

## FORFEITURE REFORM: A VIEW FROM THE JUSTICE DEPARTMENT

*Stefan D. Cassella*

PROFESSOR GURULÉ: For those of you who were able to be with us this morning, I think that the presentations by the participants were outstanding, raising again the number of complex issues that surround federal forfeiture laws, specifically civil forfeiture. I would like to, at this time, introduce our next speaker, who is Stef Cassella. Stef is the Deputy Director of the Asset Forfeiture Office in the U.S. Department of Justice in Washington, D.C.. Mr. Cassella has been a prosecutor since 1979, specializing in complex financial crime. He has been with the Justice Department since 1985, heading the Organized Crime and Racketeering and Money Laundering Section before joining the Asset Forfeiture Office in January of 1992. In addition to handling complex financial crimes, he has served as the senior counsel to the U.S. Senate Judiciary Committee from 1987 to 1989, where he worked directly with then-Committee Chairman Senator Joe Biden. He was responsible for criminal law issues and Justice Department oversight, and assisted in drafting federal statutes related to sentencing, money laundering and forfeiture. He has also been directly involved in drafting proposed legislation on behalf of the Department of Justice to reform civil forfeiture laws. I am referring specifically to the Forfeiture Act of 1995. Stef is going to address the broader issue of legislative reform and, at the same time, speak to the issue of the innocent owner defense. With that let me throw the baton to Stefan Cassella. Welcome very much to Notre Dame Law school. It is a pleasure to have you.

STEFAN CASSELLA: Thank you. One of the hardest things for a trial lawyer to do is to sit all morning while everyone else has a chance to talk and take shots at you and some of the things that you do, and not have the chance to stand up and respond. So now I have had lunch and I am happy to be your after-lunch entertainment. I am going to talk about the innocent owner defense and about some of the legislative reforms. But having heard the discussion all morning about double jeopardy, I have a couple of comments.

We lawyers, as we are want to do, tend to discuss these issues amongst ourselves in technical legal terms. We talk a lot about the evidence of double jeopardy, the precedent of the Supreme Court and the local courts and the footnotes and what they might be construed to mean, and so forth. What we tend to do—and all of us are guilty of this—we tend to lose the perspective. That is true not only in the double jeopardy context but it's true with respect to other areas of forfeiture law as well. I long believed, for example, before the Supreme Court decided *Austin*, that the government was ultimately going to lose the issue when we claimed that the Eighth Amendment's Excessive Fines Clause did not apply to civil forfeiture. Why? Because—notwithstanding the fact that there were two hundred years of Supreme Court precedent supporting the government's position—it is simply contrary to the traditions of the American people to say that someone ought to lose his house over a \$3,000

cocaine deal. Somewhere along the line the precedents began. Some court or some legislature was going to say, "You can't do that." That is ultimately what happened. I was surprised to see it come from the Court, because there was all that precedent. I assumed that Congress was ultimately going to impose upon us a reasonable measure of that rule regarding forfeiture because it just doesn't make any sense to be able to say that someone ought to lose his house over that small quantity of drugs. That is true with some of the other recent Supreme Court decisions, and, in retrospect, why they turned out the way they did.

I am equally confident that we are going to win the double jeopardy cases down the road, for the same reasons. Notwithstanding all the discussion that we heard this morning about what the various precedents on double jeopardy say, and what the footnotes in the various cases might mean, it doesn't make any sense to say that somebody who is serving a life term for drug trafficking ought to get \$500,000 in drug proceeds back so that he can spend it in jail because of some technical violation of the Double Jeopardy Clause. It just doesn't make any sense. Nor does it any make sense for the cases now being litigated under [28 U.S.C.] § 2255 to result in the way that my learned friends would have the courts apply. That is what's happening here. After a criminal defendant is thrown in jail, has pled guilty to criminal offenses, agreed not to contest the forfeiture of his property, the guilty plea was concluded, and the property was forfeited by some decree of court or administrative agency, the defendant entered into prison to serve his sentence; after all that, now because of the Ninth Circuit's decision in *405*, he says, "Wait a minute, my incarceration was a violation of my double jeopardy rights. Notwithstanding the fact that I plead guilty, and notwithstanding the fact that I agreed not to contest the forfeiture, I now realize that my double jeopardy rights were violated when I was incarcerated." Really, what he's got is a get out of jail free card. All [the drug dealers] who were ever incarcerated after agreeing not to contest, are suddenly now entitled to be released from jail. That makes no more sense than to forfeit *Austin's* house over a \$3,000 cocaine deal. It is my view that while the government may have been on the wrong side of the historical curve with regard to the application of the Excessive Fines Clause, we are on the right side of the curve with regard to the Double Jeopardy Clause. And that is why I think that these cases will ultimately turn out in favor of the government. Why, indeed, since *405* was decided last summer, the government has won something like 80% of the decided double jeopardy cases.

But that's not what I'm here to talk about. I'm here to talk about the innocent owner defense. I do want to start with a bit of a historical perspective that picks up on what Professor Blakey said this morning. In civil forfeiture, we go after the property. What does that mean? It means that we have cases called *United States v. \$405,089.23 in U.S. Currency*, in which the property is the defendant. And *United States v. 501 Depot St.*, which is an address. If this were an endangered species case, it would be something like, *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully-Mounted Sheep* [964 F.2d 474 (5th Cir. 1992)]. I don't know what was wrong with mounting the sheep but it was wrong to do it and the sheep was the defendant and that's why you have a case with that name. The point is that the property was the defendant. The property was the bad thing. You brought the case against the property. Because the case was against the property, the property owner's role in the offense was irrelevant. It just didn't matter. That seems like a peculiar rule. How can you say that a property owner's role in an offense doesn't matter when taking the property

away from them?

