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## CRIMINAL FORFEITURE OF ATTORNEY'S FEES UNDER RICO AND CCE

LINCOLN STONE\*

*[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.*

*Boyd v. United States*, 116 U.S. 616, 635 (1886).

Criminal forfeiture is a sanction imposed to dispossess persons of property by reason of some wrongdoing. On the theory that forfeiture of the assets involved in crime disturbs the economic power base of criminal organizations, Congress has declared criminal forfeiture statutes to be integral to government's battle against criminal racketeering and drug trafficking. In this regard, through the Comprehensive Forfeiture Act of 1984,<sup>1</sup> Congress amended criminal forfeiture provisions of both the Racketeer Influenced and Corrupt Organizations statute<sup>2</sup> (RICO) and the Continuing Criminal Enterprise statute<sup>3</sup> (CCE) to provide clearer authority for law enforcement to pursue forfeiture of assets. The 1984 Act authorizes, for example, government forfeiture of the proceeds of criminal activity and, in some instances without prior notice or hearing, court-sanctioned pre-trial restraints on property in order to guarantee its availability for forfeiture upon conviction of the defendant. At the same time, however, the 1984 Act directs the government to comply with certain procedures designed to protect persons with adverse interests. For instance, the government must submit to a post-trial hearing the question whether a criminal forfeiture verdict operates to divest petitioning third parties of their interest in the forfeited property.

Any long-term success derived by law enforcement from

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1. Pub. L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2040 (to be codified at 18 U.S.C. § 1963, 21 U.S.C. §§ 848, 853-855).

2. Organized Crime Control Act of 1970, tit. 9, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. §§ 1961-1968 (1982)).

3. Comprehensive Drug Abuse Prevention and Control Act, tit. 2, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

the use of forfeiture under the 1984 Act depends not only on how regularly forfeiture is pursued, but also on how well procedures of the 1984 Act protect defendants and interested parties with valid objections to forfeiture. The adequacy of procedure under the 1984 Act is especially suspect when the government seeks forfeiture of attorneys' fees. In attempting to forfeit the assets used by a defendant to pay attorneys' fees, the government endeavors to curb the practice of paying lawyers with the fruits of crime and of disguising the assets of criminal organizations as attorneys' fees paid for services rendered. The government pursues this laudable objective, however, at the expense of jeopardizing a defendant's right to meaningful representation in a criminal proceeding. In short, a prosecutor may limit significantly the pool of counsel available to the defendant and constrain the attorney's ability to act on the defendant's behalf merely by indicating an intent to seek forfeiture of any fees paid, even though the prosecutor may have no grounds to suggest that fees will be subject to forfeiture. Because of the potential adverse effect on the defendant's ability to retain adequate representation, this article argues that the 1984 Act as applied to attorneys' fees is unconstitutional, and recommends an additional hearing to remedy the problem. In recommending an amendment to the Act, this article relies primarily on an argument grounded in terms of the right to a fair trial flowing from the sixth amendment and from fifth amendment due process, rather than on an argument based solely in terms of property rights.<sup>4</sup>

In taking this position, this article is intentionally limited in focus, and therefore, examines only a few provisions of the

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4. A focus on property rights, in light of the historical underpinnings of forfeiture, would yield to a due process balancing, inevitably resulting in fewer protections to the defendant in the face of government forfeiture efforts. Note the following common law view of forfeiture:

The true reason and only substantial ground of any forfeiture for crimes consist in this: that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him.

1 W. BLACKSTONE, COMMENTARIES \*299.

1984 Act. Without denying that criminal racketeering and drug organizations wield vast economic and social power,<sup>5</sup> this article neither claims forfeiture is a necessary means for stifling the power of criminal organizations, nor contests the prevailing U.S. Supreme Court jurisprudence regarding criminal forfeiture.<sup>6</sup> This article, nevertheless, assumes that whatever truth dwells in the argument that "institutional interests" are served by ensuring criminal defense work remains a profitable enterprise,<sup>7</sup> the "institutional" argument does not justify acceptance of the practice of improving the quality of the defense bar through fees paid and knowingly received from the proceeds of crime.

Section I of this article briefly introduces the debate con-

5. The core of organized crime activity is the supplying of illegal goods and services—gambling, loansharking, narcotics and other forms of vice—to countless numbers of citizen customers. But organized crime is also extensively and deeply involved in legitimate business and in labor unions. Here it employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal profits from the public. And to carry on its many activities secure from governmental interference, organized crime corrupts public officials.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 187 (1967).

On the infiltration of labor unions, see G. BLAKEY, R. GOLDSTOCK & G. BRADLEY, *LABOR RACKETEERING: BACKGROUND MATERIALS* (1979).

Forfeiture, however, is not limited to the activities of organized crime. "White collar" crimes bilk society out of about \$50 billion per year. See U.S. CHAMBER OF COMMERCE, *WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS* 6 (1974).

6. See *Russello v. United States*, 464 U.S. 16 (1983) (forfeiture of the proceeds of criminal activity).

7. See, e.g., A. DERSHOWITZ, *THE BEST DEFENSE* (1982):

The zealous defense attorney is the last bastion of liberty—the final barrier between an overreaching government and its citizens. The job of the defense attorney is to challenge the government; to make those in power justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves.

*Id.* at 415. See also P. WICE, *CRIMINAL LAWYERS, AN ENDANGERED SPECIES*, (1978) (defense of criminals is not so "profitable"); Margolin, *Forfeiture of Attorney Fees and the Future of the Criminal Defense Bar*, *CHAMPION*, June 1985, at 10 (claiming forfeiture of attorneys' fees is part of an attempt to nationalize the retained bar, effectively eliminating all the best attorneys from the field); Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1984) (suggesting the judicial system has an "institutional incentive" in preventing the reduction of the quality and availability of criminal defense counsel).

cerning government efforts to forfeit attorneys' fees under the 1984 Act; Section II presents an historical context for RICO and CCE criminal forfeitures and identifies a few of the peculiarities of forfeiture; Section III addresses the modern revival of criminal forfeiture, including several provisions of the 1984 Act; Section IV argues that attorneys' fees are not excepted from forfeiture under the 1984 Act; Section V considers the counter-argument based on right to counsel of choice; Section VI offers a constitutional objection to forfeiture of attorneys' fees based on the defendant's right to a fair trial; and Section VII recommends that Congress amend the 1984 Act to provide for a pre-trial hearing which will facilitate a fair trial despite government efforts to forfeit attorneys' fees.

### I. THE DISPUTE OVER ATTORNEYS' FEES

Under the 1984 Act, the government may indicate its intention to forfeit attorneys' fees directly, by including in an indictment a request for forfeiture of all the defendant's assets, or more circuitously, by moving for a pre-trial restraining order covering the defendant's assets including those set aside to pay fees. While the restraining order prevents transfer or dispersion of the assets, the government subsequently might include a forfeiture of fees provision in the indictment after acquiring further information, such as attorney-client fee information compelled by a grand jury subpoena. Interpreted literally, the statute appears to allow the government to pursue either course of action; nothing on the face of the 1984 Act excepts attorneys' fees from the long arm of criminal forfeiture.<sup>8</sup>

The extensive reach of the new forfeiture law has stirred scholars and practitioners enough to inspire some to object to the law as unconstitutional and "draconian."<sup>9</sup> This dissent es-

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8. The term "fees" does not appear in the statute. Of the scant legislative history existing, nothing speaks to the issue of fees, although prior to the 1970 Act, Congress did authorize an attack on the economic power of criminal organizations "on all available fronts," S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969). An earlier draft of a similar forfeiture statute, stating that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel," by itself would not appear to resolve the issue of attorneys' fees. See *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985) (suggesting that the language is persuasive).

9. Krieger & Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737 (1984); *Powerful New Law Pulls Rug from Under Drug*

calates when the government attempts to forfeit attorneys' fees.<sup>10</sup> The objections listed in a recent ABA Section Report typify the response of the defense bar to forfeiture of attorneys' fees:

1. It denies an accused the right, under the Sixth Amendment, to retain counsel of his or her choice;

2. It impedes the ability of such retained counsel to render effective assistance;

3. It impairs the relationship of confidence and confidentiality between an accused and his or her counsel;

4. It allows the government to manipulate the roster of counsel, or to disqualify counsel by seeking to compel testimony by the lawyer against the client;

5. It discourages or disallows competent attorneys from agreeing to represent clients in criminal cases which involve allegations of forfeiture; and

6. It diverts the efforts and energies of attorneys from the preparation of the defense of an accused by requiring them to litigate issues related to their attorney-client relationship.<sup>11</sup>

In sum, two basic objections exist. First, when the government, by indictment, requests forfeiture of fees or, by restraining order, freezes assets set aside to pay defense counsel, the government allegedly has restricted constitutional protections insofar as the defendant might not be able to retain counsel of choice or counsel of a certain caliber. Second, in order to obtain fees for services rendered, the attorney must assert a claim in a post-trial, third-party hearing<sup>12</sup>—a setting which may require disclosure of confidential attorney-client communications.

This attack on the statute clothes objections to the forfei-

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*Dealer's Feet*, Chicago Tribune, July 28, 1985, § 2, at 1, col. 1.

10. Buffone, *Forfeiture of Attorneys' Fees and the Effect of the Crime Control Act of 1984*, DRUG L. REP., Jan.-Feb. 1985, at 145; Margolin, *supra* note 7, at 11; Reed, *supra* note 7 (suggesting courts should not allow forfeiture of fees without further direction from Congress); *Attorneys Protest Scrutiny of Fees' Sources*, Wash. Post, Aug. 14, 1985, at 6, col. 1 (quoting one attorney's characterization of the government effort as "a diabolical trick").

11. American Bar Association Criminal Justice Section Report to the House of Delegates, Recommendation on Forfeiture (approved as ABA policy, July 1985) [hereinafter cited as ABA Recommendation on Forfeiture].

12. 18 U.S.C. § 1963(m); 21 U.S.C. § 853(n) (requiring the third party to show a superior title or lack of knowledge of the illegal source of the fee).

ture of attorneys' fees in constitutional language. It is argued that the statute is unconstitutional as applied because it fails to afford defendants in a criminal case the the right to counsel guaranteed by the Constitution. Arguments grounded in terms of the Constitution are generally persuasive. Too often, however, prevailing constitutional standards are vague and offer little or no guidance for judges and attorneys charting unexplored waters.<sup>13</sup> A major goal of this article, therefore, is to identify which objections to the forfeiture of attorneys' fees have a constitutional foundation.

