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# In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma

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# In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma

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## I. INTRODUCTION

Drug trafficking is one of the most serious offenses in our criminal justice system. Accordingly, the capture and conviction of participants in drug trafficking organizations is of great concern to society. However, society's interest does not end with a successful conviction. It continues on to the effectiveness of the sanction(s) imposed upon the criminal in terms of deterrence, punishment, rehabilitation, and incapacitation. The drug trafficking laws produce unique problems at the post-conviction stage because the huge profits resulting from these enterprises tend to dampen the prospects for general deterrence or rehabilitation. The natural consequence of this phenomenon is a call by the general public for sanctions which would specifically deter and/or incapacitate an offender from engaging in the illegal drug trade again.

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† This article's proposal, the Comprehensive Drug Penalty Act of 1984, was passed in the form of a compromise version on October 12, 1984. The final draft included RICO coverage, but did not include substitute asset coverage. The bill was adopted in the Continuing Budget Resolution of 1985, Title II of H.J. RES. 648.

Criminal forfeiture sanctions would seem to be the appropriate remedy. However, although arguably effective in achieving specific deterrence or incapacitation goals, such sanctions also raise constitutional and historical problems. As United States Circuit Court of Appeals Judge Politz observed in a recent dissenting opinion:

> Just as nature abhors a vacuum, historically our society has abhored forfeitures . . . [T]he framers of the Constitution demonstrated their repudiation of the harsh English tradition of criminal forfeiture, and our very first Congress forbade the forfeiture of an estate because of a criminal conviction. Further, a forfeiture with an *in personam* application, as we have before us, is to be most charily assessed.[1]

Judge Politz's allusion to a constitutional prohibition is to article III, section 3, clause 2 of the United States Constitution which states: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood or Forfeiture except during the Life of the Person attainted."[2] The founding fathers, therefore, limited criminal forfeiture as punishment for treason to the life estate of the defendant's assets. As a result, it has been argued that because forfeiture of estate, the ultimate in personam forfeiture, is prohibited for treason, it is also prohibited for lesser crimes.[3] The first Congress, in fact, specifically so provided when it enacted a statute providing: "No conviction or judgment . . . shall work corruption of blood or any forfeiture of estate."[4]

This article will "charily" explore the legal and historical ramifications of in personam forfeiture, discuss how this relates to drug trafficking and, with due respect, propose an expansion of this concept in federal drug felonies.

## II. NEED

The dramatic increase in drug trafficking[5] and the tremendous profits associated with it[6] indicate that current drug laws do not deter and crime *does* pay. Drug dealers, who accumulate huge fortunes as a result of illegal drug activities, frequently perceive the financial penalties for drug dealing only as a cost of doing business. Specifically, the retail value of illicit drugs sold in 1979

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1. United States v. Martino, 681 F.2d 952, 962 (5th Cir. 1982) (Politz, J., dissenting).

2. U.S. CONST. art. III, § 3, cl. 2.

3. United States v. Grande, 620 F.2d 1026, 1037-38 (4th Cir. 1980).

4. *See* Act of April 30, 1790, 1st Cong., 2d Sess., ch. 9, § 24, 1 Stat. 117 (codified as amended at 18 U.S.C. § 3563 (1982)).

5. *See generally* THE NAT'L NARCOTICS INTELLIGENCE CONSUMERS COMM'N, NARCOTICS INTELLIGENCE ESTIMATE (1983).

6. *See infra* note 7 and accompanying text.

was estimated to be between $55 and $73 billion,[7] whereas under current federal law the maximum fine for many serious drug offenses is only $25,000.[8] Furthermore, the drug traffickers are in turn using these profits to subvert the system. The illegal revenues, roughly $60 billion annually, adversely affect the United States banking system and the nation's economy.[9] For example, these revenues are being utilized by criminal organizations to invest in legitimate business and real estate. Estimates indicate that over 700 lawful United States businesses have been infiltrated by organized crime. In Florida alone estimated real estate investments resulting from narcotics trafficking totalled $1 billion in 1977 and 1978.[10]

Against this background, present federal forfeiture procedures are tested and found wanting.[11] The following chart outlines the extent to which, in practical terms, the present forfeiture procedures were effective in 1979.

