992)).

102. For more in-depth discussions of the innocent owner defense and problems associated with its application, see generally *Symposium: What Price for Civil Forfeiture? Constitutional Implications and Reform Initiatives*, 39 N.Y. L. SCH. L. REV. 1 (1994); *Symposium: Federal Asset Forfeiture Reform*, 21 J. LEGIS. 1 (1995); GURULE, *supra* note 1, at 281-97; LEVY, *supra* note 2, at 161-76; Guerra, *supra* note 31; Saltzburg, *supra* note 28; Zeldin and Weiner, *supra* note 9; O'Brien, Note: *Caught in the Crossfire: Protecting the Innocent Owner of Real Property from Civil Forfeiture under 21 U.S.C. § 881(a)(7)*, 65 ST. JOHN'S L. REV. 521 (1991).

103. United States v. Buena Vista Avenue, 507 U.S. 111 (1993).

104. *Id.* at 115.

105. *Id.* at 116.

106. Under the relation-back doctrine, the government would have title to the property from the time of its criminal use. Thus, any post-illegal use owner, regardless of his or her innocence would not be able to use the innocent owner defense as title had already vested in the government. See *supra* note 17 and 18, and accompanying text discussing the relation back doctrine.

107. *Id.* at 123.

108. *Id.* at 127.

doctrine, the Supreme Court remanded the case to consider whether Brenna's girlfriend qualified as an innocent owner.[109]

While the Supreme Court offered some guidance for the federal courts to follow in applying the innocent owner defense, it left untouched one of the most litigated issues confounding the lower courts. In analyzing the defense, courts are forced to interpret the meaning of the phrase "without knowledge or consent." A minority of courts have held that the phrase should be read in the conjunctive, thereby requiring a claimant to prove both lack of knowledge and lack of consent in order to qualify as an innocent owner.[110] For these courts, allowing a disjunctive interpretation would permit an owner with knowledge of the criminal use to be protected under the innocent owner defense simply by showing a lack of consent. Holding "innocence [is] incompatible with knowledge" regardless of consent,[111] these courts find such a vast loophole contrary to Congressional intent and require both lack of knowledge and lack of consent. However, the majority of courts interpret the phrase in the disjunctive.[112] Their reasoning is that consent assumes knowledge and in order to give meaning to the word consent independent of knowledge, the phrase must be interpreted in the disjunctive.[113] Further, as Congress did not intend to forfeit property of innocent owners, an owner must be permitted to establish a lack of consent even though he had knowledge.[114] Thus, a property owner may successfully challenge the forfeiture by establishing either a lack of knowledge or a lack of consent. For these courts that adopt the disjunctive interpretation, another problem arises between the treatment of the pre-illegal act owners and the post-illegal act owners asserting the innocent owner defense. Although both pre-illegal act owners and post-illegal act owners may establish the defense by proving either lack of knowledge or consent, the post-illegal act owners can never give consent to the prior criminal use because the property did not belong them at the time. Therefore, the disjunctive interpretation appears to create an automatic innocent owner defense for post-illegal act owners who need not be purchasers under *Buena Vista*.[115]

The innocent owner defense faces greater uncertainty given the various definitions attributed to knowledge and consent throughout the circuits. In determining whether the property owner had knowledge, the issue becomes whether the owner must simply prove lack of personal knowledge or must meet the higher burden of lack of objective knowledge, meaning the property owner should have known of the illegal use. While most courts allow a property owner to merely establish a lack of personal

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109. Prior to *Buena Vista*, the relation-back doctrine trumped the innocent owner defense, thereby precluding post-illegal act owners from asserting an innocent owner defense.

110. *See generally* GURULE, *supra* note 1, at 285-93. Post-*Buena Vista*, the Ninth Circuit in United States v. 10936 Oak Run Circle, 9 F.3d 74 (9th Cir. 1993), and the Eleventh Circuit in United States v. 6640 SW 48th Street, 41 F.3d 1448 (11th Cir. 1995), have adopted the conjunctive interpretation.

111. *6640 SW 48th Street*, 41 F.3d at 1452.

112. GURULE, *supra* note 1, at 286. However, most circuits have not addressed the proper interpretation of without "knowledge or consent" Post-*Buena Vista*.

113. *See generally* United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 1000 (5th Cir. 1990).

114. *See* United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990).

