

inaccurate assertion that many of these provisions had received no public opposition. In fact, NACDL, at least, had adamantly opposed them, in writing, giving detailed reasons.

The current proposal to amend the Criminal Rules regarding forfeitures continues to be fatally flawed in numerous particulars. In several respects, the proposal is inconsistent with governing statutory provisions, and appears to breach the Rules Enabling Act wall between permissible "procedural" reform and prohibited effect on "substantive rights." 28 U.S.C. § 2072(b). The Standing Committee should reject these ill-advised changes outright, or at least send them back for publication and a new comment period.

In the past, the Department of Justice has managed occasionally to bypass and even to defeat the Judicial Conference's deliberative and rational rule-making processes by steering amendments through Congress to reject or avoid thoughtful Committee decisions. Here, ironically, the Department is attempting to get the Conference to do its bidding after failing in Congress. NACDL has opposed these efforts on both fronts, and will continue to do so.

A. The Amended Proposal Would Make a Substantive Change in the Role of the Jury in All Criminal Forfeiture Cases, Would Turn Over Private Property of Innocent Persons to the Government Without any Statutory Basis, and Would Abolish an Existing Right to Jury Trial of a Forfeiture Allegation When a Defendant Pleads Guilty to the Underlying Offense.

The advisory committee has properly retreated from the radical 1996 proposal of the Department of Justice, published for comment in 1997, that would have abolished entirely the jury trial right presently guaranteed by Fed.R.Crim.P. 31(e). But the revised, 1998 version now before the Standing Committee creates an entirely new statement of what issue would be triable to the jury -- a definition inconsistent with all the statutes creating the forfeiture penalty and with the essential nature of criminal forfeiture -- and eliminates the existing right of a defendant to demand a trial by jury of a contested forfeiture allegation, despite having pleaded guilty to one or more offenses contained in the indictment. Worst of all, the net result of the new procedure established by this Rule would be a wholly unauthorized transfer to the government of title to private property in which a convicted defendant is alleged to have had any sort of interest, whenever innocent third parties are too frightened, too ignorant, too poor, or too poorly represented to prove that property seized by the government in fact belongs to them. Not a single persuasive reason has been offered, nor does any exist, for restricting the jury trial right presently guaranteed by Fed.R.Crim.P. 31(e), or for so expanding the government's power to appropriate citizens' private property.

By eliminating the requirement for a determination of the "extent" of the defendant's forfeitable property or interest in property, the presumption and default

outcome under the proposed revision would be 100% forfeiture of any tainted property in which the defendant had any interest at all -- which is contrary not only to the statutory scheme but also to the very nature of criminal forfeiture, as compare with civil forfeitures. In civil forfeiture the property itself is treated as the defendant; that is what is meant by "in rem." In criminal forfeiture, by contrast, it is the convicted defendant's personal interest in the property to which the government may succeed, which may or may not be 100% ownership. The present rule, or something very like it, is therefore necessary to comply with the statutory scheme, which calls for forfeiture not of an item of property, per se, but rather of "the person's property" that has been misused in specified ways, see, e.g., 21 U.S.C. § 853(a), meaning, of course, the convicted person's interest in any item of property only.

Coupled with the proposed elimination of the specific charging requirement from Rule 7(c), as discussed under Point B of these comments, the result would be devastating to the property rights of convicted defendants and innocent third parties alike, particularly where, due to fear or ignorance, to failures of notice, or to unavailability of legal resources, no third party files a claim.

1. Asking the Factfinder the Wrong Questions.

Proposed amended Rule 32.2(b) would eliminate the present requirement of Rule 31(e) requiring a factfinder's determination of the "extent of the interest or property subject to forfeiture." Instead, in a case where "specific property is sought to be forfeited," the jury (or judge if a jury trial was not invoked) would be asked to determine "whether the government has established the requisite nexus between the property and the offense." That is the key issue for in rem (civil) forfeiture, but an affirmative answer to that question will not, by itself, support an in personam (criminal) forfeiture. See United States v. Bajakajian, 524 U.S. --, 141 L.Ed.2d 314, 326-29, 118 S.Ct. 2028 (1998) (discussing essential differences between civil and criminal forfeitures). Alternatively, if "the government seeks a personal money judgment against the defendant," then the issue would be "the amount of money that the defendant will be ordered to pay." Prop. R. 32.2(b)(1). (The notion of a forfeiture claim's leading to entry of a "personal money judgment is discussed under Point C below.) The court would then simply would order forfeited "whatever interest each defendant may have in the property, without determining what that interest is." Indeed, under this proposed radical revision of the process, no determination of the defendant's forfeitable interest would ever be made; instead, the government would eventually gain ownership of whatever property or rights to property are found to have that "requisite nexus" and which are not successfully claimed by a third party.