## II. HISTORICAL DEVELOPMENT OF FORFEITURE

The sanction of forfeiture existed in Biblical,<sup>14</sup> Greek,<sup>15</sup> and Roman<sup>16</sup> traditions and is deeply rooted in the common law.<sup>17</sup> Governments have used criminal, or *in personam*,<sup>18</sup> forfeiture as a penalty in the form of punishment against the person and only as a consequence of a judgment of conviction, and civil, or *in rem*,<sup>19</sup> forfeiture as a penalty against

13. The difficulty is particularly apparent given the recent understanding of the "corrupt lawyer" in criminal organizations. STAFF REPORT OF PRESIDENT'S COMMISSION ON ORGANIZED CRIME, MATERIALS ON ETHICAL ISSUES FOR LAWYERS INVOLVED WITH ORGANIZED CRIME CASES (1985) (the relatively few attorneys who work for the "mob" constitute a significant threat to self-governing status of the bar).

14. *Exodus* 21:28 ("If an ox gore a man or a woman, and they die, then the ox shall be stoned, and his flesh shall not be eaten").

15. See O.W. HOLMES, *THE COMMON LAW* 8 (1881).

16. 7 *TWELVE TABLES* 1, translated in 1 S.P. SCOTT, *THE CIVIL LAW* 69 (1932).

17. See generally Reed & Gill, *RICO Forfeitures, Forfeitable "Interests" and Procedural Due Process*, 62 N.C.L. REV. 57 (1983); Note, *Bane of American Forfeiture Law— Banished at Last?*, 62 CORNELL L. REV. 768 (1977).

18. An *in personam* action is one which seeks judgment against a person as distinguished from a judgment against property. The government's right to property in an *in personam* forfeiture attaches only "by the conviction of the offender." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827). See, e.g., Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 476 (1976); Note, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 HARV. L. REV. 1929, 1931 (1984).

19. An *in rem* action is one which is taken directly against property, taking no cognizance of the owner but determining rights in specific property against all the world, equally binding on everyone. Admiralty law, for example, is a bountiful source of history on the *in rem* suit. An *in rem* proceeding against a vessel was the typical means for enforcement of the maritime lien. See G. GILMORE & G. BLACK, *THE LAW OF ADMIRALTY* 36-7 (2d ed. 1975).

property regardless of the property owner's culpability.<sup>20</sup> Although the history of *in personam* and *in rem* forfeitures is extensively documented,<sup>21</sup> it is helpful to examine briefly the historical development of these two types of forfeiture in order to provide a context for making judgments about the validity of RICO and CCE forfeiture procedures.

### A. *In rem* Forfeiture

The origins of *in rem* forfeiture are diverse. Deodand, England's Navigation Acts, and nineteenth-century jurisprudence of the United States Supreme Court form the foundation of present *in rem* forfeiture procedure.

According to the common law doctrine of deodand,<sup>22</sup> the Crown confiscated the instrument of a man's death.<sup>23</sup> It was believed that before a dead man could "rest in peace," the instrument of death—the "bane"—had to be presented to the sovereign to replace the slayer's kin as the object of vengeance.<sup>24</sup> The Church used part of the proceeds from sale of the instrument of death to fund Masses for the deceased,<sup>25</sup> and the Crown benefited from a steady source of revenue.<sup>26</sup>

20. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). The effectiveness and advisability of civil forfeiture for states is still very much in debate. See, e.g., Best & Fishman, *Forfeiture: An Effective Drug Law Tool?*, 64 MICH. BAR J. 1020 (1985) (debating the merits of Michigan's controlled substance civil forfeiture statute); Zelman & Zelman, *The Florida Contraband Forfeiture Act*, 57 FLA. BAR J. 550 (1983) (identifying the broad range of private property which may be considered contraband). See also *State v. 1979 Pontiac Trans Am*, 98 N.J. 474, 487 A.2d 722 (1985) (law disfavors forfeitures and should be construed to protect owners who have done all that reasonably could be expected to prevent illegal use of their property).

21. See *Calero-Toledo*, 418 U.S. at 680-81; Note, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 232 (1982); Note, *supra* note 17; Note, *California Forfeiture Statute: A Means for Curbing Drug-Trafficking?*, 15 PAC. L. J. 1035 (1984); Note, *Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?*, 57 ST. JOHN'S L. REV. 776, 780 (1983) [hereinafter cited as Note, *Post-Seizure Hearing*].

22. Deodand is the Latin *Deo dandum*—"given to God." The institution probably resulted from the merger of biblical and pagan traditions. See Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMPLE L.Q. 169, 181 (1973).

23. O.W. HOLMES, *supra* note 15, at 24-25.

24. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 473 (2d ed. 1898).

25. Finkelstein, *supra* note 22, at 182.

26. Reed & Gill, *supra* note 17, at 64 n.56; See *Calero-Toledo*, 416 U.S.



Although earlier approval of the deodand practice appears to have resulted from a common "hatred for anything giving us pain,"<sup>27</sup> rather than from a more logical rationale, deodand survived the first half of the nineteenth-century in Britain as a penalty to be applied when death resulted from negligence.<sup>28</sup> American common law, on the other hand, never adopted the practice,<sup>29</sup> although the Supreme Court has stated that at least an analogy to the law of deodand is appropriate for federal forfeiture laws.<sup>30</sup>

American *in rem* forfeiture law also developed in part from England's Navigation Acts of the seventeenth century,<sup>31</sup> which required the shipping of commodities in English vessels. Violation of the statutory scheme resulted in forfeiture of the "smuggled goods" and of the vessel itself, without regard for the culpability of the owner.<sup>32</sup> The Crown prosecuted these cases in vice-admiralty courts, without the obstacle of a colonial jury, and the property owner or other claimants bore the burden of showing statutory compliance.<sup>33</sup>

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at 681.

27. O.W. HOLMES, *supra* note 15, at 11.

28. Reed & Gill, *supra* note 17, at 64 n.60, (citing M. HALE, *PLEAS OF THE CROWN* 424 (1st Am. ed. 1847)). Hale argued that the abolition of deodands (An Act to Abolish Deodands, 1846, 9 & 10 Vict. ch. 62) followed naturally once England decided to introduce the first wrongful death statute (An Act for Compensating the Families of Persons Killed by Accidents, 1846, 9 & 10 Vict. ch. 93).

29. *Calero-Toledo*, 418 U.S. at 682.

30. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (forfeiture of automobile for illegal transport of liquor, since it is "a 'thing' that can be used in the removal of 'goods and commodities' and the law is explicit in its condemnation of such things." *Id.* at 513). The rationale for many *in rem* forfeitures is "none other than the rationale that lay behind the deodand . . . exacted by the sovereign, i.e., the Crown in Britain, on a comparably strict and absolute basis." Finkelstein, *supra* note 22, at 222.

31. L. HARPER, *THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING* 111 (1964).

32. *Id.*

33. Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 258 (1962). The Crown preferred to avoid the colonial jury, a practice ardently criticized by John Adams:

The Parliament in one Clause guarding the People of the Realm, and securing to them the Benefit of a Tryal by the Law of the Land, and by the next Clause, depriving all Americans of that Privilege. What shall we say to this Distinction? Is there not in this Clause, a Brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman?

2 J. ADAMS, *LEGAL PAPERS* 200 (1965).

Borrowing the model of the Navigation Acts, the first Congress authorized statutory *in rem* forfeiture of ships in violation of customs laws.<sup>34</sup> In two nineteenth-century cases, Justice Story greatly influenced the development of *in rem* forfeiture law in the United States, fostering in the process the "personification fiction." In *The Palmyra*,<sup>35</sup> Story held that federal statutory law permitted a federal court sitting in admiralty to impose a forfeiture *in rem* without a prior criminal conviction. In a later, similar case,<sup>36</sup> a shipowner demonstrated that his master acted without authority, and therefore, since he, as owner, was not guilty of "piratical aggressions" he should not suffer the consequences of forfeiture. Denying the argument, Story elaborated on his "personification" rationale for imposing forfeiture: "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."<sup>37</sup> Story claimed that this result was not uncommon to the law,<sup>38</sup> but in fact was necessary as a means for "suppressing the offense or wrong, or insuring an indemnity to the injured party."<sup>39</sup> In upholding the forfeiture, Story had established the role of the personification fiction in dismissing the requirement of owner's culpability for *in rem* forfeitures in the United States. Thus, *in rem* forfeiture could be used to attack "guilty property," not merely "guilty persons."

Although in 1871 the Supreme Court upheld the constitutionality of using *in rem* forfeitures to impose the purely punitive sanction of confiscating Confederate-owned property,<sup>40</sup> some courts, nevertheless, distinguished between mere

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34. Act of July 31, 1789, §§ 12, 36, 1 Stat. 47.

35. 25 U.S. (12 Wheat.) 1 (1827). The case bears the name of the ship seized by a United States vessel for "piratical aggression."

36. *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).

37. *Id.* at 233.

38. Story noted that *in rem* forfeiture was common to smuggling and other misconduct prohibited by the revenue laws. *Id.*

39. *Id.* He may have been more concerned about preserving customs revenues which at the time provided three-fourths of all federal revenues. Reed & Gill, *supra* note 17, at 66. See BUREAU OF CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, H.R. DOC. NO. 33, 86th Cong., 1st Sess. 712 (1960).

40. The Court upheld the law, not on due process grounds, but as an exercise of the war power in taking enemy property. *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331 (1871); *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871).

remedial forfeitures and punitive forfeitures requiring proof of personal guilt. In *Boyd v. United States*,<sup>41</sup> the Supreme Court explained that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal,"<sup>42</sup> and therefore entitle the defendant to constitutional protections normally afforded a criminal defendant.<sup>43</sup> The punitive-remedial distinction of *Boyd* admonishes that *in rem* procedural rules may not be constitutionally sufficient for forfeitures requiring proof of personal guilt.<sup>44</sup>

As with their historical antecedents, modern *in rem* suits determine rights in specific property against all the world and without regard to the culpability of the property owner. The

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The Civil War presented the dilemma of how to punish rebels *in absentia* for treason. The existing treason statutes, requiring personal jurisdiction of the defendant, proved to be an inadequate route for confiscating Confederate-owned property in the North. With the Confiscation Acts, Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589 (1862), Congress approved just narrowly, and over President Lincoln's objection, the use of *in rem* forfeitures for punitive purposes. After the Supreme Court of Kentucky held the Act unconstitutional in *Norris v. Doniphan*, 61 Ky. (4 Met.) 385 (1863), the U.S. Supreme Court was obliged to examine and uphold the constitutionality of the Act, despite a vigorous dissent arguing that the forfeiture punished offenders for treason, and therefore, could be imposed only pursuant to a criminal proceeding. *Tyler v. Defrees*, 78 U.S. (11 Wall.) at 355-56.

41. 116 U.S. 616 (1886) (holding unconstitutional an act authorizing seizure of private papers to be used as evidence in prosecution of alleged crime).

42. *Id.* at 634.