115. United States v. One 1973 Rolls Royce, 43 F.3d 794 (1994) (post-illegal act owner may establish innocent owner defense by proving lack of consent regardless of his knowledge or willful blindness). *See also* GURULE, *supra* note 1, at 285-86 (As a result of the *Buena Vista* decision, the Eleventh Circuit abandoned the conjunctive interpretation in favor of the disjunctive interpretation in *6640 SW 48th Street*, 41 F.3d 1448 (11th Cir. 1996)).

knowledge, these courts prevent an innocent owner defense where the property owner deliberately or wilfully avoids knowledge of the illegitimate use of the property.[116] The courts reason that "when a person deliberately closes his eyes to the existence of the facts that would otherwise be obvious or demonstrates a conscious purpose to avoid enlightenment,"[117] that person should be considered to have knowledge. As to the meaning given "lack of consent," the courts are divided on whether the claimant must prove that he did all that he reasonably could to prevent the proscribed use of his property. In *Calero-Toledo v. Pearson Yacht Leasing, Co.*,[118] the Supreme Court in dicta reasoned that a property owner might have a constitutional defense, distinct from the innocent owner defense, if he could prove "not only that he was uninvolved in and unaware of the wrongful activity, but also had done all that he reasonably could be expected to prevent the proscribed use of his property."[119] After *Calero-Toledo*, the courts were left to decide whether this dicta should be incorporated into the innocent owner defense. Some courts refused to require the property owner to prove all reasonable measures were undertaken in order to establish lack of consent under the innocent owner defense.[120] For these courts, the property owner will succeed if he or she establishes lack of consent to the illegal use. Meanwhile, other courts have expressly incorporated the *Calero-Toledo* dicta into the innocent owner defense, thereby requiring an owner to meet the higher standard in proving lack of consent.[121]

While the innocent owner defense remains available to property owners,[122] the burden is upon them to establish by the preponderance of the evidence that they meet its complex requirements. An owner must first determine if the conjunctive or disjunctive interpretation applies to the phrase "without knowledge or consent." Then, the owner must determine which definition of "without knowledge" and "lack of consent" must be proven. Thus, establishing the innocent owner defense is anything but a straight-forward task for the property owner.

VI. PROPOSED LEGISLATIVE AMENDMENTS

Neither proponents nor critics of civil forfeiture deny the need to amend and reform the current forfeiture laws. However, reaching a compromise whereby the concerns of both sides are adequately addressed remains the challenge before Congress. On July 22, 1996, the House Judiciary Committee held hearings on H.R. 1916,[123] the

116. GURULE, *supra* note 1, at 293-95.

117. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1175 (8th Cir. 1992) (referring to the discussion of willful blindness in Mattingly v. United States, 924 F.2d 791 (8th Cir. 1991), a civil tax fraud case in which the court considered whether a willful blindness instruction could satisfy a statutory requirement of knowledge).

118. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

119. *Id.* at 689.

120. GURULE, *supra* note 1, at 295-97 (citing United States v. 1 Street A-1, 865 F.2d 427, 430 (1st Cir. 1989); United States v. Keeton Heights Subdivision, 869 F.2d 942, 946 (6th Cir. 1989); *One 1989 Jeep Wagoneer*, 976 F.2d at 1175 (8th Cir. 1992)).

121. *Id.* at 295 (citing United States v. 18 & 25 Castle Street, 31 F.3d 35 (2d Cir. 1994); United States v. 31 Endless Street, 8 F.3d 821 (4th Cir. 1993); United States v. 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992)).

122. However, the Supreme Court in Bennis v. Michigan, 116 S.Ct. 994, 1001 (1996), held that nuisance law authorizing forfeiture but not providing an innocent owner defense rendered such defense unavailable to the innocent spouse. The implication from this decision is that if a civil forfeiture statute does not provide an innocent owner defense then none is available to the property owner.

123. H.R. 1916, 104th Cong. (1995).

Civil Asset Forfeiture Reform Bill sponsored by Representative Henry Hyde last year.[124] At this hearing, the Department of Justice also presented its own civil forfeiture reform proposal. While no action was taken by Congress this term, the hearing is considered to be a prelude to legislative action that should occur in the early part of the next session. While each proposal has some merit, there are also areas where reform is needed that neither proposal adequately addresses.

A. Department of Justice's Comprehensive Reform Proposal: The Forfeiture Act of 1996[125]

The proposed reform presented by the Department of Justice represents a comprehensive attempt at improving civil forfeiture law.[126] In the past few years, numerous criticisms have been leveled against the use of civil forfeiture, ranging from improper conduct by the government to inherent flaws in the forfeiture statutes themselves. In response to academic as well as judicial concern over the future of civil forfeiture, the Department of Justice undertook the challenge of addressing many of these flaws and criticisms through proposed legislative reform. In the Forfeiture Act of 1996, the Department of Justice offers resolutions for several of the problems existing under current law.