The present rule requires the jury to determine "the extent of the interest or property subject to forfeiture, if any." As the court correctly held in United States v.

Ham, 58 F.3d 78 (4th Cir. 1995), Rule 31(e) presently assigns to the jury the task of determining the extent of the defendant's forfeitable interest, if any, in the allegedly forfeitable property. The Note cites no authority to the contrary; there is no ambiguity here to resolve by amendment.

Eliminating any provision for determining the extent of the defendant's interest in the property also has the effect of blocking enforcement of the Supreme Court's recent decisions holding that a statutorily-mandated forfeiture may nevertheless be constitutionally impermissible under the Eighth Amendment's Excessive Fines Clause. Bajakajian, *supra*; Alexander v. United States, 509 U.S. 544 (1993). It is rather difficult to see how the court is to make an excessiveness determination without knowing the extent of the defendant's statutorily-forfeitable interest.

The proposed Committee Note, copying from the DOJ's "Explanation" of its 1996 submission, identifies the determination of "extent" as a "problem" with the current Rule 31(e) (*ll.* 138, 164). The present language, however, accurately reflects both the historical role of the common law jury in this process and the present statutory scheme. It should not be eliminated.

2. Diminution of Third-Party Rights and Unauthorized Government Property-Grab.

The fundamental structural flaw in the latest version of this proposal is revealed in the Note's expressed theory that the statutes' provision for an ancillary hearing makes the present Rule an "unnecessary anachronism," as DOJ's Explanation, repeated in the proposed Note (*ll.* 205-06), puts it. Contrary to the elaborate but wholly misleading summary of current practice for determining criminal forfeitures set forth by the DOJ and unfortunately adopted in the Note, the extent of a defendant's interest in allegedly forfeitable property is not litigated in the third-party "ancillary proceedings." In fact, the applicable statutes prohibit the defendant from participating in those proceedings to litigate the extent of the defendant's own interest. 18 U.S.C. § 1963(1)(2); 21 U.S.C. § 853(n)(2); *see also* 18 U.S.C. § 1963(1)(4); 21 U.S.C. § 853(n)(4) (prohibiting consolidation of proceedings to resolve third parties' claims with any petition by defendant). Thus, the procedure set forth in proposed Rule 32.2 would eliminate any determination at all of the measure or scope of the defendant's interest. The judge would order forfeiture of "the defendant's interest" in the charged property, without further specification, whatever that might be; then, after the ancillary hearing (or when the time to file third party claims had expired) the government would obtain title to any and all of the property not determined to belong to someone else.

This change would give the government a huge and substantively unauthorized windfall in those cases where the third party does not come forward for whatever reason

-- lack of notice, fear of possible criminal or civil liability, ignorance, confusion and turmoil due to a family member's recent conviction, lack of funds to hire counsel, or whatever. Take the following, for example. Suppose the lessee of a small gift shop in the basement concourse of the World Trade Center is using the shop to occasionally sell a few grams of crack cocaine. He is arrested. The government gives notice to the defendant that it will seek criminal forfeiture as part of his sentence (which, of course, includes the defendant's interest in the gift shop which was used to facilitate the offense). Under current law, the most the government could ever get is the defendant's leasehold interest in the shop. Under the proposed revision, if the owners of the World Trade Center neglected to file a third party claim, the government would gain clear title not only to the lease, which is the only property which by law was forfeitable, but to the entire World Trade Center.

This example, while dramatic, is not farfetched. One of our committee members presently has a case in which the defendant had a leasehold interest in property that was used to grow marijuana. The government knew at the time it returned the indictment that someone else owned the property, but it nevertheless claimed criminal forfeiture of the property. Fortunately, the owners filed a third party claim and established their superior interest. The government then commenced a separate civil forfeiture action against the property, forcing the third party to litigate the same matter again under a different set of legal rules and a different standard. As the Supreme Court has recognized, any fairness in the adversarial process "is of particular importance ... where the Government has a direct pecuniary interest in the outcome of the proceeding." United States v. Good Real Property, 510 U.S. 43, 126 L.Ed.2d 490, 504 (1993). Likewise, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." Id. at 505, quoting Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring). This proposed change will unjustly enrich the government whenever a third party owner fails to file a claim, even if the defendant had only a 1% interest in the property. Far from "streamlining" the process so as to facilitate such a result, the Committee should be scrutinizing the process for ways to increase procedural fairness.

