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# CIVIL ASSET FORFEITURE REFORM: THE AGENDA BEFORE CONGRESS

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# CIVIL ASSET FORFEITURE REFORM: THE AGENDA BEFORE CONGRESS*

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Civil asset forfeiture relies on a curious legal fiction—that property itself may be guilty of misdeeds, of crimes, and may therefore be punished. Though this may seem odd, it is more than a relic of our pagan, animistic past. Think back to Exodus: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox *shall be* quit."[1] I can picture the headline: *Drug Enforcement Administration Agents Seize Ox as Conveyance in Drug Scheme and Send it Undercover as a Drug Mule.*

So, we have animals as moral agents. Speaking of objects imbued with free will, we come to English imperial admiralty law, the wellspring of modern civil forfeiture.[2] As Oliver Wendell Holmes noted, "[a] ship is the most living of inanimate things. . . . [E]very one gives a gender to vessels. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible . . . ."[3] Holmes used this example:

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* This speech incorporates U.S. Rep. Henry J. Hyde's testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary. The February 1994 hearing covered a number of forfeiture issues and focused on H.R. 3315, which included civil asset forfeiture reform provisions introduced by U.S. Rep. Craig Washington.

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1. *Exodus* 21:28 (King James).

2. For a discussion of an intermediate step, the English doctrine of deodand, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-82 (1974) and Parker-Harris Co. v. Tate, 188 S.W. 54, 55-56 (Tenn. 1916). Under this doctrine, an object that caused the death of another person—the deodand—was forfeited to the King for sale in the belief that the King would provide money for Masses to be said for the good of the dead man's soul, or ensure that the money was put to charitable uses. *Calero-Toledo*, 416 U.S. at 681. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of revenue for the Crown, the institution was justified as a penalty for carelessness. *Id.* Deodands never became part of the common law in the United States. *Id.*; *see also Parker-Harris Co.*, 188 S.W. at 55 ("[T]o the credit of American jurisprudence, from the outset the doctrine was deemed so repugnant to our ideas of justice as not to be included as a part of the common law of this country.").

3. OLIVER W. HOLMES, JR., THE COMMON LAW 7 (Little, Brown & Co. 1923) (1881).

> A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principles. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and the wagon.[4]

Holmes sees the rationale here:

> The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.[5]

There, we have it. In a British plot to dominate world trade lies the origin of civil forfeiture.

By 1789, ships and cargo violating customs laws were subject to federal forfeiture.[6] Why did we Americans so enthusiastically adopt English admiralty law? After all, we were very sensitive to English barbarisms, especially forfeiture. For instance, British law provided for the seizure of felons' estates; Congress forbade this practice in 1790.[7] Well, the reason was simple: money. In the early years of our republic,

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4. *Id.* at 27 (footnote omitted).

5. *Id.* at 28.

6. Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47. Section 12 provides that, subject to enumerated exceptions, a master or commander of a ship must not unload goods unless in open day, and must obtain a permit. Penalties for noncompliance with time and permit requirements include forfeiture of all goods landed or discharged. Section 36 sets forth the procedures for litigating a claim for recovery of goods forfeited.

7. *See* United States v. Martino, 681 F.2d 952, 959 n.23 (5th Cir.) ("The first Congress . . . enacted a provision barring corruption of the blood or forfeiture of [an] estate upon conviction.") (citing Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117), *cert. denied*, 456 U.S. 943 (1982).

customs duties constituted more than eighty percent of federal revenues.[8]

Even though customs is now just a handmaiden to protectionism and not a major revenue generator, civil forfeiture has not only survived, it has prospered. Why? The Comprehensive Drug Abuse Prevention and Control Act of 1970[9] provided for the forfeiture of controlled substances and raw materials, containers, and conveyances thereof.[10] The Psychotropic Substances Act of 1978[11] added forfeiture of money and other things of value furnished or intended to be furnished in exchange for a controlled substance, and all proceeds traceable to such an exchange.[12]

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8. *See* Tamara A. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 940 n.137 (1991) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, H.R. DOC. NO. 33, 86th Cong., 1st Sess. 712 (1960)).

9. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-971 (1988 & Supp. V 1993)) (strengthening existing law enforcement authority in regard to illegal drug transactions).

10. *Id.* § 511(a)(1)-(4), 84 Stat. at 1276 (codified at 21 U.S.C. § 881(a)(1)-(4) (1988)). The statute provides:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.
>
> (3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) . . . .

11. Pub. L. No. 95-633, 92 Stat. 3768 (codified at 21 U.S.C. § 881(a) (1988)) ("[T]o amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 and other laws to meet obligations under the Convention on Psychotropic Substances relating to regulatory controls on the manufacture, distribution, importation and exportation of psychotropic substances, and for other purposes.").

12. *Id.* § 301(a)(1), 92 Stat. at 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)) (amending 21 U.S.C. § 881 to include the government's power to seek the forfeiture of monies furnished in exchange for a controlled substance). Section 881(a)(6) provides:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for

The Comprehensive Crime Control Act of 1984[13] added all real property used or intended to be used to commit or to facilitate the commission of a drug crime.[14] The increasing utilization of these statutes caused the amount deposited in the Department of Justice's Assets Forfeiture Fund to increase from $27 million in fiscal year 1985, to $555.7 million in 1993.[15] And the money is used for law-enforcement purposes.[16]

So far, so good. As former Attorney General Richard Thornburgh said: "[I]t is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation."[17] However, a few years ago, those reading advance sheets began noticing a nascent trend: federal judges

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> a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

*Id.*

13. Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. § 3141 (1988)).

14. *See id.* § 306(a), 98 Stat. at 2050 (amended by Pub. L. No. 100-690, § 5105, 102 Stat. 4301 (1988)) (codified as amended at 21 U.S.C. § 881(a)(7) (1988)). The statute provides:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

*Id.*

15. *See* EXECUTIVE OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF JUSTICE ASSET FORFEITURE PROGRAM: FISCAL YEAR 1993, at 16 (1994).

16. 28 U.S.C. § 524(c)(1) (Supp. V 1993) (establishing the Department of Justice Assets Forfeiture Fund, money from which is available to the Attorney General for law enforcement purposes).

17. Richard Thornburgh, Address Before the Cleveland City Club Forum Luncheon (May 11, 1990).

inveighing against the utter lack of due process in civil forfeiture proceedings.[18] And those keeping up with investigative journalism noticed a slew of newspaper and television exposés of innocent property owners being stripped of their belongings, and on one occasion, of life itself, by overzealous law enforcement officials in hot pursuit of funds for their departments.[19] These are what first attracted the interest of Congressman Henry J. Hyde. You see, proud members of congress often circulate reprints of noteworthy articles from their hometown papers. A representative from Pittsburgh did this with a forfeiture series in the old *Pittsburgh Press*[20] and Congressman Hyde was astounded by what he read. This was happening in America?

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18. *See, e.g.*, United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992). The government alleged that Statewide had violated a federal money-laundering statute, and seized Statewide's assets without a prior hearing or prompt post-seizure hearing. *Id.* at 901. Statewide contended that such a seizure and the subsequent shutdown of its business without proper hearings violated due process. *Id.* at 905. The court, applying a balancing test between the government's interests and Statewide's interest, held that an illegal search did not immunize the property from forfeiture, but would preclude the government from introducing any illegally obtained evidence. *Id.* The court admonished district courts that, "in order to preserve some modicum of due process," approving seizures *ex parte* should be done only upon a showing of "the most extraordinary . . . circumstances" and, whenever possible, the courts should use less drastic measures "until the criminality underlying the claimed forfeiture can be established in the context of a proper criminal proceeding with its attendant constitutional protections to the accused." *Id.* The court further stated: "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *Id.*; *see also* United States v. $12,390, 956 F.2d 801, 807 (8th Cir. 1992) (Beam, J., dissenting in part) ("I would hold that a statute that permits an owner of noncontraband property to be divested of title on a mere showing of probable cause for the institution of a forfeiture suit does not provide the minimum process due.").