Once the government institutes forfeiture proceedings under existing law, the property owner has only twenty days from the first notice of forfeiture to file a claim and a cost bond.[127] Under the proposed reform, the claimant would be given thirty days from the last notice of forfeiture. Further, the property owner may also obtain a waiver or reduction of the cost bond by showing indigence or substantial hardship. The Attorney General or the Secretary of the Treasury have the discretionary power to waive or reduce the cost bond.[128] In order to contest the forfeiture under existing law, the property owner must pay the cost bond up front or the property will be forfeited. Furthermore, if the property owner fails to file a claim and pay the cost bond, the Department of Justice's proposal would permit the property owner to appeal the administrative forfeiture judgment but only on the issue of whether there was adequate notice as required under the Due Process Clause.[129] This appeal of the administrative forfeiture would codify existing case law,[130] while also providing a statute of limitations.

Under the Department of Justice's proposal, the forfeiture of real property would be judicial as opposed to administrative.[131] Furthermore, claimants would be allowed

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124. *Civil Asset Forfeiture Reform: Hearing on H.R. 1916 before the House Comm. on the Judiciary*, 104th Cong. (1996).

125. Forfeiture Act of 1996 Proposal (Hearing on H.R. 1916 before the House Comm. on the Judiciary, 104th Cong. (1996)) as presented by the Assistant Attorney General on behalf of the Department of Justice to the Speaker of the House) (hereinafter *DOJ*) The proposal by the Department of Justice was not submitted as a bill, however, the proposal is in bill form. Therefore, citing will be to the sections as they are found in the Department of Justice's proposal. Copy is available with author.

126. *See* Stefan D. Cassella, *Forfeiture Reform: A View from the Justice Department*, 21 J. LEGIS. 211 (1995) for general discussion of the Department of Justice's position on civil forfeiture reform.

127. 19 U.S.C. § 1608 (1994) (applicable to all civil forfeitures under customs laws).

128. *DOJ*, *supra* note 125, § 101.

129. *Id.* § 103 (which would codify leading cases on due process claims). *See* Toure v. United States, 24 F.3d 444 (2d Cir. 1994); United States v. Woodall, 12 F.3d 791, 793 (8th Cir. 1993) (If the owner has actual knowledge, even though the notice was inadequate, there is not a violation of due process); *One 1987 Jeep Wagoneer*, 972 F.2d 472 (2d Cir. 1992).

130. *See* Linarez v. Department of Justice, 2 F.3d 208, 213 (7th Cir. 1993).

131. *DOJ*, *supra* note 125, § 104.

to remain in possession of real property even though the government was pursuing its forfeiture.[132] This proposal seeks to clarify that the government need not remain in possession of property it is seeking to forfeit. However, if the government remains in possession of the property throughout the forfeiture proceedings and the property is ultimately held not to be subject to forfeiture, the property owner would be able to recover damages for loss of property against the government[133] under the Federal Tort Claims Act.[134] Contrary to current law, the government would be liable for damage done to the property while in its possession. Finally, if the government accrued interest from the property it had seized and that property was later found not to be subject to forfeiture, then the property owner would have the right to recover the prejudgment interest the government received.[135] Although courts have been divided on the right of property owners to interest accrued by the government while seeking the forfeiture of the property,[136] this proposal would establish that a property owner, successful in contesting the forfeiture of his property, has a right to any interest the government obtained from the property.

Procedurally, the Department of Justice also proposes reallocating the burden of proof in the first instance. Currently, once the government seizes the property and institutes the forfeiture proceedings, the burden is on the property owner to prove by the preponderance of the evidence that the property is not subject to forfeiture.[137] The proposals reallocation would require the government to bear the initial burden of proving by the preponderance of the evidence that the property is subject to forfeiture.[138] Only after the government meets this burden would the burden fall upon the property owner to prove by the preponderance of the evidence any affirmative defense that would preclude forfeiture, such as the innocent owner defense.[139] In meeting their respective burdens, neither party may rely on hearsay, while the property owner may also avail himself of the protections of the Fourth Amendment for suppressing illegally seized evidence.[140] Further, the proposed reform delineates the proper negative inferences that may be drawn from a claimant's invocation of the Fifth Amendment.[141] Finally, the Excessive Fines Clause analysis of the Eighth Amendment

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132. *Id.* § 105.