43. *E.g.*, *Coffey v. United States*, 116 U.S. 436 (1886) (prior acquittal on tax fraud bars subsequent forfeiture action for the same conduct). *But see* *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984) (disagreeing in the case of civil, remedial forfeiture not intended as punishment or a criminal penalty).

44. This is the position taken in *Reed & Gill*, *supra* note 17, at 67-68. Although civil sanctions can be even more punishing than criminal penalties, and arguably, therefore should not be imposed without criminal safeguards such as counsel, the courts have refused to equate "severe" and "criminal." One factor supporting this reluctance is that it would be extremely burdensome for a court to determine which civil actions were severe enough to merit criminal safeguards. On the other hand, some civil sanctions are indeed punitive and have a strong deterrent element. Apparently, however, a civil penalty will differ from a criminal fine because of the large element of retribution and moral condemnation that accompanies the criminal penalty. *See Clark*, *supra* note 18, at 407. The Supreme Court recently has examined the subtle distinctions. *One Assortment of 89 Firearms*, 104 S. Ct. at 1102-07 (civil forfeiture of unlicensed firearms has broad remedial aims).

government may seize the property if it has probable cause to believe the property was used to commit the alleged offense.<sup>45</sup> Because of the lower burden of proof and less intricate procedure, law enforcement officials use the numerous civil forfeiture measures more often than the RICO and CCE criminal provisions.<sup>46</sup> In such a civil proceeding, the claimant bears the burden of showing lack of probable cause for the forfeiture.<sup>47</sup> Although the claim of lack of knowledge of the illegal activity may preserve rights in the property seized,<sup>48</sup> the court may require the owner of property to take all reasonable precautions to prevent the illegal use of property.<sup>49</sup> Typically, an *in rem* forfeiture "relates back" to the commission of the offense,<sup>50</sup> meaning subsequent transfers of the "guilty" property are voided.

### B. *In Personam* Forfeiture

*In personam* forfeiture requires a prior determination of guilt. The common law sanction of attainder inflicted the complete forfeiture of all real and personal property on felons and traitors.<sup>51</sup> The forfeiture followed swiftly upon the

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45. *E.g.*, *United States v. One 56-foot Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1983) (question is whether "information relied on by the government is adequate and sufficiently reliable to warrant the belief by a reasonable person that the vessel was used to transport controlled substances." *Id.* at 1282). Pre-hearing seizure is constitutional in only "extraordinary situations." *Fuentes v. Shevin*, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972) (*e.g.*, when (1) seizure is necessary to secure general public interest, (2) special need for very prompt action, and (3) state insures that a government official initiates the seizure. 407 U.S. at 90-91).

46. Congress has authorized civil *in rem* forfeiture of controlled substances and the articles used to transport controlled substances, 21 U.S.C. § 881; obscene materials, 18 U.S.C. § 1465; money used in bribery schemes, 18 U.S.C. § 3612; articles not registered for customs, 19 U.S.C. § 1497; unlicensed firearms 18 U.S.C. § 924(d); and adulterated foods and drugs, 21 U.S.C. § 334.

47. *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976).

48. *United States v. M/V Andoria*, 768 F.2d 597 (5th Cir. 1985) (rights of holder of maritime lien are protected so long as had no knowledge of owner's illegal venture).

49. *United States v. One Boeing 707 Aircraft*, 750 F.2d 1280 (5th Cir.) *cert. denied*, 105 S.Ct. 2117 (1985) (limited efforts on part of owner not enough to prevent forfeiture of "gun running" aircraft).

50. *See infra* note 76. Not only must subsequent transferees be concerned with civil forfeiture, but so too must secured parties. *Goldsmith-Grant Co.*, 254 U.S. at 513 (referring to "guilt" of the property).

51. In the view of Blackstone, threat of forfeiture deterred criminal activity:

heels of a conviction for a felony and the customary felony sentence of death.<sup>53</sup>

The American colonies adopted English forfeiture laws only sporadically.<sup>53</sup> Because of the severity of punishment which denied heirs their inheritance, in 1787 the new country abolished forfeiture of estate and corruption of blood for the offense of treason,<sup>54</sup> and three years later, prohibited forfeiture of estate for all convictions and judgments.<sup>55</sup> Not until 1970, in RICO and CCE, did *in personam* forfeiture reappear in the law of the United States.

### III. REVIVAL OF CRIMINAL FORFEITURE

In 1970 Congress revived criminal forfeiture by intro-

[H]e who has thus violated the fundamental principles of government, and broke his part of the original contract between king and people, has abandoned his connexions with society; and has no longer any right to those advantages, which before belonged to him purely as a member of the community; among which *social* advantages, the right of transferring or transmitting property to others is of chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.

4 W. BLACKSTONE, COMMENTARIES \*382.

52. *Id.* at \*387. See also Blakey, *Asset Forfeiture under the Federal Criminal Law*, in THE POLITICS AND ECONOMICS OF ORGANIZED CRIME (1985). Also note that the more serious the crime, the more severe the loss. Upon conviction for treason, the king forfeited personal and real property, and corruption of blood. Hence, no line of inheritance could be traced through the attainted ancestor. 4 W. BLACKSTONE, COMMENTARIES \*381. See also 1 J. BISHOP, CRIMINAL LAW 583 (9th ed. 1923).

53. In colonial New York, for example, the seizure of goods in felony cases was rare. Not only were most convicted felons so "meanly circumstanced" that they lacked anything to forfeit, but with the problem of underpopulation, it made no sense to authorize a sanction against heirs if the sanction would provide the impetus for sons of settlers to seek freeholds in other colonies. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 715-17 (1944). On the other hand, upon conviction for treason or felony in colonial Virginia, all the offender's goods and chattels were forfeited, and the felon's heirs could not inherit any property. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 109 (1930).

54. "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. CONST. art. III, § 3, cl. 2.

55. "Provided always, and be it enacted, that no conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate." 1 Stat. 117, ch. 9, § 24 (1790), *codified at* 18 U.S.C. § 3563 (1982).

ducing forfeiture provisions in the RICO and CCE statutes. Because criminal forfeiture was limited to property connected to illegal activity and did not reach other property of the offender, Congress avoided a conflict with the 1790 statute prohibiting forfeiture of estate.<sup>56</sup> With this distinction made, however, it is questionable to what extent pre-Revolutionary *in personam* forfeiture serves as the predecessor to RICO and CCE forfeitures.<sup>57</sup>

RICO authorized the forfeiture of any "interest"<sup>58</sup> acquired or maintained in violation of the substantive provisions of RICO, and of any interest used to influence an enterprise operated in violation of these provisions.<sup>59</sup> Likewise,

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56. For a survey of the 1970 Act, see Taylor, *Forfeiture under 18 U.S.C. § 1963 - RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

57. Consider, for example, that RICO and CCE criminal forfeiture, an *in personam* procedure, utilizes distinctively *in rem* concepts like "relation back." Based on the principle that the government's interest in forfeited property "relates back" to the time the offense was committed, the government takes priority over all other interests attaching to the property subsequent to commission of the offense. See *infra* note 76.

58. Judicial interpretation of a forfeitable "interest" underscores the powerful impact forfeiture can have in penetrating illicit drug and racketeering activities. See *infra* notes 66-70 and accompanying text.

Moreover, upon conviction, forfeiture of the defendant's "interests" is mandatory. *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980) (compelling forfeiture of stock in a company through which the defendant acquired sewer contracts on the strength of a scheme of kickbacks). It may be an "illegal sentence" when the district court fails to order complete forfeiture of illegally acquired property, as determined by the jury. *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983) (court could not exclude two parcels of property from the forfeiture for support of the defendant's wife and newborn child); *United States v. Murillo*, 709 F.2d 1298 (9th Cir. 1983) (court could not exclude one of the defendant's houses and one of his cars). Therefore, the court must order forfeiture of the defendant's illegitimate interest in a business even though it would affect property rights of others in the company. *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

59. In its pre-1984 form, the relevant RICO forfeiture provision is codified at 18 U.S.C. § 1963(a) (1982):

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

CCE authorized the forfeiture of profit obtained from operating a drug enterprise, and of any interest used to influence a drug enterprise.<sup>60</sup> Under these statutes (as under the 1984 Act), the government can achieve forfeiture only after the issuance of a grand jury indictment specifying the items to be forfeited,<sup>61</sup> the finding of forfeiture by a jury,<sup>62</sup> and the entry of a judgment of forfeiture by the court.<sup>63</sup> Of course, because the proceeding is criminal, the court cannot enter a forfeiture judgment without a prior *in personam* judgment of guilt.<sup>64</sup>

Congress intended criminal forfeiture to be used as a law enforcement instrument for taking the profit out of organized criminal activity as well as for severing the connection between the principal criminal suspects and their property

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The court may accept satisfactory performance bonds in connection with property subject to forfeiture. *Id.* § 1963(b). Upon conviction, the Attorney General seizes property ordered forfeited. *Id.* § 1963(c).

60. In their pre-1984 form the relevant CCE forfeiture provisions are codified at 21 U.S.C. § 848(a) (1982):

§848. Continuing criminal enterprise

(a) Penalties; forfeitures

(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than \$200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

61. FED. R. CRIM. P. 7(c)(2).

62. FED. R. CRIM. P. 31(e).

63. FED. R. CRIM. P. 32(b)(2).

64. An *in personam* judgment binds only the party to the litigation. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process."), *rev'd on other grounds*, 401 U.S. 321 (1971). See also *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982) (forfeiture vacated along with reversed RICO conviction).

sources of economic power.<sup>65</sup> In this regard, courts have upheld the forfeiture of a restaurant used as a site for gambling activities,<sup>66</sup> stock and a position in the corporation through which the defendant bribed officials,<sup>67</sup> union offices,<sup>68</sup> and homes, whether purchased with proceeds of the continuing criminal enterprise<sup>69</sup> or used as stash houses for a marijuana distribution network.<sup>70</sup>

Yet, government achieved very little with usage of criminal forfeiture. Although Congress authorized use of the forfeiture mechanism as a powerful crime-fighting tool, a measure of its "success" in the fifteen years since 1970 is evident in the words of the Comptroller General:

[L]ittle has been done. Forfeitures to date have consisted primarily of the vehicles used to smuggle drugs and cash used in drug transactions. Compared to the profits realized, these forfeitures have amounted to little more than incidental operating expenses. The illicit profits themselves and the assets acquired with them have remained virtually untouched.<sup>71</sup>

Despite the obvious difficulties in securing forfeiture of assets,<sup>72</sup> Congress molded a number of bills, revisions, and fi-

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65. What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which these individuals constitute such a serious threat to the well-being of the nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969).

66. *United States v. Smaldone*, 583 F.2d 1129 (10th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

67. *United States v. Kravitz*, 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1752 (1985).

68. *United States v. Rubin*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

69. *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980).