19. *See, e.g.*, Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992; Andrew Schneider & Mary P. Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITT. PRESS, Aug. 11-16, 1991 (multi-part investigative series); Tim Poor & Louis J. Rose, *Hooked on the Drug War*, ST. LOUIS POST-DISPATCH, Apr. 28-May 5, 1991; Oct. 6-11, 20, 1991 (multi-part investigative series); Deborah Yetter, *Police Work or Piracy?*, COURIER-J. (Louisville, Ky.), Oct. 6-7, 1991; *see also 20/20: Killing in Paradise* (ABC television broadcast, Apr. 2, 1993); *Street Stories* (CBS television broadcast, July 9, 1992); *60 Minutes* (CBS television broadcast, Apr. 5, 1992).

20. *See* Schneider & Flaherty, *supra* note 19.

The critical mass for reform was attained when sympathetic editorials and op-ed columns began appearing in the Chicago Tribune.[21] Congressman Hyde knew that libertarian property rights advocates, as well as those concerned with the impact of forfeiture on minorities, were natural allies.[22] But the support of the respected Chicago paper assured him that, if he took the lead on reform, he was somewhat safe from knee-jerk accusations of being soft on the war on drugs. I believe this is the key to eventual legislative success for forfeiture reform on the federal level. Congressman Hyde gives cover to other Republicans worried about going out on a limb, and with criticism not just coming from the left wing, the Justice and Treasury departments know that the times are a-changin' and that it might just be in their best interests to have a hand in the fashioning of reform. I think this had something to do with Attorney General Janet Reno's October 1993 signal to Jack Brooks, former Chairman of the House Judiciary Committee, to hold off on hearings until the Department of Justice could review its asset forfeiture program.[23]

There is a question of motives which I think should be addressed. Nancy Hollander, President of the National Association of Criminal Defense Lawyers, has stated that Congress (including, presumably, Congressman Hyde) has awakened to forfeiture abuses because "abuses have stretched into areas of society not previously touched . . . . [Those] people who have a voice, people who can tell Congress."[24] This is partially true. Congressman Hyde believes that white men have rights too, but it is not the principal reason that he has come to advocate forfeiture reform. Congressman Hyde is struck by the fact that so many minorities are being victimized by forfeiture abuses—stopped for matching drug courier profiles of the most stereotypical kind and having whatever cash they have on them seized.[25] Now these profiles may serve a valid

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21. *See, e.g.*, Stephen Chapman, *Seizing Property: Law Enforcement's Dangerous Weapon*, CHI. TRIB., Mar. 7, 1993, at 3; *What Other Newspapers Are Saying*, CHI. TRIB., Feb. 27, 1993, at 21.

22. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, DRAFT MODEL—CIVIL FORFEITURE BILL (1992); BRENDA GRANTLAND, FORFEITURE ENDANGERS AMERICAN RIGHTS, FEDERAL FORFEITURE LAWS NEED TO BE AMENDED TO RESTORE DUE PROCESS AND PROTECT THE PROPERTY RIGHTS OF INNOCENT PEOPLE: F.E.A.R.'S PROPOSAL FOR REFORM 2, 3 (1992); TERRANCE G. REED (CATO INSTITUTE), AMERICAN FORFEITURE LAW: PROPERTY OWNERS MEET THE PROSECUTOR 18 (1992) (Policy Analysis No. 179); NATIONAL ASS'N OF CRIMINAL DEFENSE LAWS., ASSET FORFEITURE POSITION STATEMENT 5 (1994).

23. *See* Letter from Janet Reno to Jack Brooks (Oct. 18, 1993) (on file with the *New York Law School Law Review*).

24. Henry J. Reske, *A Law Run Wild*, A.B.A. J., Jan. 1993, at 24.

25. *See infra* notes 27-28 and accompanying text.

function—to help in structuring initial searches—or they may not,[26] but they certainly shouldn't be the sole basis for the confiscation of property. You have all heard about the martyrs of the forfeiture reform movement: black landscaper Willie Jones, who lost $9600 in cash intended for shrubbery purchases because he bought a short-return airline ticket for cash at the Nashville airport,[27] and Selena Washington, who lost $19,000 when she ventured into darkest Volusia County, Florida, with large amounts of cash to buy building material for her Charleston home, which was damaged by Hurricane Hugo.[28]

Congressman Hyde sees this as a devastatingly destructive state of affairs. How can we continue to urge the dispossessed, the underclass, those alienated from society, to become entrepreneurs, to buy into the American Dream, to strive to climb the ladder, if their property, so painfully acquired, can be taken away so cavalierly? Jack Kemp tells us that:

> [Our goals in America's inner cities should be] empowerment, ownership, and entrepreneurship . . . .
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> . . . .
>
> [We should] empower individuals to take control of their lives by acquiring education, jobs, homes, private property—and by gaining access to investment capital for entrepreneurial ventures.
>
> . . . .
>
> Generations of Americans built this country by working, saving, owning a home, starting a business. This is the classic American formula for escaping poverty.[29]

Do we really want to convince the poor that social striving is useless because the rewards are apt to be confiscated based upon little pretext? Indeed, some might call this a need to prop up our most quintessentially American of myths. Congressman Hyde, however, sees it as preventing

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26. *See* Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1416-30 (1993).

27. *See* Andrew Schneider & Mary P. Flaherty, *Government Seizures Victimize Innocent*, PITT. PRESS, Aug. 11, 1991, at A1. A federal judge eventually ordered this money returned. *See* Jones v. U.S. Drug Enforcement Admin., 819 F. Supp. 698, 719-21 (M.D. Tenn. 1993).

28. *See* Brazil & Berry, *supra* note 19, at A-16. For a detailed analysis of Selena Washington's case and the forfeiture practices of the Volusia County Sheriff's Office, see Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994).

29. U.S. Dep't of Hous. and Urban Dev., Secretary Jack Kemp Addresses the National Conference of Black Mayors, Remarks at Kansas City, Missouri, Apr. 23, 1992, at 1, 3, 4 (1992).

true inequities from reinforcing distorted and destructive assumptions about American society. As social critic George Gilder writes:

> Blacks are told that the world is against them; that the prevailing powers want to keep them down; that racism and discrimination are ubiquitous except under the order and surveillance of the law; that jobs are unavailable in business; that slumlords gouge their tenants; that policemen are to be assumed guilty until proven innocent of bias and brutality; that Martin Luther King and the Kennedy brothers were killed by the white establishment . . . .
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> [I]n the United States what this image of a racist and venal country achieves . . . is to incapacitate all of the poor who believe in it. Upward mobility is at least partly dependent on upward admiration: on an accurate perception of the nature of the contest and a respect for the previous winners of it. If we tell the poor that the system is corrupt, racist . . . we give them a false and crippling view of society.[30]

Now, lest I give the wrong impression, I should point out that Congressman Hyde is not concerned with protecting drug users and traffickers who happen to come from poor communities. Unlike some commentators,[31] he sees no problem in throwing people out of public housing projects for drug use (provided, of course, that appropriate due process standards are met).

Well, to the bill. Congressman Hyde introduced House Bill 2417, the Civil Asset Forfeiture Reform Act of 1993, on June 15, 1993,[32] with the qualified support of the American Civil Liberties Union[33] and the National Association of Criminal Defense Lawyers.[34] What does it do? The first reform was easy. It was one every commentator and interest

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30. GEORGE GILDER, WEALTH AND POVERTY 99 (1981).

