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April 2, 2003

John K. Rabiej
Chief
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Administrative Office of the United States Courts
Washington, DC 20544

**Re: Proposed Rule G, Supplemental Rules for Certain
Admiralty and Maritime Claims**

Dear Mr. Rabiej:

Thank you for providing us with a copy of the Department of Justice's reply to NACDL's comments on the proposed Rule G. We have now had an opportunity to study the DOJ reply, and would like to submit the following additional comments.

Purpose of Rule G.

We submit that the real reason DOJ proposes a new Rule G is not the need to consolidate all of the procedures governing civil forfeitures in one place--which Rule G obviously does not accomplish--but, rather, DOJ's desire to create a special set of procedural *and standing* rules unique to civil forfeiture that would once again tilt the playing field in forfeiture cases in favor of the government. Moreover, DOJ wants to accomplish this shift in the balance outside of the legislative process, where its efforts there have either already been rebuked, or would have no chance of passage. If DOJ was truly interested in "the consolidation of all procedural rules governing civil forfeiture practice in one place," the logical place to insert these new provisions would be in 18 U.S.C. § 983. Rather than consolidating all of the procedural rules in one place, DOJ's proposal requires the practitioner to jump back and forth between section 983 and the new Rule G.

The Supplemental Rules currently govern only the commencement of a civil forfeiture action--due to its in rem nature. After the filing of the claim and answer, the Federal Rules of Civil Procedure take over. There is absolutely no reason to change this established system by devising special rules--all favoring the government--to govern motions practice and standing in civil forfeiture cases. There is nothing unique about motions practice in a civil forfeiture case that requires the crafting of special rules to govern only civil forfeiture cases. To the extent that these proposed special rules conflict with the Rules of Civil Procedure, or with established case law, they would

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create confusion where none presently exists. They would also allow the government to win cases based on technicalities such as whether the claimant has asserted all of his defenses and jurisdictional objections in the Answer.

DOJ states (p. 31) that "civil forfeiture procedure should not be a game of "gotcha." We heartily agree. Indeed, CAFRA eliminated a number of DOJ's favorite "gotchas." Unfortunately however, the DOJ proposal would create new "gotchas" and traps for the unwary claimant, who is frequently proceeding *pro se* because he is unable to afford counsel.

Moreover, standing is not even a procedural matter. Standing in civil forfeiture cases has been governed by case law based on generally applicable Article III principles. See discussion, *infra*, at pages 11-16. We believe that the courts have crafted an intelligent, sound body of law in this area. DOJ rejects the cases that do not support its position on standing. Unable to persuade the courts and Congress, DOJ hopes that this Committee will craft a new set of highly restrictive standing rules more to its liking. We trust that the Committee will see DOJ's proposal for what it is, and will summarily reject it.

Rule G(2). Complaint.

We remain troubled by the unnecessary and misleading discussion of the particularity requirement in the footnotes. The only point that the footnoted commentary needs to make is that no change is intended from current Rule E(2)(a). It is simply not the case that "a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular." For that manifestly incorrect proposition, DOJ cites three district court decisions, two of which are unpublished.¹ DOJ does not discuss or even cite the legions of published circuit court opinions to the contrary, some of which we cited in our prior letter. *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993), cited by DOJ, does not support the government's position. *Daccarett*, like the other cases cited in our letter of August 26, 2002, states that the complaint "must allege sufficient facts to support a reasonable belief that the government will be able to prove the property is subject to forfeiture"--a much more demanding requirement than the government's vague formulation. The only

¹ DOJ relies on unpublished decisions throughout its draft commentary. The problem with relying upon unpublished decisions is that such decisions can be found to support almost any proposition, no matter how clearly wrong.

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conceivable reason for DOJ's persistence in including such deliberately misleading commentary is DOJ's desire to cite the Committee's notes as authority in future litigation, thereby warping the law in its favor.

DOJ also dismisses our complaint that proposed Rule G(2)(b)(v) has deleted the language "without moving for a more definite statement" which currently appears in Rule E(2)(a) by shifting the blame to the Advisory Committee's Reporter (p. 7). We continue to believe that if the language of proposed Rule G(2)(b)(v) differs from the language of Rule E(2)(a), it will inevitably invite the argument that a different meaning was intended. We believe that once the Reporter is made aware of the basis of our concerns, the necessity of this language will become obvious. If DOJ truly intends that "nothing in Rule G changes or is intended to change in any substantive way what the government is required to do to comply with the particularity requirement," then it should have no objection to the inclusion of this language.

Rule G(2)(c). Interrogatories.

Even more troubling is DOJ's response (or lack thereof) to our criticism of Rule G(2)(c), which does not attempt to grapple with the points we made. The Advisory Committee's Note to the 2000 Amendment of Rule C(6) states that "the special needs of expedition that often arise in admiralty justify continuing the practice." However, the same Note goes on to say that "[a]dmiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings." Thus, there is no logical reason to allow interrogatories to be served with the complaint in forfeiture proceedings. DOJ utterly fails to respond to this cogent point. Instead, it offers a totally different justification for allowing interrogatories to be served with the complaint: to prevent false claims from being filed in civil forfeiture proceedings (p. 8). The interrogatories, in DOJ's view (p. 9), "serve the essential purpose of providing the Government with a means of determining, at an early stage in the proceedings, who the claimant is, what interest he has in the property, and whether his claim is frivolous."

