

Formal Written Statement on Criminal Forfeiture

By E.E. Edwards

**Parliamentarian and Co-Chair, Forfeiture Abuse Task Force
National Association of Criminal Defense Lawyers (NACDL)**

**Hearing Before the Judiciary Committee,
U.S. House of Representatives, Subcommittee on Crime; September 18, 1997**

**I. Introduction:
Current Criminal Forfeiture Laws are Too Abusive and in Need of Reform;
DOJ's Draft "Criminal Asset Forfeiture Act of 1997" is the Most Radical, Lop-
Sided *Expansion* of Government Power to Seize and Forfeit Private Property
Yet Seen**

Although the federal criminal forfeiture statutes have not been significantly expanded in substance since 1986, the scope of application for these statutes has been greatly expanded, in a piece-meal fashion, since then. But the defense bar and other forfeiture reformers have never been heard with regard to the deficiencies in the criminal forfeiture statutes. Each year, or every other year, the Justice Department has relentlessly sought expansions in the scope of the criminal forfeiture laws with little scrutiny from other interested organizations or Congress.

The Justice Department's draft Criminal Asset Forfeiture Act of 1997 is the most radical and lop-sided request for expansion of the government's power to seize and forfeit property yet seen. The government's civil and criminal forfeiture powers are already too abusive. Congress should reform both the civil and criminal forfeiture statutes in a uniform manner. It should rein in, not expand, governmental abuses under these laws. The last thing Congress should be doing is broadening the government's forfeiture powers in either the civil or the criminal context, especially not in the dangerous ways urged by DOJ.

We respectfully urge the Subcommittee to convene additional hearings to examine the many ways in which the government abuses its current powers before it considers any new legislation that would lead to an expansion of those abuses, like the Department's

proposals would do. Indeed, the Subcommittee should reject the Department's draft outright.

II. Criminal Forfeiture -- Even More Dangerous to Innocent Property Owners Than Civil Forfeiture

For many months, DOJ has been waging a campaign for drastic new forfeiture powers through the relatively obscure U.S. Judicial Conference Rules Committee process. DOJ has lobbied the Rules Committee hard to eliminate the historical right to a jury trial on forfeiture issues in criminal cases. Until recently, the Department was satisfied with this "behind the scenes" lobbying campaign. Now, however, DOJ comes to this Subcommittee with a proposal for an end-run around the Judiciary's rule-making process. The Department urges the Subcommittee to hastily gut Federal Rule of Criminal Procedure 31 (e) and the important historical right to a jury trial for which the Founding Fathers fought a revolution. *See Oral Testimony Before the Subcommittee of NACDL Parliamentarian and Forfeiture Abuse Task Force Co-Chair E.E. Edwards.* The Subcommittee should reject this proposal.

It is especially important to remember that the criminal forfeiture laws are in many respects even more troubling than are the "civil" forfeiture laws. These criminal forfeiture laws, like the civil laws, need to be *reformed -- not expanded.*

For example, criminal forfeiture statutes currently provide that a third-party claimant has no right to a jury trial -- a circumstance of very questionable constitutionality. This is wrong and should be changed. Likewise, criminal forfeiture statutes place the burden of proof on the innocent third-party claimants. Third-party claimants are barred from asserting any interest at all in seized

property until the criminal proceeding against the defendant is completed. This can and often does take years, especially in complex “white collar” cases. There is a large body of case law chronicling the claims of innocent third-parties whose property has been wrongfully restrained or seized under criminal forfeiture laws.

DOJ’s draft “Criminal Asset Forfeiture Act of 1997”, like the predominantly criminal forfeiture H.R. 1965 (which DOJ also drafted), does nothing to make the currently unfair procedures in criminal forfeiture more just. Rather, the Department’s proposed legislation simply grants the government greatly expanded criminal forfeiture powers, including the draconian new power to restrain “substitute assets” *prior to trial*.

III. Current Criminal Forfeiture Laws Must Be Reformed

We propose that Congress reform the criminal forfeiture laws in the following ways:

- *Reform the current substantive over-breadth in the scope of the criminal forfeiture statutes.*
- *Strengthen the protections for innocent third party property owners and other third-party stakeholders.*
- *Reform procedures that protect the person or business accused, as well as innocent third-party property owners and other stakeholders.*

Specific discussion of these necessary reforms follows.

IV. Specific Reforms Needed in Current Criminal Forfeiture Law

A. *Congress Must Reform the Current Substantive Over-Breadth in the Scope of the Criminal Forfeiture Statutes*

➤ *Congress Needs to Fairly and Uniformly Define “Proceeds” Forfeiture*

Congress needs to define the term “proceeds.” It should be defined as “gross receipts” where illegitimate good or services such as drugs or arson for hire are involved. But otherwise, the term proceeds should be defined as net proceeds after the cost of the goods or services provided are deducted.

The proposal by the Department is wholly unacceptable, as it *exacerbates* the problem in this area. For example, in H.R. 1965 (Page 23, lines 6-20), it has drafted a radical expansion of the current definitions of “proceeds” in forfeiture law, so as to encompass all “gross receipts” of legitimate businesses, allegedly obtained from almost every felony in Title 18 of the federal code. This simply encourages unfair seizures by federal agencies that in many instances will destroy or force into bankruptcy legitimate businesses. For this reason alone, H.R. 1965 is highly objectionable and should not be supported. This provision should be deleted in its entirety, and replaced with a more reasonable, and more truly uniform definition of proceeds.

The government desires a new, broad “gross receipts” definition of “proceeds.” In non-money laundering cases, DOJ would provide only the most meager exemption, allowing legitimate business persons to deduct the cost of the goods or services provided from the gross receipts subject to forfeiture *only if it involves an “over-billing scheme.”* See H.R.

1965, discussed in NACDL's Letter to Chairman Hyde, July 28, 1997 (attached).

By defining "proceeds" in the broadest terms, the Department would turn "proceeds forfeiture" into an instrument of draconian punishment, rather than the remedial provision it is *supposed* to be. If given such a provision as that it has already exacted in H.R. 1965, the government will argue to the courts that, unless an "over-billing scheme" is involved, the narrow allowance for the costs of the goods and services provided does not apply. *Very few fraud or other white collar cases involve "over-billing." Instead, they involve all manner of different circumstances, which should be treated the same.*

Congress should amend the definition of "proceeds" in the money laundering statute, so it is the same as the definition in all other forfeiture statutes. Otherwise, the government will continue to overuse and abuse the over-broad money laundering statute. The government automatically appends it to all charges in just about every case it brings. It does so simply to "reap the bounty" allowed under the current over-broad definition of "proceeds" in that statute, and to obtain unfairly enhanced sentencing guidelines.

We agree with the government that the deduction for reasonable costs should only be available for *legitimate* goods and services. So, drugs and other inherently illegal enterprises, like gambling, for example, would not even be considered for the deduction. We do not object to this requirement that such a deduction only be available for legitimate businesses.

However, the effect of the government's over-broad "gross receipts" definition is simply to ensure over-reaching by the government, and the sure-fire wipe out, at the whim of the prosecutor, of all sorts of *legitimate businesses* -- family businesses, small partnerships, and complex corporations alike -- upon which so many in the community depend.

The courts are *already* greatly troubled by the government's *current courtroom advocacy efforts* to construe some proceeds forfeiture statutes as allowing forfeiture of the "gross receipts" of an offense, without any allowance for the cost of legitimate goods and services provided by the offender otherwise engaged in a legitimate enterprise. Courts have routinely rebuffed these arguments because they rightly consider the results sought by the government to be "absurd." *See e.g., United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (court of appeals dismisses as "absurd" government contention that \$28 million -- the gross receipts of insurance companies comprising a RICO enterprise -- was subject to forfeiture; court observed that such an extreme forfeiture would prevent the insurance companies from paying the claims of their policy holders); *United States v. 122,942 Shares of Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (rejecting government's attempt to define money laundering proceeds as gross receipts under 18 USC 981 (a)(1)(C)).

In short, the results that would occur in innumerable cases if proceeds are so broadly defined as DOJ desires, and as now in their bill, H.R. 1965, would be horrific. It is well-recognized by the courts that the government is already abusing even the *limited authority*

it *now* possesses to forfeit the proceeds of “white collar” type offenses.

For example, in embezzlement cases, where a defendant has returned the property embezzled prior to the time the embezzlement is discovered, the government has nonetheless sought forfeiture of the entire amount of the property or monies embezzled. This results in wiping out the legitimate businessperson defendant, who, of course, no longer has the wherewithal to pay back the amount embezzled since he has already returned the money to the entity from which it was taken. Indeed, this so troubled the conservative U.S. Court of Appeals for the Fourth Circuit that the panel reversed defendant William Aramony’s money laundering conviction in order to knock out the unfair “proceeds” forfeiture. At oral argument, the panel made it clear that this is what it was doing. *U.S. v. Aramony*, 88 F.3rd 1369 (4th Cir. 1996).

In other circumstances, this provision could destroy entire legitimate businesses. A defendant property-owner should not be wiped out by the forfeiture simply because he has in some technical way committed a fraud or has supplied widgets that are not precisely up to Department of Defense “mil spec” standards.

What Congress should do is reform the currently abused definition of proceeds under the money laundering statutes, and rein in the government. The last thing it should be doing is expanding the government’s powers to abuse legitimate businesses and innocent Americans through unrealistic and unfairly broad definitions of proceeds.