31. *See* Jack Yoskowitz, *The War on the Poor: Civil Forfeiture of Public Housing*, COLUM. J.L. & SOC. PROBS. 567, 592-98, 600 (1992) (suggesting that, due to the "fundamentally different" nature of public housing residents, it is questionable whether civil forfeiture laws should be applied when eviction of such residents may result in homelessness, and arguing that forfeiture's policy objectives are not furthered by such seizures because public housing cannot be sold for revenue, and there is a potential of evicting "innocent" family members along with the drug user).

32. H.R. 2417, 103d Cong., 1st Sess. (1993). Senator James Jeffords of Vermont introduced the bill in the Senate. S. 1655, 103d Cong., 1st Sess. (1993).

33. *See* AMERICAN CIVIL LIBERTIES UNION, *supra* note 22.

34. *See* NATIONAL ASS'N OF CRIMINAL DEFENSE LAWYERS, *supra* note 22, at 6.

group was clamoring for: switch the burden of proof![35] Currently, it is the property owner, not the government, who is assigned the burden of proof when he or she sues to try to get property back.[36] All the government is required to do is make an initial showing of probable cause that the property is "guilty"; the property owner must then establish by a preponderance of the evidence that the property is "innocent" or otherwise not subject to forfeiture.[37] Because this standard of proof is lower than that used in criminal law, it requires no antecedent criminal conviction of the property owner. Even the acquittal of the owner does not bar forfeiture of the property.[38] It has been estimated that eighty percent of those who lose property to the government through civil forfeitures are never charged with any crime.[39] Under H.R. 2417, the government would have to prove by clear and convincing evidence that the property is subject to forfeiture—that the unlawful act on which the forfeiture is based actually occurred, and that there is a sufficient nexus between the

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35. *See, e.g.*, Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 292-93 (1992) (arguing that, due to the substantial interests of claimants in civil forfeiture actions, there is no distinction between such actions and criminal cases, therefore, the government should have to prove its case for civil forfeiture beyond a reasonable doubt); Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1182 (1990) ("If Congress were to re-enact the statute [21 U.S.C. § 881(h)], it should require the government to prove every element of the offense beyond a reasonable doubt when a claimant challenges the forfeiture."); *see also* AMERICAN CIVIL LIBERTIES UNION, *supra* note 22; GRANTLAND, *supra* note 22, at 2; NATIONAL ASS'N OF CRIMINAL DEFENSE LAWS., *supra* note 22; REED, *supra* note 22, at 18; Letter from David Smith to Kathleen Clark, Senate Judiciary Committee, at 6 (Aug. 19, 1992) (on file with the *New York Law School Law Review*).

36. *See, e.g.*, Tariff Act of 1930, ch. 497, § 615, 46 Stat. 590, 757 (codified as amended at 19 U.S.C. § 1615 (1988)) (providing that the government bears the initial burden of showing probable cause to seize property based upon a customs law violation, and upon such showing, the burden of proving an absence of culpability rests upon the owner of the property seized).

37. *See id.*

38. *See* United States v. Assortment of 89 Firearms, 465 U.S. 354 (1984) (involving an *in rem* action brought by United States against weapons seized at the defendant's after a jury found him not guilty of dealing in firearms without a license). The Court observed: "It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel," *id.* at 362, and ruled that "neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges." *Id.* at 361.

39. *See* Schneider & Flaherty, *supra* note 27, at A1, A8.

property and the unlawful act.[40] The property owner would still have the burden of proving affirmative defenses such as lack of knowledge of the illegal activity.[41]

This is the sine qua non of reform. Probable cause as a standard? Probable cause can be met by rank hearsay.[42] The Department of Justice even has argued that probable cause can be met on the basis of anonymous informants' tips.[43] Forfeiture expert David Smith notes that "[t]he government's probable cause showing serves a preliminary screening function analogous to a grand jury indictment and is no more strict 'proof' of the property's guilt than an indictment is proof of a criminal defendant's guilt."[44] It is just unseemly to rely on such a standard when depriving people of their property.

There are several alternatives to consider when addressing this dilemma: giving the government the burden of proof by a preponderance of the evidence, by clear and convincing evidence, or by proof beyond a reasonable doubt. Why did Congressman Hyde *not* pick proof beyond a reasonable doubt? Well, if you can prove that, why not just throw the guy in jail and then seize his property through criminal forfeiture?[45] Freedom is the most precious of our rights, and it sometimes may be impossible to build a criminal case against a sophisticated and well-insulated drug lord that is strong enough to justify incarceration. That doesn't mean it is immoral to confiscate property based on a lower quantum of proof. As the Supreme Court has said:

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40. H.R. 2417 § 4 (amending 19 U.S.C. § 1608).

41. *Id.* § 8.

42. *See* United States v. 900 Rio Vista Boulevard, 803 F.2d 625, 629 nn.28-29 (11th Cir. 1986) (stating that testimony of a DEA agent linking appellant's property with drug trafficking activities, although hearsay, may be used to establish probable cause).

43. GRANTLAND, *supra* note 22, at 8.

44. DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 11.01, at 11-10.1 (1994).

45. *See id.* ¶¶ 13.01-14.09; *see also* 21 U.S.C. § 853(d) (1988). This statute establishes a "rebuttable presumption" that any property of a person convicted of a Title 21 drug felony is subject to forfeiture if the government establishes by a preponderance of the evidence that (1) such property was acquired by such person during the period of the violation or "within a reasonable time" after such period; and (2) there was "no likely source for such property" other than the violation. *See* SMITH, *supra* note 44, ¶ 14.03, at 14-29. In addition, criminal forfeiture of property following a conviction of the property owner under the Racketeer Influenced and Corrupt Organizations Act requires a finding by a jury beyond a reasonable doubt that the property in question is so related to the RICO offense that it is subject to forfeiture under the statute. 18 U.S.C. § 1963 (1988 & Supp. V 1993).

> "The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty . . . ."[46]

Justice Brennan uses the term "interest of transcending value."[47]

Why not choose preponderance of the evidence as the standard? Well, maybe. At least it takes the crucial step—symbolically and practically of shifting the burden of proof to the government, and those few federal civil forfeiture statutes that do put a burden of proof on the government use this standard. However, it's awfully weak in such a punitive environment as property forfeiture[48] and, besides, Congressman Hyde needs a bargaining chip. So, the standard chosen was clear and convincing evidence.[49] By the way, this is the standard used by the State

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46. United States v. Regan, 232 U.S. 37, 49 (1914) (quoting Roberge v. Burnham, 124 Mass. 277 (1878)).

47. Speiser v. Randall, 357 U.S. 513, 525 (1958). In *Speiser*, the plaintiffs refused to swear by oath that they did not advocate the violent overthrow of the federal or California governments, and did not support a foreign government against the United States, which was a condition to receiving a veteran's property-tax exemption, and were denied the exemption on that basis. *Id.* at 515-17. The plaintiffs contended that the oath, as a condition to the exemption, was forbidden by the federal Constitution because the exemption denied them freedom of speech without due process. *See id.* In reversing in favor of the plaintiffs, the Court declared: "Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this . . . margin of error [in factfinding] is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder . . . of his guilt beyond a reasonable doubt." *Id.* at 525-26.

48. Civil forfeiture does serve certain remedial (as opposed to punitive) goals, such as depriving "criminals of the tools by which they conduct their illegal activities." United States v. 526 Liscum Drive, 866 F.2d 213, 217 (6th Cir. 1989) (articulating the remedial intent of the forfeiture provision of the Controlled Substances Act in a case in which the appellant sought to establish sufficient ownership in order to challenge forfeiture of property connected with drug trafficking activity). Another such goal is "reimburs[ing] the Government for investigation and enforcement expenses." One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) (per curiam) (stating "that such purposes characterize remedial rather than punitive sanctions"). However, there comes a point where civil penalties are so overwhelmingly punitive in nature that a criminal law burden of proof must constitutionally be assigned to the government. Courts have not found that level to be reached by our civil forfeiture statutes, but instead have found that such measures are not "so unreasonable or excessive that [they] transform[] what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 237. For an overview of this issue, see Stahl, *supra* note 35, at 291-337.