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7. ASSET FOREITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING, April 10, 1981, GGD-81-S1, p.1-2 [hereinafter cited as ASSET FORFEITURE REPORT]. *See also* Statement of Edward Dennis, Chief, Narcotics Section, Criminal Division, U.S. Dep't of Justice, before the Subcomm. on Crime of the House Comm. on the Judiciary, U.S. House of Reps., 97th Cong., Sept. 16, 1981, Serial No. 126 at 67.

8. 21 U.S.C. § 841(b)(1)(A) (1982) (manufacture or distribution of narcotic drugs punishable by a term of imprisonment of not more than 15 years and/or a fine of $25,000). For individuals with one or more prior convictions under any federal drug law, the penalties increase to a maximum of 30 years imprisonment, $50,000 fine, or both. *Id.*

9. ASSET FORFEITURE REPORT, *supra* note 7, at 2.

10. *Id.*

11. *See id.* at 16.

NARCOTICS-RELATED SEIZURES COMPARED TO ESTIMATED ILLICIT NARCOTIC INCOME[12]

| | 1979 |
|---|---|
| NARCOTICS INCOME RETAINED BY ILLEGAL U.S. DISTRIBUTORS | $ 54,275,000,000 |
| CIVIL SEIZURES | |
| DEA | |
| Vehicles | $ 3,500,000 |
| Aircraft | $ 800,000 |
| Boats | $ 600,000 |
| Currency | $ 5,500,000 |
| Total DEA Civil | $10,400,000 |
| CUSTOMS | |
| Vehicles | $ 5,300,000 |
| Aircraft | $ 4,300,000 |
| Boats | $12,800,000 |
| Currency | $ 100,000 |
| Total Customs Civil | $22,500,000 |
| Total Civil Seizures | $32,900,000 |
| CRIMINAL FORFEITURES | |
| DEA | |
| Real Estate | $ 300,000 |
| Total Criminal Forfeitures | $ 300,000 |
| TOTAL CIVIL SEIZURES AND CRIMINAL FORFEITURES | $33,200,000 |
| SEIZURES AS A PERCENT OF INCOME | 0.06% |

Convincing testimony concerning the enormity of the drug trafficking problem and the inadequacies of present prosecution tools was presented in *United States v. Meinster,*[13] a well publicized prosecution dubbed the "Black Tuna" case by the media. Eight defendants were convicted of racketeering[14] and three were convicted in a continuing criminal enterprise.[15] The statutes that the above-mentioned defendants were convicted under are the only existing laws with "in personam" forfeiture provisions. The criminal organization in *Meinster* may have handled over one million pounds of marijuana, with gross receipts calculated at a minimum of $220 million over a year and a half.[16] According to the prosecutor, the investigation did not penetrate the organization's fiscal operation (how the money flowed and where the profits are), but

12. *Forfeiture of Profits on Narcotics Traffickers, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 96th Cong., 2d Sess. 25 (1980) (statement of William J. Anderson, Director, General Government Division, General Accounting Office).

13. 664 F.2d 971 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136 (1982). *See also Forfeiture of Profits on Narcotics Traffickers, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 96th Cong., 2d Sess. 57-60 (1980) (prepared statement of Dana Biehl, Attorney, Department of Justice).

14. 664 F.2d at 985. *See also* 18 U.S.C. § 1962 (1982) (racketeering statute).

15. 664 F.2d at 985. *See also* 21 U.S.C. § 848 (1982) (continuing criminal enterprise statute).

16. *Forfeiture of Profits on Narcotics Traffickers, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 96th Cong., 2d Sess. 59 (1980) (prepared statement of Dana Biehl, Attorney, Department of Justice).

the evidence showed that numerous bank deposits going as high as one-half million dollars were made.[17] Nevertheless, forfeiture to the federal government in this case amounted to a mere $16,000 under the existing criminal forfeiture procedures.[18] Presumably, the remaining uncovered "profits" are financing other "Black Tuna" drug operations.