More specific, the following fair and uniform definition of “proceeds” should be enacted:

“(2) For purposes of paragraph (1), the term ‘proceeds’ is defined as follows.

“(A) In cases involving illegal products such as controlled substances, illegal services, such as odometer tampering or unlawful activities such as espionage or arson, or healthcare fraud involving the provision of unnecessary services, the term ‘proceeds’ means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

“(B) In cases involving essentially lawful products or lawful services that are sold or provided in an illegal manner, the term ‘proceeds’ means the amount of money acquired through the illegal transactions resulting in the forfeiture less the direct costs incurred in providing the products or services. The defendant shall have the burden of going forward with the evidence concerning direct costs. Once the defendant does so, the government shall bear the ultimate burden of proving the amount of the proceeds subject to forfeiture.”¹

¹ This definition of proceeds avoids confusing conflict in the law threatened by the government’s unreasonable proffered definition. See e.g., DOJ’s desired definition, which it already insisted upon as part of a supposed global settlement with the full committee on the entire subject of forfeiture, in H.R. 1965, page 23-24, lines 6-20, and lines 7-8, respectively.

➤ ***Congress Must Clearly Forbid the Pre-Trial Restraint by the Government of “Substitute Assets” and Clearly Narrow the Scope “Substitute Assets” Forfeiture***

The concept of forfeiting “substitute assets” *at all* (*post*-trial) has always been a dubious one. It first entered the law as a limited concept in 1986. But even under the original, narrowly-intended conception, it has been abused by the government ever since. Reasonable restrictions must always be placed on any forfeiture of “substitute assets.” Without such restrictions, any substitute assets provision grants the government an outrageous power to arbitrarily restrain all of the property on an accused, on the theory that

Our suggested amendment *tracks*, rather than *conflicts* with the established case law under the money laundering and RICO statutes. *E.g.*, United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996) (characterizing as “absurd” government’s contention that \$28 million, representing the gross receipts of the insurance companies constituting the RICO enterprise during the course of the alleged conspiracy, was subject to forfeiture; court observes that an insurer’s gross receipts would include amounts needed to pay policy holder claims); United States v. Lizza Industries, 775 F.2d 492, 498-99 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (in bid-rigging conspiracy, “proceeds” subject to forfeiture should be amount of money acquired through illegal contracts less the direct costs from the contracts, such as the cost of cement used on a particular project; however, the prorated cost of a cement mixer, which might be used on other projects, could not be deducted); United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir.), *cert. denied*, 111 S.Ct. 2019 (1991) (“the proceeds to which the statute refers are net, not gross, revenues-profits, not sales, for only the former are gains.”); United States v. Elliott, 727 F. Supp. 1126 (N.D.Ill. 1989) (in case involving lawyer convicted of misusing confidential client information for his personal benefit in nine sets of securities transactions, government conceded that the purchase price of the stock defendant bought had to be deducted from the sale price to calculate defendant’s proceeds from the scheme); United States v. 122,942 Shares of Common Stock, 847 F. Supp. 105 (N.D.Ill. 1994) (the term proceeds in 18 U.S.C. §981(a)(1)(C) encompasses only the profit from a fraudulent stock transaction, not all of the property acquired as a result of the transaction; claimants were entitled to the return of their direct costs in purchasing the stock).

all of the property *might constitute substitute assets which may be subject to forfeiture.*

“Substitute assets” forfeiture should actually be available only where the defendant or his privies take some deliberate action to make the tainted assets unavailable -- such as transferring them abroad or hiding them. Congress needs to clarify by amendment that merely *spending* tainted money, without the intent to avoid forfeiture, is not enough to empower federal prosecutors to invoke the drastic, “seize it all,” substitute assets remedy in 18 U.S.C. §1963(m) and 21 U.S.C. §853(p).

While the present scope of the current substitute assets provisions is unclear, the government and courts have assumed that the substitute asset provisions apply whenever and for whatever reason the original tainted assets are no longer available for forfeiture. At a minimum, the substitute assets remedy should not be available with respect to *facilitating* property unless the defendant or his privies take deliberate action to make the tainted property unavailable for forfeiture. It is arbitrary enough that a car used to drive to the scene of a conspiratorial meeting is subject to forfeiture. If the defendant thereafter sells or wrecks the car without the intent to avoid forfeiture, the government should not be able to forfeit his home as substitute property.

Even worse, the government has been trying to secure for itself a horrific new power to seize substitute assets *pre-trial*. Such power would allow the government to destroy the ability of the citizen accused to use his own assets to obtain counsel and pay for the expense of his defense and to support his family, before there is even any adjudication of guilt. The

government says it needs this new authority in all criminal forfeiture cases. *Don't buy it.* Widespread government abuse under current, post-trial "substitute assets" provisions shows that such a radical expansion of power to economically cripple the defendant at the very outset of his battle with the government will be greatly abused.

➤ *Congress Must Limit the Scope of the "Facilitation" Doctrines Under Current Forfeiture Statutes*

Objective observers agree that the biggest problem with the scope of both civil and criminal forfeiture is the failure of Congress or the courts to limit the scope of facilitation forfeitures. This is, for example, the view embraced by House Judiciary Committee Chairman Henry J. Hyde in his book, Forfeiting Our Property Rights, at 61 (CATO 1995).

The scope of all facilitation forfeitures should be limited by requiring a "substantial and significant connection between the crime and the property to be forfeited." Moreover, the judge should have discretion to deny forfeiture of facilitating property if, taking into consideration the nature of the property and its use in the crime, forfeiture would be disproportionate.

Congress limited the availability of facilitation forfeitures in exactly this manner in the Economic Espionage Act of 1996, 18 U.S.C. §§1831-1839, effective October 11, 1996. Congress should also clarify that an entire legitimate business cannot be forfeited as "facilitating property" unless it is pervaded by criminal activity.

For example, the money laundering forfeiture statutes, 18 U.S.C. §§981 and 982, use "property involved in" language as a substitute for the facilitation concept. And the courts

have given the “property involved in” language an even broader construction than the congressional language calls for. This has created severe problems. It has, for instance, resulted in the forfeitures and threatened forfeitures of entire legitimate businesses, where *any* dirty money can be shown to have been deposited in a bank account owned by the business.

An example of how the government abuses the current “property involved in” language of the money laundering statutes is found in United States v. Shirk, Crim. No. 1-CR-90-294 (M.D. Pa.). In Shirk, the government sought forfeiture of businessman Ron Shirk’s Shooter Supplies, Inc., a legitimate gun business valued at \$10 million. Its theory was that, under the money laundering statutes, all “property involved in” an offense is subject to forfeiture, and all of Mr. Shirk’s business was “involved in” the alleged offense of defrauding the IRS.

While the defendant was allegedly defrauding the IRS, the government invoked the over-broad money laundering statutes against him. Why? Under the government’s theory, the “property involved in” language would allow the government to forfeit the entire business. The government could not have forfeited anything under the more relevant provisions of the Internal Revenue Code. The government shut down Mr. Shirk’s business. He only got it back by a settlement effectively extorted by the government.

Congress should rein in the government by eliminating the “property involved in” language from the money laundering statutes, which have wreaked such injustice, and

substitute instead a fair and uniform definition of facilitation, applicable to all forfeiture cases. Again, that definition should read as follows: *The scope of all facilitation forfeitures should be limited by requiring a “substantial and significant connection between the crime and the property to be forfeited.” Moreover, the judge should have discretion to deny forfeiture of facilitating property if, taking into consideration the nature of the property and its use in the crime, forfeiture would be disproportionate.*

➤ ***Congress Must Eliminate “Liberal Construction” Clauses From the Forfeiture Statutes***

Liberal construction clauses are improper in criminal statutes. They violate the “rule of lenity.” The ancient common-law rule of lenity directs the court to construe ambiguous criminal statutes narrowly, in favor of the citizen accused. It is grounded in fundamental due process principles. As the Supreme Court has said, the rule of lenity “reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.” Dunn v. United States, 442 U.S. 100, 112 (1979).

The anomalous and unfair presence of these liberal construction clauses in criminal forfeiture statutes has given the courts an excuse to decide every issue of statutory interpretation in favor of the government, instead of following the historical and traditional rule of lenity, which is grounded in basic notions of due process.

The cases are all over the map on the proper view of the Liberal Construction Clauses. *Compare* Sedima, S.P.L.R. v. Imrex Co., 473 U.S. 479, 491 n.10 (1985) (stating that Liberal Construction Clause of RICO statute should apply only to §1964, the civil, remedial, part of the statute) *with* United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) (relying on §853(o) to impose vicarious forfeiture liability on co-conspirators, which Congress never intended); United States v. Rivera, 884 F.2d 544, 546 (11th Cir.), *cert. denied*, 494 U.S. 1018 (1989) (relying on §853(o) for broad construction of facilitation provision of §853(a), court holds that rule of lenity is trumped by Liberal Construction Clause).

➤ ***Congress Needs to Clarify and Limit the Scope of Forfeiture Under the RICO Statute***

The scope of the confusingly worded RICO forfeiture provisions has never been clear. 18 U.S.C. §1963(a)(1) and (2) should be clarified and narrowed in scope. This is a complex subject, too technically extensive to cover here. For the detailed discussion the subject warrants, *See* 2 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶13.02[1][c] (1997).