49. H.R. 2417 § 4.

of New York in its drug forfeiture law,[50] and it is the standard that the Supreme Court of Florida ruled was mandated by the Florida Constitution's Due Process Clause.[51]

Second, H.R. 2417 also provides for the appointment of counsel for indigents.[52] There is no constitutional right to appointed counsel in civil forfeiture cases.[53] I dare say this is one of the reasons why eighty percent of forfeitures are not challenged,[54] along with the onerous burden of proof,[55] the low value of much forfeited property relative to the cost of counsel,[56] the intimidating nature of the legal system to many low-income property owners and, yes, the threat of self-incrimination to those property owners rightly facing criminal prosecution.[57] Forfeiture

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50. N.Y. CIV. PRAC. L. & R. § 1311(3) (McKinney Supp. 1994) (providing that, generally, in a forfeiture action commenced against a criminal defendant, the government must prove its claim by a preponderance of the evidence. In a forfeiture action commenced against a non-criminal defendant, however, the government must show by clear and convincing evidence the commission of the crime and, then, in an action relating to the proceeds of a crime, substituted proceeds of a crime, or instrumentality of a crime, the government need only prove its claim by a preponderance of the evidence.).

51. *See* Department of Law Enforcement v. Real Property, 588 So. 2d 957, 967 (Fla. 1991). The court held:

> In forfeiture proceedings the state impinges on basic constitutional rights of individuals who may never have been formally charged with any civil or criminal wrongdoing. This Court has consistently held that the [Florida] constitution requires substantial burdens of proof where state action may deprive individuals of basic rights.

*Id.*

52. H.R. 2417 §§ 5, 7 (amending 19 U.S.C. § 1608 and 28 U.S.C. § 524(c), respectively).

53. *See, e.g.*, Resek v. State, 706 P.2d 288 (Alaska 1985) (rejecting counsel's argument in *in rem* forfeiture proceeding that counsel should be appointed for the indigent defendant). The court observed: "A claimant in a forfeiture action does not face loss of liberty as a direct result of the forfeiture action." *Id.* at 291.

54. *See* Smith, *supra* note 35, at 5.

55. *See* 19 U.S.C. § 1615 (1988).

56. *See, e.g.*, Andrew Schneider & Mary P. Flaherty, *Forfeiture Threatens Constitutional Rights*, PITT. PRESS, Aug. 16, 1991, at A1. Police seized $2300 belonging to a vehicle owner in whose car they claimed to have found cocaine. *Id.* at A8. Although the substance was shown in lab tests to be bubble gum, the owner of the car had to fight in court for almost a year to reclaim his cash. *Id.*

57. *See, e.g.*, Jay N. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390 (1988):

> One area of uncertainty regarding the scope of constitutional protections afforded forfeiture claimants is the degree to which a forfeiture claimant's fifth

proceedings are so punitive—quasi-criminal if you will—that there should be a right to counsel. H.R. 2417 would provide representation of counsel for whomever is unable to afford a lawyer to challenge a federal civil forfeiture.[58] The means for such representation would come from the Justice Department's Assets Forfeiture Fund.

Third, H.R. 2417 provides added protection for innocent property owners.[59] Currently, real property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner."[60] This is, of course, meant to protect innocent owners. However, a number of federal courts have seriously eroded the provision's protections by ruling that the owner must have had no knowledge of *and* provided no consent to the prohibited use of the property.[61] Such an interpretation would mean that property owners such as Jesse Bunch would be out of luck.[62] Mr. Bunch owned a bar and residential apartments in a highly active drug trafficking area.[63] Although he knew of the drug-selling activity on the premises,

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> amendment right against self-incrimination may be permissibly compromised in situations where he bears the burden of proof in the civil case but also faces the possibility of a parallel criminal prosecution. This situation makes the claimant choose between vigorously defending the forfeiture case and risking self-incrimination, or cautiously contesting the forfeiture action so as to preserve the fifth amendment privilege.

*Id.* at 393-94 (footnote omitted).

58. H.R. 2417 § 5 (amending 19 U.S.C. § 1608). Maximum compensation would not exceed $3500 per attorney for representation before a U.S. District Court and $2500 per attorney for representation before an appellate court (the equivalent to the maximums for appointed counsel in federal felony cases). *See* 18 U.S.C. § 3006A(d)(2) (1988). These figures could be waived in cases of "extended or complex" representation where "excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit." *See* 18 U.S.C. § 3006A(d)(3).

59. H.R. 2417 § 8 (amending 21 U.S.C. § 881(a)(7) by replacing "without the knowledge or consent of that owner," and inserting "either without the knowledge of that owner or without the consent of that owner").

60. 21 U.S.C. § 881(a)(7) (1988).

61. *See, e.g.*, United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam) (holding that the "innocent owner" defense is unavailable when "the claimant *either* knew *or* consented to the illegal activities" because the policy behind forfeiture (to seize all property that has a substantial connection to the illegal drug activity) would be seriously undercut if an owner, aware of the illegal activities, could be deemed "innocent" because the owner had not consented to such activity).

62. *See* United States v. 710 Main St., 744 F. Supp. 510, *aff'd on reh'g*, 753 F. Supp. 121 (S.D.N.Y. 1990).

63. *Id.* at 512.

he took many steps to prevent it.[64] He fired two bartenders after they were arrested at the bar for drug violations, evicted two residents following their arrests, restricted use of the restrooms, posted signs advising patrons that they were subject to being photographed and searched, restricted the bar's hours of operation, and periodically called police to report drug activity in the vicinity of his property.[65] However, drug activity continued and the government seized the property.[66] Luckily for Mr. Bunch, a court ruled that he was protected by the innocent owner defense because of his lack of consent to the illegal drug trafficking and his reasonable efforts to put it to an end.[67] The court found that "Mr. Bunch, who was trying to eke out an income from a business located in a drug-infested area that posed great risks to the safety of him and his family . . . fulfilled his legal obligation."[68] This is only fair, and should be the proper interpretation of the innocent owner defense. H.R. 2417 would clarify that lack of consent to (including reasonable efforts to prevent) illegal activity is a valid defense to forfeiture by a property owner.[69]

Fourth, H.R. 2417 eliminates the cost bond requirement.[70] Currently, a property owner wanting to contest the seizure of property in an administrative proceeding or before a federal court must give the court a bond of the lesser of $5000 or ten percent of the value of the property seized (but not less than $250).[71] However, courts have found that, in cases involving indigents, the cost bond requirement is unconstitutional because it deprives such claimants of a hearing simply because they are unable to post bond.[72] And, further, the cost bond requirement serves little purpose in other cases. As David Smith writes:

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64. *See id.* at 513-17.

65. *See 710 Main St.*, 753 F. Supp. at 123-24.

66. *See 710 Main St.*, 744 F. Supp. at 518.

67. *See 710 Main St.*, 753 F. Supp. at 125.

68. *Id.*

69. H.R. 2417 § 8 (amending 21 U.S.C. § 881(a)(7) by replacing "without the knowledge or consent of that owner," and inserting "either without the knowledge of that owner or without the consent of that owner").

70. *Id.* § 6 (amending 19 U.S.C. § 1614).

71. 19 C.F.R. § 164.47(b) (1994).

72. *See, e.g.*, Wiren v. Eide, 542 F.2d 757, 763 (9th Cir. 1976) (holding that "the fifth amendment prohibits the federal government from denying the opportunity for a hearing to persons whose property has been seized and is potentially subject to forfeiture solely because of their inability to post a bond"). The case involved the seizure of an automobile from an indigent owner who contended that the $250 bond requirement violated "his rights to due process and equal protection . . . ." *Id.* (footnote omitted).