There are numerous factors that adversely affect the pursuit of forfeiture sanctions in cases like "Black Tuna." The lack of leadership and management capacity in the federal government to pursue the complex tracing of drug assets are examples. However, substantial deficiencies in the two existing in personam criminal statutes themselves also account for many of the problems outlined in the "Black Tuna" and other forfeiture cases.

## III. In Personam and In Rem Forfeitures

It is important to first differentiate between the types of forfeiture. In personam, or criminal, forfeiture is based on a determination of a defendant's personal guilt, and, as a result, the government has a right to certain property possessed by the offender.[19] On the other hand, in rem, or civil, forfeiture is based on the common law fiction that the subject of the forfeiture itself is guilty of wrongdoing; therefore, the property may be held as forfeited.[20] In the words of a medieval English writer, "[w]here a man killeth another with the sword of John at Stile, the sword shall be forfeit[ed] as deodand, and yet no default is in the owner."[21] Under this theory, the legal action is against the property which is considered tainted by the acts which gave rise to civil forfeiture.[22] This in rem taint theory is described as taking effect immediately upon the commission of an illegal act.[23] The right to the property vests in the government at that moment, and

17. *Id.* at 58-60.

18. *Id.* at 57.

19. Criminal forfeiture has been defined as a "post-conviction divestiture of the defendant's property or financial interest that has an association with his criminal activities." Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking,* 32 Am. U. L. Rev. 227, 229, 232 (1982) [hereinafter cited as *Forfeiture*].

20. United States v. United States Coin and Currency, 401 U.S. 715, 719 (1971).

21. *Id.* at 719-20 (quoting O. Holmes, The Common Law 23 (M. Howe ed. 1963)).

22. *See Forfeiture, supra* note 19, at 232-33.

23. *Id.* at 234.

when forfeiture is sought, the condemnation relates back to that time and avoids all intermediate sales and alienations, even as to purchasers in good faith.[24]

The distinction between "in personam" and "in rem" forfeiture was made early in our history by Justice Story in *The Palmyra.*[25]

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgement of conviction. . . . In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem,* cognizable on the revenue side of the Exchequer. The thing [in in rem] is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offense be *malum prohibitum*; or *malum in se.*[26]

The in rem forfeiture statutes in use today are an outgrowth of similar statutes applied by common law courts in the American colonies prior to the adoption of the Constitution.[27] These forfeiture provisions were incorporated in customs, revenue, and navigation laws.[28] Soon after the Constitution was adopted, a number of offenses, including, for example, those pertaining to the slave trade, were made subject to in rem forfeiture under federal law.[29] Enactment of forfeiture statutes under state and federal law has continued and now encompasses virtually any type of property that might be used in the conduct of criminal activity.[30]

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24. *See* United States v. Stowell, 133 U.S. 1, 13-14 (1880). The vitality of *Stowell* was recognized by the Supreme Court as recently as Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685 (1974).

25. 25 U.S. (12 Wheat.) 1 (1827).

26. *Id.* at 14.

27. C.J. Hendry Co. v. Moore, 318 U.S. 133, 137-45 (1943).

28. *Id.* at 145-48.

29. Act of July 31, 1789, 1st Cong., 1st Sess., ch. 5, §§ 12, 36, 1 Stat. 39, 47. *See also* Act of August 4, 1790, 1st Cong., 2d Sess., ch. 35, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176; Act of March 22, 1794, 3d Cong., 1st Sess., ch. 11, § 1, 1 Stat. 347; Act of March 2, 1807, 7th Cong., 2d Sess., ch. 22, § 2, 2 Stat. 426.