➤ ***Congress Should Bar Vicarious Liability for Proceeds Received by Co-Conspirators***

The courts have held that conspirators are jointly and severally liable for the proceeds received by any other member of the conspiracy. While this is a very harsh doctrine, given the ambiguity of the conspiracy statutes, it may be appropriate where the court is unable to

determine the amount of proceeds received by each member of the conspiracy. *E.g.*, United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986). However, the Fourth Circuit recently held that the same principle applies even when the exact division of the proceeds among the culprits *is* known. United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996). The effect of this decision is to allow the government to wipe out individuals for the sins of others. This wrong interpretation by at least some courts should be corrected by Congress.

B. *Congress Needs to Strengthen Protections for Innocent Third-Party Property Rights*

➤ *Congress Must Provide for a Right to Trial by Jury*

The current criminal forfeiture statutes deny an innocent third-party the right to have factual forfeiture issues decided by a jury. See 21 USC 853(n)(2); 18 USC 1963 (l)(2). This needs to be changed.

It should be clear that the Seventh Amendment provides for a right to trial by jury in the ancillary forfeiture hearing. The courts have consistently characterized this proceeding as civil in nature. *See e.g.*, United States v. Douglas, 55 F.3d 384 (11th Cir. 1995) (Congress viewed §853(n) proceeding as a substitute for separate civil litigation between government and third parties).

It is well established that the Seventh Amendment provides for a right to trial by jury in a federal civil forfeiture proceeding. Although this ancillary, third party hearing provision was enacted in 1984, there is, remarkably, no reported case addressing the question of whether the denial of trial by jury is constitutional.

The Seventh Amendment clearly requires trial by jury even in actions unheard of at common law, where they involve rights and remedies in the nature of those traditionally involved in an action at law rather than in an action at equity or admiralty. United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984). The third-party, ancillary provision of the criminal forfeiture statutes “serves the same essential function” as a common law *in rem* civil forfeiture action against property. Pernell v. Southall Realty, 416 U.S. 363, 375 (1974). It is a proceeding “in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . .” *Id.* (emphasis in original). Indeed, in Pernell, the Supreme Court held that an action for the recovery and possession of specific real or personal property is one at law triable to a jury. *Id.* at 370.

Pernell involved a mere landlord-tenant dispute. The interests that are typically at stake in a criminal forfeiture case are much weightier. It is thus particularly imperative to afford a right to trial by jury when the United States government is the plaintiff seeking to take property away from citizens who have never even been accused of wrongdoing, as in these forfeiture cases.

➤ ***Congress Needs to Clarify the Scope of Defense for “Bona Fide Purchasers for Value”***

The law needs to be made explicit, that the term “bona fide purchaser for value” (“BFP”) includes bona fide service providers (“BFSPs”) and bona fide sellers of goods and services (“BFSs”).

In order to qualify as a *bona fide purchaser* (“BFP”) for value under the “innocent owner” defense to forfeiture, you should not have to literally purchase a tangible piece of property from the bad actor. The limited statutory defense for a “bona fide purchaser for value” needs to be clarified to carry out Congress’s clear intent: to protect all those who engage in an arms-length transaction, between an innocent third party and a defendant.

The government argues that the defense is extremely narrow and applies only to *purchasers* of tangible property, *per se*. The Department is threatening to render, and in at least one important case, succeeded in rendering, the current “uniform innocent owner” provision ineffective.

The government argues that Congress has failed to protect bona fide *sellers* of goods, as well as *both bona fide sellers and purchasers of services* -- like merchants, banking institutions, and attorneys. But these business persons and entities, like bona fide purchasers of tangible property *per se*, also unknowingly engage in an arms-length commercial transaction with someone who happens to be using money later found subject to forfeiture. They should receive the same protection. This is an especially important matter for Congress to clarify given that, as the Department and the Administration should well know, it is the *selling* of goods, and especially the buying and selling of *intangible services*, which drives a healthy economy and balance of trade in this day and age.

For example, a merchant or automobile dealer, or a service provider such as a hospital, bank, doctor or attorney, who unknowingly accepts tainted money from some bad actor in exchange for legitimate goods or services *should be* protected under the “BFP” innocent owner provision.

Until recently, all of the courts considering the government's contrary position had given the "BFP for value" provisions in the criminal forfeiture statutes the reasonable interpretation that "BFP" includes *bona fide sellers and service providers* ("BFSs" and "BFSPs"). But there has now emerged an especially troubling judicial development, thanks to the Department's chief bill drafter and negotiator, Stefan Cassella. Mr. Cassella's courtroom advocacy is far different from his assurances to Congress about what the statutory "BFP" term encompasses.

Unlike all other courts, the D.C. Circuit -- in the *BCCI* cases litigated by Mr. Cassella -- has now given the "BFP for value" provision a very narrow, literalistic reading, at Cassella's urging, thus defeating the *bona fide* interests of the innocent service provider. See United States v. BCCI Holdings (Luxembourg), S.A., 961 F. Supp. 287, 295 (D.D.C. 1997) (American Express Bank cannot qualify as "BFP for value" under §1963(l)(6)(B) because that provision protects only "those transactions involving the purchase of tangible property."); United States v. BCCI Holdings (Luxembourg), S.A., (In re Petitions of Trade Creditors), 833 F. Supp. 22, 28 (D.D.C. 1993), *aff'd*, 48 F.3d 551 (D.C. Cir.), *cert. denied*, 116 S.Ct. 563 (1995) (same).

It is now especially important that Congress clarify the "BFP" provision, with language that more specifically and accurately reflects Congress' intent -- to protect a much broader category of innocent parties who unknowingly engages in arms-length transactions with a bad actor, that is, BFSs, and BFSPs for value as well.

- ***Congress Should Ensure That a Third Party Can Defend on the Ground That Property Was Not the Proceeds of a Crime or Facilitating of Crime***

It is unclear from the present language of the criminal forfeiture statutes whether a third party may defend against a forfeiture on the ground that the government has not

demonstrated that the property facilitated or constitutes the “proceeds” of the offense for which the criminal defendant was convicted. Several cases, however, have held that a third party does have the right to defend on this ground since the preliminary order of forfeiture obtained in the criminal trial is not binding on the third party. *See e.g., United States v. Douglas*, 55 F.3d 584, 586 (11th Cir. 1995); *United States v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1987).

Douglas illustrates the need to allow third parties to litigate the merits of the criminal forfeiture. The defendant had entered into a plea agreement forfeiting his interest in the properties. Under Eleventh Circuit precedent, the district court was not required to determine whether there was a factual basis for the forfeiture. A secured judgment creditor of Douglas filed a §853(n) petition demonstrating that the properties owned by Douglas were simply not subject to forfeiture. Indeed, the government did not even challenge the creditor’s factual contentions. The government’s position was held to be frivolous, and attorney fees were awarded to the creditor under the EAJA.

The government takes the contrary position -- that third-parties do not have a right to litigate the merits of the forfeiture they suffer. This position should be clearly rejected by Congress. The defendant, by whom the government would bind the innocent third-party, does not even necessarily have an interest, let alone the same interest, in the property of concern to the third-party. And yet, as in the Douglas case, the government wants these property stakeholders to be bound by the litigation choices, or plea agreements the

defendants made solely in his own *self-interest*. It is quite obvious defendants will often find that “pleading out” the property interests of another is an attractive way to diminish their own criminal penalty exposure. This corrupts the criminal justice system.

C. *Congress Should Reform Criminal Forfeiture Procedures to Adequately Protect the Person or Business Accused, as Well as Third-Party Property Owners and Other Third Party Stakeholders*

➤ *Congress Should Clarify that the Burden of Proof in Criminal Forfeiture Is Beyond a Reasonable Doubt*

Congress needs to clarify that the government must prove property is subject to criminal forfeiture, beyond a reasonable doubt. The legislative history of the Crime Control Act of 1984 makes it clear that this was the congressional intent. But the government and many courts have ignored the legislative history, reasoning that because criminal forfeiture is part of a sentence, the burden of proof should be by preponderance of the evidence. But even if criminal forfeiture is properly conceived of as part of the sentencing process, Congress remains free to establish a higher burden of proof than that which normally governs simple sentencing matters. See United States v. Pelullo, 14 F.3d 881, 902-06 (3rd Cir. 1994) (comprehensive opinion demonstrating that in RICO cases government must prove forfeiture allegations beyond a reasonable doubt); United States v. Elgersma, 929 F.2d 1538 (11th Cir. 1991), *reversed*, 971 F.2d 690 (11th Cir. 1992) (*en banc*); United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (government asserts that criminal forfeiture under 21 U.S.C. §853 requires proof beyond a reasonable doubt and court agrees with government); United States v. \$814,254.76 in U.S. Currency,

51 F.3d 207, 211 (9th Cir. 1995) (criminal forfeiture under 18 U.S.C. §982 requires proof beyond a reasonable doubt). *But see* United States v. Rogers, 102 F.3d 641, 647-48 (1st Cir. 1996) (although Congress could provide for a more stringent burden of proof it did not do so in §853); United States v. Tanner, 61 F.3d 231 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 925 (1996) (reasoning that if forfeiture is merely part of the sentence, then standard of proof should be by a preponderance).

Congress *should* establish a higher burden of proof in this area than that which normally governs *simple* sentencing matters.