Well, in certain contexts—as Bob related—it does make sense. Because what we were talking about was taking property out of circulation that had no legitimate purpose. Taking the pirate ship that was used to smuggle goods. Taking the contraband goods themselves. Taking the whiskey still away from the moonshiner. There was no legitimate purpose, during prohibition, in having a whiskey still. So it didn't matter whether the moonshiner said, "I didn't know that moonshining was illegal." There was no legitimate purpose in having the still, so it was forfeited to take it out of circulation so that it could not be used to make more moonshine. Contraband goods. There is no lawful reason or right to own contraband goods. It is contraband by definition, and so taking it out of circulation by forfeiting it was all that the law was interested in, and it didn't matter whether or not the smuggler said that he didn't realize that smuggling was in fact illegal. The property itself was inherently bad or illegal to possess. Now, in those cases, the law didn't care what the owner did or didn't know. Those were pure *in rem* forfeiture cases. Purely remedial in nature, and that is why there is no protection for innocent owners. And every forfeiture statute, every civil *in rem* statute enacted since 1789, was like that. None of them had any protection for innocent owners. In fact, they are still on the books today, a large number of civil *in rem* statutes that have no protection for innocent owners. Child pornography, gambling, smuggling. They follow the historical rule that applies in a pure *in rem* case that the role of the property owner is irrelevant.

But in recent years, as Professor Blakey said this morning, we have expanded the concept of forfeiture. We no longer limit forfeiture to a purely remedial context from which it came. We forfeit, in drug cases, the proceeds of the crime. We forfeit property that was used to facilitate the crime. That often means people's houses, cars, businesses and bank accounts. There may have been no legitimate reason for owning contraband or for owning a whiskey still, but there are plenty of legitimate reasons for owning a house or a car or a business or a bank account. So when you expand forfeiture into that area, it no longer is irrelevant what the defendant knew; it becomes very relevant. It should be appropriate for a land owner to say, "I did not realize that my farm was being used, in my absence, by drug dealers," or, "I did not realize that when my brother borrowed my car, that he was going to use it to transport explosives," or, "I did not realize that the money that was sold to me at the currency exchange was money from a drug dealer."

Congress recognized that in 1984. I think that was the first time—I may be mistaken—when they got away from the notion of purely *in rem* forfeiture by enacting an innocent owner defense as part of the [amendments to the Comprehensive Drug Abuse Prevention and Control Act]. If it were purely an *in rem* statute, there wouldn't be an innocent owner defense. We got away from purely *in rem* statutes when innocent owner defenses became statutory. So, in drug cases, with respect to proceeds and facilitating property real and personal, for money laundering and for many other of the more modern *in rem* statutes, you have the concept of the owner's innocence being part of the statutory structure. What I call that, is a hybrid between a purely *in rem* statute and *in personam* statute. It is a hybrid because the property owner's role is now material. There are some problems with the way those innocent owner statutes were drafted and the way that they have been interpreted. There are, in fact, problems caused by the fact that Congress has not been particularly consistent in the way they drafted the statutes, nor have they been particularly clear in the wording of the statutes. There are still pure

*in rem* statutes out there which give no innocent owner protection at all. There are other statutes that protect an owner that lacks knowledge of the illegal act, and still others protect owners who lack knowledge and do not consent to the illegal act. Others say that you are an innocent owner if you have no knowledge, no consent, and not willfully blind. There are other combinations as well. All this refers to what it means to be innocent.

Congress has not done a better job in respect to what it means to be an owner. Some statutes protect "owners," some protect "owners and lienholders," some statutes protect persons with a "legal interest" in the forfeited property. Other statutes, "*bona fide* purchasers for value." Nor have the courts done any better than Congress in drafting or interpreting the statutes. These statutes mean very different things in different circuits. I am going to give some illustrations in a couple of different contexts as to this confusion and inconsistencies, both with respect to what it means to be innocent and what it means to be an owner. I am going to talk about—if I had my way—how the laws might be amended to resolve a lot of these inconsistencies and bring the statutes up to date.

Before I do that, let me say this about bringing the statutes up to date. When Bob talked this morning about the choices that confronted Senator McClellan in 1970, he said there were two. Congress could have chosen *in personam* forfeiture that carried with it the panoply of due process rights that apply in a criminal court case, or it could have chosen civil *in rem* forfeiture which did not have the kinds of due process protections that apply in a criminal case. There was, in fact, a third alternative, which was not considered then and has not been considered since, and it should have been. That is civil *in rem* forfeiture with the procedures implemented that do carry with them due process protections. Congress consistently, beginning in 1970, and continuing in 1978, in 1984, and in October of every even-numbered year since 1984—why it is that Congress only passes criminal statutes in October of even-numbered years, I don't know, but you can look it up; they always do, in 1984, '86, '88, '90, '92, and in '94—enacts civil forfeiture statutes which essentially say, "The procedures shall be those that apply in customs in admiralty," just cross-referencing those. The procedures that apply when we were forfeiting pirate ships and whiskey stills may have been appropriate in that day for those kinds of assets. But when you are forfeiting someone's house or car or his bank account or business, it makes sense to require some additional due process protection. Congress' failure to enact any legislation that has those additional due process protections is exactly the reason why judges have been called upon to implement due process protections by case law. They are legislating from the bench. That is what the Supreme Court has been doing, and that's what the lower courts have been doing. But judges don't make particularly good legislators. Different judges in different circuits come up with different interpretations, apply different solutions to what they see to be trouble in aspects of different statutes. And as a result, you end up with inconsistent application of the law all over the country. And layering that on top of the fact that Congress itself has been inconsistent with respect to what statutory words it chose in different statutes, you end up with an incredible mess. That is exactly what you have in the innocent owner area, and why you do need some legislation; and I will talk about the legislation at the end. But the theme is, to try to bring up to date the procedures in civil forfeiture so that the procedures are fair and are perceived as fair. So they apply to the kinds of property that we are forfeiting today in a civil context, as opposed to the kinds of property that were being forfeited

in the 18th Century under Admiralty Law. And, so that they apply consistently across the country.

But, at the same time, [we need] to recognize that civil forfeiture is still an extremely important aspect of federal law enforcement. We cannot simply do all forfeitures criminally. There are times when criminal forfeiture is appropriate and should be employed; there are other times when you simply have to do the forfeiture civilly: when the defendant is dead, when he's overseas, when he's a fugitive, when the property owner is not the person who perpetrated the offense, but is one who allowed his or her property to be used to perpetrate the offense. If we didn't have civil forfeiture, we could never forfeit a crackhouse; the absentee landlord allows his property to be used by his tenants to distribute drugs to schoolchildren as they walk by. And you can prosecute the tenants until you're blue in the face and the cows come home, you never forfeit the building. Why? Because they don't own the building. The absentee landlord owns the building. And he allowed this building to be used for this purpose, and so it should be forfeited.