30. *See* 15 U.S.C. § 11 (1982) (forfeiture of property acquired in violation of anti-trust laws); 15 U.S.C. § 1177 (1982) (forfeiture of property used in connection with illegal gambling); 16 U.S.C. §§ 65, 117(d), 128, 171, 256c, 408l (1982) (forfeiture of guns and other equipment used unlawfully in national parks); 18 U.S.C. § 924 (1982) (forfeiture of firearms used illegally); 18 U.S.C. § 1082 (1982) (forfeiture of property used in connection with illegal gambling); 18 U.S.C. § 3617(d) (1982) (forfeiture of vehicles and aircraft seized for a violation of liquor laws); 18 U.S.C. §§ 3618-3619 (1982) (forfeiture of conveyances used to introduce intoxicants into Indian territories); 19 U.S.C. § 1306 (1982) (forfeiture of unwholesome imported meat); 19 U.S.C. § 1453 (1982) (forfeiture of property seized in violation of customs laws); 21 U.S.C. § 334 (1982) (forfeiture of adulterated food); 31 U.S.C. § 490 (forfeiture of funds illegally withheld by public official); 49 U.S.C. § 782 (1982) (forfeiture of vessels, vehicles and aircraft used to transport contraband).

## IV. History of In Personam Forfeitures

As distinguished from the commonly used and accepted in rem forfeiture process, the general antipathy in our law for in personam forfeiture relates primarily to forfeiture of estate, which was the ultimate penalty of this kind at common law. Circuit Judge Winter, in *United States v. Grande,*[31] noted that under early English law the complete forfeiture of all real and personal property followed as a consequence of conviction for a felony or treason. This was consistent with the basic premise of feudal society that the King, who was ultimately the owner of all land and property, would regain all land and property if there was a breach of faith, such as a conviction for murder.[32] As Judge Winter noted, "when convicted of treason or a felony, the defendants' 'blood was corrupted' so that nothing could pass by inheritance through his line."[33] As the feudal system evolved, the application of forfeiture of estate and corruption of blood offenses narrowed.[34] Although forfeiture of estate was applied in the American colonies occasionally,[35] the use of forfeiture of estate and corruption of blood for treason was banned by the Constitution in 1787.[36] Furthermore, in personam forfeiture is prohibited for all federal convictions and judgments,[37] and many state constitutions have forbidden forfeiture of estate.[38]

Prior to 1970, the only federal law with in personam forfeiture was the Confiscation Act of 1862[39] which authorized the President

31. 620 F.2d 1026, 1038-39 (4th Cir. 1980).

32. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty,* 46 TEMP. L.Q. 169, 183 (1973).

33. 620 F.2d at 1038.

34. *See Forfeiture, supra* note 19, at 232.

35. *Id.* at 233.

36. *See* U.S. CONST. art. III, § 3, cl. 2.

37. 18 U.S.C. § 3563 (1982).

38. ALA. CONST. art. I, § 19; ALASKA CONST. art. I, § 15; ARIZ. CONST. art. II, § 16; ARK. CONST. art. II, § 17; COLO. CONST. art. II, § 9; CONN. CONST. art. IX, § 4 (treason conviction may not result in any forfeiture of estate); DEL. CONST. art. I, § 15; FLA. CONST. art. I, § 23; GA. CONST. § 2-203; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 30; KAN. CONST. Bill of Rights, § 12; KY. CONST. Bill of Rights, § 20; ME. CONST. art. I, § 11; MD. DECLARATION OF RIGHTS art. 27; MINN. CONST. art. I, § 11; MO. CONST. art. I, § 30; NEB. CONST. art. I, § 15; N.C. CONST. art. I, § 29 (for forfeiture of estate as consequence of conviction or attainder for treason); OHIO CONST. art. I, § 12; OKLA. CONST. art. II, § 15; ORE. CONST. art. I, § 25; PA. CONST. art. I, § 19; S.C. CONST. art. I, § 4; TENN. CONST. art. I, § 12; TEX. CONST. art. I, § 21; WASH. CONST. art. I, § 15; W. VA. CONST. art. III, § 18; WIS. CONST. art. I, § 12.