Even if criminal forfeiture is part of the sentencing process, it is unique in many respects that warrant the higher standard. For one thing, a jury must return a verdict of forfeiture before property can be taken by the government. The fact that Congress provides for a jury trial right on the issue of forfeiture demonstrates the sound congressional intent that the burden of proof should be beyond a reasonable doubt. *See* Sullivan v. Louisiana, 113 S.Ct. 2078 (1993). The legislative history of the 1984 Act is clear on this point.

➤ ***Congress Should Ensure Prompt Post-Restraining Order Hearings for Persons and Businesses Accused as Well as Interested Third-Party Owners and Other At-Risk Stakeholders***

The restraining order provisions of the 1984 Act have been declared unconstitutional by most of the circuits. *See e.g.*, U.S. v. Riley, 78 F.3d 367 (8th Cir. 1996); U.S. v. Monsanto, 924 F.2d 1186 (2d Cir (en banc)), *cert. denied*, 502 U.S. 943 (1991); U.S. v. Roth, 912 F.2d 1131 (9th Cir. 1990). *Cf.* Aronson v. City of Akron, 116 F.3d 804 (6th Cir.

1997) (similar Ohio State “RICO” statute).

Congress should provide for a prompt, post-restraining order adversary hearing upon the request of a defendant or third party who asserts an interest in the assets restrained by the government.

At such a hearing, the government must be required to at least show probable cause for its belief that the restrained assets are subject to forfeiture. The defendant or third party should also be able to request that the order restraining assets be lifted on hardship grounds -- such as undue interference with an ongoing business.

Moreover, if *facilitating* property is restrained, there should be an automatic exemption for funds needed to pay counsel in the criminal case and for necessary living expenses. The restraining order hearing provision in H.R. 1965, which was drafted at the last minute by the Justice Department, is blatantly unconstitutional in its denial of due process. *See* July 28, 1997 Letter to Chairman Hyde, at 11-12 (attached).

➤ ***Congress Should Ensure the Right to a Bifurcated Forfeiture Trial***

Most courts have recognized that a defendant’s request for a bifurcated criminal forfeiture trial should be granted. *See e.g.* United States v. Sandini, 816 F.2d 869 (3rd Cir. 1987); United States v. Feldman, 853 F.2d 648 (9th Cir.), *cert. denied*, 489 U.S. 1030 (1988). However, some courts have declined to adopt a rule requiring even partial bifurcation of the proceedings. *See e.g.*, United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 831 (1988). Because the conduct of a unitary trial is likely to result

in unfair prejudice to an accused, and unduly limit a defendant's opportunity to present evidence showing that particular items of property are not subject to forfeiture, bifurcation should be available whenever the defendant requests it. *See* Markus, Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure, 59 Temp. L.Q. 1097, 1107-1127 (1986).

➤ ***Congress Should Amend 21 U.S.C. 853(h) and 18 U.S.C. 1963 to Allow for Stays of Execution Pending an Appeal of a Forfeiture Order***

21 U.S.C. §853(h) and 18 U.S.C. §1963 should be amended to allow a defendant to seek a stay of execution pending appeal of the criminal forfeiture order. Inexplicably, the present provisions only allow a *third party* to seek such a stay of execution. Even DOJ agrees that these provisions should be amended to allow the defendant to apply for a stay of forfeiture execution.

➤ ***Congress Should Reinvigorate Rule 7(c)(2) of the Federal Rules of Criminal Procedure***

Congress needs to reinvigorate Rule 7(c)(2), by emphasizing that it indeed means what it says: “No judgment of forfeiture may be entered in a criminal proceeding unless the indictment . . . allege[s] the extent of the interest or property subject to forfeiture.” The lower courts have ignored the command of this Rule, holding that if the government gives notice of the specific property or categories of property allegedly subject to forfeiture, in a bill of particulars or even by less formal means, such as pretrial discovery, the Rule is somehow “satisfied.” *See e.g.*, 2 David B. Smith, Prosecution and Defense of Forfeiture

Cases, ¶14.01 (1997) (collecting cases).

Now that the Supreme Court has incorrectly stated in Libretti v. United States, 116 S.Ct. 356 (1995), that criminal forfeiture can be regarded as merely “part of the sentence,” and not in the nature of a separate charge in the indictment, there is little or no hope of getting the lower courts or the Supreme Court to correctly interpret Rule 7(c)(2). Congress must act to set this important matter right.

➤ ***Congress Should Amend Federal Rule of Criminal Procedure 11(f)***

Federal Rule of Criminal Procedure 11(f) should be amended, to ensure it is always made applicable by courts to the forfeiture aspect of a plea agreement. Rule 11(f) forbids a court to enter judgment upon a plea of guilty without assuring that there is a “factual basis” for the plea. But in Libretti v. United States, 116 S.Ct. 356 (1995), the Court held that, *by its terms*, Rule 11(f) does not *require* a district court to inquire into the factual basis for a stipulated forfeiture of assets embodied in a plea agreement.

The Court did not dispute Libretti’s concern about the potential for prosecutorial overreaching. It merely held that Rule 11(f) as presently phrased does not address that concern: “We do not mean to suggest that a district court must simply accept a defendant’s agreement to forfeit property, particularly when that agreement is not accompanied by a stipulation of facts supporting forfeiture, or when the trial judge for other reason finds the agreement problematic.” 116 S.Ct. at 365. In this regard, the Court observed that the Department of Justice had recently issued a Revised Policy Regarding Forfeiture By

Settlement and Plea Bargaining in Civil and Criminal Actions, Directive 94-1 (Nov. 1994). This Directive instructs prosecutors that, to ensure a valid forfeiture agreement, the agreement to forfeit property must be in writing “and the defendant must concede facts supporting the forfeiture.”

Although that was not done in Libretti, the Court, through a somewhat strained scouring of the record, was able to conclude that the trial judge was satisfied, by the time sentence was imposed, that the facts supported the forfeiture agreed to by Libretti. Therefore, the Court concluded that it did not have to decide “the precise scope of a district court’s independent obligation, if any, to inquire into the propriety of a stipulated asset forfeiture embodied in a plea agreement” -- apart from Rule 11(f).

In a cogent dissent, Justice Stevens emphasized:

“[T]he law -- rather than any agreement between the parties -- defines the limits on the district court’s authority to forfeit a defendant’s property. [Thus,] entirely apart from Rule 11(f), the district court has a legal obligation to determine that there is a factual basis for the judgment entered upon a guilty plea. Such plea agreements must be scrutinized by the courts to guard against the possibility that a wealthy defendant might bargain for a light sentence by voluntarily ‘forfeiting’ property to which the government had no statutory entitlement. This, of course, is not the law. No matter

what a defendant may be willing to pay for a favorable sentence, the law defines the outer boundaries of a permissible forfeiture.”

116 S.Ct. at 370.

At oral argument, even the Solicitor General explicitly conceded this important point. *Transcript of Oral Argument*, at 32-33. And yet still the majority did not acknowledge what the government itself was willing to concede.

The Arizona Republic said it well in its editorial on the Libretti decision:

The Supreme Court “essentially said that if Congress wants forfeiture agreements reviewed [by the courts], Congress had better rewrite the rule. Congress had better do so.”

Legal Extortion, The Ariz. Republic, Nov. 27, 1995, at B6. We agree. We respectfully urge Congress to so rewrite the rule to make this important matter of fundamental fairness explicit.

V. Specific Provisions of the DOJ Draft Criminal Forfeiture Bill to Which NACDL Does and Does Not Object

In hopes of assisting the Subcommittee, and the full Committee which already has before it the Department’s predominantly criminal forfeiture bill, H.R. 1965, the following are provisions being requested by DOJ to which we do, and do not object:

A. *Specific Provisions Requested by DOJ to Which NACDL Does Not Object*

We do not object to consideration of the following provisions in the Department's latest forfeiture expansion bill, as part of a true criminal forfeiture *reforming* bill, which includes the much-needed reforms discussed above.

- **Sec. 102** (Use of Criminal Forfeiture as an Alternative to Civil Forfeiture).
- **Sec. 105** (Repatriation of Property).
- **Sec. 107** (Criminal Seizure Warrants).
- **Sec. 109** (Discovery Procedure of Criminal Forfeiture Judgments).
- **Sec. 111** (Appeals by Government in Criminal Forfeiture Cases) (however, this should be modified to bar appeals from adverse jury verdict or verdicts of no forfeiture by the judge sitting as the trier of fact).
- **Sec. 114** (Motion and Discovery Procedures for Ancillary Hearings) (however, this provision should be modified to make discovery a right and to allow summary judgment motions to be made at any time).
- **Sec. 115** (Intervention by the Defendant in the Ancillary Proceedings).
- **Sec. 116** (In Personam Judgments).
- **Sec. 117** (Right of Third Parties to Contest Forfeiture of Substitute Assets).
- **Sec. 119** (Forfeiture of Third Party Interests in Criminal Cases).
- **Sec. 120** (Severance of Jointly Held Property).
- **Sec. 121** (Victim Restitution).

➤ **Sec. 122** (Delivery of Property to the Marshals Service).

B. *Specific Provisions Requested by DOJ in its Draft Criminal Forfeiture Expansion Bill to Which NACDL Most Strenuously Does Object*

We most strenuously *do* object to the following provisions in DOJ's latest forfeiture expansion bill. (Page References are to the Draft Bill we received three days before the hearing of September 18.)

➤ **Draft Page 7.**

This DOJ proposal, to abolish the ancient right to trial by jury in criminal forfeiture determinations, is the single worst provision in this draft full of outrageous and dangerous provisions. It should be rejected outright.