133. *Id.* § 106.

134. 28 U.S.C. § 2680(c) (1994).

135. *DOJ, supra* note 125, § 107.

136. *Compare* Library of Congress v. Shaw, 470 U.S. 310, 311 (1986) *with* United States v. $277,000, 69 F.3d 1491 (9th Cir. 1995).

137. For a criticism of this approach, see United States v. $30,600, 39 F.3d 1039 (9th Cir. 1994); United States v. $31,990, 982 F.2d 851 (2d Cir. 1993).

138. *DOJ, supra* note 125, § 121(e) (This provision would require the government to establish a substantial connection between the property and the offense when the theory of forfeiture is facilitation, thus codifying the majority rule as stated in United States v. One 1986 Ford Pickup, 56 F.3d 1181 (9th Cir. 1995)).

139. The property owner no longer bears the burden of proving that the property is not subject to forfeiture, however, the owner still has the burden of establishing any affirmative defenses. *See* United States v. One Parcel . . . 194 Quaker Farms Rd., 85 F.3d 985 (2d Cir. 1996) (property owner should retain burden of proving affirmative defenses because the owner is in the best position to establish this evidence).

140. DOJ, *supra* note 125, § 121(g) & (h) (Section (g) codifies the criminal exclusionary rule in the civil context). *See* United States v. $7,850, 7 F.3d 1355 (8th Cir. 1993).

141. *Id.* § 121(i) (codifying United States v. Certain Real Property Located At 4003-05 5th Ave., 55 F.3d 78 (2d Cir. 1995)).

would not be considered until after the entry of the forfeiture judgment.[142] If the court (as opposed to the jury) finds the forfeiture to be excessive, then the judge may reduce the amount of the forfeiture.[143] This proposal attempts to guide the federal courts in the proper procedure to follow in applying the rational of *Austin*.

If the government seizes the property before trial, the property owner would be permitted to inform the court that the property is needed to pay attorney's fees. Although not allowed under current law, the court would be required to make a pre-trial determination of whether probable cause exists to believe the property is subject to forfeiture.[144] This determination is made without regard to any affirmative defenses in order to prevent a mini-trial from occurring. If the court finds that probable cause exists, the property would remain subject to forfeiture notwithstanding the defense costs. If the court concludes that probable cause does not exist, the property would be released to the claimant.

Probably the most innovative reform suggested by the Department of Justice is the enactment of the Uniform Innocent Owners Defense[145] which would govern all civil forfeitures. As it currently stands, some civil forfeiture provisions have an innocent owner defense, while others do not. Further, even these forfeiture provisions which provide an innocent owner defense vary in scope and application. By establishing an Uniform Innocent Owner Defense, property owners would not be faced with the uncertainty as to which requirements need to be met, nor would the courts find themselves interpreting multiple distinct provisions. Finally, most of the problematic language in current provisions is eliminated or clarified.

The Uniform Innocent Owner Defense proposed by the Department of Justice involves two levels of analysis. The first level applies to property owners at the time of the offense giving rise to the forfeiture. In order to establish innocence, these property owners would be required to prove: (1) either lack of knowledge or (2) that upon learning of the illegal use to which the property was being used, the property owner did all that reasonably could be expected to terminate such use, specifically, the owner did not consent. Furthermore, if a property owner is relying on lack of knowledge as a defense, the court would be required to reject the defense if the property owner was willfully blind or ignorant.[146] Intentional ignorance would negate the owner's innocence. Thus, as to property owners at the time of the criminal use, the disjunctive, as opposed to the conjunctive interpretation of the defense, is adopted. The second level of analysis involves property acquired by the owner after the property's illegal use. The issue becomes whether the owner knew or should have known about the prior illicit use. Under the proposal, the property owner would be permitted to establish the defense only if he: (1) is a *bona fide* purchaser for value, (2) is without knowledge of the prior illegal use, and (3) is without reasonable cause to know that the property was subject to forfeiture.[147] The limitation that the property owner be a *bona fide* purchas-

142. *Id.* § 121(m).
143. *Id.* (codifying United States v. Sarbello, 985 F.2d 716, 718 (3d Cir. 1993)).
144. *Id.* § 121(l).
145. *DOJ, supra* note 125, at § 123 (the Innocent Owner Defense Statute to be codified at 18 U.S.C. § 983). *See also,* Civil Asset Forfeiture Reform Act: Hearing before the House Committee on the Judiciary, 104th Cong., 2nd Session (1996) (testimony of Stefan Cassella, Deputy Chief Asset Forfeiture and Money Laundering Section Criminal Division).
146. *Id.* § 123(b)(1).
147. *Id.* § 123(b)(2).

er would preclude family and friends from relying on the defense when the property was simply given to them as a gift.