39. Confiscation Act, 37th Cong., 2d Sess., ch. 195, § 5, 12 Stat. 589 (1862).

to seize the life estate of Confederate soldiers. This statute was upheld by the Supreme Court in *Bigelow v. Forest*[40] and *Miller v. United States.*[41]

In 1970, however, an in personam forfeiture procedure was included both in the Racketeer Influenced and Corrupt Organizations statute (hereinafter RICO),[42] and the Continuing Criminal Enterprise Statute (hereafter CCE).[43] Under RICO, if convicted of racketeering, the defendant forfeits all "interest" in the criminal "enterprise."[44] CCE provides that any defendant convicted under that statute specifically forfeits "profits" derived from the criminal enterprise.[45]

The justification for these extraordinary sanctions in RICO, also applicable to CCE, was stated in *United States v. Martino.*[46] The legislative history is "replete" with references to a broad "hit them where they hurt" philosophy.[47] The legislative intent to apply forfeiture of assets as both a penalty and a deterrent is clear. For example, Senator Robert Byrd, a member of the Senate Judiciary Committee, anticipated the deterrent effect of the broad forfeiture sanctions when he stated, "[b]y removing its leaders from positions of ownership, by preventing them and their associates from regaining control, *and by visiting heavy economic sanctions on their predatory business practices* this legislation should prove to be a might[y] deterrent to any further expansion of organized crime's economic power."[48]

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40. 76 U.S. (9 Wall.) 339 (1869).

41. 78 U.S. (11 Wall.) 268 (1870).

42. Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-1968 (1982)). The penalty section of RICO provides in part:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1982).

43. Pub. L. No. 91-513, 84 Stat. 1266 (codified at 21 U.S.C. § 848 (1982)). The penalty section of CCE provides in part:

> Any person who is convicted under paragraph 1 of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise; and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

21 U.S.C. § 848(a)(2) (1982).

44. 18 U.S.C. § 1963(a) (1982).

45. 21 U.S.C. § 848(a)(2) (1982).

46. 681 F.2d 952, 957 (1982).

47. *Id.* at 957 n.17.

48. 116 CONG. REC. S607 (daily ed. Jan. 21, 1970) (remarks of Sen. Byrd) (emphasis in original).

When enacted by Congress, these provisions were perceived to be a bold and innovative approach to attack the economic base of criminal activity, including narcotics trafficking.[49] In fact, however, the success of in personam forfeitures under RICO and CCE has been minimal. First, the percentage of illicit narcotic income forfeited is negligible.[50] Second, from the enactment of these statutes in 1970 until March 30, 1980, only ninety-eight prosecutions were brought for drug violations under either of these statutes.[51] There are a number of reasons, many administrative in nature, why the forfeiture provisions in RICO and CCE have not been as effective as anticipated in attacking the economic base of drug trafficking.[52] Non-administrative problems which continue to limit forfeiture procedures and their effectiveness include: first, statutory limitations on the scope of property to be forfeited; second, the degree of "nexus" which must be shown between the illegal activity and the property to be forfeited; and third, the lack of existing statutory tools to prevent concealment or transfer of property involved in a criminal transaction to a third person before forfeiture can be accomplished.[53] Some progress, however,

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49. *See* U.S. DEP'T OF JUSTICE, CRIMINAL FORFEITURE UNDER THE RICO AND CONTINUING CRIMINAL ENTERPRISE STATUTES (1980).

50. *See supra* note 12 and accompanying text.

51. ASSET FORFEITURE REPORT, *supra* note 7, at 11. *Total Narcotic Cases Charged Under RICO and CCE (For the period 1970 through March 1980)* (note a)

| | CCE | RICO (Narcotics) | CCE and RICO Narcotics | TOTAL |
|---|---|---|---|---|
| Number of cases | 73 | 16 | 9 | 98 |
| Amount of forfeitures (thousands)[a] | $659 | $1,305 | (b) | $1,964 |

a. The litigation status of forfeiture cases indicated as of March 1980 are updated through September 1980.

b. Forfeitures in this case totalled $187,000 and are included in the RICO and CCE totals as follows: $65,000-CCE, $122,000-RICO.