The Explanatory Note (*ll.* 421-27, 447-49) states that the court would still have to make a finding that at least one of the defendants had a "legal or possessory interest" in the property, even if no one files a claim in the ancillary hearing. This is a meaningless "safeguard." Any such finding, under the procedure defined by the proposed rule, would amount to an ex parte determination. It would be a rare case in which at least one of the defendants did not have at least a possessory interest in the property, yet a mere possessory interest, under the law, provides no basis at all for forfeiture.

The point made in Professor Stith's Sept. 14, 1998, letter to her fellow subcommittee members is especially important. The explanation offered in the notes as to why the extent of the defendant's interest need not be determined at the time the

preliminary order of forfeiture is entered not only fails to justify the change, but it ignores the significant consequence and unfair effect of the change. Precisely because defendants do not have any interest in opposing the forfeiture of property that is not actually theirs -- or may understandably be focused on protecting their liberty, even at the possible expense of their property -- there needs to be a determination made by the jury or judge of the extent of the defendant's interest. Otherwise, the property of third parties will always be at risk of erroneously being forfeited without any restriction. If a jury has determined that a particular interest in property is the defendant's, then there is at least some justification for requiring a third party to come forward, make a contrary claim, and bear a burden of proof to overcome that special criminal verdict.

But under this proposal, property in excess of that which is legally forfeitable in a criminal case -- that is, property which is not the defendant's, and which is certainly not the government's -- will routinely be included in "preliminary" orders of forfeiture. The failure to specify and determine the extent of the defendant's interest thus has the effect of requiring third party ancillary hearings that would be unnecessary if the extent of the defendant's interest were specified. The government then gets to keep the innocent third parties's property unless the third party comes forward and meets its burden at an ancillary hearing. The failure to specify the defendant's interest also gives the government an unfair advantage in the ancillary proceeding because the third party must make his or her claim without knowing the extent of the property the government is able to show belongs to the defendant -- which is the only property that legally should be at risk in the criminal case.

In her Sept. 14 letter, which we fully endorse, Professor Stith explains incisively why this proposal should not be approved. As Professor Stith shows, this rule revision would create a presumption that property used in, or constituting proceeds of a crime belonged to any person convicted of that crime. Not only is this presumption of dubious factual validity, it constitutes a major substantive change in the law not appropriately achieved by a change in the Rules of Criminal Procedure.

3. Changing the Quality and Burden of Proof.

Rule 32.2(b)(1), as proposed, would allow the court's determination of forfeitability to be based on "evidence or information" presented by the parties. The term "information," as used here, obviously means something other than "evidence." As a result, the rule would allow a shocking departure -- perhaps even an unconstitutional one -- from the present requirement that a criminal forfeiture be established under the same rules of evidence that apply in the guilt phase of a criminal trial. A criminal forfei-

ture cannot be based on rank hearsay and proffers.¹ This proposed revision of the Rule must be rejected for this reason alone.

The proposed Committee Note errs in repeating the DOJ's fundamentally misleading claim about the burden of proof for criminal forfeiture being a preponderance of the evidence. Ordinarily, when the Rules propose to resolve a point on which there is a disparity of views in the case law, the Note says so candidly, not argumentatively. First, the burden of proof is a legislative or constitutional matter, involving the striking of a balance between individual rights and government power. It is not one of mere "practice and procedure" but rather affects a "substantive right." 28 U.S.C. § 2702(b). The Committee ought not try to influence it by Rule or Note. If it does, however, the Judicial Conference position should be based on a thoughtful and balanced assessment of the case law, historical tradition, and Congressional intent.

NACDL believes that both the Sixth Amendment and Congressional intent impose a burden of proof beyond a reasonable doubt in all federal criminal forfeiture cases. The proposed Committee Note selectively cites a handful of incorrectly decided cases (again copied from the DOJ "Explanation") to the contrary, all of which simply ignore Congress' clear requirement of proof beyond a reasonable doubt. The case law under RICO and CCE strongly establishes that the burden of proof is beyond a reasonable doubt for criminal forfeiture. See United States v. Pelullo, 14 F.3d 881, 902-06 (3d Cir. 1994) (criminal RICO forfeiture requires proof beyond a reasonable doubt); United States v. Pryba, 674 F.Supp. 1518, 1520-21 (E.D.Va. 1987), aff'd, 900 F.2d 748 (4th Cir.), cert. denied, 498 U.S. 924 (1990) (same); United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984) (same). See also 18 U.S.C. § 1467(c)(1) (beyond-a-reasonable-doubt burden for criminal forfeiture in obscenity prosecutions). None of these authorities is mentioned in the Note.