DOJ fails to explain what is unique about forfeiture cases that justifies the creation of this special advantage for the government. It is true, as DOJ contends, that it has no control over who will file a challenge to a civil forfeiture.² But DOJ has not

² The same is true of criminal forfeiture cases where, after the preliminary order of forfeiture is entered, any third party can challenge the forfeiture. Yet the Rules of Criminal Procedure do

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shown that it will suffer greatly if a claimant without standing is flushed out in due course through normal discovery, rather than immediately. At best, the government has offered a weak reason to permit interrogatories to be served with the complaint directed *solely to the issue of standing*. DOJ offers no explanation for allowing it to immediately propound questions, without leave of court, directed to the merits of the property owner's case; the credibility of his witnesses; the documentary evidence in his possession; *etc.* We know from experience that often times the real purpose for filing interrogatories with the complaint is to discourage property owners from contesting the forfeiture. That is why the interrogatories are typically so overbroad, burdensome and vexatious. Faced with a battery of such interrogatories at the very outset of the litigation, many would-be claimants decide that getting back their property is just not worth the effort and expense.

DOJ's suggestion that there is a heightened danger of false claims in forfeiture cases is disingenuous. Because claimants are litigating against the federal government in a quasi-criminal context, rather than against a private party, they are far *less* likely to make false claims than in an ordinary civil case. No one wants to be charged with perjury or obstruction of justice, and no one in his right mind trifles with federal law enforcement authorities. The few cases cited by the government have no bearing on the issue here--whether interrogatories should be permitted to be served with the complaint.

DOJ states (p. 9) that Congress recognized in CAFRA that the filing of frivolous claims was a serious problem and a legitimate concern for the government; and that language discouraging the filing of such claims was made an important part of the reforms enacted in 2000, citing 18 U.S.C. § 983(h). We disagree.³

Despite DOJ's strong objections, CAFRA abolished the prior requirement that every claimant give a "cost bond" to defray the government's expenses in litigating the forfeiture action. The same DOJ lawyers who wrote proposed Rule G lobbied Congress

not allow the government to serve interrogatories--or utilize other means of discovery--at any point in the proceeding *without the leave of the court*. Rule 32.2(c)(1)(B) ("before conducting a hearing on the [third party] petition, the court *may permit* the parties to conduct discovery"). We have not heard any government complaints about problems in criminal forfeiture cases occasioned by this much more restricted right to take discovery.

³ If DOJ's characterization of Congress' attitude is correct, then the safeguards against false claims in CAFRA should be sufficient by themselves.

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for months trying to persuade lawmakers not to abolish the cost bond requirement. They vociferously argued that the cost bond was essential, asserting that without it the government would be deluged with frivolous and false claims. Congress was not persuaded by these dire predictions, which, naturally, have not come to pass. Merely as a sop to law enforcement, Congress enacted section 983(h)--a provision which we do not believe has ever been invoked since the passage of the CAFRA.

Rule G(3)(a). Arrest Warrant.

We are pleased that DOJ acknowledged our concerns regarding the seizure of property, and we are satisfied with the revised language of proposed Rule G(3)(a).

Rule G(3)(b)(ii). Sealed Complaints.

DOJ has not met our objection to the provision allowing the government to delay execution of the warrant when the complaint is filed under seal, or when the action is stayed prior to execution of the warrant. We noted that there is no authority permitting the government to file a complaint under seal. While conceding that such practice is at odds with the "forthwith" service requirement of Rule E(4)(a), DOJ nonetheless asserts (p. 12) that filing a complaint under seal "is accepted practice," albeit "rarely employed." Accepted by whom? Certainly not the courts. DOJ's "authority" for this practice is a DOJ form motion and order attached to the Explanation as Exhibit A. It apparently does not matter to DOJ that no one else accepts it.⁴ The first time such "accepted" practice was challenged, it was struck down as inconsistent with Rule E(4)(a). *U.S. v. Funds Representing Proceeds of Drug Trafficking* (\$75,868.62), 52 F.Supp.2d 1160 (C.D. Cal. 1999).

We agree that there may be unusual circumstances, such as the terrorism case posited in the DOJ's Explanation (p. 13), where filing a complaint under seal or staying

⁴ The district court cases cited by DoJ (p. 12 n.27) are inapposite. In those cases the courts allowed the complaint and/or other documents to be filed under seal for a very brief period of time--until the property could be seized--to prevent the owner from disposing of or concealing it. DoJ has not found any case in which the court authorized sealing--even for a brief period of time--to avoid jeopardizing an ongoing criminal investigation. We would have no objection to a rule authorizing the court, in appropriate circumstances, to allow the complaint to be filed under seal for a brief period of time until the property is seized or restrained. But because the government can seize property pursuant to a sealed seizure warrant issued under Rule 41, there would rarely, if ever, be a need to file a complaint under seal for this purpose.