52. *Id.* at 16-29.

53. *Id.* at 30-42. In the past, prosecutors faced another major problem with the RICO statute. It was whether the term "enterprise" as used in RICO encompassed both legitimate and illegitimate enterprises or was limited to the former. Thus, one circuit maintained some doubt as to whether a de facto criminal enterprise could be subject to a RICO prosecution. In United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), the First Circuit Court of Appeals held that such wholly criminal de facto enterprises were not subject to a RICO prosecution. The decision was contrary to numerous other circuits' positions. *See, e.g.,* United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980); United States v. Provenzano, 620 F.2d 985, 992-93 (3d Cir.), *cert. denied,* 449 U.S. 899 (1980); United States v. Whitehead, 618

has been made in correcting administrative problems in recent years.[54]

### *A. Scope of Property to be Forfeited*

RICO provides that upon conviction for racketeering in an enterprise, the defendant should forfeit to the United States any "interest he has acquired or maintained in violation of [RICO]."[55] Circuit courts generally have construed this language to mean that only interests of enterprises which violated RICO were subject to forfeiture while profits and income derived from violations of RICO were not.[56] Such an interpretation greatly hindered the effectiveness of the provision in combating illegal drug trafficking.[57] However, the United States Supreme Court, in *Russello v. United States*,[58] recently corrected this misinterpretation by holding that "interest" included profits and proceeds received from activities prohibited by RICO.

On the other hand, CCE specifically provides that profits obtained from activities prohibited by CCE are subject to forfeiture.[59] One possible weakness of this provision is an interpretation that profits equal proceeds minus costs. Such an interpretation would again greatly hamper the effectiveness of forfeiture in preventing drug trafficking and would give a prosecutor an impossible burden of proof.[60] A more realistic limitation on the scope of property subject to forfeiture under CCE is the statute itself. The forfeiture only becomes effective if the defendant carries on a series of narcotic offenses,[61] supervises, directs, or manages at least five or more persons in the course of carrying out this series of offenses,[62] and receives substantial resources by

F.2d 523, 525 n.1 (4th Cir. 1980); United States v. Aleman, 609 F.2d 298, 304-05 (7th Cir. 1979). This issue could be particularly relevant to drug trafficking enterprises which almost by definition are de facto criminal enterprises. The Supreme Court in United States v. Turkette, 452 U.S. 576 (1981), reversed the circuit court; therefore this problem has been alleviated. However, the question of what constitutes the appropriate assets of such an organization remains unanswered.

54. ASSET FORFEITURE REPORT, *supra* note 7, at 18-19.

55. 18 U.S.C. § 1963(a)(1) (1982).

56. United States v. McManigal, 708 F.2d 276, 284-85 (7th Cir. 1983); United States v. Marubeni Amer. Corp., 611 F.2d 763, 766-67 (9th Cir. 1980).

57. *See* Russello v. United States, 104 S. Ct. 296, 301 (1983).

58. *Id.*

59. 21 U.S.C. § 848(a)(2)(A) (1982).

60. In United States v. Jeffers, 532 F.2d 1101, 1117 (7th Cir. 1976), *aff'd in part*, 432 U.S. 137 (1977), the court noted the "extreme difficulty in . . . finding hard evidence of [conspiratorial or criminal] net profits."