And there are simply times when you don't need to bring about the punishment of the individual through the application of the full panoply of criminal sanctions. There are offenses for which civil sanction is sufficient. The interests of justice do not require every person who violates the law to be incarcerated in Lompoc penitentiary. If a doctor violates the law by over-billing the Medicaid program \$10,000, maybe the appropriate thing to do is to take the \$10,000 away from him, or double that amount, or suspend his license, or in some other way impose an administrative sanction. We don't need to put everybody in jail who violates the law. There are all kinds of times where you prosecute a defendant and his spouse is involved in the crime, but in a minor way, and there is no need to prosecute the spouse criminally and put both of them in jail. If you can achieve a sanction against the wrongdoer, who is less involved, by imposing a sanction civilly through forfeiture or otherwise, that is sufficient in the interest of justice. And the notion that we shouldn't have civil forfeiture, that it should be essentially repealed as Congressman Conyers would have done and that everything has to be done criminally, is to say that everyone who violates the law has to spend time in a federal penitentiary. I don't think that is what we need to do.

Now, what about some of the examples of problems in the innocent owner context? Suppose the statute says—as several of them do—that a property owner is innocent if he or she “lacks knowledge or consent” to the underlying act that gives rise to the forfeiture? Well, does that mean that the property owner has to prove that he or she lacked knowledge *and* did not consent? Or, would it be sufficient for the property owner to say, “I either lacked knowledge *or* I didn't consent.” Which is it? It's sort of an academic question; a nice, interesting logical conundrum. But it has real-life consequences. Suppose a woman—and it is usually a woman, so I will use that example—says, “I knew that my husband was a drug dealer, and I knew that he was dealing drugs out of our house, but I did not want him to do that. I told him to stop and I did everything that I could to stop it.” In the Ninth Circuit, that woman loses. She is not an innocent owner. The Ninth Circuit says that you must prove that you did not know about the offense *and* that you did not consent, so she loses because she is unable to satisfy the requirement that you prove lack of knowledge. In the Second, Third, and Eleventh Circuits, the wife would win because in those circuits she can say, “I knew but I didn't consent.” You have a split in the circuits on a very fine point that has real-life consequences. Can someone who knew about the illegal use of his or her property

nevertheless stop the forfeiture by showing lack of consent? In that example, we are talking about people or a person who owned the property or had an interest in the property at the time the crime occurred.

What about someone who acquires the property later? Someone who doesn't get the property until after it has been used or derived from an illegal event? For example, you have the bad guy and he uses his truck to transport drugs from one place to another, and after he does that, he gives the truck to his sister. He says, "I want you to have my truck. In fact, the reason that I want you to have my truck is because I used it to transport drugs, and the government is about to come and forfeit it from me so I want to give it to you to prevent that from happening." Sister, knowing that the dropped truck was used to transport drugs and is subject to forfeiture, takes title of the truck. Government comes along and wants to forfeit the truck. We say, "Truck used in drug trafficking crime: subject to forfeiture." Sister comes in and says, "Innocent owner." How can you be an innocent owner? You knew when you took the truck that it had been used in trafficking drugs. "Ah, I didn't know that *until I took title*. But the statute should be read to say that I am innocent if I didn't know about the crime *at the time it occurred*. I didn't consent to the truck being used at the time that it occurred. How could I have consented to the use of the truck at the time the crime occurred when I didn't own it then?" Anyone who acquires the property after the commission of the crime is an innocent owner [under that rationale] because such person, by definition, could not have consented to the illegal use of the property, if she didn't own it.

The Third Circuit said, "That's right." In the Third Circuit, Oscar Goodman, counsel for Nicky Scarfo, a notorious mafioso in Philadelphia, takes title to Nicky's Rolls Royce after Nicky uses it to transport drugs. Oscar Goodman comes in and says, "Innocent owner. I got the Rolls Royce after the crime occurred, how could I have consented?" The Third Circuit says he's right. The statute says that, and maybe the statute is a mess, but it is up to Congress to fix the statute and until Congress does, we have a statute on the books that says knowledge *or* consent and we read knowledge or consent disjunctively. We are going to read it disjunctively in this case as well—the after-the-fact transferee context—and that means that in every case an after-the-fact transferee will be able to get his property back. Even if he's Oscar Goodman, counsel to Nicky Scarfo, who knows he's getting a dirty Rolls Royce, because he, by definition, could not have consented to the use of property that he did not own at the time that it was used illegally. Judge Becker, for the Third Circuit [in *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3rd Cir. 1994)], he basically said that maybe this is nonsense, but it is not the court's job to undo nonsense that Congress has enacted.

Now the same facts—exactly the same facts—were presented to the Eleventh Circuit a couple of weeks later, and the Eleventh Circuit says "We don't promulgate nonsensical case law. It would make absolutely no sense to allow someone who acquires property, knowing that it is illegally derived or illegally used, to be anointed with the status of innocent ownership, and we will not do so here." And so, the Eleventh Circuit rule is that if you know you're getting tainted property at the time that you obtain it, you are not an innocent owner: what logically most people would assume it means not to be an innocent owner. You take property from someone who says, "Here's my drug proceeds, take it from me. Here is the automobile I used to transport the drugs. Here is the property that I used to launder the proceeds of my extortion offense." And that person would not be an innocent owner in the Eleventh Circuit. But you have a split in the circuits between those two.

Now, the courts also can't make up their minds as to what innocence means. I am not just talking now about this before-the-fact and after-the-fact transferee context, and whether you have to prove both knowledge and consent, or one, or the other. But what does it mean to consent? What does it mean to have knowledge? In the Sixth Circuit, they say a person lacks knowledge if he lacks *actual* knowledge. What he might have suspected or what he should have known doesn't matter. He didn't know, therefore he is an innocent owner. So, he says, "Yes, the money paid to me was \$40,000 in twenty-dollar bills wrapped in rubber bands hidden in a diaper bag, covered with white powder; but I didn't *know* it was drug money." And presumably, in the Sixth Circuit, that would be some sort of a defense. Other courts take a more, I would say, pragmatic view, and they say that a person is innocent only if he or she takes all reasonable steps either to prevent the use of his or her property in a crime or to find out whether the property that he or she is acquiring was used in or derived from a criminal offense. Key words are "*take all reasonable steps*." And those words come out of a Supreme Court decision by Justice Brennan in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)] in 1974, and I think that is a very sensible distinction. So, for example, in the Second Circuit, if you have a landlord who owned a building whose tenants were using the location for the distribution and use of drugs, the property is forfeited and the landlord comes in and files an innocent owner claim. He loses, unless he can show that he did everything that a reasonable person in his situation would have done to put a stop to the use of the property. It would not be sufficient for him to simply testify that he said, "Don't do that," or to put up a sign that said, "Just say no" on the building. Perhaps he would have been required to do something else like, call the police, evict tenants who were caught trafficking drugs, make sure that there was adequate lighting and locks on doors to provide security for law-abiding tenants. Doing the kinds of things that a reasonable person ought to do in order to prevent the illegal use of his property. You have a split in the circuits between those that feel the "all reasonable steps approach" is innocence, and those who require a much narrower standard and would allow someone to claim innocence based on lack of actual knowledge or something less than taking all reasonable steps.