70. *United States v. Zielie*, 734 F.2d 1447 (11th Cir. 1984). *See also* *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985) (no requirement to trace proceeds of kickback scheme on real estate transactions).

71. COMPTROLLER GENERAL OF THE UNITED STATES, *ASSET FORFEITURE - A SELDOM USED TOOL IN COMBATting DRUG TRAFFICKING* 9 (1981) (recommending Congress "strengthen" forfeiture statutes). Of the ninety-eight RICO and CCE narcotics cases through March 1980, the government forfeited \$2 million, which is less revenue than one heroin trafficker can generate in a month. *Id.* at 10.

72. *See, e.g., Forfeiture in Drug Cases: Hearings on H.R. 2648, H.R. 2910, H.R. 4110, H.R. 5371 Before the Subcomm. on Crime of the House Comm. of the Judiciary*, 96th Cong., 1st and 2nd Sess., 223-24 (1983) (testimony of



nal adjustments to strengthen the law of criminal forfeiture in the form of the Comprehensive Forfeiture Act of 1984.

### A. *Congressional Intent of the 1984 Act*

In passing the new law, Congress acknowledged:

conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations were left intact . . . traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country.<sup>73</sup>

Congress decided that any success in combating racketeers and drug traffickers will depend on how well government carries out an assault on the economic benefits<sup>74</sup> reaped by these criminals, and specifically on how well government can utilize forfeiture. Such an assault required procedural clarity, according to Congress. Thus, the purpose of the Forfeiture Act is "to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law en-

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Irvin B. Nathan, Deputy Attorney General):

Discovering a defendant's assets, securing them, providing their relationship to his crimes and seizing them after judgment are extremely difficult, time-consuming tasks which most federal investigations and prosecutors are not particularly well equipped to handle. Sophisticated criminals, with access to top flight lawyers and accountants, can readily conceal their assets. The assets can be kept in the names of nominees, in secret bank accounts overseas, in shell corporations or run through money laundering operations. Even when assets are uncovered, and title is proven, there are evidentiary problems in attempting to link the assets to criminal activities. Finally, prosecutors are concerned that introducing detailed evidence relating to forfeitable assets may prolong and make more complex the criminal trial.

73. S. REP. NO. 225, 98th Cong., 2d Sess. 191 *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3374 [hereinafter cited as SENATE REPORT].

74. The Internal Revenue Service made conservative estimates of unreported 1981 income: \$23.4 billion in drugs; \$3.4 billion in gambling; \$7.4 billion in prostitution. DEP'T OF THE TREASURY, INTERNAL REVENUE SERVICE, INCOME TAX COMPLIANCE RESEARCH: ESTIMATES FOR 1973-81, at 35-39 (1983). Other sources claim illicit income is much higher. NATIONAL INTELLIGENCE CONSUMERS COMM., THE SUPPLY OF DRUGS TO THE U.S. ILLICIT MARKET FROM FOREIGN AND DOMESTIC SOURCES IN 1979, at 5 (1979) (estimating \$64 billion in illicit drug income in 1979). Theft and fencing is lucrative also. *See, e.g.,* Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1511 (1977).

forcement agencies . . . [which is accomplished by] focus[ing] primarily on improving the procedures applicable in forfeiture cases.''<sup>75</sup>

### B. Procedural Changes

The Comprehensive Forfeiture Act of 1984 attempts to clarify the role of criminal forfeiture in law enforcement's efforts against crime-for-profit organizations. Apart from the many changes made, Congress retained much of the familiar *in personam* procedure of the 1970 Act, which authorized forfeiture only upon a conviction and a finding of forfeiture by a jury. In the 1984 Act, some provisions formalize standards of procedure,<sup>76</sup> others attempt to resolve conflicts between federal courts,<sup>77</sup> and still others attempt to provide procedural guidance for carrying out forfeiture objectives.<sup>78</sup> Through

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75. SENATE REPORT, *supra* note 73, at 192.

76. Congress formalizes the theory, for example, that forfeiture "relates back" to the time of the act giving rise to the forfeiture, 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c) (effectively reversing *United States v. McManigal*, 723 F.2d 580 (7th Cir. 1983), which held that the "relation back" doctrine does not apply to RICO), a theory which Congress claims has a long history of acceptance in civil forfeiture law. See *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (right to the property conditionally vests in the government immediately upon commission of the offense). Because the government interest is not "perfected" until the judge and jury have declared forfeiture is proper, forfeiture operates much like an equitable lien. See *Trojanowski, RICO Forfeiture: Tracing and Procedure*, in 1 MATERIALS ON RICO 353 (G. Blakey ed. 1980). Essentially, the provision operates to void all pre-conviction transfers, with the exception of "arms length" transactions with purchasers having no notice of prior interests.

77. The proceeds, or property derived from proceeds, obtained in violation of RICO shall be forfeited. 18 U.S.C. § 1963(a)(3) (codifying the U.S. Supreme Court decision in *Russello*). Compare *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980), with *United States v. Martino*, 681 F.2d 952 (5th Cir. 1981), *aff'd*, *Russello v. United States*, 464 U.S. 16 (1983). Congress had already authorized the forfeiture of "profits" under CCE. See *supra*, note 60.

78. The original forfeiture bill considered by Congress included a substitute assets provision, authorizing the court to order forfeiture of substitute assets of equivalent value in the event property deemed subject to forfeiture is no longer available at the time of conviction. Encouraged by the ABA Criminal Justice Section, Congress deleted the substitute assets section and opted instead for an alternative fine provision: "In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits of other proceeds." 18 U.S.C. § 1963(a); 21 U.S.C. § 855. See *Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary on H.R. 3272, H.R. 3299, and H.R. 3275*, 98th Cong., 1st Sess. 52 (1983) (remarks of Stephen Horn, and William W. Taylor, on behalf of the ABA

these provisions, Congress successfully infused into the new law many of the procedural protections typically associated with criminal proceedings, but notably missing from the 1970 version of criminal forfeiture.<sup>79</sup>

An example of the protections is the post-trial hearing for consideration of third-party claims.<sup>80</sup> Since third parties may not intervene or commence a suit to interfere with the principal case, *bona fide* purchasers of the property must avail themselves of the post-trial hearing. Thus, should the prosecutor decide to seek forfeiture of attorneys' fees, the attorney may be forced to assert the claim for fees in this hearing. To prevail in the hearing, the petitioner must establish, by a preponderance of the evidence, that (1) the petitioner had a legal interest in the property superior to the interest of the defendant at the time of the acts giving rise to the forfeiture, or (2) the petitioner is a *bona fide* purchaser for value without cause to believe the property was subject to forfeiture.<sup>81</sup>

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Criminal Justice Section). Since the "may be fined" language vests discretion in the court, presumably, the trial judge will mete out a fine based on the defendant's ability to pay. See Note, *supra* note 18 (recommending a "profits fine" in proportion to the offender's unjust enrichment from the crime).

The congressional approach to RICO and CCE forfeiture was almost identical. The CCE forfeiture provisions differ from RICO, however, in one important way: a rebuttable presumption operates at trial that a person's property is subject to forfeiture if the United States establishes by a preponderance of the evidence that the defendant acquired the property at, or reasonably after, the time of the violation, and that there was no likely source for such property other than through violating the statute. 21 U.S.C. §853(e).

79. See, e.g., Reed & Gill, *supra* note 17; Note, *Due Process in Preliminary Proceeding Under RICO and CCE*, 83 COLUM. L. REV. 2068 (1983); Note, *Continuing Criminal Enterprise Statute: Effect of Forfeiture Provisions on Third Parties*, 22 DUQUESNE L. REV. 171 (1983); Note, *Post-Seizure Hearing*, *supra* note 21.

80. 18 U.S.C. § 1963(m); 21 U.S.C. § 853(n). Prior to this stage, a special jury verdict is required for property vis-a-vis the defendant. "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." FED. R. CRIM. P. 31(e).

In fulfilling the requirement the jury may have to specify which properties were part of the criminal enterprise and the percentage of the defendant's interest in each. *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980). The special verdict requirement may be waived, however, if the parties have entered into a stipulation "in lieu of a Special Verdict," setting forth the defendant's ownership interest subject to forfeiture and preserving the right to challenge any forfeiture. *United States v. Hess*, 691 F.2d 188 (4th Cir. 1982).

81. If the petitioner "prevails," the court will amend the order of

Thus, assuming the defendant paid the attorney after committing the alleged offense, the attorney petitioning for fees would have to present the facts relied upon in believing the defendant's assets were not subject to forfeiture.

While Congress authorized the expanded use of pre-trial injunctions and restraining orders, which operate to freeze assets and "to prevent dissipation pending determination of guilt or innocence,"<sup>82</sup> the Forfeiture Act ensures that these orders can issue only according to procedures which minimize the adverse impact on affected property.<sup>83</sup> After notice and an opportunity for a hearing is given to the property owner, a trial court may issue a pre-indictment restraining order if (1) "there is a substantial probability that the United States will prevail on the issue of forfeiture," (2) failure to enter the order will result in making the property unavailable for forfeiture, and (3) the court determines that "the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered."<sup>84</sup> Conceivably, such an order may encompass the assets used to pay attorneys' fees. Furthermore, under extraordinary circumstances, the government may seek a temporary, pre-indictment re-

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forfeiture accordingly. 18 U.S.C. § 1963(m)(6)(A)-(B); 21 U.S.C. § 853(n)(6). If the petitioner fails to present the required proof, the United States holds clear title to the property. 18 U.S.C. § 1963(m)(7); 21 U.S.C. § 853(n)(7). The adequacy of protection for third party interests is questioned in *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985).

The statute does not require hearing before a jury, which might appear to be unconstitutional in light of *United States v. One 1976 Mercedes Benz*, 618 F.2d 453 (1980) (holding that the owner of a vehicle subject to civil forfeiture has right of trial by jury). However, the third party hearing is not a civil forfeiture proceeding, or suit at common law, but rather is more akin to a hearing on a petition in equity to clear a "clouded" title, and therefore, the petitioner is not entitled to a jury under the Seventh Amendment. *Schwartz v. United States*, 582 F. Supp. 224 (D. Md. 1984) (government not required to reprove ownership every time a new claim is asserted). On the other hand, the denial of a jury has precedent in *in rem* forfeiture under the Navigation Acts. See *supra* note 33 and accompanying text.

82. *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979).

83. 18 U.S.C. § 1963(e); 21 U.S.C. § 853(e).