61. 21 U.S.C. § 848(b)(2) (1982). A series of narcotic offenses requires proof of three or more related violations. *See* United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

62. 21 U.S.C. § 848(b)(2)(A) (1982).

virtue of operating the continuing criminal enterprise.[63]

### *B. Degree of Nexus Which Must be Shown Between Illegal Activity and Property to be Forfeited*

In personam forfeiture requires that there be a nexus between the illegal act and the property forfeited.[64] In general, there are four classes of property subject to forfeiture under both RICO and CCE: (1) *contraband,* goods or merchandise whose importation, exportation or possession is forbidden (these are the most commonly forfeited goods, examples being controlled substances and gambling devices); (2) *derivative contraband,* items which serve the purpose of conveying or facilitating the illegal transaction, such as cars, boats, and airplanes; (3) *direct proceeds,* such as cash received in the illegal transaction; and (4) *derivative proceeds,* property that may be unrelated to the illegal operation but which is purchased and maintained directly or indirectly with the proceeds of the illegal transactions, such as stocks or real estate investments.[65]

It is this fourth category, derivative proceeds, which has presented the most difficulty in forfeitures in drug cases. Actually, the problem is both statutory and enforcement in nature. One of the administrative deficiencies is the lack of technical expertise in the Drug Enforcement Agency in dealing with financial cases.[66] Proof of a nexus between derivative proceeds and the illegal activity usually requires extensive tracing to determine if the property is forfeitable under criminal forfeiture, however, and some of these problems can be handled statutorily.[67]

### *C. Concealment or Transfer of Assets to Third Parties*

Inability to preserve assets which might be subject to forfeiture is the third and probably most important flaw existing in in personam forfeiture procedures at the present time. The difficulty comes from the liquidity of the assets involved, particularly in drug related crimes where the defendants have developed sophis-

63. 21 U.S.C. § 848(b)(2)(B) (1982).
64. *See supra* notes 35-59 and accompanying text.
65. *See* ASSET FORFEITURE REPORT, *supra* note 7, at 2-4.
66. ASSET FORFEITURE REPORT, *supra* note 7, at 19-21.
67. For a discussion of tracing, see TRAJANOWSKI, RICO FORFEITURE: TRACING AND PROCEDURE IN TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIMES 378 (G. Blackey ed. 1980).

ticated methods of concealing the assets, laundering the profits, and then investing in clean assets.

Preserving derivative assets which might be subject to forfeiture is particularly difficult under RICO and CCE. These difficulties were expressed in a Senate Report which stated:

> Unlike civil forfeitures, in which the government's seizure of the asset occurs at or soon after the commencement of the forfeiture action, in criminal forfeitures, the assets generally remain in the custody of the defendant until the time of his conviction for the offense upon which the forfeiture is based. Only after conviction does the government seize the asset. Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.
>
> Currently the only mechanism available to the government to prevent such actions is the authority to obtain a restraining order, and this statutory authority is limited to the post-indictment period. Thus, even if the government is aware that a person is disposing of his property in anticipation of a filing of criminal changes [sic] against him, it has no specific authority under the RICO or CCE statutes to obtain an appropriate protective order. Furthermore, even if the government is able to obtain a restraining order, should the defendant choose to defy it, he can effectively prevent the forfeiture of his property and face only the possibility of contempt sanctions for his defiance of the court's order. The important economic impact of imposing the sanction of forfeiture against the defendant is thus lost.[68]

## V. Comprehensive Drug Penalty Act of 1984—A Proposed Solution

Based on these demonstrated weaknesses in current forfeiture laws and a desire to attack the economic base of drug trafficking, Congress is considering the Comprehensive Drug Penalty Act of 1984 [CDPA].[69] CDPA was designed to increase the effectiveness of the criminal forfeiture provisions under federal procedures by addressing the three areas of weakness previously outlined.[70]

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68. S. Rep. No. 97-520, 97th Cong., 2d Sess. 4 (1982).

69. H.R. 4901, 98th Cong., 2d Sess. (1984). The same piece of legislation was enacted previously in 1982 by the 97th Congress (H.R. 7140 and S. 2572). A modified version of H.R. 7140 was included as Title I of an anti-crime package, H.R. 3963, which passed both Houses of Congress. The bill, however, was pocket vetoed by President Reagan on January 14, 1983. Memorandum of Disapproval, 19 Weekly Comp. Pres. Doc. 47 (Jan. 14, 1983). President Reagan's failure to sign H.R. 3963 was unrelated to the Title I provisions concerning forfeiture. In fact, the President stated that "[w]hile its provisions on forfeiture of criminal assets and profits fall short of what the Administration proposed, they are clearly desirable. Had they been presented to me as a separate measure, I would have been pleased to give my approval." *Id.*

70. *See supra* notes 53, 55-68 and accompanying text. CDPA, in fact, goes considerably beyond the problem of criminal forfeiture.