The Senate Report on the 1984 legislation which included what became 21 U.S.C. § 853 (criminal forfeiture in drug cases, later incorporated by reference for procedural aspects of money laundering forfeiture) repeatedly demonstrates Congress's understanding that the government's overall burden of proof under § 853, as well as under the amended RICO forfeiture provisions, would remain beyond a reasonable doubt. United States v. Elgersma, 929 F.2d 1538, 1547-48 (11th Cir. 1991) (discussing legislative history), overruled, 971 F.2d 690 (1992) (in banc). See also H.Rep. No. 845,

¹ Tending to confirm our alarm at this language is the indirect suggestion, offered by way of contrast to the ancillary hearing, that the Federal Rules of Evidence are not thought applicable to the forfeiture phase of a criminal trial. (Note, at *ll.* 464-66). It is commonly assumed under present practice that the Rules do apply, and this should not be changed -- certainly not without input from the Evidence Rules Advisory Committee.

98th Cong., 2d Sess. 18, 38 (1984) (adopting Justice Department's request for language that criminal forfeiture must be established by proof beyond a reasonable doubt in both RICO and drug statutes). See 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶14.03, at 14-39 to -41 (12/98 rev.).² In fact, the DOJ language adopted in the proposed Committee Note is a reversal of its position taken when its policy-makers were closer to the legislative history; then, the government conceded that the burden of proof under § 853 is also beyond a reasonable doubt. See *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986) (agreeing with government's position that burden of proof is beyond-reasonable-doubt), *cert. denied*, 480 U.S. 931 (1987).

The Committee should not endorse or adopt the improper effort of the Executive Branch to undermine Congressional intent and pertinent case law, by approving this part of the proposed Note. If the Administration thinks the burden of proof for criminal forfeiture should be lowered to a mere preponderance, it should look to Congress, as it has so far unsuccessfully attempted to do.³ In short, the Committee should not weigh in on the burden of proof issue. The matter is at best controversial.⁴

4. Restriction of the Right to Jury Trial

Although abolition of the right to jury trial in criminal forfeiture matters caused this proposal to be defeated by the Committee in April, the jury trial right as preserved in the current, revised proposal is merely the rump of the present jury right. First, it only applies in a case in which the finding of guilt was made by a jury. Presently, a defendant can plead guilty to criminal charges and still demand a jury trial on the forfeiture aspect of the case -- although that rarely happens. Why should a defendant be forced to go through a jury trial on the issue of guilt just to preserve his or her right to a

² The cases selectively cited in the proposed Note are based on a dubious inference from the language of 21 U.S.C. § 853(d), which applies to drug proceeds only. D.B. Smith, *id.*

³ The history of the highly contentious struggle in Congress in recent years to reform the federal forfeiture laws is recounted in detail in 1 D.B. Smith, *supra*, ¶1.02, at 1-20 to 1-23.

⁴ The Department's partisan position further taints the proposed Note at lines 447-62, which gratuitously advances the DOJ's bald assertion that co-defendants are jointly and severally liable for any forfeiture even where the government is able to determine precisely how much each benefited from a scheme. This is a substantive issue, on which the Rules Committee, as such, could not have a view.

jury trial on a contested allegation of forfeiture? Neither the jury nor the judge determines the extent of the defendant's interest in the property during the criminal trial, nor is that a necessary aspect of any plea colloquy.

The rump jury trial right would also not be applicable when the government seeks a "personal money judgment" against the defendant. In Point C below, NACDL disputes whether there is any such form of criminal forfeiture. But certainly there is no special reason to leave this type of forfeiture judgment up to the judge. A jury is just as capable of determining the amount of proceeds received by a defendant or group of defendants, and that issue is no less likely to be factually contested than any other.

The only real reason that the government opposes jury determinations is that juries sometimes refuse to forfeit homesteads or personal property. The jury, the government supposes, is more likely to harbor doubt about the defendant's culpable ownership or to reject a perceived overreaching by prosecutors, or even occasionally to act on sympathy for the defendant's family's plight. The government considers such displays of humanity and common sense -- which are entirely consistent with the jury's historic function as the conscience of the community, shielding the citizen in particular cases from the law's harshness or the prosecutor's zeal -- an intolerable interference with its profitable forfeiture program. This proposal has nothing to do with procedural reform or improving the fairness of the process; it has only to do with an unchecked desire by the DOJ to win and to punish.

If the English Crown could tolerate the occasional, case-specific display of moderation, conscience, or humanity by English and colonial juries, so can the mighty United States Government in the late twentieth century. Indeed, if the government fails to win the criminal forfeiture, and feels that justice has not been served, it can always pursue a civil remedy in addition. See United States v. Ursery, 518 U.S. 267 (1996) (no double jeopardy bar).