Another source of confusion that I believe was mentioned before has to do with the question, "Who is an owner?" Does he have to be a *bona fide* purchaser, does he have to be a lienholder, does he have to be a person with some sort of title interest? An illustration of this comes from comparing the criminal forfeiture statute with the civil forfeiture statute. Let's take my fellow who uses his truck to transport drugs and now he gives his truck to his sister. Gives: keyword. It is a gift to his sister. If we bring a criminal forfeiture action against this fellow and the sister files claim and says that she is an innocent owner, she loses; because, the criminal forfeiture statute says that for a third party to prevail in a forfeiture action, she must have acquired her interests as a *bona fide* purchaser for value. We protect, basically, only those who, without realizing the fact that they were acquiring tainted property at the time, nevertheless gave value for it. Specifically, [someone] who opens the want ads and sees a truck for sale and says, "Hey, I want to buy a truck." He responds to the ad, buys the truck and never realizes that he is dealing with a drug dealer, gives value and acquires the truck.

In the civil statute, the Supreme Court has held that Congress did not limit the protection to *bona fide* purchasers; Congress protected anyone who was an owner. So, the sister who was the donee of this truck has the opportunity to proclaim her innocence. At the same time, it gives drug dealers, extortionists, terrorists, and con artists

the opportunity to insulate that property, at least from civil forfeiture, by transferring it to an innocent person. So passing title to a truck that I transported car bombs in, to my kid—who is innocent by definition—insulates it from civil forfeiture: and makes absolutely no sense. Justice Kennedy, in his dissenting opinion in *92 Buena Vista Avenue* says that this makes no sense whatsoever, and it leaves the government's forfeiture statute in a total mess. Justice Stevens says—echoing what Judge Becker would say later in the Third Circuit case—it is not up to the Court to fix stupid statutes; if Congress wants to fix this and limit it only to *bona fide* purchasers, that's what Congress is going to have to do. We, the Court, are not going to write it that way. Justice Kennedy would have read a *bona fide* purchaser requirement into the statute, but the majority did not do that. So, something else is going to have to be fixed in order to prevent this loophole in the law from being used by those who violate it.

Now, I have already said that the statutes are also inconsistent about protecting these owners and lienholders. And so, who are some other kinds of owners? Let me give you these examples. Suppose that this truck that is used to transport the car bombs had a lien on it from the finance company—from GMAC or something. Is the finance company an owner? I think so. Most courts have held that whether the statute uses the word "lienholder" or not, whether it says just "owner," or "owner and lienholder," lienholders are protected because they've got an actual secured interest in the property that is recorded. Suppose the truck used to transport this illegal property is titled by the bad guy in the name of his Aunt Tilly. Aunt Tilly has never seen the truck, doesn't know how to drive a truck, couldn't explain how you get a truck into first gear. He simply uses her name as the nominee on the title. Can she come in and file a claim as an innocent owner? In most courts, no. But there is a split on that decision. Some courts would allow the title owner to object to the forfeiture, most would require that she demonstrate some "dominion or control" over the property and is not merely a nominee. Suppose the truck that is being used to transport these explosives is in the possession of the guy driving it who is not the owner. Can the driver file a claim as an innocent owner based on the fact that he was just asked to drive the truck down the street? Again, a split in the courts. Some say a person in possession has standing to object to a forfeiture and others say, "no," that he would have to show that he owned the truck.

One of my favorites is: Suppose that the truck is owned by a fellow who borrowed some money from his cousin. His cousin says, "I never got any security for the loan, but I always assumed that if my cousin was unable to pay the loan he was going to give me the truck." So he had an expectation that if the loan was not paid, he would get the truck. When the government comes along and says, "forfeiture of truck used to transport explosives," cousin Alfonse shows up and claims [to be an] innocent owner because if you take the truck away from his cousin, he won't be able to repay his debt. Again, a split in the circuits. In most parts of the world, the courts would say, "Sorry, you're out of luck, you had no secured interest in the truck." If Alfonse lived in the Fourth Circuit, though, he might get a truck to drive.

An issue that Miriam deals with all the time, I'm sure, is, "What happens in community property states?" You have a person who has a large unexplained income. Maybe he robs banks, maybe he takes bribes, maybe he sells drugs, maybe he is a notorious mafia hit man and makes a lot of money from this particular enterprise. The spouse says, "My husband was raking in a lot more money than he seemed to be making at his job at the hot dog stand. I knew he was working a lot of nights but I didn't



know that he was a mafia hit man. Since this is a community property state, I, as his spouse, have a 50% interest in all the marital property and so therefore you cannot forfeit the proceeds of all his illegal activity from him, half of it belongs to me. I get to keep my marital property." That is an issue litigated consistently in the courts in California and elsewhere. What about a spouse's right to object to the forfeiture of criminal proceeds acquired during the marriage and whether that is good public policy?

How would I fix all this given the chance to do so? Let me make sure that it is clear that I am speaking for myself. I have worked on some legislative reform for the Department of Justice and I am hopeful that will be sent, in some form, to Capitol Hill soon. It has not yet been sent to Capitol Hill and the Justice Department, therefore, does not have an official position. There are many things that have to happen before it does. And so, when I make these suggestions as to how I would like to see things change, I am speaking for myself, and it may or may not ever be government policy.