DOJ would have Congress abolish the jury trial right for which the Founding Fathers fought a revolution, and treat forfeiture as a simple "sentencing matter," like a sentencing guideline determination, under a new Rule 32.2. This is an especially outrageous proposal, as I have discussed at length in my oral remarks.

Moreover, the Department's proposed Rule 32.2 makes no sense, insofar as it provides that where no third party files a petition, the defendant's property "is forfeited in its entirety." *See* Draft Page 8, at line 2. So, what if the defendant only obtained 10% of the property with alleged dirty money? Obviously, the government should only be able to forfeit 10% of the property, regardless of whether a third party files a claim.

Rather than abolishing a defendant's right to trial by jury, that right should in fact be extended by Congress to innocent third parties, as explained above. Indeed, as discussed

above, although the courts have not considered it in any reported jurisprudence, the Seventh Amendment requires jury trial of a third party's claims. In any event, it is certainly what fair policy requires.

➤ **Draft Pages 9, 11, 12, 13.**

For the reasons discussed above, we object to the government's proposal for new powers of pre-trial seizure or restraint of alleged "substitute assets." Indeed, the government's currently abused, post-trial substitute asset forfeiture powers should be reined in, as discussed above.

In addition, the Department's proposed restraining order hearing provision, at draft page 12, is blatantly unconstitutional. See Monsanto, Riley, Roth, Aronson v. City of Akron, cited above, among other decisions on point. Assets needed to pay attorney fees or necessary living expenses should be exempted in facilitation cases, whether or not substitute assets are involved.

➤ **Draft Page 14.**

The burden of proof should remain as it is: "evidence beyond a reasonable doubt." Congress should not make the government's forfeiture of the citizenry's private property *easy*. Rather, it should be ensuring its protection against wrongful government takings. Why should someone lose everything he has worked for, based on a mere 51% likelihood that it is forfeitable -- and this, according to the government's wishes, with no jury determination? Do we really want to put Americans' life savings, family farms and

businesses at such an unfair risk? *At the very worst*, the burden of proof should be “clear and convincing evidence.”

➤ **Draft Page 17, lines 22-26.**

This new provision would bar a third party from asserting any interest in “illegal proceeds” except as the most narrowly-construed “bona fide purchaser,” under section 853(n)(6)(B). There is much wrong with this. But for one thing, it is plainly unconstitutional.

Under the government’s proposal, if the third party is the true owner of the alleged “proceeds,” she is to be divested of them without any opportunity to be heard! What if they are not in fact “proceeds”? The government is not infallible.

➤ **Draft Page 19.**

Discovery should not be discretionary. How can parties be divested of their property with no opportunity for discovery? A motion for summary judgment should be permitted prior to discovery, as well as after discovery. A private citizen subjected to the perils of forfeiture should be able to obtain quick, appropriate summary judgment relief against the government, just as litigants can in all sorts of other civil disputes with “lesser” accusers. This is not only fair. This is the only efficient use of scarce federal court resources.

➤ **Draft Page 27.**

The uniform definition of proceeds here is grossly unfair. Indeed, it is even worse than (and inconsistent with) the highly objectionable one already insisted upon by the

Department in H.R. 1965. See NACDL Letter to Chairman Hyde, July 28, 1887 (attached).

Here, DOJ constructs a provision for itself that does not allow a deduction for the cost of legitimate goods sold or services provided under any circumstances, no matter how technical, or regulatory the forfeiture-triggering infraction.

➤ **Draft Page 29.**

18 U.S.C. §924(d) would be expanded under the DOJ draft -- to broadly sweep into the scope of forfeiture not only firearms, but *all* property “involved in” a crime of violence or drug trafficking crime in which the firearm was “used” or “carried.” This is completely unnecessary, and dangerous. It gives the BATF even more forfeiture authority than other agencies, because the “involved in” language is so broad.

➤ **Draft Page 31.**

The government’s reach must be curbed in this area. Vehicles used on two or more occasions to transport computers, et cetera, simply should not be forfeitable.

➤ **Draft Page 31.**

The draft would expand forfeiture under the National Firearms Act. Why? The expansion seems wholly unnecessary. The language is also too vague and over-broad. What assets are DOJ and BATF trying to reach here? Homes in which guns are kept?

VI. Conclusion

Mr. Chairman, thank you very much for affording us the opportunity to be heard about this important subject of criminal forfeiture -- specifically, the many ways it needs to

be reformed to rein in the current arbitrary, abusive government powers so victimizing of innocent property owners.

The last thing that is needed is for the government to be given still more sweeping criminal forfeiture powers.

Not only should this latest DOJ Draft Bill be rejected. The Committee and Congress should likewise reject H.R. 1965. H.R. 1965, also drafted by the Department, is primarily a criminal forfeiture (expansion) bill. And it is far too badly infected with the same dangerous provisions in this latest DOJ draft bill to be supported.

We hope you will convene additional hearings as soon as possible, on the many ways in which current criminal forfeiture law is in dire need of meaningful reform, to protect the sanctity of the basic American principle of private property ownership.

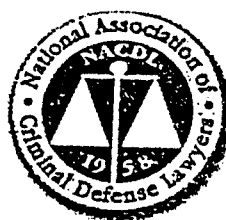
Meanwhile, H.R. 1835 is a very good, broadly-supported, true civil forfeiture reform bill -- *uncontaminated by DOJ's criminal forfeiture expansion wishlist*. It was the subject of very positive hearings at the Full Committee in June. We hope it will be moved to the floor immediately, and independently of the Crime Subcommittee's serious consideration about criminal forfeiture reform.

We look forward to assisting you and the Committee in any way we can to achieve the necessary reforms of both the civil and the criminal forfeiture laws. My fellow co-chairs on the NACDL Forfeiture Abuse Task Force and I stand ready to help; as does our very knowledgeable legislative director in the Washington National office, Ms. Leslie Hagin,

who may be reached at (202) 872-8600 (ext. 226). My fellow Task Force Chairs and I can also be reached through Ms. Hagin at the national office.

#####

ATTACHMENT



RESIDENT
Judy Clarke
Spokane, WA
PRESIDENT ELECT
Gerald B. Lefcourt
New York, NY
FIRST VICE PRESIDENT
Larry S. Pozner
Denver, CO
SECOND VICE PRESIDENT
William B. Moffitt
Washington, DC
TREASURER
Edward A. Mallett
Houston, TX
SECRETARY
Irwin H. Schwartz
Seattle, WA
PARLIAMENTARIAN
Laurie Shanks
Albany, NY
IMMEDIATE
PAST PRESIDENT
Robert Fogelinet
New York, NY

DIRECTORS

Julie B. Aimen
Chicago, IL
Henry W. Asbill
Washington, DC
James A.H. Bell
Knoxville, TN
Michael V. Black
Phoenix, AZ
Stephen B. Bright
Atlanta, GA
Juanita R. Brooks
San Diego, CA
Raymond M. Brown
Newark, NJ
Peter A. Chang, Jr.
Santa Cruz, CA
Mary E. Conn
Bellevue, TX
Richard K. Corley
Providence, RI
Charles W. Daniels
Albuquerque, NM
Drew Findling
Atlanta, GA
John P. Flannery, II
Leesburg, VA
David Dean Fussell
Orlando, FL
Lawrence S. Goldman
New York, NY
Gary G. Guichard
Atlanta, GA
M. Cristina Gutierrez
Baltimore, MD
Tova Indritz
Albuquerque, NM
Frank Jackson
Dallas, TX
Richard Kammen
Indianapolis, IN
Helen Leiner
Fairfax, VA
Jack T. Litman
New York, NY
Shaun McCrea
Eugene, OR
Jeralyn E. Merritt
Denver, CO
G. Fred Metos
Salt Lake City, UT
Marvin D. Miller
Alexandria, VA
Daniel E. Monnat
Wichita, KS
George H. Newman
Philadelphia, PA
Martin S. Pinules
Cincinnati, OH
Dennis Roberts
Oakland, CA
David S. Rudolf
Chapel Hill, NC
Natman Schave
Tucson, AZ
Barry C. Scheck
New York, NY
Elizabeth Semel
San Diego, CA
Burton H. Shostak
St. Louis, MO
Theodore Simon
Philadelphia, PA
Richard J. Truberman
Seattle, WA
Lawrence A. Vogelman
Concord, NH
Martin G. Weinberg
Boston, MA

July 28, 1997
By Hand Delivery

Honorable Henry Hyde
Chairman
U.S. House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

As you know, the National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers, secured to the citizenry under the Sixth Amendment to the Constitution, to ensure justice and due process for persons accused of crime. We are a professional bar association formed in 1958 and comprised of 9,000 direct members, and 78 state and local affiliates with another 25,000 members. Our members include private criminal defense lawyers, public defenders, judges and law professors who have devoted their lives to preserving fairness within America's criminal justice system. Many of our members have defended the many citizens who have been victimized by the asset forfeiture laws you have for so long been trying to reform. Many have done so for free, working *pro bono*.

NACDL is grateful for your leadership in this area. Through the years, we have staunchly supported your valiant efforts to reform these unfair laws and curb the abuses suffered by innumerable Americans at the hands of overzealous law enforcement agencies. We have worked tirelessly at every opportunity to lend our assistance in the legislative process toward reform. And we appreciate the opportunity to play any role in your worthy efforts.