> There is no reason why a person whose property is seized by the government should have to post a bond to defray some of the government's litigation and storage expenses in order to have the right to a day in court to contest the forfeiture. . . . The cost bond requirement is simply an additional financial burden on the claimant and an added deterrent to contesting the forfeiture.[73]

Case closed.

Fifth, H.R. 2417 provides property owners with a reasonable time period for challenging a forfeiture.[74] Currently, if a property owner wants to challenge a forfeiture in federal court, he or she must "file his claim within 10 days after process has been executed."[75] This time period is woefully inadequate. Let me quote David Smith again:

> Even assuming that notice is published the next day after process is executed, the reader of the notice will have a mere nine days to file a timely claim. Most local rules require that notice be published for three successive weeks, on the assumption that interested parties will not necessarily see the first published notice. But by the time the second notice is published, more than ten days will have elapsed from the date process was executed. Thus anyone who misses the first published notice will be unable to comply with the exceedingly short time limitation for filing a claim . . . .[76]

Even though this time limit sometimes is ignored in the interests of justice, failure to file a timely claim can result in a judgment in favor of the government.[77] H.R. 2417 would extend this period to sixty days.[78]

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73. Smith, *supra* note 35, at 5.

74. H.R. 2417 § 3 (amending FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims)).

75. FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims).

76. SMITH, *supra* note 44, ¶ 9.03(1), at 9-42.9 to 9-42.10.

77. *See, e.g.*, United States v. Beechcraft Queen Airplane, 789 F.2d 627 (8th Cir. 1986). The court strictly construed the rule for filing a timely claim because the defendant failed to (1) precede his answer with a verified claim, (2) request an extension of time, and (3) show that he had never received actual notice, even though the court conceded that defendant "may have believed that he had thirty days to file a response because that is what the warrant of seizure and monition said." *Id.* at 630.

78. H.R. 2417 § 3 (amending FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims)).

Sixth, H.R. 2417 provides a remedy for property damage caused by government negligence.[79] Currently, the federal government is exempted from liability under the Federal Tort Claims Act for damage caused by the negligent handling or storage of property detained by law enforcement officers.[80] Property awaiting forfeiture can be quickly devalued:

> Seized conveyances devalue from aging, lack of care, inadequate storage, and other factors while waiting forfeiture. They often deteriorate—engines freeze, batteries die, seals shrink and leak oil, boats sink, salt air and water corrode metal surfaces, barnacles accumulate on boat hulls, and windows crack from heat. On occasion, vandals steal or seriously damage conveyances.[81]

Vacant and boarded-up real property is especially subject to deterioration, and, sometimes, government agents utterly destroy property in futile searches for contraband.[82] It is hardly a victory for a boat owner to get back a rusted and stripped hulk of a vessel. Congressman Hyde's bill would simply allow property owners to sue the government for negligence.

Seventh, H.R. 2417 allows for the return of property pending final disposition of a case.[83] Currently, customs law does allow for the release of property pending final disposition of a case upon payment of a

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79. *Id.* § 2 (amending 28 U.S.C. § 2680(c)).

80. *See* Kozak v. United States, 465 U.S. 848 (1984). The Court held that the U.S. Customs Service was not liable under the Federal Tort Claims Act, 28 U.S.C. § 2680(c) (1988), for damage to an art collection seized from the petitioner when he was suspected of smuggling the collection into the country. *Id.* at 862. The statute exempts from coverage "[a]ny claims arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c).

81. U.S. COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, BETTER CARE AND DISPOSAL OF SEIZED CARS, BOATS, AND PLANES SHOULD SAVE MONEY AND BENEFIT LAW ENFORCEMENT, at ii (GAO/PLRD-83-94, 1983).

82. *See Florida Man's Plight Sparks Customs Service Bill*, UPI, Mar. 13, 1992 (reporting the destruction of sailboat by 11 customs agents who boarded the vessel armed with fire axes, powerdrills, and a chainsaw and, during a seven-hour search for drugs, damaged the vessel beyond repair); Andrew Schneider & Mary P. Flaherty, *Jet Seized, Trashed, Offered Back for $66,000*, PITT. PRESS, Aug. 15, 1991, at A6 (reporting destruction of plane seized and "torn apart" during a Drug Enforcement Administration search).

83. H.R. 2417 § 6 (amending 19 U.S.C. § 1614). For this section I am indebted to the National Association of Criminal Defense Lawyers.

full bond.[84] However, a property owner who cannot afford to secure such a bond is out of luck, especially when the property is used in a business, because its lack of availability for the time necessary to win a victory in court can force an owner into bankruptcy.[85] Often, the property owner must settle with the government for a specific sum of money to get the property back, despite the fact that the government has an extremely weak case.[86] H.R. 2417 specifies that property can be released if continued possession by the government would cause the claimant substantial hardship; however, conditions may be placed on release that are appropriate to preserve the availability of the property or its equivalent for forfeiture should the government eventually prevail.[87]

The Civil Asset Forfeiture Reform Act is obviously reformist. It does not abolish civil asset forfeiture, as the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, would like. The reason for this is partly pragmatic. Congress is not going to get rid of a $500 million cash cow. But it is also because Congressman Hyde sees a role for civil forfeiture in an integrated crime-suppression strategy. However, there is no excuse for the sloppy police work and "pillage and plunder" mentality that is sometimes evident in forfeiture activities today.[88] It is no small thing to take a person's property or livelihood, and it should not be done lightly.

Although H.R. 2417 addresses several important concerns, there are some major issues which Congressman Hyde did not take on. One is that of adoptive forfeiture. Under this practice, state law enforcement officers

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84. 19 U.S.C. § 1614 (1988).

85. *60 Minutes*, *supra* note 19, at 8 (reporting the seizure by the Drug Enforcement Administration of a jet chartered to transport suitcases which contained "drug money"). Although the owner of the jet denied knowledge of the contents of the suitcases and the criminal charges against him were dropped, the jet was not returned and, subsequently, the owner filed for bankruptcy. *Id.*; *see also* Schneider & Flaherty, *supra* note 82, at A6 (reporting the same DEA seizure).

86. *See* Louis J. Rose & Tim Poor, *Police Make Suspects Pay 'Fees'*, ST. LOUIS POST-DISPATCH, Apr. 28, 1991, at A1 (describing seizures from people who paid local police for the return of their property without ever being charged with a crime); *see also* Schneider & Flaherty, *supra* note 27, at A9 (reporting that a business was seized because there was insufficient evidence to "press a criminal case" against the owner).

87. H.R. 2417 § 6 (amending 19 U.S.C. § 1614).

88. *See Florida Man's Plight Sparks Customs Service Bill*, *supra* note 82 (reporting the search of a sailboat by the U.S. Customs Service that resulted in $50,000 worth of damage to the vessel, which had been purchased three days earlier for $24,000); *see also* David Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine) at 70; Schneider & Flaherty, *supra* note 56, at A7 (reporting that in police-training films searches included pulling out the "back seats, side door panels and roof linings" of cars).

seize property under state law and bring it to a federal agency for federal forfeiture (provided that a violation of federal law has occurred and the property is forfeitable under federal law).[89] The feds then return as much as eighty-five percent of the net proceeds to the state or local agency that initiated the case.[90] What would motivate local authorities to engage in such a practice? Often, this is done in order to circumvent state laws allocating funds generated by forfeiture to non-law enforcement uses. For example, in Missouri, all funds forfeited under state law go to the state's general fund.[91] State legislatures find this practice to be a slap to the face. It is hard to argue. Allocation formulas are political decisions that should be decided by political decisionmakers. Local law enforcement has every right to lobby for its share of the take just as any other interest group does—no more, no less. Why didn't Congressman Hyde take on this abuse? It would have created insurmountable political problems, and that is a perfectly legitimate rationale.[92]

A related issue is that of how the federal government should divide up the forfeited assets it keeps. Prior to the Comprehensive Crime Control Act of 1984,[93] federal forfeiture revenue was deposited in the general fund of the United States Treasury; however, monies now collected by the Department of Justice which are not used to assist state and local agencies are deposited in the Department of Justice Assets Forfeiture Fund.[94] The money can be used to pay for forfeiture-related expenses, for rewards to informants, to equip cars, boats and planes for law enforcement purposes, for prison construction costs, and for various other purposes.[95] This is clearly an invitation for abuse—the very agencies seizing property benefit from the proceeds. As a federal judge noted, "some observers . . . question whether we are seeing fair and effective law enforcement or an

89. 19 U.S.C. § 1616a (1988 & Supp. V 1993); *see* SMITH, *supra* note 44, ¶ 7.02.