B. Proposed Amendment to Rule 7(c): Averment in the Indictment of the Specific Property Subject to Forfeiture.

Proposed Rule 32.2(a) would further devastate the fairness of the criminal forfeiture process by destroying the grand jury's function. This proposal would replace current Rule 7(c)(2), which requires that the indictment or information allege "the extent of the interest or property subject to forfeiture," with a requirement that the charging instrument merely aver "that a defendant has a possessory or legal interest in property that is subject to forfeiture." Although the courts have generally held that Rule 7(c)(2) does not require that an indictment or information itemize the property alleged to be subject to forfeiture, NACDL believes a specification requirement is plainly implicit in Rule 7(c)(2)'s current "extent" language. Far from undermining this

protection, any amended Rule ought to require such averments expressly. Otherwise, the grand jury cannot serve as a check on the prosecutor's power to restrain or seize property without probable cause.⁵

The present language of Rule 7(c) barely suffices to satisfy the due process requirement that an accused person receive notice of the penalty s/he faces. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996). The pleading requirement of present Rule 7(c) cannot be further watered down and survive constitutional attack.

Due process has two components: the right to adequate notice and a meaningful opportunity to be heard. This proposal attacks both components of due process. The proposal would amend Rule 7(c)(2) to abolish the requirement that the indictment specifically allege the "extent" of the property subject to forfeiture, replacing it under Rule 32.2(a) with a meaningless averment that would add little or nothing to the "notice" already afforded by the criminal statutes themselves. DOJ apparently reasons that because some courts have ignored the clear language of the Rule, the Rule should be changed to conform to those court decisions. (In this regard, the Note [again, tendentiously] cites only United States v. DeFries, 129 F.3d 1293 (D.C.Cir. 1997), virtually ignoring the unanimous judgment of other courts that specific notice, at least through a bill of particulars or discovery, is required.⁶) NACDL disagrees that Rule 7(c) now permits less than itemized notice, as did the Supreme Court in Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 632 n.10 (1989) (noting Rule 7(c)(2)'s requirement that "any assets which the Government wishes to have forfeited must be

⁵ Contrary to the staff comment at Action Item 2 on the Committee's agenda, stating that "the Committee received no comments on the proposed amendment to the rule" (i.e., Rule 7(c)), NACDL strongly opposed this change, in two single-spaced pages (10-11) of our comment letter dated February 15, 1998, just as we do in this letter. If those comments were overlooked, perhaps this is another reason for republication and further consideration by the advisory committee.

⁶ The proposed Advisory Committee Note (*ll.* 125-30) obliquely cites United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665 (4th Cir. 1996), a case arising out of a third-party ancillary proceeding, in which the comment about the sufficiency of the bill of particulars was therefore dictum, and in which the indictment did, in any event, mention \$168,000 in currency, which the government later claimed had been used to pay the firm's fee. The Note also mentions the irrelevant discussion in United States v. Voigt, 89 F.3d 1050 (3d Cir. 1997), about substitute assets (while misspelling the name of the case).

specified in the indictment").⁷

Most critical in this regard is the interrelationship of this rule and the restraining order provisions of the statutes. The criminal forfeiture statutes authorize the government to restrain or seize property (other than as "substitute assets") upon the return of an indictment alleging that specific property is subject to forfeiture. The only check on the prosecutor's already awesome power to seize or restrain defendants' assets when they are most in need of them to defend themselves is the grand jury.

The DOJ has recently asked Congress to expand its criminal forfeiture powers vastly by allowing it to restrain or seize "substitute" (*i.e.*, untainted) assets, again based solely on the return of an indictment against the defendant alleging forfeiture. Although the requirement that the grand jury pass on each item of property allegedly subject to forfeiture is a totally inadequate safeguard for property rights, it is the only safeguard in the current statutory scheme. That is why the DOJ is now trying to get the Judicial Conference to abolish it, essentially making the judge a rubber-stamp for what would turn into an administrative forfeiture scheme only nominally labelled as "criminal," but stripped of any of the protections that adhere to the criminal process. If Rule 7(c)(2) is eviscerated, the whole theory behind the restraining order provisions of the statutes falls apart.

Even if notice given through a bill of particulars or less formal means satisfies the due process standard recognized in the BMW case, notice outside the indictment clearly does not establish probable cause. Thus, there could be no justification for issuing a restraining order without a hearing. Rule 7 thus cannot be amended and replaced with proposed Rule 32.2(a) unless Congress first amends the restraining order provisions, or the Committee adds a due process hearing protection to be invoked before a restraining order can be issued. See 2 D.B. Smith, *supra*, ¶14.01, at 14-3 to 14-4.