However, concern over the potential situation in which property subject to forfeiture is jointly owned by a guilty person and an innocent third party, such as a spouse, led the Department of Justice to provide a court with three options when entering forfeiture judgments to protect these innocent interests. First, the court may sever the property if possible, whereby the innocent party retains possession of some of the property. Second, the court may order the property liquidated, giving the innocent owner a portion of the proceeds. Finally, the court may permit the innocent spouse or family to remain in possession of the property.[148] However, the property is subject to a government lien, if the property is disposed of by the owners.

Further, the Uniform Innocent Owner Defense would provide a rebuttable presumption for financial institutions that hold liens, mortgages or other secured interests in the property subject to forfeiture.[149] If the financial institution proves that it abided by internal standards created to ensure the exercise of due diligence in making loans and acquiring interest in the property and was without actual notice of the illegal use to which the property was being put, there would be a rebuttable presumption that the financial institution acted "reasonably" for purposes of establishing the innocent owner defense. The government would be permitted to rebut this presumption by showing that the financial institution should have been on notice that its internal standards were inadequate.[150]

The Forfeiture Act of 1996 addresses many of the criticisms surrounding existing forfeiture provisions. It offers owners more protection and clarifies some of the ambiguity that previously existed. However, the Department of Justice's proposals fail to address the issue of attorneys fees for successful property owners or the problem of returning forfeited property to the seizing agencies. These concerns must be addressed in order to diminish the incentive and practice of abusing civil forfeiture.

B. Representative Hyde's Bill: The Civil Asset Forfeiture Reform Act of 1995[151]

While Rep. Henry Hyde's proposal is not nearly as comprehensive as the Department of Justice's version, it focuses on a few areas of civil forfeiture that are currently criticized as being unfair: (1) the notice and cost bond requirement, (2) possession of property by the owner during the forfeiture proceedings, (3) government liability for damage suffered by property while in the possession of the government, (4) the burden on the government in judicial forfeiture proceedings, (5) minor reform to the innocent owner provisions in Title 21, and (6) the right to counsel for indigent property owners.[152] The most provocative and controversial provision within the Rep. Hyde's proposal is the right to counsel for indigent property owners. The other provisions touch on the general concerns found in the Department of Justice's proposal; however, Rep. Hyde's proposal tends to be more extreme in redressing the current flaws and abuses of

148. *Id.* § 123(d).
149. *Id.* § 123(e).
150. *Id.*
151. H.R. 1916, 104th Cong. (1995).
152. *See also* REPRESENTATIVE HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995).

civil forfeiture.

As to the procedural reform proposed by Rep. Hyde's proposal, it begins by reforming the existing notice and cost bond requirement. Once the federal agency or government has instituted civil forfeiture proceedings, the property owner has a limited period of time in which to file a claim and cost bond in order to challenge the forfeiture. Rep. Hyde's proposal calls for amending the time period from twenty days to thirty days from the *first* publication of the notice of forfeiture.[153] The Department of Justice's proposal allowing for thirty days from the date of the *final* notice of forfeiture offers greater protection to property owners than Rep. Hyde's proposal. The cost bond requirement would be eliminated altogether under Rep. Hyde's proposal.[154] Under existing law, a cost bond must be paid in order for a property owner to challenge forfeiture. The Department of Justice opposes the elimination of the cost bond, instead, favoring its *in pauperis* exception which allows the court to exempt indigent property owners from the cost bond requirement. Rep. Hyde's concern that a property owner will not be capable of paying the cost bond would be adequately addressed by the *in pauperis* exception, without opening the door for property owners to file meritless challenges simply because they would no longer have to pay a cost bond.

Rep. Hyde's proposal would return real and personal property to the owner pending forfeiture judgment upon a showing of substantial hardship.[155] While the Department of Justice's proposal would also permit the owner of real property to remain in possession, it opposes the retention of personal property by the owner as such property is easily diminished or disposed. Under existing law, all property may be seized and the property owner is not left in possession. Given the Supreme Court's acknowledgment in *Calero-Toledo* of the need to prevent property owners from frustrating law enforcement efforts to forfeit personal property,[156] the more reasonable approach would be to adopt the Department of Justice's proposal and only permit retention of real property.