90. *See* SMITH, *supra* note 44, ¶ 7.02, at 7-8 to 7-9; *see also* Schneider & Flaherty, *supra* note 27, at A9 ("In federal court, local police are guaranteed up to 80 percent of the take—a percentage that may be more than they would receive under state law.").

91. MO. ANN. STAT. § 513.623 (Vernon Supp. 1993) (providing that the proceeds of any judicial sale or disposition of property forfeited as a result of a criminal violation, except for property forfeited as a result of a child abuse statute violation, is to be paid into the state general fund).

92. *Cf.* H.R. 3347 § 17 (amending 21 U.S.C. 881(e)(3) by prohibiting transfers of property between federal and local or state agencies that would circumvent state law prohibiting forfeiture or limiting use or disposal of property forfeited to state or local agencies).

93. Pub. L. No. 98-473, 98 Stat. 1837.

94. *Id.* § 301, 98 Stat. at 2052 (codified at 28 U.S.C. § 524(c)(1) (Supp. V 1993)).

95. *See id.*

insatiable appetite for a source of increased agency revenue."[96] The Supreme Court chided former Attorney General Thornburgh for issuing a memorandum informing United States Attorneys that "[w]e must significantly increase production to reach our budget target. . . . Failure to achieve the . . . projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income . . . ."[97] Now this is less of a problem at the federal level than at the state level, where the very agent who seizes a Corvette can soon be driving it around in undercover patrols,[98] and where small police departments can lavish high-tech gadgets upon themselves.[99] But, even at the federal level, the practice is troubling. Congressman Hyde did not address this issue, maybe because no bill has a realistic chance of becoming law that will take hundreds of millions of dollars a year away from the Justice Department, and away from the war on drugs.

Additionally, Congressman Hyde avoids the issue of disproportionality—that is, whether some forfeitures are so out of line with the severity of the underlying criminal behavior that they are

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96. United States v. $12,390, 956 F.2d 801, 807 n.6 (8th Cir. 1992) (Beam, J., dissenting in part). For a discussion of the case, see generally Virginia A. Albers, Note, *Is Greater Process Due?* United States v. Twelve Thousand, Three Hundred and Ninety Dollars, 26 CREIGHTON L. REV. 841 (1993). The author argues that the burden of proof should be reallocated to coincide with the government's burden in Title VII cases. *Id.* at 842. In such cases, as Judge Beam noted, a probable cause showing by the government could establish a rebuttable presumption of a right to the property by establishing a colorable claim of title and a colorable claim that the property was acquired legitimately. *$12,390*, 956 F.2d at 811-12. The government then would have the burden of rebutting the presumption with evidence admissible at trial. *Id.* at 812. Albers also argues that the government should be required to comply with the Federal Rules of Evidence in civil forfeiture proceedings because of forfeiture's quasi-criminal nature. Albers, *supra*, at 842.

97. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 n.2 (1993) (quoting 38 U. S. ATT'YS' BULL. 180 (1990)).

98. *See* Schneider & Flaherty, *supra* note 27, at A8 (reporting that police may use forfeited items merely by signing a form saying that such use will be "for law enforcement purposes," and noting that a forfeited Corvette was made available for the use of an assistant prosecutor); *see also* GRANTLAND, *supra* note 22, at 13-14 (asserting that "slush funds" created under forfeiture law have "gotten out of hand" because law enforcement agency personnel can keep items seized).

99. *See* Tim Poor & Louis J. Rose, *Frontenac 'Hard Core' on Taking Cars*, ST. LOUIS POST-DISPATCH, May 2, 1991, at 1A, 4A.

unconscionable.[100] He is mainly concerned with those with clean hands, who present the most compelling examples of abuse. A yacht for a joint,[101] however, is troubling. He does maintain, though that the S.S. Minnow should have been seized because of all that unreported cash Mr. Howell was carrying. As you may know, after the introduction of H.R. 2417, the Supreme Court decided that forfeitures can at some point become so disproportionate that they violate the Eighth Amendment's prohibition of excessive fines.[102] It will be interesting to see how lower courts flesh out these rulings. These Supreme Court decisions have made Congressman Hyde more amenable to considering statutory proportionality standards.

Congressman Hyde also chose not to address the issue of facilitation. Our drug laws subject to forfeiture all real property "which is used, or intended to be used, in any manner or part, to . . . *facilitate* the commission of a [drug crime]."[103] Courts have read into this provision

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100. For an example of such a forfeiture, see Chapman, *supra* note 21, at 3 (reporting that a person's $6000 boat was seized for "illegally catching three fish"); *see also* Heilbroner, *supra* note 88, at 72.

101. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

102. Austin v. United States, 113 S. Ct. 2801 (1993). The Supreme Court held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture proceedings and refuted the government's contention that forfeiture was not punitive but, rather, remedial and, as such, should not be considered as constituting punishment for purposes of the Eighth Amendment. *Id.* at 2812. The Court stated that, although forfeiture can be viewed as remedial, it may also constitute punishment: "'[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* (quoting United States v. Halper, 490 U.S. 435, 448 (1989)); *see also* Alexander v. United States, 113 S. Ct. 2766 (1993). After being convicted of 17 counts of obscenity and three counts of violating RICO, Alexander, the owner of more than a dozen stores and theaters dealing in sexually explicit material, was sentenced to six years in prison, fined $100,000, and ordered to pay the costs of prosecution, incarceration and supervised release. *Id.* at 2769-70. In addition, Alexander was forced to forfeit his businesses and almost $9 million. *Id.* at 2770. The United States Court of Appeals for the Eighth Circuit, without considering whether such a forfeiture was disproportionate or "excessive," held that it did not violate the Eighth Amendment because proportionality review was not required "'of any sentence less than life imprisonment without the possibility of parole.'" *Id.* (quoting Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991)). The Supreme Court found that, in making such a determination, the Eighth Circuit had erroneously included the "excessive fines" component of the Eighth Amendment with that of "cruel and unusual punishment," when it should have analyzed the forfeiture at issue as an excessive fine because it was "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Id.* at 2775-76.

103. 21 U.S.C. § 881(a)(4) (1988) (emphasis added).

a requirement that there be a "substantial connection between the property and the underlying illegal transaction" to avoid forfeitures where the property "has only an incidental or fortuitous connection to criminal activity."[104] However, the connection can often be tenuous. For example, in one case a house was found to have been used to facilitate drug sales because it was found to be the drop-off spot as well as the base from which its owner conducted his negotiations.[105] Congressman Hyde is content with the "substantial connection" test, as long as it is applied judiciously.