We cannot, however, support H.R. 1965 as written. Rather than reining in abuses, this bill now substantially *expands* the forfeiture laws, which will lead to an *increase* in law enforcement abuses.

1025 Connecticut Avenue NW, Suite 901 Washington, DC 20036

Tel: (202) 872-8600
Fax: (202)-872-8690

E-mail: assist@nacdl.com
Website: www.criminaljustice.org

EXECUTIVE DIRECTOR
Stuart M. Stetler

We write to explain in detail our objections to H.R. 1965, in terms of both its civil and criminal provisions. We have raised these objections with your counsel, counsel for Mr. Conyers, and counsel for the Department of Justice. We have asked to speak with you personally about them. And we memorialized them all, preliminarily, in our June 17 letter analysis objecting to the "Discussion Draft Document," which was introduced in Committee without change, as H.R. 1965, two days later, June 19, 1997.

We have been advised by General Counsel Tom Mooney that our comments are welcome, and that they will be given careful consideration. In that spirit, we respectfully offer the following refined comments about H.R. 1965, as currently written.

In short, we believe your worthy effort to reform asset forfeiture law was frustrated at the mark-up of H.R. 1835, when a switch was made in favor of a substitute bill tracking the DOJ's demands for new, ever-more expansive forfeiture powers. At that time, several hastily drafted provisions were inserted into the bill at DOJ's behest with no input from NACDL or the many other concerned citizens and organizations long supportive of your reform efforts. While we know your bill is intended to curb forfeiture abuses, if enacted as now written it will in fact *greatly expand the government's unfair forfeiture powers, both in terms of scope and procedures, instead of curbing them.* H.R. 1965 as written would make forfeiture law *more* unfair, not less.

As you have been in the vanguard in attempting to bring about meaningful reform, we urge you to make some critically important changes to H.R. 1965, through a Manager's Amendment.

The following are the most seriously flawed provisions of H.R. 1965, and are the ones most in need of correction through a Manager's Amendment:

1. H.R. 1965 contains an ineffective "uniform innocent owner" provision which fails to protect *bona fide* sellers of good and services, like merchants, automobile dealers, banking institutions, doctors and attorneys, who unknowingly engage in an arms-length commercial transaction with someone who happens to be using money later found subject to forfeiture.
2. H.R. 1965 contains an extraordinary provision effectively repealing an individual's existing right to summary judgment against the government for wrongful seizures. It carves out a special rule on summary judgment in favor of the government in forfeiture cases, which is not only unfair to the affected citizen, but anomalous in American law.
3. H.R. 1965 expands current forfeiture law to encompass all "gross receipts" allegedly obtained from almost every felony in Title 18 of the federal code, thereby encouraging unfair seizures by federal agencies that in many instances will destroy or force into bankruptcy legitimate businesses.

4. H.R. 1965 provides for extreme and unprecedented pre-trial, injunctive restraints on entirely untainted property (so-called "substitute assets"), which are not the primary property allegedly subject to forfeiture, without the government ever having to demonstrate that the substitute assets are actually forfeitable and that they are at risk of being concealed, transferred or dissipated. The defendant is afforded no right to a meaningful hearing on the propriety of the restraint, *at any time*.

5. H.R. 1965 contains a provision that would deprive indigent citizens of their new right to appointed counsel without unreasonable interference by the attorneys for the government. This provision requires that an indigent citizen who seeks appointment of counsel must first subject himself to wide-open, uncounseled interrogation by the prosecutor on *not just his financial status*, but even on the merits of the case.

More specifically, by page and line cite, here are the reasons why these provisions in H.R. 1965 must be deleted or changed:

I. Page 7-8, lines 9-25; lines 1-17.

Re: "(d) Appointment of Counsel". (Sec. 2 Creation of General Rules Relating to Civil Forfeiture Procedures)

This provision is anathema to American law. It is inconsistent with fundamental American principles of due process and fair access to justice. It would condition a citizen's right to appointed counsel on his or her "willingness" to be subjected to wide-open, uncounseled cross-examination by the prosecutor before the case has even begun.

This provision should be deleted in its entirety. It should be replaced with a fair appointment of counsel provision, consistent with the model Criminal Justice Act (CJA) appointment of counsel provisions -- as provided below.

As currently re-written by DOJ, this core provision is now meaningless. It creates a costly, unwieldy procedure, unique to American law, whereby one's claim of indigence and request for court-appointed counsel is subject to cross-examination by the government. It not only allows a prosecutor to cross-examine an uncounseled citizen about his assets, under the guise of probing the *bona fides* of his claimed indigence. *It also allows a wide-open interrogation as to anything, including the substance of the charges underlying the seizure and potential defenses to forfeiture, such as the innocent owner defense.*

This was no oversight by the DOJ. They have insisted upon this provision, as written, even *after* it was pointed out that it would allow prosecutors to cross-examine

the uncounseled citizen claimant, not just on the issue of indigence, but on the merits of the case.

Thus, the nation's poorer citizens, or those *rendered indigent* by the government's seizure of assets, would have to run the substantial, unprecedented risks of uncounseled, under-oath questioning by prosecutors in order to obtain court-appointed counsel. Those wealthy enough to afford private counsel would not.

Of course, under all other appointment of counsel statutes, the courts are quite capable of discerning whether one is actually financially eligible for the benefit. Especially ill-considered and wasteful, this provision in H.R. 1965 may even compel the courts, under the Fifth and Sixth Amendments, to appoint counsel to the person being subjected to such an unlimited examination by prosecutors -- a procedure supposedly intended to decide whether or not the person *should* have counsel appointed.

In addition, as now written, Subsections (2) and (3) in the bill are in conflict. Subsection (2) envisions using the well-established, fair procedures established under the Criminal Justice Act (CJA) for appointments of counsel. (These are the model provisions always envisioned by previous Hyde and Conyers bills over the years. And the CJA fund is now even the *source* to be tapped under the bill, rather than the Asset Forfeiture Fund as you originally intended, for the money to pay for appointed counsel.) Subsection (3), however, contradicts subsection (2) and is unprecedented in American jurisprudence.

The following amendment is needed to correct the confusion between (d)(2) and (d)(3), and to restore this core, appointment of counsel provision to a meaningful one.

Delete Section (d)(3), at page 8, lines 6-17, in its entirety. Substitute the following, as a new (d)(3):

“(d) * * *

(3) The procedures for implementing the right set out in subdivision (d) (1) of this section shall be those provided by law, and as provided by 18 U.S.C. 3006A and Fed. R. Crim.P. 44(b), and by local rule of the district court in which the property is seized or the forfeiture is commenced. The request for appointment of counsel shall be made to the Clerk of the Court of the district in which the property is seized, who shall provide the applicant with a Financial Affidavit. The Clerk shall forward the request for counsel and completed Financial Affidavit to a United States Magistrate Judge, who shall act upon the request within five (5) court days. All time periods set forth in this statute shall be tolled between the time the person submits the completed Financial Affidavit and the time the court acts upon the request.

II. Page 10, line 20.

Re: “Uniform Innocent Owner” Provision.

This is an ineffective “uniform innocent owner” provision failing to protect bona fide sellers of good and services — like merchants, banking institutions, and attorneys — who, like bona fide purchasers of tangible property, also unknowingly engage in an arms-length commercial transaction with someone who happens to be using money later found subject to forfeiture.

“Innocent owner” is too narrowly defined in this provision. The provision must be clarified to insure that equally-deserving bona fide service providers and bona fide sellers are also covered.

In order to qualify as a *bona fide purchaser* (“BFP”) for value under the innocent owner provision, you should not have to literally purchase a tangible piece of property from the bad actor. *Thus, the bill needs to be explicitly clarified to state that the term “BFP” includes bona fide service providers (“BFSPs”), and bona fide sellers (“BFSs”).*

For example, a merchant or automobile dealer, or a service provider such as a hospital, bank, doctor or attorney, who unknowingly accepts tainted money from some bad actor in exchange for legitimate goods or services also ought to be protected under the “BFP” innocent owner provision, *so long as he or she was reasonably without cause to believe that the money was subject to forfeiture.*¹

¹ Note that this “due diligence” requirement now in H.R. 1965 is not even part of the innocent owner provisions in *current* law at sections 881 and 981. Thus, in this way alone, the provision already represents a *significant narrowing* of the *current* innocent owner

In our June 17, 1997 preliminary letter analysis of the "discussion draft" DOJ substitute bill that would become H.R. 1965, we said all of the courts have given the identical BFP for value provisions in the *criminal forfeiture* statutes the reasonable interpretation that "BFP" includes *bona fide sellers and service providers* ("BFSs" and "BFSPs"). But there has now emerged an especially troubling judicial development, thanks to DOJ's chief bill negotiator, Stefan Cassella, making it even more imperative that this bill be corrected to specify that BFSs and BFSPs are fully within its contemplation of protected innocent owners.

Unlike all other courts, the D.C. Circuit -- in the *BCCI* cases litigated by Mr. Cassella -- has now given the "BFP for value" provision a very narrow, literalistic reading -- at Cassella's urging -- thus defeating the *bona fide* interests of the innocent service provider. See *United States v. BCCI Holdings (Luxembourg), S.A.*, 961 F. Supp. 287, 295 (D.D.C. 1997) (American Express Bank cannot qualify as "BFP for value" under §1963(1)(6)(B) because that provision protects only "those transactions involving the purchase of tangible property.") *United States v. BCCI Holdings (Luxembourg), S.A., (In re Petitions of Trade Creditors)*, 833 F. Supp. 22, 28 (D.D.C. 1993), *aff'd*, 48 F.3d 551 (D.C. Cir.), *cert. denied*, 116 S.Ct. 563 (1995) (same).