Rep. Hyde's proposal would also provide for government liability for any injury suffered by the property while in the hands of the government under the Federal Tort Claims Act.[157] This proposal would not limit recovery to owners who successfully challenge the forfeiture, namely, innocent owners.[158] On the other hand, the Department of Justice's proposal would require that the owner be successful in the challenge before recovering for any damage done to the property. Given the overly broad language of Rep. Hyde's proposal, the Department of Justice's proposal limiting the scope of government liability under the Federal Tort Claim Act appears to protect the innocent owner while not compensating unsuccessful property owners for damages suffered by property which now belongs to the government.

Furthermore, Rep. Hyde's proposal would reallocate the burden of proof to the government while simultaneously calling for a higher standard of proof. First, once the property owner files a claim and a cost bond, Rep. Hyde's proposal would place the

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153. H.R. 1916, 104th Cong. § 3 (1995).
154. *Id.* § 5(a).
155. *Id.* § 6.
156. *Calero-Toledo*, 416 U.S. at 678 (citing Fuentes v. Shevin, 407 U.S. 67, 80 (1993), where it was determined that in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible).
157. 28 U.S.C. § 2680(c) (1994).
158. H.R. 1916, 104th Cong. § 2 (1995).

initial burden back on the government to prove the property is subject to forfeiture. Second, it would raise the government's standard of proof to "clear and convincing."[159] Thus, the government would have to prove that the property was subject to forfeiture by clear and convincing evidence. The Department of Justice opposes this high standard, arguing that the preponderance of the evidence standard is normally used in civil proceedings. As the higher standard would represent an unprecedented departure from this general standard, the wiser course would be to leave the standard of proof at the preponderance and secure protections of property owners through other avenues.

As to the innocent owner defense, Rep. Hyde's proposal would make minor amendments, most of which would be incorporated into the Uniform Innocent Owner Defense proposed by the Department of Justice.[160] Rep. Hyde's proposal would permit a property owner to establish an innocent owner defense simply by proving lack of consent regardless of knowledge. However, the proposal would define lack of consent by the higher standard which requires a property owner to take "all reasonable steps to prevent the illicit use of the property."[161] The Department of Justice's Uniform Innocent Owner Defense would permit the same defense for property owners at the time of the illegal use. For those property owners who obtain the property after the criminal use, the uniform innocent owner statute would require the property owner be a *bona fide* purchaser for value without knowledge and without reasonable cause to know the property is subject to forfeiture. As after-acquired property owners cannot give consent, Rep. Hyde's proposal would create an automatic innocent owner defense. The Department of Justice's proposal addresses the analytical distinction between pre- and post- illegal act owners. Therefore, the Department of Justice's proposal would be more practical and avoid the inconsistent results under Rep. Hyde's proposal.

Probably the most controversial aspect of Rep. Hyde's proposal is the provision for the appointment of counsel for indigent property owners.[162] In the context of civil proceedings, the appointment of counsel is unprecedented. As there is no threat to personal liberty, the right to counsel has never been applied in the civil context.[163] Under Rep. Hyde's proposal, the court appointed counsel would be paid for out of the Federal Asset Forfeiture Fund, regardless of the success or failure on the merits of the forfeiture challenge. An ironic result would occur if the government were required to pay for attorneys fees of an unsuccessful owner. Given the uncertainty of establishing this right, the prudent course of action is to analyze other alternatives. While the Hyde proposal correctly points out the need to address the costs a property owner incurs in contesting civil forfeiture, its solution is extreme and may be unnecessary if other

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159. *Id.* § 4.

160. H.R. 1916 only amends the innocent owner defense in Title 21 with regard to drug forfeitures.

161. *Id.* § 8; *DOJ, supra* note 125, § 123(b)(1)(B).

162. H.R. 1916, 104th Cong. § 5 (1995).

163. *See* United States v. $292,888.04 in United States Currency, 54 F.3d 564, 569 (9th Cir. 1995) (as civil forfeiture did not carry potential for imprisonment, Sixth Amendment right to counsel did not attach); United States v. Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996) (generally no constitutional right to counsel in civil actions, therefore, no right to effective counsel in civil forfeiture actions); United States v. $100,375.00 in United States Currency, 70 F.3d 438, 440 (6th Cir. 1995) (finding the Sixth Amendment right to counsel did not apply in civil forfeiture proceedings); United States v. 7108 West Grand Avenue, 15 F.3d 632 (7th Cir.), *cert. denied*, 114 S.Ct. 2691 (1994) (finding that the Sixth Amendment right to counsel did not apply in civil forfeiture proceedings).

alternatives would achieve the same result.