The first thing that I would do is that I would draft a uniform innocent owner statute so that the same rules apply to all types of civil forfeiture: so that there is no longer the case of there being some statutes that have no innocent owner defense at all and others that have an innocent owner defense drafted inconsistently from other statutes. I would have the same statute apply across the board and I would have it apply in both criminal cases and civil cases so that the same rules apply both ways. I think that is just good government.

With respect to the knowledge or consent issue, I personally agree with the Second, Third, and Eleventh Circuits. I think that if someone has knowledge that a property is being used illegally, she should nevertheless have the opportunity to argue in court to a jury that she took all reasonable steps to prevent the illegal use of the property. As to what those steps would be, would be up to a jury to decide. I will talk more about that in a moment . . . . Now, the Ninth Circuit—that's the conjunctive circuit—has a point in one regard. A person who consents to the illegal use of his or her property should *not* be able to defend by claiming lack of knowledge. How can you consent to something, of which you have no knowledge? Well, this way. I consent to your use of my boat, with the concealed compartment, perfect for smuggling, on the next moonless night, in Smuggler's Cove. But, I never know if you ever used it or not. I consented to you using the boat but I never knew if you actually used it. What would be worse, I didn't care whether you ever went and used it. I don't think that the person who consents should be allowed to argue, "I consented but I had no knowledge that it actually resulted in illegal use." I think that if a person has knowledge, they should be allowed to show lack of consent but if they consented, they should also have to show that they had no knowledge.

What about the after-the-fact transferee? The guy like Oscar Goodman, the drug lawyer who acquires the property after it was used. It should be irrelevant what someone knew or didn't know before the crime occurred. That person should be judged by what he or she knew at the time they took title to the property. So, if someone takes title to the property, knowing at that time that it is subject to forfeiture because it was used illegally, he or she is not an innocent owner, by anyone's definition, and that person should not be allowed to assert an innocent owner defense. The relevant question should be, "What did you know when you acquired the property?" That is the rule in criminal cases and should be the rule in civil cases.

Just as it is the rule in criminal cases that you have to be a *bona fide* purchaser, I think that in a civil case, the rule should be you have to be a *bona fide* purchaser in

order to qualify as an innocent owner when you accepted the property as a transferee after the crime occurred.

What about the standards? What does it mean to be innocent? I think that a person should be considered an innocent owner if he convinces a jury of people drawn from the community that he did whatever a reasonable person would do in that circumstance, to prevent the illegal use of the property. If it is a wife and she says that she knew her husband was a drug dealer but he was abusive and it was not possible for her to do any more than what she did—which was, perhaps, she complained to friends, may have made a call to the police but only once; otherwise, she was powerless to object to this continued drug deal in her house. If the jury accepts that is what this person, in this circumstance, is capable of, and they could not have done any more, that person is an innocent owner. If the jury were to find of that landlord who put up a sign that says, “Just say no” at his tenement house, if that is what a person would do in that circumstance for prohibiting hypodermic needles to school children, then so be it. But if the jury said, “Wait a minute, you could have changed the locks, you could have evicted people, called the police and other things,” that person would not be an innocent owner. A case came up in the Second Circuit where two parents who own real property claimed that they were powerless to stop their children from selling drugs on the premises and therefore were innocent owners. The court said, “Well, maybe if your children were minors we could accept that because you can’t throw your minor children out of the house, you have to do your best to raise them. But these ‘kids’ were 30 years old. You could have thrown them out of the house or called the police. You didn’t do that. You let them live there, let them sell drugs and then claimed that you were an innocent owner because you couldn’t do anything about it.” The Second Circuit said, “You are not an innocent owner.” Basically, what the community standard would be for innocence and what is reasonable.

Definition of an owner. Who is an owner? I said before that I think that it should be a *bona fide* purchaser: no more insulating property from forfeiture by giving it to six-year old children in trust. The same rule that applies in the criminal cases should apply in the civil cases. I would protect lienholders and other secured creditors. If someone really has what the law recognizes as a secured interest in property, and that person—a finance company, bank, mortgage company, whatever—is truly innocent, then that person should have his interest in the property protected as if he were the actual owner of the property. But naked legal title should not be sufficient. Someone who simply has his name on the title of an automobile, boat or airplane, but has never seen it or has exercised no dominion or control over it, as merely a nominee, should not have any right to intercede in a forfeiture action and protect the property from forfeiture.

With respect to community property, a spouse should be entitled to take advantage of state property laws in all respects with respect to property acquired during a marriage. If that property was used to facilitate a crime, that spouse should be able to say, “I have an interest in the property and I didn’t know that it was being used to facilitate a crime.” But there should never be any opportunity to rely on state property law to claim ownership in criminal proceeds. No one has a right to own or possess or enjoy criminal proceeds, whether he or she is the person who committed the crime or the person who, by virtue of simply being married to the wrongdoer, acquires an interest in the property. Criminal proceeds should be either forfeited to the government and kept by the government, or forfeited to the government and used to be restored as

property to the victims—if it was a crime, such as a fraud, that had victims. In white collar cases, that is the importance of forfeiture; as an opportunity to get property back to the victims.

MR. TROBERMAN: Are we talking gross or net?

MR. CASSELLA: Gross or net. I heard you say this morning that you think that if a drug dealer sells drugs for \$15,000, but needed a loan from the bank for \$10,000 to get the drugs from his supplier, he should be able to deduct the cost of the loan to the bank and only the net should be forfeited. If it turns out that this fellow in Oklahoma was paid a million bucks to blow up the office building and we find a million bucks in an account were forfeited, are you telling me that we should be able to give him credit for the cost of the explosives?

MR. TROBERMAN: No, but what I'm telling you is that in the community property example that you just gave, if the husband takes \$10,000 out of the community bank account—that's not ill-gotten gains—and uses that to buy drugs and then sells them, under your proposal, the wife would lose it all. But you also said that she shouldn't lose her community interest in legitimately acquired assets.

MR. CASSELLA: I think that when someone sells drugs for \$15,000, \$15,000 is the proceeds. If he gets a million for blowing up a building, then a million is the proceeds. The fact that he incurred expenses on the way—having to rent the truck—shouldn't matter . . . . [In short, the wife] loses. Because her husband spent their community property on whatever he wanted to spend it on. If he wanted to spend it on renting a truck so he could blow up a building, if he wanted to spend it on buying drugs on consignment, he spent it. The proceeds are the proceeds, and the proceeds get forfeited.