84. 18 U.S.C. § 1963(e)(1)(B)(i)-(ii); 21 U.S.C. § 853(e)(1)(B)(i)-(ii). Considerable lower-court litigation preceded adoption of a standard of proof for sustaining a restraining order. *E.g.*, *United States v. Veliotis*, 586 F. Supp. 1512 (S.D.N.Y. 1984) ("probable cause"); *United States v. Beckham*, 562 F.Supp. 488 (E.D. Mich. 1983) ("clear and convincing"); *United States v. Harvey*, 560 F.Supp. 1040 (S.D. Fla. 1982) ("preponderance"); *United States v. Veon*, 538 F. Supp. 237 (E.D. Cal. 1982) (same).

straining order without prior notice or opportunity for a hearing.<sup>85</sup> For this *ex parte* order to issue, the government must establish probable cause that the property is subject to forfeiture and that provision of notice would jeopardize the availability of the property.<sup>86</sup>

Although the Act provides for a hearing when the government seeks a pre-indictment restraining order (even if *ex parte*, a hearing must be held within ten days), it neglects to require a hearing when the restraining order is requested "upon the filing of an indictment or information" charging a violation of RICO or CCE.<sup>87</sup> The reason for the omission of a hearing could be that the probable cause determination (that a crime is committed and that forfeitable property is connected with the crime) required for the grand jury to file an indictment is an adequate substitute for the "substantial probability" standard which prevails at the hearing on a pre-trial restraining order. The fact that restraints on liberty require only a probable cause determination makes this substitution plausible.<sup>88</sup> The same rationale, however, cannot jus-

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85. 18 U.S.C. § 1963(e)(2); 21 U.S.C. § 853(e)(2).

86. The *ex parte* order may last for no more than ten days unless extended for good cause. Also, a hearing must be held at the earliest possible time but prior to expiration of the temporary order. *Id.*

Although Congress concedes that "[t]he permissibility of the postponement of notice and hearing until after the initial entry of a restraining order in a criminal forfeiture case has not been squarely addressed by the Supreme Court," SENATE REPORT, *supra* note 73, at 204, the legislators rely primarily on the *civil* forfeiture precedent of *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which upheld the seizure of a pleasure yacht without prior notice and hearing since (1) the seizure served the significant governmental purpose of instituting *in rem* forfeiture; (2) advance notice might thwart the governmental objective; and (3) the seizure was conducted by governmental officials who can determine the legality of the seizure. *Id.* at 671. In a more recent case, albeit *civil*, the Supreme Court has stated that the requirements of the Speedy Trial Act serve as a proper analogue for determining whether the delay in conducting a post-seizure hearing has violated the defendant's rights of due process. *United States v. \$8,850*, 461 U.S. 555 (1983).

87. 18 U.S.C. § 1963(e)(1)(A); 21 U.S.C. § 853(e)(1)(A).

88. See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (probable cause determination is sufficient for extending restraint on liberty after arrest); *United States v. Graewe*, 689 F.2d 54, 56-58 (6th Cir. 1982) (pre-trial bail denied based on hearsay showing of danger to witnesses in RICO prosecution); *United States v. James*, 674 F.2d 886, 891-92 (11th Cir. 1982) (pre-trial bail set at \$2 million to assure appearance of defendants). See also SENATE COMM. ON THE JUDICIARY, THE BAIL REFORM ACT OF 1983, S. REP. NO. 147, 98th Cong., 1st Sess. 45 (1983) (stating that proof of "substantial probability" of flight is not required because of the difficulty in meeting

tify neglecting to require a hearing on the restraining order upon the filing of an information. The information is typically filed by the prosecutor alone without the review and "check" of a judicial officer or grand jury; that is, the prosecutor could restrain the defendant's assets without a hearing on the validity of the restraint. Fair procedure, or due process,<sup>89</sup> may require a "prompt hearing," compelling the government to produce adequate grounds to justify the restraint.<sup>90</sup>

#### IV. WHY ATTORNEYS' FEES ARE NOT EXCEPTED FROM FORFEITURE

With the blessing of Congress and the procedural clarity to pursue the assets of racketeers and drug traffickers through criminal forfeiture, federal prosecutors are in a position to make comprehensive attacks on criminal organizations. For some prosecutors, this entails scrutiny of lawyer activity, including efforts to forfeit attorneys' fees. These efforts would come as little surprise since the language of the 1984 Act locates the government's interest in forfeited assets *at the time the offense is committed*. Given this relation back language, the prosecutor may decide to pursue fees believed to be paid with the proceeds of criminal activity or with the assets of an illegitimate enterprise. Even if it is uncommon for a recently-indicted person to transfer "tainted" property to an attorney as a retainer,<sup>91</sup> the relation back concept, it seems, would vest in the government a priority interest in the illegitimate, forfeitable property superior to the interest of the third-party attorney.

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the standard so early in the criminal proceedings).

89. Although "due process has never been, and perhaps can never be, precisely defined," *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24 (1981), the Supreme Court has recognized that hearings to determine the validity of governmental restraints are fundamental to due process. *Fuentes v. Shevin*, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972).

90. *United States v. Ray*, 731 F.2d 1361 (9th Cir. 1984) (failure to conduct hearing, however, does not disturb the conviction); *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982) (prosecution must show the probability that jury will convict the defendant and find the properties subject to forfeiture). Recently, in *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985), the Ninth Circuit Court of Appeals held that the failure to hold a hearing over the course of five years violated the Federal Rules of Civil Procedure Rule 65 requirement of an immediate hearing whenever the court grants a temporary restraining order *ex parte*.

91. It does occur. *See, e.g.*, *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

In *United States v. Rogers*,<sup>92</sup> however, a Colorado federal district court granted the defendant's motion to exclude attorneys' fees from forfeiture based on the rationale that "Congress intended different treatment of assets transferred to third parties and assets in the hands of the defendant."<sup>93</sup> Writing for the court in *Rogers*, Judge Kane declared that the 1984 Act was not designed to upset "legitimate transfers for value," and therefore, assets no longer held by a defendant could be forfeited only if "transferred as some type of sham or artifice."<sup>94</sup> In other words, according to *Rogers*, if the assets transferred to an attorney are given for value—the attorneys' services—the exchange is *bona fide* and the fees are not to be forfeited.

The reasoning of *Rogers* is difficult to reconcile with operation of the relation back doctrine. The government's interest in the defendant's illegitimate assets, whether property used to influence an illegal enterprise or proceeds obtained from criminal activity, vests at the time the underlying criminal offense is committed. The government's interest is superseded only if a petitioner can fulfill the requirements of the third-party hearing, namely: (1) show a prior, superior interest in the assets, or (2) show that the assets were acquired in a *bona fide* transaction for value and without notice that the property was "subject to forfeiture." *Rogers* construes this language to mean that property transferred for value in a *bona fide* transaction is not "subject to forfeiture." On the contrary, the third-party hearing language does not address what property is "subject to forfeiture,"<sup>95</sup> nor does it limit in any way the operation of the relation back doctrine to vest property in the government immediately upon commission of the offense. Rather, the third-party hearing language merely provides a remedy for transferees who can show they have given value *and* had no notice of the government's priority interest in the property "subject to forfeiture."

The 1984 Act, therefore, does not except assets used for attorneys' fees from items subject to forfeiture under RICO and CCE. In the cautionary words of a New York district court in *Simels v. United States*:

[F]ees paid to attorneys cannot become a safe harbor from

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92. 602 F. Supp. 1332 (D. Col. 1985).

93. *Id.* at 1347.

94. *Id.*

95. Property subject to forfeiture is defined in 18 U.S.C. § 1963(a) and 21 U.S.C. § 853(a).

forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds . . . . To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power.<sup>96</sup>

## V. RIGHT TO COUNSEL OF CHOICE

In *Rogers*, Judge Kane also considered at length the effect government efforts to forfeit attorneys' fees would have on the defendant's right to counsel of choice. Because this article concludes, unlike the *Rogers* court, that attorneys' fees are "subject to forfeiture," the counsel of choice objection to forfeiture of attorneys' fees is worth brief examination. This argument by itself, however, does not warrant declaring the 1984 Act unconstitutional as applied to attorneys' fees.

The *Rogers* court reasoned that both a pre-trial threat of forfeiture and an injunction or restraint on assets intended for fees prevents the defendant from retaining counsel of choice.<sup>97</sup> The restraint on assets might preclude retaining counsel of first choice from the outset, while including a provision in the indictment for forfeiture of fees could minimize the financial appeal of defendant's case such that highly skilled counsel might not be available at all.

Under the sixth amendment the defendant has a right,<sup>98</sup> although not an absolute one,<sup>99</sup> to counsel of choice. Surely, the right has economic limitations since we cannot say, for

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96. 605 F. Supp. 839,850 n.14 (S.D.N.Y. 1985), *rev'd on the subpoena issue*, 767 F.2d 26 (2d Cir. 1985).

97. *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D.Colo. 1985).

98. *See Powell v. Alabama* 287 U.S. 45, 67 (1932) (defendant should have fair opportunity to secure counsel of own choice); *Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984) (accused financially able to retain counsel of own choosing must not be deprived of reasonable opportunity to do so). *But see United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984) (defendant failed to show that restraining order freezing assets actually restricted ability to retain counsel of choice when "counsel of choice" already appointed under Criminal Justice Act of 1964).

99. *United States v. James*, 708 F.2d 40, 44 (2d Cir. 1983) (upholding disqualification of defense counsel on basis of defendant's intention to seek testimony of former client of defense counsel); *Ford v. Israel*, 701 F.2d 689, 692-93 (7th Cir.) (rule requiring representation by local counsel does not deprive defendant of any sixth amendment right), *cert. denied*, 464 U.S. 832 (1983).



example, that the poor have a "choice" of counsel. A court may further limit the right. In determining whether to respect the defendant's desire to retain a particular attorney as defense counsel, it is within the court's discretion to balance competing interests<sup>100</sup> and in particular to consider the interests of the government in judicial integrity and efficiency.<sup>101</sup>

Considering the tendency among courts to weigh these competing factors, the counsel of choice argument is not a compelling one. A significant countervailing public interest, like the government's interest in forfeiting the assets of criminal organizations, might prevail over the defendant's interest in retaining counsel of first choice. Until Congress establishes clearly that public policy favors one interest over another, the defendant's interest in counsel of choice will be subject to a court's discretionary judgment about the relative importance of the government's interest in forfeiture.

## VI. CONSTITUTIONAL OBJECTION TO FORFEITURE OF ATTORNEYS' FEES

Although the *Rogers* court wrongly construed the 1984 Act to except from forfeiture all assets transferred by the defendant in arm's length transactions for value, the forfeiture of attorneys' fees under the 1984 Act must be consistent with the fair trial principles implicit in the fifth and sixth amendments in order to be constitutionally valid. This article argues that the potential exists for law enforcement to seek forfeiture of attorneys' fees under the 1984 Act in a manner inconsistent with the constitutional guarantee of a fair trial.

### A. *Fair Trial Right*

The sixth amendment guarantees the defendant in a

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100. *Morris v. Slappy*, 461 U.S. 1 (1983) (sixth amendment does not guarantee "meaningful attorney-client relationship").