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the action prior to execution of the warrant might be justified. DOJ states (p. 14) that "[i]f a judge is persuaded that there are good reasons to file a case under seal" it should be permitted to do so and to delay service of the warrant. But that is not the rule DOJ has proposed. The proposed rule does not require the government to make any particular showing to a judge before the complaint is filed under seal or the action is stayed. We know from experience that *ex parte* requests by the government to file documents under seal are routinely rubber-stamped by busy courts, whether or not there is any compelling reason to do so. That loose practice is not acceptable where the sealing of a complaint may delay the property owner's right to be heard for years, thereby nullifying the strict time limits established by CAFRA, and causing the owner irreparable injury.

In order to obtain an *ex parte* sealing order or stay, the government should be required to make a compelling showing--not a mere conclusory allegation--that such a drastic measure is truly necessary to avoid jeopardizing an ongoing criminal investigation. The rule should also require the court to make written findings that the strict standard for obtaining a sealing order or stay has been met. See *In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990) (because the grant of a stay of discovery can deprive claimants of property without a hearing for a long time, "the government should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient."); *U.S. v. Real Estate at 1303 Whitehead St., Key West*, 729 F. Supp. 98, 100 (S.D. Fla. 1990) (government must make a compelling showing of good cause for a stay of discovery in the same form that a party must show justification for a preliminary injunction; "Such a showing will avoid the hazards of unjustified indefinite delay, ensure that claimants receive due process of law, and generally assure the court of the propriety of a stay."); *U.S. v. \$151,388.00 U.S. Currency*, 751 F. Supp. 547 (E.D.N.C. 1990) (adopting four-part test set out in *1303 Whitehead St.*); *U.S. v. Certain Real Property Located at 5137/5139 Central Ave.*, 776 F. Supp. 1090 (W.D.N.C. 1991)(same); *U.S. v. four Parcels of Property in Louisville, Ky.*, 864 F. Supp. 652 (W.D. Ky. 1994)(same). These cases all involve stay of discovery applications by the government in an adversarial context, after the litigation has begun. The hazards for claimants' rights are much greater where the government is seeking to obtain a stay or sealing order *ex parte*, as with DOJ's proposed rule. The government should have to satisfy the *1303 Whitehead St.* standard before obtaining a stay or sealing order.

Finally, we object to the general watering down of the present requirement of Rule E(4) that warrant or supplemental process be executed "forthwith." In place of the "forthwith" language, the DOJ proposal would substitute "as soon as practicable." DOJ

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cannot cite a single case where a court construed "forthwith" unreasonably, without regard to the practical constraints that the marshal faces. We are concerned that the less demanding "as soon as practicable" language will encourage the government to delay execution of the warrant without good cause.

Rule G(4). Notice.

Rule G(4)(a). Notice by Publication.

We stand by objections to the proposed publication provisions of Rule G(4)(a) as set forth in our letter of August 26, 2002. We note with some skepticism DOJ's claim that "[I]n deciding which of the proposed options to use, prosecutors will take into account the case law requiring that notice be given in a manner reasonably likely to achieve results." (p. 18) What DOJ seeks to enact is a rule that allows minimum due process as the standard against which its actions are measured. Thus, DOJ wants to set the bar at the very minimum that the Constitution will allow. We, on the other hand, believe that the bar should be set higher in order to ensure that property owners will not lose their property without ever having notice of the pending action.

We do, however, commend DOJ's suggestion that all forfeiture notices should be placed on a "central forfeiture notice government website." Rule G(4)(a)(v) (p. 21). We agree that this is a good idea for the reasons stated by DOJ, and note that it could be accomplished at minimal cost to the DOJ. But we continue to believe that internet notice should be in addition to, not in lieu of, traditional publication in a newspaper.

Rule G(4)(b). Direct Notice.

We strongly disagree with DOJ's explanation and analysis of proposed Rule G(4)(b). 18 U.S.C. §983(a)(4)(A) provides as follows:

(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of

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final publication of notice of filing of the complaint.
(emphasis supplied)

Thus, we believe that it is DOJ, not NACDL, who has failed to distinguish between the concepts of service of process and providing notice to potential claimants.

DOJ disingenuously argues (p. 16) that "[A]t the outset of a civil forfeiture case, the Government often does not know who, if anyone, will claim an interest in the res." That is simply not true. The vast majority of civil forfeiture proceedings involving personal property are initiated with an administrative notice of seizure and intended forfeiture. If no one responds to the notice, the property is forfeited administratively. If, on the other hand, a claim is filed pursuant to 18 U.S.C. §983(a)(2), then the Government, subject to the exceptions set forth in 18 U.S.C. §983(a)(3)(B) or (C), must file a complaint for forfeiture in the appropriate United States district court pursuant to 18 U.S.C. §983(a)(3). At that point, the government clearly knows who has asserted a claim to the property. In the experience of the undersigned, it has always been the government's practice to serve process on any person who has filed an administrative claim and requested that the matter be filed in district court.⁵

Unlike forfeitures involving personal property, all civil forfeitures of real property and interests in real property must be commenced as judicial forfeitures. 18 U.S.C. §985(c) provides as follows:

(c)(1) The Government shall initiate a civil forfeiture action against real property by --

- (A)** filing complaint for forfeiture;
- (B)** posting a notice of the complaint on the property; and
- (C)** serving notice on the property owner, along with a copy of the complaint.

⁵ The government is not required to serve process on persons who did not file a claim pursuant to 18 U.S.C. §983(a)(2), so long as the government has complied with the notice requirements of 18 U.S.C. §983(a)(1).