PROFESSOR BLAKEY: What do you do about tort claimants?

MR. CASSELLA: Tort claimants lose, because they don't have any legal interest in the property, if it's just a generalized interest. If it's their property, then, of course, it's different.

PROFESSOR BLAKEY: Yes, but I'm not asking about current law. I'm asking what it ought to be.

MR. CASSELLA: Yes, I think that's what it ought to be.

PROFESSOR BLAKEY: As between the government and the victim of the crime, why should the government forfeit and prevent the victim from being able to sue the perpetrator to recover the claim?

MR. CASSELLA: I think that if a set of victims are tortiously deprived of their property, say in a fraud . . . .

PROFESSOR BLAKEY: No, no, no. Just the straight one.

MR. CASSELLA: One victim?

PROFESSOR BLAKEY: Well, one victim, and it's mental pain and suffering.

MR. CASSELLA: It makes a lot of difference to me.

PROFESSOR BLAKEY: Well, I want to come to the other one, but it's a different issue. First, let's take the victim. Why should the government's coffers rise, and the assets of the perpetrators sink, and the victim—who would otherwise have a claim—be second, in effect, and therefore lose?

MR. CASSELLA: The government's coffers should rise only temporarily and the government should then turn the property over to the victims as restitution. That's the way forfeiture ought to work in fraud crimes and other crimes involving victims. It does work that way now in criminal forfeiture. For reasons that I have never been able to understand, Congress has never allowed us to use civilly-forfeited property to pay restitution to victims, except in bank fraud cases. And that's got to change. We are already making property available to victims. But, I don't think that victims ought to be claiming ownership of the property, because if the victims could claim ownership of the property, what would happen is this. Say there's more than one victim. Each victim's property shows up in the defendant's account sequentially. The last guy is going to be able to say "that property is traceable to my loss," and is going to get all the money—100% of his loss—back, where the earlier victims are going to get less than 100%—or perhaps none—if the bad guy spent some of the money. And it does not seem fair to me that merely because of the fortuitous circumstance of being the last-victimized person, that I get all the property by claiming ownership in a forfeiture case where my brother and sister victims get nothing. If the property of the bad guy is forfeited, we have accomplished two things. We, first, use the power of the government to deprive the bad guy of his property—which is often more effective than allowing individual victims who may be of meager means to have to go in and sue. So we probably get the bad guy more quickly and more surely, and then we're able to distribute the property among all the victims fairly, on a *pro rata* basis.

PROFESSOR BLAKEY: Would you set standards for restitution and require the government to do it, or leave it discretionary, the way it is now?

MR. CASSELLA: I would leave it discretionary. That is something that I feel strongly about. I would leave it discretionary because otherwise, if you say that the government must do this, you run the risk that some victim is going to claim that gave the victim a cause of action against the government, and we'd be in court for the next years litigating with the victims. That's not who we want to be litigating with. We want to be serving the victims, not litigating against them. And, rather than inadvertently handing them a cause of action, it would be better simply to get the money back to the victims. And there is no reason to believe that the government wouldn't want to give the money back to the victims, because it's both politically popular to do and it is the right thing to do. And that's what we do in the cases where we're allowed to do it. It's frustrating for me, to be sitting in a policy position, to have to tell Assistant U.S. Attorneys around the country who forfeit property civilly in fraud cases, that they cannot

give the property back to the victims. They want to give it back to the victims; the cops want to give it back to the victims; the victims want their property. The statute says you cannot restore property to victims in a civil case. It makes no sense.

PROFESSOR BLAKEY: What about prior transferees? . . . You are into pharmaceuticals, and I sell you—legitimately sell you—a bunch of drugs. I am not now a secured creditor of yours—and I have not yet been paid by the company—then misbehavior occurs and the company is now forfeited. I am a trade creditor. I put my property into the estate and I now am the holder of a claim against the estate . . .

MR. CASSELLA: But you're not a secured creditor, you're a trade creditor.

PROFESSOR BLAKEY: In other words, what I did is I took the estate, and I put my property into the estate. And I am now a holder of a claim against the estate.

MR. CASSELLA: You have a cause of action. The wrongdoer is now out of business and you are in the same position as the person who says, "Wrongdoer, you ran over my foot with your car and I have an injury."

PROFESSOR BLAKEY: No, the real difference is that in the tort situation, I have a loss but the perpetrator didn't have a gain. In this situation, the perpetrator had a gain, and the government now when it forfeits the estate of the perpetrator is getting the "benefit of the gain" that I conferred on the perpetrator by the transaction, done innocently.

MR. CASSELLA: You mean that the perpetrator retained the gain, and the government therefore enjoys it; which would happen in some cases and not others.

PROFESSOR BLAKEY: Well, let's take the one where it does happen.

MR. CASSELLA: All right. I don't think that a general creditor has an ownership interest in property. I think a general creditor, a tort victim, or any other . . .

PROFESSOR BLAKEY: Do you see a difference between a tort claimant who . . .

MR. CASSELLA: The difference between a tort victim whose claim is in pain and suffering, versus a tort victim whose claim is in embezzlement . . .

PROFESSOR BLAKEY: Sure.

MR. CASSELLA: . . . where there actually was a private property, and the bad guy did enjoy the property? I don't see that one as any different from the contract creditor or the trade creditor. I think for all of these people, they do not have an ownership interest. They don't own the property. They have a generalized, undifferentiated interest in the entire estate of the bad guy, and if the government forfeits a given asset from the bad guy, there is nothing invalid about it. What we want to protect against is the government's forfeiture of property from whomever the government deems to be a bad guy, when that property is in fact the property of someone else. That's not the right thing to do. We convict "X" of committing a crime, we forfeit "X"'s property, or if

we find that "X" allowed his property to be used in the commission of a crime—knowingly—we forfeit "X"'s property. We should not be about forfeiting "Y"'s property if it turns out that that's who's the real owner.

PROFESSOR BLAKEY: Stef, some of this is sort of metaphysical, on what you mean by property. Let's kind of step back and say—as between these parties—who gains and who loses? And does the government have an interest in what is forfeited? I mean, if the government wants to raise money, let it go raise it through taxes. And, if it wants to deprive the bad guy of the money, let's do it by forfeiture. But now, as between the "unsecured creditor" whose assets did augment the estate, and the government, choose between those two in a kind of equitable balance.