101. *Grady v. United States*, 715 F.2d 402, 404 (8th Cir. 1983) (per curiam) (defendant's right to obtain counsel of choice balanced against need for efficient and effective administration of criminal justice; counsel properly withdrew when counsel's testimony important to prosecution and change of counsel did not interfere with defendant's rights); *United States v. Hobson*, 672 F.2d 825, 828-29 (11th Cir.) (per curiam) (defendant's interest in representation by counsel of choice outweighed by likelihood that testimony about counsel's alleged criminal activity will severely impugn integrity and credibility in eyes of jury), *cert. denied*, 459 U.S. 906 (1982); *United States v. Cortelleso*, 663 F.2d 361, 363 (1st Cir. 1981) (defendant's right to particular counsel does not supersede government's right to call defendant's counsel as essential witness).

criminal case the right to "the Assistance of Counsel for his defense."<sup>102</sup> The right to counsel is absolute since it is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"<sup>103</sup> Assistance of counsel is essential to "render[ing] the trial a reliable adversarial testing process."<sup>104</sup>

Speaking recently for the U.S. Supreme Court, Justice O'Connor remarked that the purpose of the right to counsel is "to ensure that criminal defendants receive a fair trial,"<sup>105</sup> and although "[t]he Constitution guarantees a fair trial through the Due Process Clauses, . . . it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."<sup>106</sup> A

102. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defense." In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's sixth amendment right to have "Assistance of Counsel" is denied. The Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). See *Strickland v. Washington*, 104 S. Ct. 2052 (1984) (right to effective assistance relates to "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."); *United States v. Cronin*, 104 S. Ct. 2039 (1984) (ineffective assistance of counsel claim must be supported by allegations of specific errors made by counsel).

103. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)). For the importance of counsel, see *Argersinger v. Hamlin*, 407 U.S. 25, 31-32 (1972) (indigent defendant has right to counsel in criminal cases, whether felony or misdemeanor); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) ("That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.").

104. *Strickland*, 104 S. Ct. at 2065.

105. *Id.*

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

*Gideon v. Wainwright*, 372 U.S. at 344.

106. *Strickland*, 104 S. Ct. at 2063. See also *Scott v. United States*,

fair trial is achieved, in part, by providing the defendant with counsel who is competent and committed to advocating the client's interests.<sup>107</sup> Although the "adversarial process" does not require that defense counsel match resources and skills with the prosecutor,<sup>108</sup> "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."<sup>109</sup> Thus, the right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive "the crucible of meaningful adversarial testing."<sup>110</sup> It is this adversarial process, in which counsel acts in the role of advocate, that contributes to fairness in the criminal justice system.<sup>111</sup>

As by the sixth amendment, "the defendant's right to a fair trial [is] mandated by the Due Process Clause of the Fifth Amendment to the Constitution."<sup>112</sup> The fifth amendment prohibits deprivations of "life, liberty, or property" without

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427 F.2d 609, 610 (D.C. Cir. 1970) (noting sixth amendment standard of counsel is more "stringent" than fifth amendment); *United States v. Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (stating choice of counsel devolves from sixth amendment as well as due process clause of fifth amendment); *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978) (identifying a "right to counsel theme" of the due process clause).

107. *Strickland*, 104 S. Ct. at 2065 ("overarching duty to advocate the defendant's cause"); *Tollett v. Henderson*, 411 U.S. 258, 268 (1973) ("faithful representation" of client's interests required); *McMann*, 397 U.S. at 771 (accused is entitled to effective assistance of competent counsel).

108. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975) (denial of assistance of counsel for attorney to neglect to investigate role of co-defendant in alleged crime).

109. *Herring v. New York*, 422 U.S. 853, 862 (1975) (sixth amendment guarantees right to make final summation).

110. *Cronic*, 104 S. Ct. at 2045. "[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring*, 422 U.S. at 857.

111. *Anders v. California*, 386 U.S. 738, *reh'g denied*, 388 U.S. 924 (1967) (indigent has right to assistance of counsel for first appeal from criminal conviction).

112. *United States v. Agurs*, 427 U.S. 97, 107 (1976). *See also* *United States v. Marion*, 404 U.S. 307, 324 (1971) (prosecutorial delay could prejudice due process right to fair trial).

"due process of law."<sup>113</sup> Although "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation,"<sup>114</sup> the fair trial guarantee of the fifth amendment at least ensures the presumed innocence of the defendant in a criminal proceeding,<sup>115</sup> and counsel's duty of loyalty to the client.<sup>116</sup>

### B. *Potential Government Abuse*

Because the defendant's right to counsel of choice is a qualified one, the reasoning of the *Rogers* court would be less than persuasive if the sole effect of a government threat to forfeit attorneys' fees was to deny the defendant counsel of first choice. The right is not absolute. The concern that the counsel of choice argument raises, however, is not that applying the forfeiture statute to attorneys' fees will deny the defendant counsel of choice, but rather that applying the statute to attorneys' fees permits the federal prosecutor to select defense counsel of the *government's* choice, or at least to restrict significantly the pool of available defense counsel. Moreover, the attorney that does handle the defendant's case must confront eternal conflicts, created by the existence of an indictment seeking forfeiture of attorneys' fees, and which function to jeopardize counsel's ability to render partisan advocacy. There appears to be at least a kernel of truth to the claim that in permitting the government to pursue forfeiture of attorneys' fees, "[t]he right to counsel will be empty because it will depend upon what government is willing to provide for a particular defendant."<sup>117</sup> This would be a practice

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113. "Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

114. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

115. *E.g.*, *Taylor v. Kentucky*, 436 U.S. 478, 493 (1978); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.")

116. *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984); *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (attorney must avoid conflicts of interest). Professional ethics also imposes a duty of loyalty. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b) (1983).

117. ABA Recommendation on Forfeiture, *supra* note 11, at 3.

completely foreign to the criminal law, and it threatens the defendant's constitutional right to a fair trial.

The objective of the new law is to provide a mechanism for the government to confiscate the ill-gotten gains of criminal enterprise and to prevent the illegal transfer of those gains to third parties. It would be naive to presume that lawyers can be nothing other than "innocent" third parties and, as a result, should be excluded from the reach of the forfeiture law. Thus, it is entirely consistent with the purpose and, indeed, the language of the forfeiture law for the government to pursue forfeiture of attorneys' fees which are paid with tainted assets or from the proceeds of crime.<sup>118</sup> Yet, this possibility does not entail abandoning *all* the important protections afforded by defense counsel. In fact, a constitutional approach to the criminal forfeiture of attorneys' fees is one that respects the integral role of defense counsel in the adversarial process. This role is not respected when the government abuses the purpose of the forfeiture statute and maneuvers unilaterally to "choose" defense counsel.

Typically, RICO and CCE cases involve complex issues and demand several years of court time at taxpayer expense. The government draws on a substantial amount of resources to prosecute these cases. While "fair trial" under the Constitution does not require that the defendant have an equal level of resources available for use, in evaluating what due process requires, few courts would condone the abuse of the adversary system which would occur if the government were permitted to manipulate the roster of counsel available to a defendant fighting to preserve freedom. As the *Rogers* court

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118. This view may be unrealistic if courts follow the reasoning of pre-1984 Act decisions. *E.g.*, *United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984) (denying forfeiture of fees paid to attorney since proceeds of illegal activity were no longer in possession of defendant); *United States v. McManigal*, 723 F.2d 580 (7th Cir. 1983) (same). The Seventh Circuit Court of Appeals has overruled these decisions in *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985). Of course not every judge agrees. *Id.* at 804-07 (Ripple, J., dissenting) (objecting to the ambiguity of the forfeiture legislation and noting that historically forfeiture has been regarded with "deep suspicion"). Neither does the ABA, which approves of forfeiture only if the attorney engages in "criminal conduct" or accepts a fee as a "fraud" or a "sham." There is no indication under the ABA proposal that acceptance of fees paid from proceeds of crime would amount to "criminal conduct," "fraud," or "sham." Interestingly, prosecutor might avoid the obstacles of criminal forfeiture and seek remedial forfeiture of fees under a civil statute. *See United States v. One Parcel of Land*, 614 F. Supp. 183 (N.D. Ill. 1985).

recognized, "government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries."<sup>119</sup>

Essentially, the notice of forfeiture, including fees, places in the lap of defense counsel the decision of whether to risk providing services without receiving compensation because of an inability to prove that counsel was unaware of the "tainted" source of the attorneys' fee. Arguably, few lawyers would take this risk. The point, then, is not that forfeiture of attorneys' fees prevents the defendant from retaining counsel of first choice. Rather, the critical point is that the prosecutor can use the *threat* of forfeiture of fees to reduce the pool of counsel available to the defendant. Economic interests alone will preclude much of the private bar from taking the case in which the government wants to forfeit attorneys' fees.<sup>120</sup>

Sentiments of equality might support the argument that a RICO or CCE defendant, who cannot muster enough credibility to convince an attorney that the accused possesses "clean" assets to pay a fee, should resort to the public defender's office, just like the indigent who has no assets. That argument, however, fails to consider the potential for abuse in the statute. Certainly, if a criminal defendant has no "clean" assets to retain private counsel, then the defendant can secure the services of a public defender. The source of abuse, however, lies in the indictment itself and in what message the indictment or restraining order conveys. The message conveyed is that attorneys' fees will come from assets which are presumed to be forfeitable. The effect is that such notice of forfeiture of fees functions to deter potential defense counsel from taking the case *before* the attorney is capable of making a rational decision whether or not the defendant can pay fees from a legitimate source. In achieving such a result, the government has taken long strides toward excluding the best available defense counsel from particular cases (assuming an economic motivation) and possibly leaving the defendant with the services of the typically overburdened

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119. *Rogers*, 602 F. Supp. at 1350.

120. Nonetheless, a lawyer could get reasonable compensation set by Congress for attorneys appointed under the Criminal Justice Act. 18 U.S.C.A. § 3006A (1985). Congress has doubled the rate to \$60 per hour for time expended in court and to \$40 per hour for out-of-court services. Moreover, it is possible that there would be no limit on the maximum amount an attorney may receive for representation in complex cases.

public defender.<sup>121</sup> This result is possible even though the defendant may have legitimate resources for payment of fees.

### C. Attorney-Client Conflicts

The defendant's fair trial interests are jeopardized further insofar as the threat of forfeiture of fees manufactures conflicts of interest and impairs the attorney's ability to be a partisan advocate. Although such a result implicates the attorney-client privilege, a certain level of conflict imperils the attorney's ability to fulfill the duty of loyalty owed to the client under the Constitution. To the extent that the 1984 Act permits the government to create this conflict unilaterally by pursuing forfeiture of attorneys' fees, the statute is unconstitutional as applied.