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(2) If the property owner cannot be served with the notice under paragraph (1) because the owner --

(A) is a fugitive;

(B) resides outside the United States and efforts at service pursuant to Rule 4 of the Federal Rules of Civil Procedure are unavailing; or

(C) cannot be located despite the exercise of due diligence, constructive service may be made in accordance with the laws of the State in which the property is located.

Thus, 18 U.S.C. §985(c) clearly requires service of process consistent with Rule 4 of the Federal Rules of Civil Procedure. If the government could serve notice "in any manner reasonably calculated to ensure that notice is received, including first class mail, private carrier, or electronic mail" as proposed in Rule G(4)(b)(ii), the exceptions set forth in 18 U.S.C. §985(c)(2)(A), (B), and (C) would be superfluous.

Moreover, the government knows at the outset of proceedings involving real property the identities of potential claimants. That is one of the primary purposes for recording interests in real property. It is inconceivable that DOJ would seriously argue that it could forfeit a property owner's home without serving process on the owner of the property.

Finally, we note that the service of process contemplated by current Rule C(3) involves the delivery of a warrant of arrest for the seized property to a marshal or other person specified to receive such process by Rule C(3)(b)(ii). We agree with DOJ that current Rule C(3) does not make any specific provision for either service of process or notice on persons who file a claim or are otherwise known to the government to have an interest in the seized property. But that clearly does not mean that service of process on persons who have asserted an interest in the property is not required. Indeed, both 18 U.S.C. §983 and §985 expressly contemplate service of a copy of the complaint. Service of a copy of the complaint on the property owner or person with an interest in the property must be distinguished from service of a warrant of arrest delivered to a marshal or other person authorized to receive the warrant.

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Accordingly, we propose that if proposed Rule G is to be adopted at all, Rule G(4)(b) should be modified as follows:

(b) Service of Process.

(i) In addition to the requirements of Rule G(4)(a) --

(A) The Attorney General must serve notice of the forfeiture action, including a copy of the complaint, pursuant to Rule 4 of the Federal Rules of Civil Procedure on any person who has filed a claim pursuant to 18 U.S.C. §983(a)(2); or

(ii) In those cases in which the forfeiture action is commenced directly in district court without an administrative notice of seizure and intended forfeiture, the Attorney General must serve notice of the forfeiture action, including a copy of the complaint, pursuant to Rule 4 of the Federal Rules of Civil Procedure on any person whom the government knows, or reasonably should know, has an interest in the seized property, including, in the case of real property, on any person who has a recorded interest in the property.

Rule G(4)(b)(ii).

In light of the amendment proposed above, proposed Rule G(4)(b)(ii) should be eliminated.

Rule G(4)(b)(iii).

For the reasons stated in our letter of August 26, 2002, we stand by our objections to proposed Rule G(4)(b)(iii). If an inmate has filed a claim pursuant to 18 U.S.C. §983(a)(2), or has a recorded interest in real property, then *service of process* on the inmate should be made in the same manner provided for service of process on an inmate in any other civil proceeding.

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Rule G(4)(b)(iv) and (v).

In light of the our proposed modifications to Rule G(4)(B)(i), these provisions are no longer necessary.

Rule G(5)(a) -- Claim and Standing.

DoJ's drastic curtailment of traditional standing rules in forfeiture cases is an outrageous proposal that flies in the face of virtually *all* the case law and Congress' work in the CAFRA. In our prior letter we laid bare the deceptive nature of DOJ's proposal. Somewhat chagrined, DOJ acknowledges that it is attempting to change the law in its favor; and that it never dared ask Congress to do what it now asks this Committee to do. DOJ admits that it is dissatisfied with court decisions in this area and wants the Committee to overrule them. But it gives the Committee no good reasons for overstepping its authority to write rules of procedure. And it offers no persuasive arguments on the merits of its standing proposal. See *U.S. v. 5 S 351 Tuthill Road, Naperville, Ill.*, 233 F.3d 1017, 1023 (7th Cir. 2000) ("we think it particularly imprudent to adopt without a specific reason a [restrictive standing] test that appears to increase the harshness of the forfeiture remedy. So we will hew to the traditional 'actual stake in the outcome' test in analyzing whether [claimant] has standing").

As an initial matter, we object to the statement on pages 33-34 of DOJ's Explanation that subsection (5)(a)(i) sets forth requirements that are derived, in part, from the statutory requirements for filing a third party claim contesting a criminal forfeiture pursuant to 21 U.S.C. § 853(n)(3). The language of section 853(n)(3) is wholly different from--and serves a different purpose than--the language of proposed subsection (5)(a)(i). The petition that a third party claimant must file to challenge a criminal forfeiture is similar in breadth and scope to a complaint in a civil case. As the cases cited by the government indicate, failure to provide all of the required information is grounds for dismissal.