MR. CASSELLA: We do that all the time. I mean, there are any number of times when we have a case where the number of claims against a defendant and his estate far exceed the value of the estate. And rather than forfeit anything we simply tell the parties, "What we're going to do is put the defendant in bankruptcy and let the bankruptcy trustee parcel out the property." That's what bankruptcy trustees do.

PROFESSOR BLAKEY: If you do it that way rather than enforce the forfeiture against them, you're going to be fifth [in line at bankruptcy], and an unsecured creditor is going to be fourth.

MR. CASSELLA: I don't want to be a bankruptcy trustee. I don't want to spend my time parcelling out money . . . . That's what the problem is in the BCCI case: is that you want me to be the guy parcelling out money to your clients at the expense of the other four million victims around the world that also have claims. Whereas, I want to be turning the money over to a liquidator to do that job . . . .

Let me just finish talking about the other legislative ideas, beyond the innocent owner defense that we have been talking about. On the reform side of the ledger, I accept the notion that the traditions of the American people are that the government prove that a crime has occurred and not the property owner have to prove that a crime did not occur. So I support the notion that we change the historic structure of the admiralty and maritime rules as they apply in civil forfeiture to put the burden of proof on the government. The government should have to prove, by a preponderance of the evidence, that a crime occurred and that this property is involved in the crime or was derived from the crime. To me, the current situation where the burden of proof is on the property owner is another anachronism from the days left over of pure forfeiture when it was derived from admiralty. And that's not the way it should apply when bank accounts and businesses and cars and houses are subject to forfeiture. So, the government has to prove that the property is forfeitable in a civil case just as we now have to prove, by a preponderance of the evidence, that the property is forfeitable in a criminal case.

Also, on the reform side of the ledger, I think the time limit should be expanded. I think that someone should get thirty days in which to respond to a notice that the property is being forfeited. I also think that, in all civil cases, someone should get twenty days in which to answer a complaint—right now, I think it's only ten. I think the time should run from the time when you receive notice of the complaint and not at the time the complaint is actually filed. So, expand those time limits. Give people their

day in court, give them access. I would not agree to some of the proposals I've seen that would make the time limits something like 60 days, 180 days, months at a time. Why not? Because there are counter-balancing considerations; there are costs involved. Something like 85% of all forfeitures are never contested by anyone. And these involve assets that need to be stored and maintained. When you increase—as we're proposing—that the number of days between seizure and forfeiture be doubled, or increased by a third or whatever, you are increasing the cost of storage by that amount in 85% of the cases where there's no claim filed. If you were to extend the period of time to 60 days or 90 days, or 120 days you would be doubling, tripling, quadrupling the costs that the government has to incur for no purpose when no one is going to file a claim for the property. But I do think some reasonable extensions in time make sense to give everybody a sense that this is a fair proceeding.

I would also provide that the cost bond requirement be waived, in some circumstances. I would not abolish the cost bond across the board right away, although I personally would like to abolish the cost bond across the board. It bothers me that someone has to pay money to go to court to get his property back. On the other hand, there's got to be some mechanism for keeping frivolous claims out of court. DEA, FBI, Customs and Secret Service are out there day in and day out seizing quantities of money from launderers in airports, on trains, in automobiles, and so forth, that no one is contesting, right now. And the theory is that if somebody could get into court without having to post bond and risk the loss of the bond, that all kinds of characters would come out of the woodwork and start claiming those assets just to tie us up in court in the hope that the U.S. Attorneys Office would have to, because of the flood of cases, set a declination policy and let the smaller ones go. So how do you reconcile these two interests? And the way I think you reconcile them is to allow the Attorney General to waive the cost bond requirement in some categories of cases, as a first step, and see whether or not it results in a flood of cases. For example, suppose we got into legislation and we waived the cost bond in any case involving a bank account. That would be a good place to start, because, after all, the largest justification for the cost bond—in addition to the avoidance of frivolous claims—is that we used the cost bond to pay the additional costs of storage and maintenance that accrue when there is a contest over the forfeiture. There isn't any cost of storage and maintenance when you seize a bank account. So, maybe if you waive the cost bond in bank account cases, if we do that and defense attorneys all over the country began filing all kinds of claims, because it didn't cost anything anymore to file the claims, then we'd say, "Aha! Those on the side of the argument who said 'You can't do away with the cost bond, you'll only end up with a flood of claims,' will be shown to be correct," and we will not be able to do this. On the other hand, if that doesn't result in a flood of litigation, then maybe we can waive the cost bond in other cases, and ultimately get to the point which I think we should be at, which is no cost bond in any case, so that people have now one less obstacle to get their day in court.

I would allow claimants and the government to seek stays in civil cases. I think the government ought to be able to seek a stay on the ground that the discovery in a civil case could jeopardize an ongoing grand jury investigation or undercover investigation. Currently, we are not able to get a stay on that basis, unless the court exercises discretion and chooses to do so. But, by and large, we cannot get a stay in that situation until the indictment is filed. On the other hand, I think that there are times when the defendant ought to be entitled to a stay because the discovery in the civil case

could jeopardize his or her Fifth Amendment rights of self-incrimination. I don't think a person should be put in the position of having to waive the Fifth Amendment in order to defend his property, or evoke the Fifth Amendment—and lose the property—in order to protect himself in a parallel criminal case. So I would now expand the rights on both sides to stay civil cases.

I would provide—which some courts already provide, and others do not—for a hearing in a criminal case where the property is restrained before trial, detailing whether or not the defendant needs this property to retain counsel—to retain counsel under the Sixth Amendment right to counsel in a criminal proceeding—and whether or not the property is subject to forfeiture. If the property is forfeitable, as the Supreme Court said in *Calpin & Drysdale*, it may not be used to retain counsel. But there has to be—it seems to me—a hearing on that question, pre-trial. Because otherwise, the finding that the property is not forfeitable comes too late to the defendant who wants to use the property to hire counsel in the criminal case. And, the right has to be exercised by a time when it's possible to do the person some good. So, I would allow for a hearing on that question. Where I would draw the line is—in those instances, which come up more in the Second Circuit than anywhere else—where defense counsel comes in and says, “We’re going to have a hearing here on whether or not this restrained property is needed for attorneys fees.” And begins the hearing by putting the government agents on the stand and conducting discovery. And learning all there is to learn about what went on in the grand jury investigation and the undercover investigation. And looking behind the grand jury’s finding of probable cause for the indictment. I don’t think those things are material to the question of whether or not there’s probable cause for the forfeiture and whether or not the person needs property for attorney’s fees. The government ought to find a way to make his property available or make a determination available on the use of his property for attorneys in a timely way. But, not in a way that opens up every case to a mini-trial on the underlying criminal issues before you even get to the point where the trial begins—and that is exactly what some defense attorneys have tried to do.