Finally, the most thoroughgoing reform of all was rejected—doing away completely with civil asset forfeiture, or requiring that the government prove its case beyond a reasonable doubt. I believe I have mentioned the reasons why.[106]

As I have illustrated, Congressman Hyde's bill has "dropped the ball" in some respects. But then, there is Congressman John Conyers, who was one of the first in Congress to sound the alarm over forfeiture abuses, especially as to how they impacted on minorities.[107] On October 22, 1993, he introduced House Bill 3347, the Asset Forfeiture Justice Act.[108] This bill goes far beyond Congressman Hyde's legislation, and essentially would shut down the federal government's civil forfeiture program. While I suspect that no one, least of all Representative Conyers, expects any substantial part of his legislation to be enacted into law, it provides a

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104. United States v. Certain Lots in Va. Beach, 657 F. Supp. 1062, 1065 (E.D. Va. 1987).

105. *See* United States v. 124 E. N. Ave., 651 F. Supp. 1350, 1353-54 (N.D. Ill. 1987). The court differentiated the isolated use of a telephone at a home to discuss a narcotics sale from the facts in the present case in which "the phone at the defendant property was used regularly to coordinate the sale and delivery of cocaine" and the "property was to be the situs of a delivery of five kilograms of cocaine." *Id.* Under the latter facts, "a sufficient nexus between the alleged illegal activity and the defendant property is asserted [because] probable cause existed to believe the defendant property was being used or intended to be used to facilitate the violation of federal narcotics laws." *Id.* at 1354.

106. *See supra* text accompanying notes 45-47.

107. While Chairman of the House Committee on Government Operations' Subcommittee on Legislation and National Security, Representative Conyers held a number of hearings on asset forfeiture. *See Review of Federal Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993); *Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess. (1992).

108. H.R. 3347, 103d Cong., 1st Sess. (1993). The bill has also been introduced as Title X of the Congressional Black Caucus's omnibus crime bill. *See* H.R. 3315, 103d Cong., 1st Sess. (1993).

good gauge of Congress' level of disgust with forfeiture abuses. Moreover, it reminds us that reform—and there will be reform—can be carried out by those essentially friendly to the underlying program, as well as by those hostile to it.

Right off the bat, H.R. 3347 switches the burden of proof in civil forfeiture proceedings to the government and imposes upon it a standard of clear and convincing evidence.[109] So far, so good. That's all Congressman Hyde did. But, H.R. 3347 also requires that forfeiture must be preceded by a "conviction of the owner of such property for the crime upon which the forfeiture is based."[110] There is a name for this: criminal forfeiture. But this is much more rarely used, much less effective and, thus, a much too drastic step.[111]

H.R. 3347 further requires a preliminary hearing prior to most seizures absent exigent circumstances.[112] As you may know, the Supreme Court recently ruled that the Due Process Clause of the Fifth Amendment mandates a preliminary hearing before the seizure of real property.[113] Congressman Hyde believes that, outside of real property, which, except in California, rarely threatens to pick up and move, such a requirement would prove too burdensome on law enforcement. Try to imagine a case where there is no risk that property or assets would disappear once the owner is tipped off to an imminent seizure.

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109. H.R. 3347 § 4 (amending 19 U.S.C. § 1615).

110. *Id.* § 2 (amending 19 U.S.C. § 1604).

111. *Id.* § 9 (amending 18 U.S.C. § 1082(c)). A reinforcing provision, this section requires that some action be taken against the property owner *in personam*. *Id.* Presumably, a criminal indictment would be enough.

112. *Id.* § 5 (amending 18 U.S.C. § 981(b); 19 U.S.C. §§ 1595(a)(1), 1603(a); 21 U.S.C. § 881(b)). A hearing is not necessary with seizures "incident to an arrest or a search under a search warrant" when (1) "the property subject to seizure has been the subject of a prior judgment in favor of the United States"; (2) "there is probable cause to believe that the property is directly or indirectly dangerous to health or safety"; or (3) "there is probable cause to believe that the delay occasioned by the need to secure an order will frustrate the seizure." *Id.*

113. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 505 (1993). The Court relied on the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), which requires consideration of the private interest at stake, the risk of erroneous decisions through the procedures used, and the government's interest. *Good*, 114 S. Ct. at 501. Under this analysis, the Court characterized the government's interest as "the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action." *Id.* at 502. The Court found no such need. *See id.* For a general discussion of the use of the *Mathews* balancing test, see Lassiter v. Department of Social Servs., 452 U.S. 18, 26-27 (1981).

As with H.R. 2417, the Conyers bill eliminates the cost bond requirement,[114] requires the appointment of counsel for indigents,[115] extends the filing deadline to sixty days,[116] and allows for actions to be brought under the Federal Tort Claims Act.[117] Also, analogous to Congressman Hyde's provision allowing property to be released pending the final disposition of a case, H.R. 3347 provides that, before seizure, the government must show a court that "the need to preserve the availability of the property [through seizure] outweighs the hardship to any party of interest."[118]

H.R. 3347 also provides that a property owner has a right to a jury trial in civil forfeiture cases.[119] This is already a Seventh Amendment right[120] for owners of property seized on land.[121] For "seizure made on waters navigable by vessels of ten tons burthen and upwards, the court sits as a Court of Admiralty," and no jury trial is required.[122] Now, there is nothing wrong with extending this right over water, but far be it

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114. H.R. 3347 § 6 (amending 19 U.S.C. § 1608).

115. *Id.*

116. *Id.* § 10 (amending FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims)).

117. *Id.* §§ 19, 23 (amending 28 U.S.C. §§ 2680(c), 2645). Compensation would not require negligence on the part of government employees. *Id.* § 19.

118. *Id.* § 5 (amending 18 U.S.C. § 981(b); 19 U.S.C. § 1603(a); 21 U.S.C. § 881(b)).

119. *Id.* § 7 (amending 19 U.S.C. § 1610).

120. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved . . . .").

121. *See* United States v. 1976 Mercedes Benz 280S, 618 F.2d 453, 456 (7th Cir. 1980) (holding that the owner of an automobile allegedly used in connection with the transport of narcotics was wrongly denied a jury trial in a forfeiture proceeding). The district court in *1976 Mercedes Benz* discussed at some length the Seventh Amendment's preservation of the right to a jury trial in civil suits at common law, and distinguished equity cases from admiralty cases, in which there is no right to a jury trial. *See id.* The Seventh Circuit quoted C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943): "'[I]n cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations *in rem* with trial by jury.'" *1976 Mercedes Benz*, 618 F.2d at 463 (quoting *Hendry*, 318 U.S. at 153). Because the car was seized on land, the forfeiture case would proceed as at common law; therefore, the defendant was entitled to a jury trial. *Id.* at 468.

122. The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823) ("In cases of seizure, on land, the court sits as a court of common law [and] the trial must be by jury[, however, i]n cases of admiralty . . . , it has been settled . . . that the trial is to be by the court.").

for a Republican to come out in defense of yacht owners. In any event, for one reason or another, defense counsel do not make use of this valuable tool where they already have it.[123]

H.R. 3347 further provides that no "property which has been paid or pledged as bona fide attorneys' fees be forfeited . . . ."[124] The Supreme Court, however, has ruled that the Sixth Amendment[125] does not exempt from criminal forfeiture assets intended to be used to pay for counsel in a criminal prosecution.[126] Why should we take this step with civil forfeitures? One should not have the right to use ill-gotten gains to procure the most costly lawyers around.

H.R. 3347 also establishes a statutory proportionality standard: "the value of the property forfeited . . . may not exceed the pecuniary gain derived from the offense . . . ."[127] This seems much more liberal than any constitutional standard that could possibly come down following the Supreme Court's decisions in *Austin v. United States*[128] and *Alexander v. United States*.[129] If a dealer sells a lethal dose of drugs with a street value of twenty-five dollars, only the twenty-five dollars can be seized.[130] This diminishes any real deterrent effect to the vanishing point. For purposes of forfeiture, what would be the value of a bald eagle killed in violation of United States law, especially since it is illegal to stuff and sell it?[131]

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123. SMITH, *supra* note 44, ¶ 11.01.