The government has been using the strict requirements of section 853(n)(3) as a "gotcha" in criminal forfeiture cases. We are concerned that the misleading statement in the commentary that subsection (5)(a)(i) "sets forth requirements regarding the content of the claim that are derived from the statutory requirements...for filing a third party claim contesting a criminal forfeiture action pursuant to 21 U.S.C. §853(n)(3)" is designed to allow the government to argue in future litigation that subsection (5)(a)(i)'s requirements are be construed *in pari materia* with §853(n)(3). That would transform the claim from the short and simple statement required by the literal language of

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subsection (5)(a)(i) into a lengthy document in which the claimant must set forth--on peril of dismissal--all facts supporting his claim and the relief sought. The sheer length of footnote 50 on p. 34 of the DOJ draft convinces us that this is DOJ's stratagem. Unfortunately, we have seen DOJ use misleading commentary for future litigation purposes many times. This Committee should pay as much attention to the carefully written--but frequently duplicitous--commentary proffered by DOJ as to the actual language of proposed Rule G. The devil is often lurking in the footnotes, not in the language of the proposed Rule.

Rule G(5)(a)(i)(B). Standing.

The law of standing in civil forfeiture cases has been created by the courts over many years, based on general Article III principles. It is a still evolving body of law. In recent years the courts have repeatedly rejected DOJ's unpersuasive arguments for a crabbed and narrow view of standing. See *generally*, 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶9.04 (Dec. 2002 ed.). Unable to persuade even the most conservative courts to adopt its unreasonably narrow view of standing, DOJ now seeks to persuade this Committee to do what the courts, in dozens of decisions, have rejected. Given the audacity of this proposal, it is not unreasonable to expect that DOJ would have provided a detailed explanation of how it believes the courts have consistently erred in their standing decisions. However, no such explanation was forthcoming.

DOJ does not offer any explanation whatsoever as to why it thinks that a possessory interest in property should not generally be sufficient to confer standing. Our prior letter shows that DOJ did not ask Congress to alter standing law in this unprecedented manner. To the contrary, DOJ asked the Congress that enacted CAFRA to clarify that a possessory interest is sufficient to confer standing. DOJ offers no explanation for this reversal of its position.

DOJ's discussion of its complaint with the current law of standing is confusing and misleading. DOJ states (p. 35) that NACDL is "*partially* correct; in the absence of any statutory guidance, *many* courts do grant standing to claimants with no ownership interest." This is simply not true. It is firmly established that persons who have a mere possessory interest or a secured lienholder's interest in property have standing. There are no conflicting cases. DOJ has not cited a single case holding to the contrary. DOJ contradicts its own statement that there is a conflict on this issue in the very next sentence of its Explanation, where it characterizes the current case law as a "rule [that] needs to be changed." If the case law is in conflict, there is no "rule" to change.

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DOJ then states that the courts "used the terms 'ownership' and 'standing' almost interchangeably." This, too, is false, and DOJ cites no cases for this remarkable statement. According to DOJ, this has "led to a great deal of confusion." We are not aware of any confusion on the issue other than the confusion DOJ is attempting to foster, presumably to justify a change in the established rules of standing. As evidence of this "confusion," DOJ cites a case in which a district court first ruled that claimant had standing but then reached a contrary conclusion after the trial on the merits. The Fifth Circuit held that the claimant did have standing, which was rather obvious. *U.S. v. \$9,041,598.68 in U.S. Currency*, 163 F.3d at 245. We fail to see what lesson DOJ purports to derive from this case. The fact that one district judge misunderstood the elementary difference between standing and the claimant's defense on the merits does not justify the wholesale revision of the law of standing in forfeiture cases.

DOJ next argues (p. 36) that the "courts have struggled to adopt a rule that distinguishes standing and ownership. The rule that has emerged in the past two or three years is this: standing and ownership are different concepts--one determines whether the claimant gets in the courthouse door; the other is an element of the affirmative innocent owner defense." This statement is highly misleading. Standing has, since the very beginning of American forfeiture law in the 18th century, always encompassed far more than outright ownership of the property, as the case law demonstrates. Thus, standing and ownership have always been distinct concepts.⁶ There has never been a "struggle" to distinguish them.

When Congress enacted CAFRA in 2000, it included a definition of who is an "owner" for purposes of asserting the innocent owner defense--one of many affirmative defenses to forfeiture. 18 U.S.C. § 983(d)(6). The statutory innocent owner defense had been around since at least 1978 and there had never been much of a problem in deciding who had standing to litigate the innocent owner defense. Nonetheless, at DOJ's urging, Congress sought to codify this point. DOJ tried to get Congress to restrict standing for those asserting the innocent owner defense, but it did not succeed. Congress merely codified the existing case law on the point. Section 983(d)(6) specifically allows bailees--who have only a possessory interest in the property--to

⁶ In the criminal forfeiture context, by contrast, the standing requirement in 21 U.S.C. § 853(n)(2) tends to merge with the availability of the statutory defense under 21 U.S.C. § 853(n)(6)(A) for third parties who have a superior interest in the property--which the third party has the burden of establishing. *E.g.*, *U.S. v. Hooper*, 229 F.3d 818, 820 n. 4 (9th Cir. 2000); *U.S. v. Ribadeneira*, 105 F.3d 833, 835 (2d Cir. 1997); Stefan D. Cassella, *Third Party Rights in Criminal Forfeiture Cases*, Crim. L. Bull. 499, 525 (Nov./Dec. 1996).

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assert the innocent owner defense.⁷ Following the evolving case law, it only requires the bailee to identify the bailor and to show a "colorable legitimate interest in the property seized." §983(d)(6)(B)(ii). This requirement is designed to thwart drug money couriers who attempt to conceal the owner of the money. Thus, DOJ's only legitimate concern in this area was taken care of in CAFRA.