The fact that the government (indeed, Mr. Cassella himself) is arguing *in courts* for a literalistic interpretation of BFP for value, and succeeding (at least in some cases), while simultaneously telling the Committee staff that "of course, BFP is broad enough to cover BFSPs and BFSs", makes it *all the more important* that the words "BFP for value" be replaced by language that specifically and accurately reflects Congress' intent -- to protect a much broader category of innocent parties who unknowingly engage in arms-length transactions with a bad actor, that is, BFSs, and BFSPs for value as well.

III. Page 16, lines 6-12.

Re: Section Sec. 2 (l) (the So-Called "Pre-Discovery Standard")

Subsection (l), at page 16, lines 6-12, should be deleted in its entirety.

This is an extraordinary provision, creating a special, and abusive, summary judgment rule for the government in forfeiture cases, enjoyed by no other party in any other type of civil litigation. The provision would defeat the citizen's current rights to summary judgment against the government in a case commenced without the requisite probable cause, by carving out a special rule on summary judgment for the government in forfeiture cases. It would allow the government to "seize now, and fish later" -- through the very costly, time-consuming civil discovery process -- to try to find after-the-fact "justification" for its forfeiture action.

defense.

The objectionable provision does not deal with the governing Fourth Amendment/probable cause seizure standard, as some have suggested. This provision does not deal with the seizure. Rather, it would grant the government the new "right" to delay responding to a timely and meritorious motion for summary judgment, as any other litigant would be required to do in any other case under the summary judgment rules.

At best, the current wording of this Rule 56 discovery provision is both confusing and misleading as now written. But worse, while DOJ is assuring Congress that this provision merely "tracks Rule 56," the general summary judgment rule, it is clear the Department intends to argue something much different in the courts.

At best, then, the provision is nonsense as written, and can only produce confusion and unjust decisions, because some courts are bound to conclude that it "must" mean something different from the current law of summary judgment, as specific congressional dictates are not to be interpreted by the courts to be meaningless. For that reason alone, it is best to simply eliminate the entire provision.

*Worse still, this provision says that even if a citizen has a good claim for summary judgment, the court would now be specifically forbidden from handling the case as it would any other, according to standard Rule 56 summary judgment procedures. Rather, the court would be forced to allow the DOJ to operate under *special rules*, whereby the "World's Largest Law Firm" could harass an innocent citizen and waste the federal court's resources through a costly and time-consuming "fishing expedition" for new evidence to "support" its forfeiture allegation.*

*Given the fact that property is not supposed to be seized without probable cause, it would be far better to require a rule *opposite* to that in the bill -- that a court should *never allow the government a continuance* for discovery under the now-discretionary Rule 56(f), before the government answers, and survives, the citizen's summary judgment motion. As recently observed by a federal court of appeals: "Without such a rule, government agents might be tempted to bring proceedings (and thereby seize property) on the basis of mere suspicion or even enmity and then engage in a fishing expedition to discover whether probable cause exists." *U.S. v. \$191,910.00 U.S. Currency*, 16 F.3d 1051, 1067 (9th Cir. 1994); *Accord U.S. \$31,990,00 U.S. Currency*, 982 F.2d 851, 856 (2d Cir. 1993). *At minimum, this mischievous provision should be stricken from the bill. The government should not be granted any such special rule. It should be bound by the same rules of procedure, including summary judgment rules, as bind all other litigants in America's federal courts.**

IV. Page 23, lines 6-20.

Re: "Uniform Definition of Proceeds"

H.R. 1965 in fact now has two different definitions of "proceeds" and is not uniform. There should be only one such definition of proceeds. As now written, this provision would greatly expand current forfeiture law to reach all "gross receipts" allegedly obtained from almost every felony in Title 18 of the federal code, thereby encouraging unfair seizures by federal agencies that in many instances will destroy or force into bankruptcy legitimate businesses.

This is probably the single most egregious provision in H.R. 1965. It should be deleted in its entirety, and replaced with a more reasonable, more truly uniform definition of proceeds.

The bill provides a broad "gross receipts" definition of "proceeds." In non-money laundering cases, the bill now provides a narrow exemption allowing legitimate business persons to deduct the cost of the goods or services provided from the gross receipts subject to forfeiture, *but only if it involves an overbilling scheme*. Thus, the government will surely argue to the courts that, unless an "overbilling scheme" is involved, the narrow allowance for the costs of the goods and services provided does not apply.

Very few fraud or other white collar cases involve overbilling. Instead, they involve all manner of different circumstances, which should be treated the same.

Moreover, the money laundering statute's definition of "proceeds" should be the same as the definition in all other forfeiture statutes. Otherwise, the government will continue to overuse and abuse the over-broad money laundering statute (automatically appending it to all charges in just about every case it brings, simply to "reap the bounty" allowed under the current overbroad definition of "proceeds" in that statute).

By defining "proceeds" in the broadest terms, the Department would turn "proceeds forfeiture" into an instrument of draconian punishment rather than the remedial provision it is *supposed* to be.

We are all agreed that the deduction for reasonable costs are only to be available, as under the bill, for legitimate goods and services. So drugs and other inherently illegal enterprises would not even be considered for the deduction. We do not object to the requirement, imposed by the bill, that the deduction only be available for legitimate businesses.

But the effect of this overbroad "gross receipts" definition is to ensure over-reaching by the government, and the sure-fire wipe out, at the whim of the prosecutor, of all sorts of *legitimate businesses* -- family businesses, small partnerships, and complex corporations alike -- upon which so many in the community depend.

The courts are *already* greatly troubled by the government's *current courtroom advocacy efforts* to construe some proceeds forfeiture statutes as allowing forfeiture of the "gross receipts" of an offense, without any allowance for the cost of legitimate goods and services provided by the offender otherwise engaged in a legitimate enterprise. Courts have rebuffed these arguments because they rightly consider the results sought by the government to be "absurd." See *e.g.*, *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (court of appeals dismisses as "absurd" government contention that \$28 million -- the gross receipts of insurance companies comprising a RICO enterprise -- was subject to forfeiture; court observed that such an extreme forfeiture would prevent the insurance companies from paying the claims of their policy holders); *United States v. 122,942 Shares of Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (rejecting government's attempt to define money laundering proceeds as gross receipts under 18 USC 981 (a)(1)(C)).

The results that would occur in innumerable cases if proceeds are so broadly defined as now in H.R. 1965, would be horrific. It is well recognized by the courts that the government has been abusing even the *limited authority* it *now* possesses to forfeit the proceeds of "white collar" type offenses.

For example, in embezzlement cases, where a defendant has returned the property embezzled prior to the time the embezzlement is discovered, the government has nonetheless sought forfeiture of the entire amount of the property or monies embezzled. This results in wiping out the legitimate businessperson defendant, who, of course, no longer has the wherewithal to pay back the amount embezzled since he has already returned the money to the entity from which it was taken. Indeed, this so troubled the conservative U.S. Court of Appeals for the Fourth Circuit that the panel reversed defendant William Aramony's money laundering conviction in order to knock out the unfair "proceeds" forfeiture. At oral argument, the panel made it clear that this is what it was doing. *U.S. v. Aramony*, 88 F.3rd 1369 (4th Cir. 1996).

In other circumstances, this provision could wipe out entire businesses. A defendant property-owner should not be wiped out by the forfeiture simply because he has in some technical way committed a fraud or has supplied widgets that are not precisely up to Department of Defense "mil spec" standards.

H.R. 1965 purports to provide some relief, but only in a narrow class of "overbilling" cases. Yet, even there, the relief promised by the provision is illusory, since it does *not* apply to all-encompassing money laundering cases. For example, in every case in which fraud is involved, the government typically charges money laundering as well (due to the tremendous overbreadth of the money laundering statute). By doing that, the government avoids any limitation on proceeds forfeiture in cases based simply on mail or wire fraud.

The current provision defining proceeds as all "gross receipts" should be stricken and the following definition substituted, as "(2)" at lines 6-20:

"(2) For purposes of paragraph (1), the term 'proceeds' is defined as follows.

"(A) In cases involving illegal products such as controlled substances, illegal services, such as odometer tampering or unlawful activities such as espionage or arson, or healthcare fraud involving the provision of unnecessary services, the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

"(B) In cases involving essentially lawful products or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture less the direct costs incurred in providing the products or services. The defendant shall have the burden of going forward with the evidence concerning direct costs. Once the defendant does so, the government shall bear the ultimate burden of proving the amount of the proceeds subject to forfeiture."²

² *This definition of proceeds avoids confusing conflict in the law threatened by the current wording in H.R. 1965. Unlike the current wording of the bill, this suggested amendment tracks, rather than conflicts, with the established case law under the current money laundering and RICO statutes. E.g., United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996) (characterizing as "absurd" government's contention that \$28 million, representing the gross receipts of the insurance companies constituting the RICO enterprise during the course of the alleged conspiracy, was subject to forfeiture; court observes that an insurer's gross receipts would include amounts needed to pay policy holder claims); United States v. Lizza Industries, 775 F.2d 492, 498-99 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986) (in bid-rigging conspiracy, "proceeds"*

V. Page 24, lines 7-8.

Re: Subsection (3), under (h), "Uniform Definition of Proceeds"

The Eighth Amendment has been uniformly held to provide no protection to the citizen challenging a proceeds forfeiture. If Congress fails to protect that citizen or business entity from abuses in this area, the person will in fact have no protection.