Rather than adopt the proposed amendment, the Standing Committee should instruct the Advisory Committee to clarify the Rule's longstanding language. Despite some judicial decisions to the contrary, the Rule must provide that only property or interests in property specifically named in the indictment may be forfeited criminally, and then only to the "extent" (that is, up to the value in dollars or other measure of the interest) alleged in the indictment. Likewise, where the statute in question authorizes forfeiture of property "derived from" or which "represents" the primary forfeitable asset, and the government relies on that theory, the indictment should be required to advance those averments as well. This would make clear that the jury, not the judge, is to make

⁷ Some of the dictum in this footnote was disavowed in Libretti v. United States, 516 U.S. 29 (1995), but not Caplin & Drysdale's reading of Rule 7(c)(2)'s plain meaning.

the factual determination of what particular property has been exchanged for the property that bore the original tainted relationship to the criminal offense.

C. Endorsement of the Non-Statutory Concept of a "Personal Money Judgment" as a Form of Criminal Forfeiture.

One of the most radical substantive changes that this rule would create -- entirely new in this version of the proposal and never submitted for public comment -- is endorsement of the notion that a court can impose a "money judgment" as a form of criminal forfeiture. Prop. R. 32.2(b)(1). Notwithstanding certain erroneously-decided cases, there is no statutory authority for this concept, which the Committee should not allow the Department of Justice to slip into the Rules.

Congress has never authorized the forfeiture of simple dollar amounts, nor does it authorize imposition of a money judgment equal to the amount of illegal proceeds or laundered funds, for example. By their terms, the forfeiture statutes allow seizure only of specific real or personal property that has been the subject of a special verdict under Fed.R.Crim.P. 31(e) determining the identity and extent (when amount is in issue) of the condemned property. For example, the money laundering forfeiture statute provides, in pertinent part:

The Court, in imposing sentence on a person convicted of a [covered] offense ... shall order that the person forfeit to the United States any property, real or personal, involved in such offense or any property traceable to such property.

18 U.S.C. § 982(a)(1) (emphasis added). This statute authorizes only the forfeiture of a guilty "res" or (in its absence) specific property traceable to it; forfeiture of an amount of money is not authorized.

The Senate Report concerning this language explains "property involved" as follows:

[T]he term "property involved" is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.

134 Cong.Rec. S17365 (Nov. 10, 1988). Under this definition, an arithmetic amount (as opposed to currency as a physical object) cannot be "the money or other property" subject to a forfeiture verdict or judgment under § 982(a)(1). To the extent that a forfeiture order is based on the contrary premise, it is completely invalid. The idea of a "money judgment" as a form of forfeiture is also inconsistent with the existence of statutory provisions for forfeiture of substitute assets. Substitute forfeiture is allowed when "property involved" in the money laundering, for example, or that is "traceable to

such property" cannot be located or seized. See 21 U.S.C. § 853(p), as well as 18 U.S.C. § 982(b)(1)(A), which incorporates it.

Congress authorized forfeiture of substitute assets because criminal forfeiture by its nature involves specific existing property, but it sometimes happens that a defendant, by his act or omission, causes the loss, transfer or devaluation of that property, as specified in 21 U.S.C. § 853(p). There were a few pre-1986 cases, before the enactment of the substitute assets provisions, which upheld entry of a money judgment to enforce a forfeiture where the actual forfeitable property was unavailable for seizure, and a few others recently. David B. Smith, a leading authority, states that this kind of ruling:

ignores the basic nature of a forfeiture, whether criminal or civil.

There simply cannot be a forfeiture without something to forfeit.

Although the district court's order was denominated a "forfeiture," it was clearly a personal money judgment against the defendants, as the court of appeals recognized. The court relied on the fact that criminal forfeiture judgments are in personam in nature rather than in rem and that money is fungible. But even in personam forfeitures are still forfeitures; they are not to be confused with fines or other personal money judgments.

2 D.B. Smith, supra, ¶13.02, at 13-36 (12/98 rev.). Accord, United States v. Ripinsky, 20 F.3d 359, 365 n.8 (9th Cir. 1994); United States v. Meyers, 432 F.Supp. 456, 461 (W.D.Pa. 1977). The Note's citation of United States v. Voigt, 89 F.3d 1050 (3d Cir. 1997) (which misspells, *ll.* 258-59), without any internal pinpoint reference to any holding of that lengthy decision, is inappropriate and misleading, as the Voigt case did not involve a challenge to any such "money judgment" forfeiture, and its analysis actually rejects most of the government's arguments, emphasizing the statutory requirements that any property to be forfeited must satisfy the "involved in" or "traceable to" standard, or else meet the statutory test for substitute assets. See 89 F.3d at 1081-88. As Judge Cowen's opinion states, "we should not be in the business of overlooking the plain terms of a statute in order to implement what we, as federal judges, believe might be better policy." Id. at 1085.