DOJ is correct in stating (p. 36) that "it is now the law that a person with a merely 'colorable interest' in the property has a sufficient interest to satisfy the Article III case-or-controversy requirement...but that same person may fail to establish his affirmative ["innocent owner"] defense if he does not qualify as an 'owner' of the property [as broadly defined in §983(d)(6)]." DOJ does not explain what is wrong with this approach. It seems to us to be elementary common sense.

DOJ then complains (p. 37) that "the courts have been inclined to interpret the case-or-controversy requirement freely, extending standing to persons with the most tenuous connection to the property..." However, the cases DOJ cites as examples of what it considers to be an overly generous approach to standing were, in our opinion, all correctly decided. At a minimum, none of the decisions is unreasonable.⁸

DOJ further complains (p. 37 n.58) of an unpublished decision holding that a claimant who denied ownership of currency at the time it was seized, but who later filed a claim asserting ownership, has standing. However, it is not uncommon for a person in possession of a large quantity of currency to deny ownership (or even to deny any

⁷ Section 983(d)(6)(A) defines owner to also include a person who has a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest. Thus, the definition of "owner" is not restricted to persons who have a true ownership interest in the property. That is because Congress never intended to exclude such persons from the protection of the so-called innocent owner defense.

⁸ If anything, the courts may have erred in requiring claimants to establish Article III standing *in addition to* statutory standing under Rule C(6), since it is the government that is invoking the power of the court to effect the forfeiture. Ordinarily, it is "the party invoking federal jurisdiction [who] bears the burden of establishing standing." *Luhan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Accordingly, the Second Circuit has recently questioned whether it is even necessary for a claimant to establish Article III standing. *U.S. v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 n.9 (2d Cir. 2002). In light of the fact that the government is the party invoking federal jurisdiction, DOJ should be grateful to the courts for erecting Article III standing requirements for claimants.

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knowledge of the currency) when first confronted by the police, because of the fear that claiming ownership might be incriminating. If such a person later claims to be the owner, under penalty of perjury, his initial disclaimer of ownership simply creates a factual question for decision by the trier of fact. It does not automatically bar the person from litigating the forfeiture case--the ridiculous rule the government apparently wants this Committee to impose on the courts. An analogous rule would bar a defendant who makes a confession to the police from thereafter contesting his guilt!

Next, DOJ criticizes a decision "assuming" that a claimant who held the keys to a truck from which Customs seized \$900,000 had standing to contest its forfeiture. *Mantilla v. U.S.*, 302 F.3d 182, 185 (3rd Cir. 2002). There is nothing surprising about this decision. As the court of appeals stated, "Mantilla did possess the funds at the time of transfer." The court went on to hold that Mantilla did not have standing to contest the forfeiture of a separate sum of cash confiscated from a vehicle "that Mantilla did not own, possess, or occupy." *Ibid.* Thus, *Mantilla* is a well-analyzed decision.

DOJ then condemns (p. 38 n. 60) an unpublished district court decision holding that a non-owner resident who would be left homeless by the forfeiture of his father's house had standing to contest the forfeiture. Again, we agree with the district court. The claimant in that case certainly had a colorable interest in the property sufficient under Article III for standing. In any event, we are unaware of any other case raising this particular issue. It is certainly not a recurring problem for the government.

DOJ's final "horror story" is a case holding that a finder of lost currency has standing to contest the forfeiture of the currency (p. 38-40). However, the decision is clearly correct. Property interests are defined by state law. In most, if not all states, a finder of lost property is an owner. Most people who find large sums of currency do not turn the money over to the police. The few good citizens who do turn the money over are surprised at the government's greed and ingratitude. The government typically claims that the money is drug-related, even if it doesn't have a scintilla of evidence to back up its claim. DOJ thinks it a "travesty" (p. 40) that it should have to prove its dubious forfeiture claim against the finder of the currency! And this "travesty" supposedly justifies DOJ's sweeping proposal to severely restrict standing. We submit that the real travesty is DOJ's proposal and the amazingly arrogant attitude toward property rights that it reflects.⁹

⁹ DOJ's statement (p. 39) that under current law a mere nominee or straw owner would have standing is clearly false. The cases uniformly hold that a straw owner who merely has title

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DOJ states (p. 40) that "NACDL's position," that standing should be coextensive with the requirements of Article III, "has nothing to recommend it." But DOJ admits that NACDL's position is also the position of the courts (and not just the federal courts). What DOJ fails to explain is why the courts all agree with NACDL's position and reject DOJ's position, if it has nothing to recommend it.

According to DOJ (p. 38), CAFRA's alteration of the government's burden of proof in a civil forfeiture case "has produced unforeseen and deleterious consequences for the administration of justice." But DOJ agreed in the CAFRA drafting process that its burden of proof should be raised to a preponderance of the evidence. What exactly are the unforeseen consequences? DOJ claims that it must now "establish the forfeitability of the property by a preponderance of the evidence before the issue of ownership is even joined." This is not true. The government can challenge the claimant's standing immediately after a claim is filed, either through a motion to strike the claim or a motion for summary judgment. The government does this routinely, aided by the claimant's answers to the interrogatories the government routinely files with the complaint pursuant to Rule C(6).¹⁰ The government does not have to establish the forfeitability of the property before it litigates a standing issue. It is true that the government has to litigate the merits of its case with anyone who *has* standing, even if the claimant is not the owner. The same was true prior to the enactment of CAFRA. The government apparently thinks this is an intolerable imposition (p. 38-39). We fail to see DOJ's concern. Does the DOJ really believe it should *not* have to litigate the merits with a claimant who has standing?