Lines 7-8 on page 24 must be deleted, and instead, the following should be substituted: "shall be left in the discretion of the court."

This change is necessary because the Eighth Amendment as it has been misinterpreted by the courts, would *never prohibit* a forfeiture of *proceeds* that have been invested and then greatly appreciated in value. Relying on the Eighth Amendment in this area is reliance on a straw man.

VI. Pages 68-69

Re: Section 47 – "Hearings on Pre-Trial Restraining Orders."

As we have stated to your counsel, Mr. Conyers' counsel and DOJ counsel on numerous occasions, this criminal forfeiture provision is extreme and unwise. It provides for pre-trial, injunctive restraints on entirely untainted property – so-called "substitute assets" – which are not the primary property allegedly subject to forfeiture, without the government ever having to demonstrate that the substitute assets are actually forfeitable or that they are at risk

subject to forfeiture should be amount of money acquired through illegal contracts less the direct costs from the contracts, such as the cost of cement used on a particular project; however, the prorated cost of a cement mixer, which might be used on other projects, could not be deducted); *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 111 S.Ct. 2019 (1991) ("the proceeds to which the statute refers are net, not gross, revenues-profits, not sales, for only the former are gains."); *United States v. Elliott*, 727 F. Supp. 1126 (N.D.Ill. 1989) (in case involving lawyer convicted of misusing confidential client information for his personal benefit in nine sets of securities transactions, government conceded that the purchase price of the stock defendant bought had to be deducted from the sale price to calculate defendant's proceeds from the scheme); *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105 (N.D.Ill. 1994) (the term proceeds in 18 U.S.C. §981(a)(1)(C) encompasses only the profit from a fraudulent stock transaction, not all of the property acquired as a result of the transaction; claimants were entitled to the return of their direct costs in purchasing the stock).

of being concealed, transferred or dissipated. The defendant is afforded no right to a meaningful hearing on the propriety, or impropriety of the restraint.

The whole section 47 on pre-trial restraint of substitute assets should be deleted in its entirety. There is no "fix" for this provision.

Congress has never given the government power to restrain or seize substitute assets prior to trial. And for good reason!

This new power envisioned in the bill would allow the government to destroy the ability of the citizen accused to use his own assets to obtain counsel and pay for the expense of his defense and to support his family, before there is any adjudication of guilt.

The government says it needs this new authority in all criminal forfeiture cases. *Don't buy it.* This drastic power to economically cripple the defendant at the very outset of his battle with the government will be greatly abused.

The concept of forfeiting "substitute assets" *at all (post-trial)* has always been a dubious one. It first entered the law as a limited concept in 1986 and has been abused ever since. Many examples are easily found. (We can provide them to you or your staff.)

Reasonable restrictions must always be placed on any forfeiture of "substitute assets." Without such restrictions, any "substitute asset" provision is utterly contrary to the spirit and purpose of all your laudable efforts toward reform. It would simply give an outrageous new power to arbitrarily restrain all of a defendant's property, on the theory that all of the property constitutes substitute assets which *might* be subject to forfeiture. The government gets to do this without having to make any showing to the court that the "substitute assets" are in fact subject to forfeiture or that such drastic restraint is necessary to conserve the assets.

This provision must be stricken from the bill.

###

Mr. Chairman, some might claim, as the Department's chief negotiator Stefan Cassella does, that H.R. 1965 is better than no bill at all because as long as it makes forfeiture "procedure" more fair, there is nothing wrong with so vastly expanding the government's civil and criminal forfeiture "powers." Aside from the fact that the bill *creates less fair procedures* (e.g., the "seize now, fish later," special government summary judgment rule addressed above), the argument is

simply far too sweeping. As you have observed in your excellent book, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (Cato Institute 1995), the scope of forfeiture statutes is just as important as the procedures used in enforcing them. Statutes that allow drastic, arbitrary forfeitures -- such as those endorsed and expanded by H.R. 1965 as written -- cannot be made fair through procedural tinkering, however well-intended.

As your own book demonstrates, one of the central problems with forfeiture is the extreme overreach, or scope of government powers under the forfeiture statutes -- an overreach greatly aggravated, through unprecedented expansion, by H.R. 1965. This overbreadth, expanded by the bill, will allow the government to impose drastic penalties on wrongdoers and on innocent persons alike.

Finally, you should be aware that this bill is but a piece of the Department's strategy to use criminal forfeiture much more, and to render it much more unfair in terms of both scope and procedure. Right now, they are busy lobbying the U.S. Judicial Conference to do away with the right to a jury trial in criminal forfeiture cases. Their scheme is to substitute a "streamlined" sentencing proceeding before a judge, at which rank hearsay would be admissible.

Make no mistake, the Department is intending to use criminal forfeiture much more and much less fairly than in the past -- in large part because of the extremely expansionist criminal forfeiture provisions in H.R. 1965.

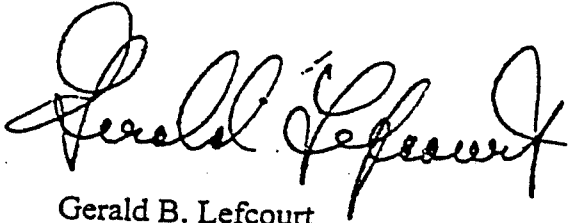
Criminal forfeiture is in many respects at least as troubling as civil forfeiture. If anything, innocent third party property owners and other innocent property stakeholders are harmed even more by criminal forfeiture actions. For example, these statutes provide that a third party claimant has no right to a jury, a circumstance of very questionable constitutionality. This is wrong and should be changed. Likewise, the statutes place the burden of proof on the innocent third party claimant. Moreover, third party claimants can assert no interest at all until the criminal proceedings against the one accused wrongdoer is completed, which of course can and routinely does take years, especially in complex white collar business cases. There is a very large body of well-established caselaw dealing with the claims of innocent third parties whose property has been wrongfully restrained or seized under the criminal forfeiture laws.

Although H.R. 1965 now largely a criminal forfeiture bill, it does nothing to make these unfair procedures in criminal forfeiture more just. Rather, it gives the government greatly expanded criminal forfeiture powers, including the draconian power to restrain substitute assets prior to trial.

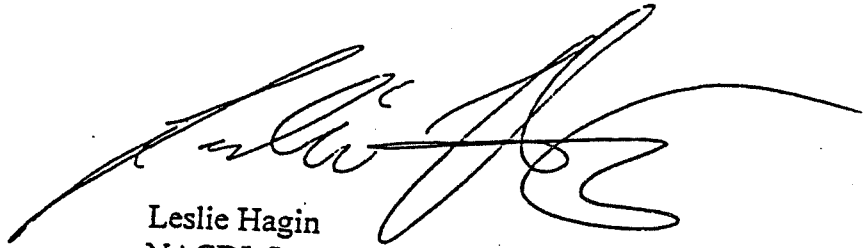
Again, Mr. Chairman, we commend you for your tireless leadership in attempting to meaningfully reform the asset forfeiture laws. But the current bill, H.R. 1965, is so seriously flawed that we cannot support it. It is no wonder that the Department and some other law enforcement agencies who have always opposed your reform efforts are now the only supporters of the current bill.

As always, we support you in your valiant efforts, and look forward to assisting you in any way possible to remove or amend the most egregious forfeiture-expanding provisions the DOJ has managed to slip into your bill.

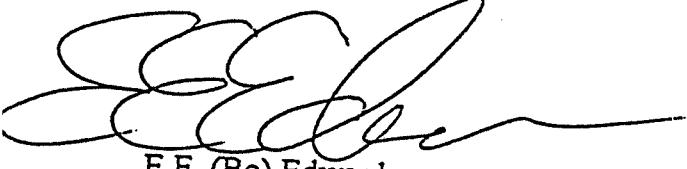
Sincerely,



Gerald B. Lefcourt
NACDL President-Elect
New York, New York



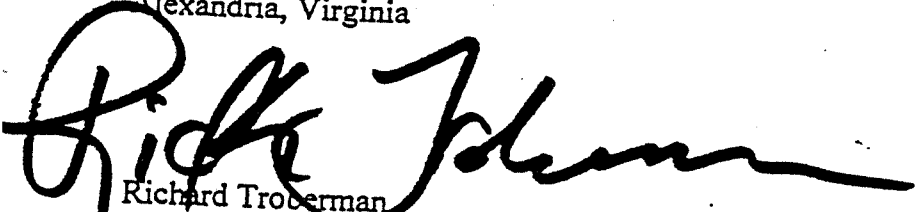
Leslie Hagin
NACDL Legislative Director and Counsel
Washington, D.C. National Office



E.E. (Bo) Edwards
NACDL Forfeiture Abuse Task Force Co-Chair
Nashville, Tennessee



David B. Smith
NACDL Forfeiture Abuse Task Force Co-Chair
Alexandria, Virginia



Richard Troberman
NACDL Forfeiture Abuse Task Force Co-Chair
Seattle, Washington

cc: Honorable John Conyers, Ranking Member