The proposed amended rule includes language, never circulated for public comment, purporting to eliminate the statutory right to an ancillary hearing where the property ordered forfeited is a sum of money. Prop. R. 32.2(c)(1). This is obviously a substantive matter with due process implications that cannot properly be implemented on a revision of a proposed procedure rule, at the Standing Committee level. One of our members, for example, is currently representing a third party in an ancillary proceeding involving the criminal forfeiture of \$53 million pursuant to a guilty plea made by the defendant in return for a Rule 11(e)(1)(C) sentence of probation. This case would illustrate every point made under A.2. above, as well as the extreme abuse

that is possible given the unity of interest shared by the government and a pleading defendant in forfeiting property that does not belong to that defendant.

The "money judgment" provisions of proposed amended Rule 32.2 -- which have never been circulated for public comment -- perhaps most vividly illustrate the failure of this entire proposal to heed Third Circuit Judge Greenberg's warning, speaking of criminal forfeitures of substitute assets, that "we need to keep prosecutorial zeal for such remedies within particular boundaries." In re Assets of Myles Martin, 1 F.3d 1351, 1360-61 (3d Cir. 1993). See also United States v. One 1985 Mercedes-Benz, 300 SD, 14 F.3d 465, 468 (9th Cir. 1994) ("forfeitures are not favored; they should be enforced only when within both letter and spirit of the law"). On account of its inclusion of these novel, controversial, substantive, and inappropriate provisions, the proposed Rule should be rejected by the Committee.

D. Substitute Assets

NACDL agrees that it may be justifiable to have a different notice rule for substitute assets under the statutes that provide for such substitution. Under the present scheme, a need for substitution is often not apparent until it is no longer practical to obtain a superseding indictment. Once a criminal forfeiture has been determined in accordance with due process, as discussed in the earlier parts of this commentary, we have no objection to a judge's making the determination, on a proper showing by the government and after a fair hearing, that the specific forfeitable property cannot be reached, so that substitution of other property can occur, to the extent authorized by statute.

The rule should not, however, allow substitution of assets "at any time," as proposed. Prop. R. 32.2(e)(1). Whether there is or should be a statute of limitations on such action, or whether the equitable doctrine of laches has a role to play here instead, is a substantive matter that the Rules should not address, and certainly should not purport to decide to the contrary.

Proposed Rule 32.2(e), or any other amended rule addressing the issue of forfeiture of substitute assets, should safeguard the defendant's and interested third parties' rights to be heard on the question of forfeiting substitute property. The present proposal mentions the possibility of an ancillary hearing on a motion for substitution, Prop. R. 32.2(e)(2)(B), but fails to provide any mechanism by which that might come about. NACDL therefore suggests, if the Rule is again returned to the Advisory Committee, that proposed subsection (e)(2) become (e)(3), and that a new (e)(2) be inserted to the effect that: "Notice of any motion for substitution of assets must be served on the defendant and the defendant's last known counsel, as well as on any other person who may reasonably be thought to have an interest in the proposed substitute

asset, allowing at least 20 days for the filing of a responsive pleading." Under the proposed draft the prosecutor might think he or she could seek an order forfeiting alleged substitute property based on an ex parte showing, and without any other due process protections. This would surely lead to error and injustice in many cases.

E. Rules for Third-Party Ancillary Proceedings

Proposed Rule 32.2(c) would regulate for the first time the "ancillary proceedings" allowed under 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(n), in which third parties may seek to vindicate their interests in property subjected to criminal forfeiture by a verdict against another. In general, the creation of rules to ensure fairness in such proceedings is an excellent idea. By definition, these third parties have not been criminal defendants; as to their interests, the government is presumptively seeking to deprive them of property and Fifth Amendment due process is necessarily the touchstone. This aspect of the rule should therefore offer protections such as would be allowed any citizen whose property the government seeks to condemn or seize. Their rights should not be less than those of anyone making a claim in a civil forfeiture setting.

The proposed rule would grant the court discretion whether to permit discovery in accordance with the civil rules. Of course, the government in this context has already had the benefit of a criminal investigation, a grand jury inquiry, and often a trial. To save judicial resources and to protect innocent claimants from undue expense and oppression, we agree that the government need not be allowed further discovery. As to any claimant, however, just as the right to discovery would not be questioned in other civil matters, the right to a fair proceeding should not be discretionary. NACDL suggests that the pertinent words read "the court shall permit any claimant to conduct discovery in accordance with the Federal Rules of Civil Procedure where such discovery would be necessary or helpful to narrow or resolve factual issues."