Rule G(5)(b). Answer.

DOJ continues to assert (p. 42) that current Rule C(6)(a)(iii), unlike Fed.R.Civ.Pro. 12, requires a claimant to file an answer before filing a motion to

but does not exercise dominion or control over the property has no standing. 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶9.04[2][c][i] (discussion of case law relating to straw owners).

¹⁰ As DOJ admits (p. 43), it uses Rule C(6) to "smoke out" claimants who have no real interest in the defendant *in rem* before the court invests judicial resources in litigating the claim." This is why we said earlier that such interrogatories, if permitted at all, should be limited to the issue of claimant's standing. The court also has inherent authority to inquire, *sua sponte*, into the claimant's standing. *U.S. v. \$600,000.00 in U.S. Currency*, 871 F. Supp. 1397, 1400 (D. Kan. 1994).

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dismiss or any other responsive motion. DOJ then dismissively states "[T]he difference of opinion between the government and the NACDL on this issue is clearly stated." But DOJ didn't respond in any meaningful fashion to the points we raised in our August 26, 2002 letter. Moreover, DOJ's interpretation of the current rule is sheer sophistry.

DOJ complains that "it should not have to litigate challenges to the complaint until it knows who the claimant is and that he has a right to challenge the forfeiture at all." We agree, of course, that a claimant must file a claim before challenging a forfeiture. See, Rule C(6)(a)(1)(A); 18 U.S.C. §983(a)(2). See also, Proposed Rule G(5)(a). But that is wholly unrelated to the issue of whether a person who has filed a claim (thus identifying himself and his interest in the property) must then file an answer before filing a motion to dismiss or any other responsive pleading pursuant to Fed.R.Civ.P. 12. It is the claim--not the answer--that establishes a claimant's standing in a civil forfeiture case.

Despite DOJ's assertion that the current rule prohibits the filing of motions prior to an answer, courts routinely hear and decide motions to dismiss in forfeiture cases before an answer is filed. The Supplemental Rules for Certain Admiralty and Maritime Claims were adopted February 28, 1966, effective July 1, 1966. The first modern forfeiture statute, 21 U.S.C. §881, was enacted in 1970 as part of the Controlled Substances Act. In the more than three decades that the Rule and the statute have been on the books, only one reported decision--and that decision is currently on appeal--has agreed with DOJ's interpretation of the relationship between Rule C(6) and Fed.R.Civ.P. 12.

Moreover, DOJ's interpretation simply doesn't make any sense. As we stated in our prior letter, there must be a mechanism for challenging a complaint that fails to comply with the particularity requirements of Rule E(2). Rule E(2) requires that the government's complaint "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts." The requirement of Supplemental Rule E(2) (as well as proposed Rule G(2)(b)(v)) would be meaningless, and its purpose frustrated entirely, if a claimant were required to answer insufficiently pled allegations *before* moving for relief. See also, David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04[4] (June, 2001) ("[c]laimant will be excused from filing an answer on the merits pending disposition of defenses made by motion under Fed.R.Civ.P. 12."). DOJ did not respond to this cogent point at all.

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Rule G(7). Pre-trial Motions.

Rule G(7)(a). Motion to Suppress Use as Evidence.

In our letter of August 26, 2002, we pointed out that proposed Rule G(7)(a) represents a narrowing of the case law because it limits suppression to use of the evidence at trial. DOJ responded (p. 51) by stating that "NACDL also says that the exclusionary rule should apply in instances other than trial. They do not say, however, when, other than 'at trial,' illegally seized evidence might be suppressed." The answer is simple--illegally seized evidence must be suppressed not just at trial, but at any pretrial hearing, including, *e.g.*, a motion to dismiss or a motion to suppress.

Rule G(7)(b). Motion to Strike Claim.

We fail to see why the government should be permitted to challenge a claimant's standing "at any time before trial" (Section (7)(b)) while the claimant waives any jurisdictional challenge he fails to raise in his answer (Section (5)(b)). DOJ evidently believes that what is sauce for the goose is not sauce for the gander. The government's proposed rule is particularly outrageous since (1) claimants often represent themselves or have inexperienced attorneys who have never handled a forfeiture case, while the government is always represented by forfeiture specialists who know the law; and (2) standing includes not merely Article III standing but statutory standing. If the claimant files his claim or answer a day after the statutory deadline, or there is some other technical defect in the form of the claim (such as a failure to properly verify it), the government should have to move to strike in a timely manner or waive its technical objection. It is not fair to allow claimant to spend a lot of time and money litigating a meritorious forfeiture claim, only to throw him out of court on the eve of trial because he failed to dot his i's or cross his t's. DOJ wants every opportunity to win cases through "gotchas" ("failure to comply with the filing requirements") but wants to be protected from losing them because it chose to file its case in the wrong district. It would seem much more reasonable to allow a claimant to challenge the court's in rem jurisdiction at any time before trial. However, DOJ's proposal would forbid that.

