NACDL Testimony

June 11, 1997

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Hearings on Bi-Partisan Bill to Provide a More Just and Uniform Procedure for Federal Civil Asset Forfeitures ("Civil Asset Forfeiture Reform Act of 1997")

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before
Committee on the Judiciary, U.S. House of Representatives

Regarding Bi-Partisan Bill to Provide a More Just and Uniform Procedure for Federal Civil Asset Forfeitures ("Civil Asset Forfeiture Reform Act of 1997")

Mr. Chairman, Mr. Conyers, Other Distinguished Members of the Committee:

Thank you for providing me this opportunity to speak about a case of mine which exemplifies especially well the great need for this bi-partisan bill.

Case Study: Kaufman

The specific case I want to tell you about is especially egregious in terms of the target victims, but quite typical in terms of the operation. The case is United States v. Kaufman, Cr. 92-134 (S-1)(JBW), Eastern District of New York. In this case, the government filed forfeiture actions against bank accounts and real property of the religious institutions allegedly involved in a "money laundering" transaction. The illicit activity, however, was actually created and implemented by the government, as a "sting" operation run amok. This travesty was compounded by the government's separate, parallel forfeiture action in which it seized the

religious institution's bank account. The substantial assets of several religious institutions were in fact threatened as direct and innocent victims of the *government-generated* crimes asserted by the government.

In short, the government's thirst for high-profile "sting" operations and forfeited assets was so extreme in this case that it motivated the government to *entrap* unsuspecting religious persons -- in this case, Orthodox Jewish persons in the Williamsburg section of Brooklyn, New York.

Without any indication that my client George Kaufman was involved, or intended to become involved, in any money laundering or other illegal activity, the government lured him into its "sting" operation by affirmatively misleading him into believing that the money an undercover agent and the agent's target-contact brought him for transactions was from *legitimate* sources.[1] This "sting operation" was in clear violation of the Attorney General's Guidelines.

My client was in fact so unduly disadvantaged that he was left with no real choice but to accept the government's coercion of him into a plea for a crime he did not commit -- in order to free the bank account of his religious institution and go on with his life.

Mr. Kaufman's case points up the dangers of the current asset forfeitures laws, capable of being used as a crippling tool with which to coerce a person into a plea -- even in the most innocent circumstances. Let me explain specifically.

II. Lessons From Kaufman

A. *In Rem* Forfeiture Is Oppressive

In 1992, Judge George Pratt of the United States Court of Appeals for the Second Circuit well-expressed the rightful concern about the seemingly ever-expanding use of federal forfeiture statutes:

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

United States v. All Assets of Statewide Auto Parts, 971 F.2d 896 (2d Cir. 1992). Subsequently, Judge Pratt equally well-articulated the fundamental problems with the civil forfeiture laws: "The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result."

United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993). I could not say it better. But I might add that it is high-time for the statutes and rules to be changed by Congress.

B. *In Rem* Forfeiture Turns Cherished American Principles of Due Process on Their Head

Consider this: as Americans, we are inbred with the notion that before we may be deprived by the government of our life, liberty or property, we are entitled to our fair day in court -- to confront witnesses against us; to remain silent or testify in our own behalf if we choose; and to hold the government to a burden of proof beyond a reasonable doubt.

But under *in rem* federal forfeiture law, many of these protections do not apply. It is a citizen's nightmare: where warrants of seizure are issued by the clerks of the Court; the property owner has the burden of proof; the innocence of the owner alone is often *not* a defense[2]; rank hearsay is admissible in favor of the government (contrary to the rules of evidence), but is *not* admissible from the property owner; and the government's right to forfeit property vests at the time it is simply alleged to have been used illegally, rather than at the time of an actual Judgment. In fact, the government can allege alternative, *inconsistent* theories of forfeiture in its complaint and still prevail.

C. *In Rem* Forfeiture has Exploded and Become a Seizing Agency Cash Cow that Victimizes Innocent People

There are now more than 100 forfeiture statutes in place on the state and federal level. Since 1985, the total value of federal asset seizures has increased approximately *1,500 percent* -- to over $2.4 billion, including over $643 million for the Department of Justice in fiscal year 1991 alone. Of the $1.5 billion that was forfeited between 1986 and 1990, for example, $474 million in cash and $70 million in property was shared with state and local law enforcement agencies.[3] In just four years, this sharing with State and local law enforcement rose from $22.5 million in cash and property, in 1986, to over $200 million by 1990.

These figures are often cited by prosecutors as evidence that forfeiture is one of the single greatest weapons in the war on crime. High-profile cases where organized crime figures have been prosecuted and their assets seized are splashed across the newspapers to further make the point. But such selective case-cites ignore the cold facts. All across this country, people who have not been charged with a crime, and who are in fact innocent of any wrongdoing, have had their cars, boats, money and homes unfairly taken away by the government.