As Judge Kane opined in *Rogers*, "[t]he threat of an attorney having to disclose information obtained from his client will chill the openness of those communications, thereby impinging on the right to counsel."<sup>122</sup> The court concluded, in effect, the post-trial ancillary hearing established in the

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121. This line of argument does not necessarily apply with equal weight to the issue of using grand jury subpoenas to obtain client fee information from attorneys. Compare *Simels v. United States*, 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on the subpoena issue*, 767 F.2d 26 (2d Cir. 1985) (grand jury subpoena issued only three months after retracted trial subpoena looks like abuse of grand jury process), with *Doe v. United States*, 781 F.2d 238 (2d Cir. 1986) (*en banc*) (denying motion to quash subpoena since value of attorney's testimony regarding prior fee arrangements with former client outweighs the danger that the grand jury appearance would disqualify attorney from representing the client again), *vacating Doe v. United States*, 759 F.2d 968 (2d Cir. 1985) (requiring a preliminary showing of relevance and search for alternative sources). One basic distinction between the threat of fees forfeiture and the potential for attorney disqualification by issuing a grand jury subpoena is that the subpoena may deny the defendant of, at most, one particular attorney. The threat of forfeiture, on the other hand, could severely limit the field from which a defendant chooses counsel.

The Justice Department has issued a "Policy With Regard to the Issuance of Grand Jury or Trial Subpoenas to Attorneys for Information Relating to the Representation of Clients," which requires obtaining information from alternative sources "unless such efforts would compromise a criminal investigation or prosecution." 37 CRIM. L. REP. (BNA) 2480 (Sept. 25, 1985). The Massachusetts Supreme Judicial Court, by disciplinary rule, has required prosecutors to secure judicial approval prior to issuing subpoenas of defense lawyers. See *Weiner, Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 AM. CRIM. L. REV. 95 (1985); *New Rule Set on Lawyer Subpoenas*, NAT'L L. J., Nov. 4, 1985, at 3; *U.S. Acts to Block a Curb on Subpoenas to Lawyers*, N.Y. TIMES, Jan. 3, 1986, at 9, col. 1.

122. 602 F. Supp. at 1349.

1984 Act would require a disclosure of how the attorney knew assets for fees were not part of a sham transaction. This disclosure, according to the court, would necessarily encompass privileged attorney-client communication. The possibility of disclosure in the future would have the present effect of chilling open communications between attorney and client.<sup>123</sup>

The underlying theory of the attorney-client privilege is that "encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously."<sup>124</sup> The privilege functions by denying compulsion of attorney testimony about protected communications between the attorney and the client. Generally, the privilege extends to confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.<sup>125</sup> To be privileged, the communication must be confidential, and it must be necessary to obtain informed legal advice.<sup>126</sup>

Because the privilege prevents disclosure of relevant evidence, it must be "strictly confined within the narrowest possible limits consistent with the logic of its principle."<sup>127</sup> In defining the limits, courts have held that client identity and fee information, although incriminating, generally are not privileged since the fact of identity and payment of a fee are not "confidential communications" and, therefore, cannot be privileged information.<sup>128</sup>

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123. *Accord* United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985) (questioning legality of subpoena for attorney fee information). *But see* Simels v. United States, 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on the subpoena issue*, 767 F.2d 26 (2d Cir. 1985) (grand jury subpoena issued only three months after retracted trial subpoena looks like abuse of grand jury process), rejecting the *Rogers* court view on forfeiture of fees, on attorney-client privilege, and on sixth amendment.

124. J. WEINSTEIN & M. BERGER, EVIDENCE § 503(02) (1985); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (for fully informed legal advice client must confide in attorney); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (interests of justice require client to utilize attorney's service without fear of subsequent disclosure).

125. 8 J. WIGMORE, EVIDENCE § 2295 (3d ed. 1940).

126. *In re Shargel*, 742 F.2d 61 (2d Cir. 1984) (upholding denial of motion to quash subpoena requesting fee information).

127. *Fisher*, 425 U.S. at 403 (holding the production of accountants' workpapers does not involve testimonial self-incrimination under the fifth amendment); *Shargel*, 742 F.2d 61 (2d Cir. 1984) (identification of persons as clients of an attorney does not disclose a confidential communication).

128. *Shargel*, 742 F.2d at 64 (privilege only encompasses communications necessary to obtain informed legal advice); *In re Witnesses Before*



Nearly every opponent of applying forfeiture to attorneys' fees has argued that the statutory scheme of the third party hearing violates the attorney-client privilege.<sup>129</sup> As a petitioner for fees in a post-trial hearing<sup>130</sup> the attorney would have to establish the basis for believing assets used for fees were not subject to forfeiture.

Although the statute would not require the attorney to scrutinize every financial transaction ever made by the defendant, the law probably should be interpreted to contemplate a reasonable inquiry into the source of the professional fee. It is improbable, for example, that the attorney could believe property was not subject to forfeiture if the defendant offered to pay the fee in small-numbered bills out of a brown paper bag. Of course, the unique role of the attorney, which may entail having intimate knowledge of a client's personal and business affairs, demands a more thorough inquiry than could be expected from the average third party.<sup>131</sup> The attorney of a longstanding attorney-client relationship, for instance, may have little or no trouble indicating which facts and circumstances contributed to forming a belief that the source of a legal fee would not be subject to forfeiture, and in so indicating, the attorney need not disclose communications protected by the privilege.

Even if the statutory scheme imposes requirements ultimately beneficial to the profession,<sup>132</sup> it may be practically impossible for an attorney to present information which in-

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Special Grand Jury, 729 F.2d 489, 491 (7th Cir. 1984) (fee information privileged only if so much is already known that its disclosure would reveal a confidential communication); *In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983) (disclosure of amount of fees not privileged).

129. *Rogers*, 602 F. Supp. at 1348-49; Buffone, *supra* note 10, at 146; Krieger & Van Dusen, *supra* note 9, at 740-42.

130. The attorney must meet the requirements of a "bona fide purchaser for value." 18 U.S.C. § 1963(m)(6)(B); 21 U.S.C. § 853(n)(6)(B). The attorney, of course, does not "purchase" anything but in fact "sells" services. The attorney, nevertheless, is considered on the level of a purchaser for purposes of the third party hearing.

131. The typical grocery store checker, for instance, would not suspect impropriety on the part of a customer merely because payment was in small-numbered bills.

132. The forfeiture law forces the issue of whether attorneys should accept fees paid out of the profits of criminal activity. For a thorough criticism of prevailing ethical norms and advocacy of "personal ethics," see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29. See also Heffernan, *The Moral Accountability of Advocates*, 61 NOTRE DAME L. REV. 36 (1985) (denying unaccountability for conduct merely on basis of conforming to codes of professional conduct).

sures a right to the professional fee without revealing privileged communications. If nothing else, ongoing breaches of the attorney-client privilege which result solely by operation of a statutory scheme provide support for the view that the procedure is inimical to partisan advocacy. Perhaps ultimately, repeated violations provide solid evidence that the defendant is denied the fair trial guaranteed by the Constitution.

Apart from the attorney-client privilege concerns, the conflict fostered by the statute may cause the attorney to be less than a zealous advocate of the client's interests; in order to preserve the right to fees, communication with the client may be intentionally limited. Consider that the Federal Rules permit an indictment reference to "all property" of the defendant.<sup>133</sup> Consider, also, that one route for proving continuing criminal enterprise is to show evidence of the defendant's "legal" income and resources compared to what the defendant has spent. How can defense counsel zealously defend against such an approach while taking care to remain partially ignorant of the defendant's financial background in order to protect the right to attorneys' fees? Such a balancing act suggests that the attorney and client have adverse interests, which is just the kind of conflict lying at the root of an ineffective assistance of counsel claim.<sup>134</sup>

As Judge Leval in *United States v. Badalamenti* described the dilemma encountered by defense counsel: "His obligation to be well informed on the subject of his client's case would

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133. The government's indictment must allege what is subject to forfeiture. "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information shall allege the extent of the interest or property subject to forfeiture." FED. R. CRIM. P. 7(c)(2).

Courts have upheld a general reference to "all property," however, as long as the indictment would give adequate notice to the defendant to marshal evidence for defending against the proposed forfeiture. *E.g.*, *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983) (supplementing indictment with bill of particulars describing property); *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980) (forfeiting a yacht and a discotheque-motel located in Chalkis, Greece).

134. See *Holloway v. Arkansas*, 435 U.S. 475 (1978) (reversing conviction for attorney's failure to account for adverse interests of co-defendants); *Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984) (denial of fair trial rights when attorney acted as witness for prosecution); *United States v. De Falco*, 644 F.2d 132, 136-37 (3rd Cir. 1979) (denial of sixth amendment rights when counsel under indictment and entered plea bargain on his case in same court hearing client's case). The defendant is entitled to the "undivided loyalty" of counsel. W. LA FAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 11.9 (1985).

conflict with his interest in not learning facts that would endanger his fee by telling him his fee was the proceeds of illegal activity."<sup>135</sup> More broadly, it is argued that the sense of trust and confidence in a relationship between attorney and client is impaired by the prospect that an attorney may become a witness against the client in the pending prosecution.<sup>136</sup>

These conflicts are great and amount to a significant burden on defense counsel. In sum, government application of the 1984 Act to attorneys' fees threatens seriously defense counsel's ability to maintain the duty of loyalty owed to the defendant.

Although the Justice Department has claimed it will not seek fee forfeitures unless the prosecutor can prove a defense lawyer has "actual knowledge" that the source of the professional fee is an asset "from criminal misconduct,"<sup>137</sup> an intra-departmental policy of restraint, accountable to nobody, is not the kind of protection upon which a defendant should have to rely in the face of such risk for abuse.<sup>138</sup> A procedure which bestows upon the government the means to reduce significantly the number and the loyalty of available defense counsel is one which does not appear to be consistent with the fair trial guarantee of the Constitution.<sup>139</sup>

## VII. PROPOSED AMENDMENT

Considering the risk of depriving the right to a fair trial,

135. *Badalamenti*, 614 F. Supp. at 196.

136. *E.g.*, Krieger & Van Dusen, *supra* note 9, at 742. *See* *Virgin Islands v. Zepp*, 748 F.2d 125, 139 (3d Cir. 1984). This claim relates to the broader notion of duty of confidentiality: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). The claim also pertains to the advocate-witness rule which bars attorneys from appearing in litigation as both advocate and witness, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1981). *See* *United States v. Prantil*, 764 F.2d 548 (9th Cir. 1985) (prosecutor barred from testifying by advocate-witness rule).

137. *Justice Department Guidelines on Forfeiture of Attorneys' Fees*, 38 CRIM. L. REP. (BNA) 3001 (Oct. 2, 1985).