Rule G(7)(c). Motion for Release of Property.

Section (7)(c) also remains objectionable even though DOJ has eliminated some of the obvious conflicts between the original proposed rule and §983(f). As we stated in our prior letter, §983(f)(1)(A) merely requires the claimant to have "a possessory interest in the property." That is the explicit language of the statute. DOJ's current phraseology ("a party with standing to seek the release of the property under 18 U.S.C.

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§ 983(f) is likely to be misleading in light of DOJ's proposal to eliminate standing for persons who have a possessory interest in the property. Attorneys and judges might be misled into believing that more than a possessory interest is required.¹¹

But there is an even more basic problem with this proposal. Congress would not have provided that persons with a mere possessory interest could obtain the release of the property *pendente lite* if--as would be the case under the DOJ proposal--such persons do not have standing to contest the forfeiture. DOJ's proposal to restrict standing to persons with an ownership interest is plainly in conflict with CAFRA as well as all of the case law.

DOJ has *apparently* accepted our position that Rule 41(e) motions for return of seized property should be available until a verified complaint has been filed, thereby making legal relief possible in court. That is what the last sentence of the current draft of Section (7)(c) says.¹² But the sentence before it states, in contradictory fashion, that a "motion for the release of property pursuant to Section 983(f) is the exclusive means for seeking the return of the property to the custody of the claimant pending trial." That sentence should be eliminated since it conflicts with the following sentence. The only new thing in Section (7)(c) would be the last sentence. In that case, it should be rewritten as follows:

"(c) Rule 41(e) Motions. Rule 41(e) of the Federal Rules of Civil Procedure may not be used to seek the return of property in civil forfeiture actions once a verified complaint has been filed. However, if a hearing on a Rule 41(e) motion has commenced prior to the filing of the verified complaint, the court shall have discretion to grant the requested relief, notwithstanding the filing of the complaint."

The final caveat would prevent the government from playing fast and loose with the courts. Without it, the government could simply file a forfeiture complaint after it became apparent it was going to lose the Rule 41(e) motion because it had no legal

¹¹To avoid confusion, the language should say, "a person with a possessory or ownership interest in the property."

¹²However, the draft's commentary leaves us in some doubt since much of it appears inconsistent with the new language of Section (7)(c).

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basis for seeking forfeiture. The mere filing of the complaint would divest the court of jurisdiction over the Rule 41(e) motion.

Rule G(7)(d). Dismissal.

Rule G(7)(d)(i).

Please see our objections to Rule G(5)(b), above.

Rule G(7)(d)(ii).

Our concern for this proposal has more to do with DOJ's explanation than the proposed rule itself. Proposed Rule G(7)(d)(ii) is an accurate statement of the law. See 18 U.S.C. §983(a)(3)(D). However, because the subject matter of the proposed rule is already covered almost verbatim in the statute, there is no need for the rule, other than to give DOJ an opportunity to suggest that the statute doesn't mean what it says. What the government is claiming in the Explanation is that the rule really means that no complaint may be dismissed on the ground that the United States did not have *probable cause* at the time the complaint was filed. But that is clearly not what the statute provides, and is an interpretation Congress expressly sought to avoid.

Section 983(a)(3)(D) was enacted to reflect CAFRA's heightened burden of proof and new filing deadlines. Instead of mere probable cause, the government must now establish that the property is subject to forfeiture by a preponderance of the evidence. Accordingly, Congress agreed that the government should not be required to prove its case by a preponderance of the evidence at the time it files the complaint. But Congress certainly did not intend to authorize the government to initiate civil forfeiture proceedings without probable cause, as DOJ now asserts in its Explanation of Rule G(7)(d)(ii). Clearly, Congress knows how to draft a statute. Had Congress intended to enact DOJ's proposal, 18 U.S.C. §983(a)(3)(D) would have provided as follows:

(ii) A complaint may not be dismissed on the ground that the United States did not have *probable cause* at the time the complaint was filed to establish the forfeitability of the property.

This they did not do. Indeed, as we pointed out in our prior letter, the drafters of CAFRA specifically sought to avoid this result in the legislative history that accompanied CAFRA:

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And, while the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier). The bill is not intended to limit the right of either party to bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

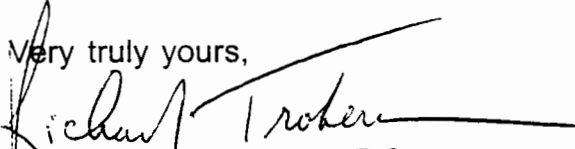
146 CONG. REC. H2050 (daily ed. April 11, 2000). This Committee should not be party to DOJ's transparent attempt to rewrite the statute.

Rule G(7)(e). Excessive Fines.

For all of the reasons stated in our prior letter, we continue to oppose this provision. Despite DOJ's urging, Congress rightfully chose not to enact this provision. DOJ has not provided sufficient reason for this Committee to second guess Congress in this regard.

This concludes our supplemental response to proposed Rule G. We appreciate the opportunity to offer the Advisory Committee our additional comments on this proposed rule, and we look forward to our continued participation in the rule-making process.

Very truly yours,


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