124. H.R. 3347 § 8 (amending 18 U.S.C. § 981(a)(2)).

125. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

126. *See* Caplin & Drysdale v. United States, 491 U.S. 617, 630 (1989). The Court stated:

> It is our view that there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense. Otherwise, there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during or after a criminal trial.

*Id.* at 631.

127. H.R. 3347 § 11 (amending 21 U.S.C. §§ 853(a), 881(a)).

128. 113 S. Ct. 2801 (1993); *see also supra* note 103.

129. 113 S. Ct. 2766 (1993); *see also supra* note 103.

130. H.R. 3347 § 11 (amending 21 U.S.C. § 881(a) by inserting "[e]xcept that the value of the property forfeited under this section may not exceed the pecuniary gain derived from the offense or the pecuniary loss caused by the offense").

131. *See* 16 U.S.C. § 668b (1988 & Supp. V 1993).

Congressman Conyers' bill eliminates the manifestly unfair relation-back doctrine, which strips away the innocent owner defense by conferring title of property to the government at the time of the underlying criminal activity.[132] Under this theory, if a person innocently buys or receives tainted property, the government can claim that the buyer never was an owner because defective title was passed.[133] This "would result in the forfeiture of property innocently acquired by persons who had been paid with illegal proceeds for providing goods or services to drug traffickers . . . ."[134] This provision is fine, except that the Supreme Court ruled last February that the government cannot claim ownership under the relation-back theory for any time period before forfeiture actually takes place.[135]

Yet another issue that only Congressman Conyers confronts is the nexus problem, which H.R. 3347 attempts to solve by limiting real property subject to seizure under the Controlled Substances Act to that "used primarily to commit a violation of [the Act] punishable by more than 1 year's imprisonment . . . ."[136] The term "primarily" presumably means just that: a house would have to be primarily used as a drug drop rather than for habitation to be forfeitable. This goes a bit too far.

Congressman Conyers tackles adoptive forfeiture by requiring that all assets transferred to state and local law enforcement agencies be sent directly to state treasuries for disposition according to state law,[137] and by prohibiting funds from being "transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposal of property . . . ."[138] Good for him.

Additionally, H.R. 3347 tackles the "disposition of funds" problem—not by sending all assets to the federal treasury—but by requiring that at least half of the amounts disbursed be used for drug

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132. H.R. 3347 § 12 (amending 18 U.S.C. §§ 981(f), 1963(c); 21 U.S.C. §§ 853(c), 881(h)).

133. *See* United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (involving a home allegedly bought with proceeds of illegal drug trafficking whose owner claimed lack of knowledge of any wrongdoing as a defense).

134. *Id.* at 1135 (footnote omitted).

135. *See id.* at 1137 ("The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. And it cannot profit from the statutory version of that doctrine in [21 U.S.C.] § 881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense under § 881(a)(6).").

136. H.R. 3347 § 13 (amending 21 U.S.C. § 881(a)).

137. *Id.* § 14 (amending 18 U.S.C. § 981(e)(2); 19 U.S.C. § 1616(c)(1)(B)(ii); 21 U.S.C. § 881(e)(1)(A)).

138. *Id.* § 17 (amending 21 U.S.C. § 881(e)(3); 31 U.S.C. § 9703(b)(4)).

education, prevention, and treatment programs.[139] Congressman Hyde certainly believes that law enforcement comes first. Successful treatment for those not wholly committed to recovery is a blue moon proposition.

Furthermore, H.R. 3347 prohibits paying an informant more than $250,000 a year.[140] This provision is apparently aimed at airport personnel who report suspicious characters and typically keep ten percent of any resulting take.[141] This is a useful practice and Congressman Hyde sees no need to curtail it. In fact, airlines could possibly give out frequent-flier miles to passengers who provide good tips. However, he is concerned about the wide use of criminals as informants.

H.R. 3347 also requires that records be kept concerning property transferred, especially "the circumstances of the investigation and seizure of the forfeiture, including the race, national origin, gender, and age of those with an interest in the property prior to seizure."[142]

In addition, H.R. 3347 requires that forfeiture proceedings be instituted within one year after seizure, and that interest be paid on seized cash or negotiable instruments that are eventually returned.[143] Good ideas, except we might want to go further. There is already a provision that requires the government to file its complaint for forfeiture within sixty days after a claim and cost bond have been filed challenging the seizure of a conveyance under the anti-drug statute.[144] Why not extend this provision to all forfeiture proceedings?

H.R. 3347 also provides that "[n]o action to forfeit property shall be brought more than 1 year from the date of the offense that is the basis for

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139. *Id.* § 15 (amending 28 U.S.C. § 524(c)).

140. *Id.* § 16 (amending 18 U.S.C. § 1963(g)(3); 19 U.S.C. § 1619(c); 21 U.S.C. § 853(i)(3); 28 U.S.C. § 524(c)(2); 31 U.S.C. § 9703(b)).

141. *See* Andrew Schneider & Mary P. Flaherty, *Crime Pays Big for Informants in Forfeitures*, PITT. PRESS, Aug. 14, 1991, at A1 (reporting that in 1990, the U.S. Department of Justice paid $24 million to informants).

142. H.R. 3347 § 18 (amending 19 U.S.C. § 1616a(c)).

143. *Id.* § 19 (amending 28 U.S.C. § 2465).

144. The statute provides:

> Not later than 60 days after a claim and cost bond have been filed under section 1608 of title 19 regarding a conveyance seized for a drug-related offense, the Attorney General shall file a complaint for forfeiture in the appropriate district court, except that the court may extend the period for filing for good cause shown or an agreement of the parties. If the Attorney General does not file a complaint as specified in the preceding sentence, the court shall order the return of the conveyance to the owner and the forfeiture may not take place.

21 U.S.C. § 888(c) (Supp. V 1993).

the forfeiture . . . ."[145] Current customs law sets out a statute of limitations such that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property . . . shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered."[146] Congressman Hyde also has no problem with cutting the time period down to a year, but one year from the discovery of the offense, not one year from the time of the offense. Otherwise, a loophole is created for those criminals crafty enough to conceal their activities.

Finally, H.R. 3347 requires that administrative and contracting expenses not exceed ten percent of the amount paid from the Department of Justice Assets Forfeiture Fund,[147] and that the Attorney General file a yearly report to Congress of these expenses.[148] Furthermore, the bill requires that the Attorney General offer "low value real property" for sale "for nominal consideration to tax-exempt organizations that provide direct services furthering community-based crime control, housing, or education efforts" in the area.[149] Fine.

Well, I imagine the Justice and Treasury departments would be happier with Congressman Hyde's bill than with Congressman Conyers'. Congressman Hyde would leave civil forfeiture an effective and lucrative program while again allowing us in government to look ourselves in the mirror.

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145. H.R. 3347 § 7 (amending 19 U.S.C. § 1610).

146. 19 U.S.C. § 1621 (Supp. V 1993). The customs law contains additional time requirements. *See, e.g.*, 19 U.S.C. § 1604 (1988) (requiring the Attorney General "forthwith to cause the proper proceedings to be commenced" when it is probable that a forfeiture has been incurred). However, the Supreme Court has ruled that because Congress failed "to specify a consequence for noncompliance with the timing requirements of 19 U.S.C. §§ 1602-1604 . . . the responsible officials administering the Act [impliedly] have discretion to determine what disciplinary measures are appropriate . . . . [T]he courts should not dismiss a forfeiture action for noncompliance." United States v. James Daniel Good Real Property, 114 S. Ct. 492, 506-07 (1993).

147. H.R. 3347 § 20 (amending 28 U.S.C. § 524(c)).

148. *Id.* § 21 (amending 28 U.S.C. § 524(c)(6)).

149. *Id.* § 22 (amending 21 U.S.C. § 881(e)).