The Department of Justice's proposal and Rep. Hyde's proposal awaiting Congress in the 1997 session offer unprecedented efforts of civil asset forfeiture reform. They provide Congress with critical guidance in this complex area of law. However, further legislative reform beyond that proposed by either the Department of Justice or Rep. Hyde's Proposal is necessary. In addition, internal guidelines and regulations among the seizing offices and prosecuting governments must be strictly enforced if the legitimacy of civil forfeiture is going to be maintained.

VII. REFORM BEYOND THE LEGISLATIVE PROPOSALS

A. Attorneys Fees

While Rep. Hyde's proposal for appointing counsel for indigent property owners is too extreme a solution to the problem of the enormous legal costs involved in contesting civil forfeiture, it properly points to an area where reform is needed, especially for those property owners who are successful in contesting the forfeiture. For owners whose property value is less than the cost of hiring an attorney to challenge the forfeiture, it makes little economic sense to contest the forfeiture. Even if the property owner is successful and the property is returned, the owner loses all of the money spent on attorneys fees which may far exceed the value of the property. This situation is unacceptable as the innocent property owner either permits the forfeiture of the property or contests the forfeiture, thereby incurring legal costs in excess of the value of the property. Thus, civil forfeiture reform must incorporate some type of an awarding of attorneys fees for those property owners who are successful in challenging the forfeiture. An innocent property owner would not only regain the property but also be reimbursed for legal costs so the innocent owner would be made whole. Any amount of reimbursement should come out of the Federal Asset Forfeiture Fund.

Currently under the Equal Access to Justice Act,[164] a court "shall award to a prevailing party other than the United States fees and other expenses" in a civil action brought by the United States unless it finds that the government's action was substantially justified or special circumstances existed that would render an award unjust.[165] In *United States v. Douglas*,[166] the Eleventh Circuit held that civil forfeiture proceedings are "civil action" within the meaning of this Act. The civil forfeiture in this case was ancillary to criminal forfeiture prosecutions. The defendant entered into a plea agreement in which he consented to the forfeiture of his property. Prior to this plea agreement, however, Noel Lussier loaned the defendant $157,500.00 and instituted a civil action to recover the sum from defendant's properties. The *Lussier* court deposited defendant's property with the clerk pending resolution of the litigation. The property forfeited as part of the plea agreement included some of the property involved in Lussier's lawsuit.[167] The *Douglas* court held that property owners and third party claimants could sue the government to recover legal expenses incurred as a result of an unsubstantiated civil forfeiture proceeding. It declared that "[f]ailure to apply the Equal Access to Justice Act to [forfeiture under § 853(n)] would contravene Congress's desire

164. 28 U.S.C. § 2412(d)(1)(A) (1994).
165. *Id.*
166. 55 F.3d 584 (11th Cir. 1995).
167. *Id.*

to instill governmental accountability and to level the playing field in economic disputes between the government and its citizens."[168] The court held that the substantial basis requirement was met if there was a reasonable basis in law and fact to support the government's claim.[169] As the government was aware of Lussier's lawsuit rendering the property not subject to forfeiture, the court found the government's forfeiture frivolous and affirmed the awarding of attorneys fees.[170]

While the Equal Access to Justice Act provides a legal basis for awarding attorneys fees to property owners, there is concern that the property owner will not be made whole, even if successful in challenging the forfeiture, unless the government lacked a substantial basis. It might be more appropriate to require a higher showing than a reasonable basis in law and fact in order to establish the government's action had a substantial basis. Or it might be more preferable to reimburse all successful property owners for legal fees incurred as a result of contesting the forfeiture proceeding by providing for a lose-pay provision in the civil forfeiture statutes.

One additional aspect supporting the awarding of attorneys fees for successful property owners is the deterrent affect it would have on abusive or meritless seizures and forfeiture proceedings. The seizing agencies and the prosecuting offices would have to consider the strength of their evidence establishing that the property is subject to forfeiture and decide whether to pursue judicial forfeitures. The forfeiture would not be pursued in weak cases for fear of having to reimburse property owners for their attorney's costs. Therefore, the abuse of civil forfeiture by law enforcement would also be curtailed as a result.