138. The Guidelines place no "limitations on otherwise lawful litigative prerogatives of the Department of Justice," and are for strictly internal purposes. *Id.* at 3003.

139. Basic interests of a free community may hinge largely on the vitality of the adversary system. *See, e.g.*, REPORT OF THE ATTORNEY GENERAL COMMITTEE ON POVERTY AND ADMINISTRATION OF CRIMINAL JUSTICE 8-11 (1963).

the benefit of additional procedural safeguards could prove to be invaluable. The 1984 Act should be amended to provide for a pre-trial hearing whenever the government gives notice of an intention to forfeit attorneys' fees. The pre-trial hearing, along with the jury decision at trial, would decide all issues relating to fees and would obviate the need for the post-trial third-party hearing provisions to decide on claims for attorneys' fees.

#### A. *Pre-Trial Hearing and a Reasonable Fee*

The safeguard of a pre-trial hearing to decide the fees issue should involve little additional burden relative to the benefits offered. The requirement would not be unduly burdensome in view of the already existing provision for a pre-trial hearing on restraining orders. Moreover, the defendant receives the benefit of having a judicial officer decide the kind of legal representation the defendant receives throughout trial. Other arbitrary factors, including speculation and prosecutorial aggressiveness, are eliminated. The government, at the same time, can pursue its forfeiture objectives without uncertainty about the constitutionality of the conduct.

Furthermore, when forfeiture of fees is an issue at a pre-trial hearing, the defendant should be able to pay a "reasonable fee"<sup>140</sup> for legal services performed prior to and in the course of the hearing. A reasonable fee provision is essential to the hearing requirement since it assures that the defendant in a pre-trial hearing receives adequate representation, which is not necessarily guaranteed by the existing Forfeiture Act.<sup>141</sup>

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140. This is a "reasonable fee" in the ordinary sense, not limited by the "cap" of the appointed counsel provision, *supra* note 120. In its discretion, a court may allow the prevailing party in a federal civil rights action a "reasonable attorney's fee." 42 U.S.C. § 1988. Courts have a great deal of experience in applying the many factors used to determine what is "reasonable." See, e.g., *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983).

141. As I have discussed earlier, the mere threat of forfeiture may dissuade attorneys from accepting a case even if only to prepare for a pre-trial hearing. It may be argued that the defendant should have access to assets, both legally and illegally acquired, to offset "ordinary and necessary expenses" which presumably would include the cost of counsel.

Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

When the government petitions the court to issue a pre-trial restraining order on the defendant's assets, ordinarily the Forfeiture Act requires a hearing to determine whether the order should issue or remain in effect.<sup>142</sup> If the order also restrains assets intended to pay attorneys' fees, as it would if reference is made to "all assets," then, by definition, the hearing on the order should also address the question of whether and to what extent the defendant has assets to use for attorneys' fees. To date, courts have not made such a determination, preferring instead to address only the broader, preliminary issue of whether fees can be seized at all.<sup>143</sup> Nevertheless, at this stage, already the risk exists that an innocent defendant could be deprived of the quality of legal representation that can be afforded out of legitimate assets. The hearing on the order, therefore, not only should determine the validity of the order but also should determine specifically what the defendant can use to retain counsel after the hearing and during the trial. Meanwhile, the defendant should be allowed access to resources sufficient to pay a "reasonable fee" for legal services relating to the hearing.

Where the government, by way of indictment, indicates its interest in forfeiting fees but does not petition for a pre-trial restraint of assets, again the risk exists that the defend-

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18 U.S.C. § 1963(f). See also 21 U.S.C. § 853(g).

Assuming an argument along these lines would propose a "reasonable fee" for the attorney, it would differ from my proposal only in the event that the pre-trial hearing rendered a decision that the defendant owned insufficient assets to retain counsel. In this event, however, the difference in dollars can be substantial. My proposal would allow the defendant to pay a "reasonable fee," *supra* note 140, for the services relating to the pre-trial hearing, but would allow the defendant only the services of "appointed counsel," *supra* note 120, for the remainder of the trial. Permitting the defendant to pay "reasonable fees" or the "going market rate" for legal services, without regard for the lack of "clean" assets, would result in payment of a fee much higher than what I have proposed. More importantly, such a result highlights one of the underlying themes of this paper; if with some proof it is shown that a defendant owns insufficient "clean" assets to retain counsel, then the defendant may have access to the level of counsel which is ordinarily available to indigents: a public defender. Moreover, my proposal discards the post-trial, third-party hearing only when attorneys' fees are an issue.

142. A restraining order could issue upon the filing of an indictment or information, without a prior hearing. Earlier, I questioned the constitutionality of restraining property without a hearing. *Supra* notes 87-90 and accompanying text.

143. See, e.g., *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985).

ant will be deprived of the quality of counsel that legitimately can be afforded. The defendant may have assets readily available for retaining counsel, but many attorneys would consider the risk of fee seizure to be high, and as a result, would be reluctant to take a case in which the government has indicated an interest in forfeiture of attorneys' fees. A court, therefore, should conduct a pre-trial hearing on the question of whether the defendant has assets to use toward attorneys' fees. Accordingly, the defendant should be entitled to use assets sufficient to pay a reasonable legal fee for services relating to the hearing.

### B. *Substantial Probability Standard*

The rules which prevail at the hearing must be sensitive to, on the one hand, the prosecution's reluctance to reveal too much of its principal case, and on the other hand, both the presumed innocence of the defendant and the presumed legitimate pool of resources out of which the defendant pays legal fees. Almost certainly, if the government must jeopardize its efforts to secure a conviction in order to forfeit attorneys' fees, the prosecution will abandon the forfeiture count and instead exclusively pursue the conviction. A hearing which does not account for this governmental interest, therefore, is one which does a disservice to law enforcement's long-term efforts to curtail crime-for-profit activities. Equally ineffective, however, is a hearing which deprives a defendant of the presumed legitimacy of assets owned. Such a hearing could impair the defendant's ability to retain counsel.

In light of these interests, a "substantial probability" standard of proof should prevail at the hearing on the issue of attorneys' fees.<sup>144</sup> Aside from the fact that a pre-trial restraining order similarly can issue only upon a "substantial

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144. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). For an interesting introduction to the analogous area of preliminary injunctions, compare *American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1985) (Judge Posner's formula for "presenting succinctly" the factors a court must consider), with Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) (balance gravity of interim injury against possibility of interlocutory judicial error).

probability" showing,<sup>145</sup> the purpose of requiring this burden is two-fold. First, it is far short of "beyond a reasonable doubt," or even "clear and convincing," which in this context would amount to full disclosure or free, open discovery of the prosecution's case prior to trial.<sup>146</sup> Second, the burden of proof is high enough to discourage the almost casual government request for attorneys' fees—a practice which could become appealing to prosecutors under the current statutory scheme. Congress has recognized that the test of "substantial probability" is a "stringent one,"<sup>147</sup> and it would require the prosecution to present some convincing indicia of wrongdoing, or to show that there is a "substantial probability" that the defendant has committed a crime, that the defendant has assets subject to forfeiture and that attorneys' fees will be paid from those assets. The prosecution might meet this burden by showing the likelihood that the defendant will be convicted of a crime, and the fact of a high retainer fee in a situation where the defendant has little or no reported income and no other significant, legitimate financial or family assistance.

### C. *Derivative Use Immunity*

The pre-trial hearing may require the defendant to testify, and although the proceeding is pre-indictment, fifth amendment protections against self-incrimination probably should apply. A useful procedural tool, therefore, would be the grant of derivative use immunity to the defendant at the hearing. Anything disclosed at the hearing could not be used in the principal case, unless the government could show that it obtained the evidence from an independent, legitimate source.<sup>148</sup>

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145. *Supra* note 84.

146. Not only is the government not expected to disclose trial strategy but important societal interests, such as protection of witnesses, are served by a policy of limited criminal discovery. *See, e.g., United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982) (murder of government witnesses); FED. R. CRIM. P. 16(d)(i) (grant of protective order on showing to court alone).

147. SENATE REPORT, *supra* note 73, at 203.

148. *See Kastigar v. United States*, 406 U.S. 441 (1972) (finding grant of derivative use immunity consistent with fifth amendment privilege against self-incrimination). *See generally* L. TAYLOR, WITNESS IMMUNITY (1983).

#### D. *Effect of Hearing and Jury Decisions*

If at the pre-trial hearing the court decides the defendant owns sufficient legitimate resources from which to pay counsel, or for the same reason, decides not to restrain any of the defendant's assets, then the defendant has no constraints in using whatever assets the defense requires. If the court, on the other hand, determines that some or all of the defendant's assets are "subject to forfeiture" or pre-trial restraint, then the defendant must proceed to trial accordingly, even if only accompanied by a public defender. The restraint on assets may preclude the defendant from offering a retainer, whereas the hearing decision that assets may be subject to forfeiture gives notice of the likelihood that fees will be forfeited, and as a result, probably reduces the attraction of the defendant's case among potential defense counsel. More than likely, the hearing decision would have a lasting impact on the defendant's ability to retain quality counsel.

The jury decision at trial controls whether any of the defendant's assets are forfeited in fact. If the jury decides that none of the defendant's assets should be forfeited, then the defendant may use whatever is required to pay counsel even though counsel already has rendered the services. With this in mind, defense counsel may decide to provide services, despite a pre-trial decision suggesting fees would be subject to forfeiture, because of the view that the government's evidence would not persuade a jury to order forfeiture of fees. On the other hand, if the jury decides that some or all of the defendant's assets are to be forfeited, then the defendant's ability to pay counsel is constrained accordingly. The government may forfeit assets already transferred to the attorney, but in any event, the government may not reach the "reasonable fee" the attorney receives for services rendered prior to and during the hearing.

The primary benefit of this approach is two-fold. First, the proposed amendment guarantees the defendant *access* to counsel. The guaranteed "reasonable fee" provision allows defense counsel to consider the merits of the government's case without the threat of fee forfeiture. Second, an impartial judicial system, rather than the local prosecutor, bears the responsibility of depriving a defendant in a criminal case of the ability to retain private counsel.

#### CONCLUSION

The Comprehensive Forfeiture Act of 1984 represents



Congress's latest attempt to do something about the substantial economic clout exerted by criminal racketeers and drug traffickers. In the view of Congress, criminal forfeiture is the mechanism through which law enforcement may make a worthwhile attack on the profit-generating apparatus forming the lifeblood of these organizations. The efforts of Congress in this area deserve praise. This article has concluded that a generally commendable forfeiture law may have an adverse effect on a defendant's right to a fair trial when the prosecution seeks to forfeit attorneys' fees. In recommending that the forfeiture statute be amended, this article attempts to outline an approach to forfeiture of attorneys' fees consistent with the constitutional protections guaranteed to defendants in the criminal justice system.