Likewise, as in other civil matters, the parties should be able to move for summary judgment at any time. The proposed rule, as drafted, would instead require the parties to wait until "discovery ends." Prop. R. 32.2(c)(1)(B). Motions for summary judgment are often based on issues of law or discrete factual points. Under this proposal a court would be powerless to stop the government from exhausting a citizen through expensive, intrusive, and time-consuming discovery, even where it was not necessary. As under FRCP 56(e)-(f), a party who believes that the other side has moved for summary judgment prematurely may say so in opposition to the motion.

We are pleased that the Note asserts (*ll.* 465-66) that the Federal Rules of Evidence will be applied in ancillary hearings. Unfortunately, Fed.R.Evid. 1101(d) is currently uninformative on this subject. The committee should refer an explicit amendment on that subject to the Evidence Rules Advisory Committee.

Finally, a third-party claimant is not a criminal defendant; the third party has what amounts to a civil claim. See United States v. Lavin, 942 F.2d 177, 181-82 (3d Cir. 1991) (Becker, J.); Prop. Adv. Comm. Note (ll. 393-416). A claimant in a civil forfeiture matter (other than with respect to seizures in admiralty) has a Seventh Amendment right to trial by jury. See 1 D.B. Smith, supra, ¶11.01, at 11-1 through 11-7. The third party claimant against a criminal forfeiture, in our view, thus also enjoys a Seventh Amendment right to jury trial that should be referenced and protected by any amended Rule on this subject. 2 id. ¶14.08, at 14-59 to -60.

If the goal is to avoid any possibility of two hearings on the same issue, which is the ostensible motivation for the entire fundamental restructuring of criminal forfeiture procedure that this Rule would create, the solution is to let the defendant appear in the ancillary hearing and to allow a jury trial there. Unfortunately tracking the Department's single-minded advocacy, the proposed Committee Note's discussion of this issue (ll. 421-27, 447-49), in relation to cases where "no third parties assert their interest in the ancillary proceeding," (l. 447) makes no sense at all, stating that the court would in every case have to make a finding that at least one of the defendants had a forfeitable interest in the property, even if no one files an ancillary claim. The language of the Rule prohibits that finding from determining the extent of the defendant's interest, even though, as we discuss above, the statutes require such a finding, which cannot await the filing of ancillary petitions. Those are filed after entry of judgment, 21 U.S.C. § 853(a),(n), too late to provide any meaningful "safeguard" to the defendant. Moreover, any such finding, under the procedure defined by the proposed rule, would constitute an ex parte determination. None of this is any substitute for the statutorily-required determination of the nature and extent of a defendant's forfeitable interest, which in turn defines the lawful scope of the criminal forfeiture judgment.

Conclusion

The revised amended Criminal Rule 32.2 makes changes which are impermissibly substantive, not procedural, within the meaning of the Rules Enabling Act. It is ill-conceived, in that its key conceptual notion is inconsistent with the essence of criminal forfeiture. It would aggrandize the government's property rights at the expense of innocent third parties, in a manner unauthorized by the forfeiture statutes.

The advisory committee's amended proposal is entirely one-sided. If a comprehensive re-write of the rules governing criminal forfeiture is in order, why not include some changes to make the process more fair? NACDL and others have much to contribute, but from a different point of view. We could come up with a long list of proposed changes that would make the process fairer and remove constitutional doubts about its legality. For example, as noted above, third parties should have a right to a jury trial on

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sion dealing with third parties who do not receive adequate notice. The proposed Committee Note says they have a remedy under FRCP 60(b) (*ll.* 440-45), but that rule has a sharply limited scope and was designed for cases where the party has already fully participated in a course of litigation. Why not address this problem in the Rule itself, after investigating the real circumstances of such cases?

The Standing Committee should vote down the Advisory Committee's proposal entirely. At least, the present version is too different from that published to be adopted at this time without republication for comment. We stand ready to assist the Committee in real reform of criminal forfeiture procedure, once the instant, ill-conceived proposal is rejected.

This statement was jointly prepared by NACDL's Committee on Rules of Procedure and our Forfeiture Abuse Task Force.

Sincerely,

PETER GOLDBERGER
*Co-Chair, NACDL Committee
on Rules of Procedure*

Please reply to Leslie Hagin, Esq.,
Legislative Director, at the above address
and also to:

Peter Goldberger, Esq.
50 Rittenhouse Pl.
Ardmore, PA 19003