B. Redistribution to Law Enforcement Agencies

One area of civil forfeiture not addressed in either of the proposed reforms is the redistribution of the forfeited property back to law enforcement, more specifically, back to the seizing agency.[171] Under current law, this redistribution creates greater incentive for these agencies to seize suspect property. Furthermore, as forfeiture amounts have been included in fiscal budgets, the need to seize property is no longer an option, rather, it is a necessity. As the power to seize leads to direct benefits, this power is being abused in some instances. Preventing this overly eager and abusive seizing of property by law enforcement does not require the elimination of civil forfeiture. Instead, it requires the elimination of the incentive or motive to abuse.

Clearly, forfeitures of illegally used or derived property attacks the economic base of the criminal enterprises. However, the derived property need not be entirely returned to the seizing agency. Instead, some of the property should be redistributed into educational and social programs, such as D.A.R.E, aimed at the prevention of crime.[172] Thus, a BMW seized by the Drug Enforcement Agency should be sold and

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168. *Id.* at 587.

169. *Id.* at 588. *But see* United States v. Real Property Located At 2323 Charms Rd., 946 F.2d 437 (6th Cir. 1991) (substantial basis met if government complied with particularity requirement of Supplemental Admiralty and Maritime Claims Rule (E)(2)(a)).

170. *Id.* at 589.

171. *See generally*, Cheh, *supra* note 59, at 41-47 (discussing problems surrounding direct pay-back to law enforcement of forfeited assets); Nkechi Taifa, *Civil Forfeiture v. Civil Liberties*, 39 N.Y. L. SCH. L. REV. 95, 107-12 (1994); LEVY, *supra* note 2, at 144-60.

172. Cassella Testimony, *supra* note 145 (seizing agency authorized to give up to 15% of the redistributed funds to community programs).

the proceeds should be directed towards an inner-city youth program or adult rehabilitation programs. The seizing agency should still be given some portion of the property seized to allay its law enforcement costs, but the majority of the property or the proceeds should be directed at preventative programs. In order to allow these agencies to readjust their fiscal budgets to compensate for the lost forfeiture proceeds, the redistribution should be implemented over a period of years. Thus, reducing the portion of the forfeited property returned to the seizing office will diminish the incentive to abuse civil forfeiture.

C. Internal Guidelines and Procedures

> [K]eep in mind, however, that the purpose of civil forfeiture is *to deter and punish criminal activity*, not to make a profit for the government or collect property for official use.[173]

Legislative reform is insufficient to eliminate some of the abuses that occur internally within the agencies. Within the seizing agencies (state and federal), Department of Justice, and state prosecuting offices, strict internal guidelines need to be adhered to or implemented in order to curb overzealous civil forfeiture. Guidelines should delineate: (1) the appropriate circumstances for seizing property, (2) when an administrative forfeiture should be pursued, and (3) upon a property owner's challenge, when the prosecuting office should maintain a judicial forfeiture proceeding.[174] Further, when these guidelines are not followed or when their standards are not met, forfeiture proceedings should be dismissed and the property returned to its owner. Deals whereby the property owner forfeits part of the property simply to settle when in actuality none of the property is forfeitable should not occur. The financial costs of contesting forfeiture should not be used as leverage by the seizing office to convince owners to submit to forfeiture. The seizing agency must not maintain forfeiture proceedings that are not legitimate, such as the seizure of property where the property is not subject to forfeiture. Internal guidelines must be implemented and adhered to in order to promote civil forfeiture while preventing its abuse.

VII. CONCLUSION

Congress faces a heavy burden in its 1997 session. Civil forfeiture reform measures must be undertaken to address the current flaws and abuses which permit the improper use of civil forfeiture. However, Congress must be leery of reform which renders civil forfeiture ineffective as a tool in the government's "war on drugs." Therefore, it is critical that Congress not act hastily or take extreme actions after considering Rep. Hyde's proposal and the proposal submitted by the Department of Justice. Drastic measures should not be adopted when less extreme measures aimed at comprehensive reform will provide effective reform while preventing undesirable consequences. Furthermore, law enforcement agencies must adhere to internal civil forfeiture regulations. If they do not attempt to curb internal abuses, they only force Congress and the courts to do it for them by narrowing the use of civil forfeitures in the war on drugs.

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173. TROLAND, ASSET FORFEITURE: LAW, PRACTICE, AND POLICY 55 (1988).

174. *See* TROLAND, *supra* note 173 (discussing federal asset forfeiture procedures and guidelines); *see also,* DRUG ENFORCEMENT ADMINISTRATION, DRUG AGENT'S GUIDE TO FORFEITURE OF ASSETS (1987).

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