Finally, as we’ve already discussed, I would allow in all forfeiture cases for the forfeited funds to be used to pay restitution to the victims.

Now, at the same time, there’s an awful lot that needs to be done legislatively on the pro law-enforcement side of the ledger. Fixing all of the problems we discussed, with respect to innocent owners would certainly be a high priority. And I suggest we make the changes that I talked about. But, there’s other things. If the government is going to assume the higher burden of proof in civil cases, as it ought to, because this is really no longer a purely *in rem*, remedial, action; this is a pro-law enforcement sanction that we are pursuing in cases involving the facilitating of property, and proceeds, and so forth. If we’re going to be doing this, for law enforcement purposes, and we’re going to be satisfying a high burden of proof as a result, then we should have the tools of law enforcement, the same tools that are available to law enforcement in criminal cases should be available in civil cases, as well. And today, they are not. In criminal cases, we can issue grand jury subpoenas to collect evidence. In civil trials, there is no ability to collect evidence before the complaint is filed. And after that, we have the rules of discovery under the rules of civil procedure. So, we need the ability to issue civil subpoenas to collect evidence. We need the ability to get access to records—like court reports and so forth. Under the same protections and circumstances that prevail in criminal cases, we need to have access to those records in civil cases.



Again, to satisfy our burden of proof.

Ironically, today, seizure warrants are available in civil cases, but not in criminal cases. If I see property that I think is derived from a terrorist act and it's in a bank account and I think that it might zip off to Beirut by electronic transfer in a matter of hours, I can seize it with a civil seizure warrant, but I can't seize it with a criminal seizure warrant. And that doesn't make any sense to me. It forces the government to pursue a civil forfeiture case, when the government would rather have pursued a criminal forfeiture case. So, there are going to be seizure warrants that apply in civil and criminal context, equally. And there ought to be a provision—as there is now in drug cases, but not in others—to allow for warrantless seizures in exigent circumstances when one of the exceptions to the Fourth Amendment warrant requirement would apply. In drug cases, I can have an agent seize a bank account, based on probable cause and exigent circumstances, without getting a warrant. In a money laundering case, in a bank fraud case, I can't. And that doesn't make any sense. If there's exigent circumstances, and the Fourth Amendment warrant exception applies, we should be able to seize the property to make sure it doesn't go anywhere.

In the realm of procedures, in addition to the ones I discussed on the reform side of the ledger, there's an awful lot of things that need to be done to make these things make sense on the criminal side. Some Circuits allow us to restrain pre-trial—in a criminal case—substitute assets. And some Circuits do not allow us to restrain pre-trial, substitute assets. So for example, in the Fourth Circuit, I get an indictment which says Joe Doe committed crime acts, the proceeds were a million dollars, he no longer has the million dollars, we will seek in substitute assets the million dollar antique car collection that he now has. And we can get a restraining order in the Fourth Circuit preventing him from alienating the antique car collection while the indictment is pending. In the Ninth Circuit, if Miriam does that, she names him in the indictment and the defendant says thank you very much for letting me know you're going to forfeit my antique car collection, it is now up for sale. And he can sell it to anyone he wants before trial and the government cannot restrain him, because the Ninth Circuit does not allow us to restrain substitute assets, pre-trial. So I would fix that legislatively.

I would provide for the issuance of the order of forfeiture in criminal cases right after the jury verdict, so there isn't a long delay between the jury verdict and time of sentencing—which is now when we get the order of forfeiture. Thus, we can get the procedure started a lot earlier and afford the third parties their hearing rights a lot earlier. I would authorize the courts to order the defendant to repatriate his property to the United States. If he's sent his property off to Switzerland, I would make it part of the court's authority to order him to bring it back from Switzerland. The court has jurisdiction over him, the person, in a criminal case, and the court would have the authority to do that.

And finally—in the substantive law this is going to be the most important—I think we ought to be allowed to forfeit the proceeds of all crimes. I don't know why it is we think, in terms of public policy, it's wrong for a drug dealer to retain drug proceeds, it's wrong for a person that commits bank fraud to retain bank fraud proceeds, but it's not wrong for a person who commits murder-for-hire to retain murder-for-hire proceeds. If criminal proceeds should not be retained by the wrongdoer, they shouldn't be retained by the wrongdoer, and there should be forfeiture across the board for all criminal proceeds . . .

I would define proceeds to mean gross, not net, so we could stop litigating this

issue, and having people who didn't commit the crime try to deduct the cost of explosives.

I would allow forfeiture for guns used to commit felonies in crimes of violence, vehicles used for gun-running and those kinds of things.

And, finally, to address some of these double jeopardy problems, I would allow criminal forfeiture everywhere there is now civil forfeiture. As Bob's history—we've come full circle here—recited this morning, once upon a time there was only civil forfeiture. And criminal forfeiture came about in 1970, and it's been added since then. [Even today], most forfeiture statutes are civil. And so you have this peculiar circumstance where in a case where the only forfeiture statute is civil—like gambling—and you're in the Ninth Circuit, or Oz, or some other place where the double jeopardy rule applies, the government in a gambling case has to decide, "Do I prosecute the gambler or do I take his property?" But I can never do both. Because I cannot, notwithstanding Judge Reinhardt and his opinion in *405*, do both in a criminal case if there isn't a criminal forfeiture statute: for gambling, or child pornography, or smuggling, or a whole lot of other things.

MR. EDWARDS: Unless you go RICO.

MR. CASSELLA: Unless everybody is a RICO defendant and gets twenty years in jail.

MR. EDWARDS: But you don't want to do that.

MR. CASSELLA: I don't think so. So, I would allow for—across the board—if the law provides for civil forfeiture, it should provide for criminal forfeiture, as well. Thank you all very much.