In fact, a study done by the *Pittsburgh Press* has revealed that as many as 80% of the people who lost property to the federal government through forfeiture were never charged with any crime. And most of the forfeited items were not the luxurious playthings of drug barons, but modest homes, simple cars and hard-earned savings of ordinary people. The Drug Enforcement Administration's own database shows that big-ticket items -- those valued at more than $50,000 -- made up just 17% of the 25,297 items seized in one sample 18 month period.

D. Applicable Procedural Rules are Patently Unfair: Bi-Partisan Bill Would Bring Fairness and Uniformity to Law

Congress has never before enacted procedural rules specifically designed to govern forfeiture actions under 21 U.S.C. 881 or 18 U.S.C. 981(a)(1)(A). Instead, it "borrowed" the forfeiture rules codified in the Customs Laws, 19 U.S.C. secs. 1602, *et seq.*, and the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules"), as the rules to govern judicial forfeiture proceedings and pleading requirements. *See* 21 U.S.C. sec. 881(d); 18 U.S.C. sec. 981(d); 28 U.S.C. sec. 2461(b); 7A J. Moore & A. Pelaez, Moore's Federal Practice and Procedure, C.11 at 669 (2d ed. 1983). The Supplemental Rules are part of the Federal Rules of Civil Procedure, *see* Fed.R.Civ.P. A-F, which apply to actions *in rem (see* Fed.R.Civ.P. A(2)), such as civil forfeitures.

But these rules and administrative agency regulations provide a complex maze of procedures governing the forfeiture action, almost all of which are stacked against the property owner. For instance, under DEA regulations, property valued at less than $500,000 can be forfeited "administratively;" that is, summarily and without effective court oversight. It is estimated that 80% of all forfeitures proceed in this fashion. There is no right to judicial review of an administrative forfeiture absent a showing that the agency failed to undertake any review at all. *See e.g.*, United States v. One 1987 Jeep Wrangler Automobile, 972 F.2d 472 (2d Cir. 1992).

This very good bill would go a long way toward finally providing uniformity and fairness to the forfeiture rules. Following are some key aspects of the bill's reforms.

1. Regarding Claim and Cost Bond

For forfeitures under $500,000, a Claim and Cost Bond is the mechanism for transferring jurisdiction over the matter from the agency to the federal district court. The procedure for filing a claim and cost bond is authorized by Title 19 U.S.C. sec. 1608. That statute provides that a claimant must file a claim and cost bond within *20 days* after the first date of publication of the notice of seizure in a newspaper of general circulation. The bond required is 10% of the value of the property seized or $5,000.00, whichever is less. This access-to-justice-tax would rightly be eliminated by this bill.

Regarding Burden of Proof (Now On the Claimant)

Currently, the burden of proof is perversely placed upon the claimant, to demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause for forfeiture have not been met, or to show the claimant's lack of knowledge or consent to illegal activities.

This is a remarkable requirement considering it is the government that has instituted the lawsuit. It also presents a constitutional anomaly, in view of the quasi-criminal nature and important private interests at stake in forfeiture proceedings.

This bill puts the burden where it belongs, on the government, and by a standard appropriate to the gravity of the interests at stake, "clear and convincing evidence."

Regarding Innocent Owner Defense -- Achieving Uniform Fairness

Both 21 U.S.C sec. 881(a)(4) & (6), and 18 U.S.C. sec. 981(a)(2) provide an "innocent owner" defense. Under Section 881, "no property shall be forfeited...to the extent of an interest of the owner, by reason of any act or commission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.* at 881(a)(6),(7). *See also* Section 881(a)(4)(C)("no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"). Section 981's innocent owner defense is nearly identical but unduly stricter: the claimant must prove he did not have knowledge of the illegal use of the property; consent is irrelevant. Under both sections, the burden is on the claimant to establish the defense.

But myriad other forfeiture statutes do not even contain an innocent owner defense provision. The bill would make the innocent owner defense uniform, applicable to all civil forfeiture cases; and fair, according to the guidelines provided in Section 881. This too is a crucial reform.

III. Conclusion

Thank you again for affording me this opportunity to comment on this highly commendable reform measure. Each and every one of its provisions is very much needed. I am especially pleased to see that it already enjoys such strong bi-partisan support, and hope this is a harbinger of prompt passage.

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1. Mr. Kaufman was lured into exchanging the undercover agent's cash for checks provided by Mr. Kaufman. Mr. Kaufman was selected because, as part of the Orthodox Jewish community, "everything [he] do[es] is with cash." Transcript 1, at p.53. *I.e.*, because their religious institutions had legitimate sources for their money -- coming in large part from cash contributions from their congregants -- and legitimate bases for their excellent relationships with their banks (enabling them to certify checks for large amounts).

2. *See e.g.*, Bennis v. Michigan, 516 U.S. __, 116 S.CT. 994 (1996) (5-4).

3. 21 U.S.C. sec. 881(e)(1)(A) authorizes the Attorney General to transfer part or all of forfeited personal property to "any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property." Up to 85% of property forfeited may be returned to the State.

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