First, CDPA substantially increases maximum permissible criminal fines in drug cases (generally tenfold) and establishes a new alternative fine concept under which drug offenders can be fined up to twice their gross profits or proceeds where

### *A. Scope of Property to be Forfeited*

Regarding the scope of property which can be forfeited under the new statute, CDPA states:

> Any person who is convicted of a felony under this title of title III (the Controlled Substances Act)[71] shall forfeit to the United States such person's interest in—
>
> (1) any property constituting or derived from gross profits or other proceeds obtained as a result of such violation;
>
> (2) any property used, or intended to be used, to commit such violation; and
>
> (3) in the case of a person convicted under section 408 of this title [CCE],[72] in addition to the property described in paragraphs (1) and (2), any interest in, claim against, or property or contractual right of any kind affording a source of control over, the continuing criminal

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the alternative fine would be greater than that specified in the crime itself. H.R. 4901, 98th Cong., 2d Sess. § 104 (1984).

Second, it amends the present civil forfeiture law, 21 U.S.C. § 881 (1982), to permit the civil forfeiture of land and buildings used, or intended to be used, for holding or storage of controlled substances when such use constitutes a felony. H.R. 4901, 98th Cong., 2d Sess. § 102 (1984). Current law is unclear as to whether warehouses or other buildings can be forfeited.

Third, CDPA changes certain venue authority to allow the Justice Department to bring civil forfeiture actions in the district where the defendant is found or where the criminal prosecution is brought. *Id.*

Fourth, it sets aside up to $10 million per year in fiscal years 1985 and 1986 from forfeiture dispositions into Department of Justice and Customs revolving funds to be used for drug law enforcement purposes. H.R. 4901, 98th Cong., 2d Sess. §§ 108, 209 (1984).

Fifth, it outlines authority for courts to restrain the transfer of property which might be subject to forfeiture and allows, under certain circumstances, the seizure of such property in order to insure its availability for a forfeiture proceeding. Remission and mitigation provisions are also provided in order to protect the interest of innocent property owners. It also details procedures for allowing temporary restraining orders in ex parte hearings under extraordinary circumstances. *Id.* at § 104.

CDPA also contains significant administrative reforms in Title II dealing with the Customs Service. *Id.* at §§ 201-214. This is intended to expeditiously alleviate some of the egregious administrative aspects of forfeiture procedures. *See* U.S. GENERAL ACCOUNTING OFFICE, BETTER CARE AND DISPOSAL OF SEIZED CARS, BOATS AND PLANES SHOULD SAVE MONEY AND BENEFIT LAW ENFORCEMENT (1983). The essence of Title II is to: first, increase the scope of what the Customs Service could "administratively forfeit" (essentially a default judgment process in their civil forfeiture procedure) from $10,000 to $100,000, with no dollar limit in cases involving a conveyance of contraband in default situations; second, set up a "Customs Forfeiture Fund;" third, allow the Customs Service to discontinue forfeiture on property in favor of similar proceedings by state and local agencies; and fourth, increase certain Customs' law enforcement authority. H.R. 4901, 98th Cong., 2d Sess. §§ 201-214.

71. 21 U.S.C. §§ 801-969 (1982).

72. 21 U.S.C. § 848 (1982). *See supra* notes 43, 45 and accompanying text.

enterprise.[73]

Thus, criminal forfeiture is expanded to all "gross profits or other proceeds" for *all* federal drug felonies. Therefore, CDPA makes clear that the scope of the property is broad as distinguished from the present "profits" in CCE.[74] Furthermore, CDPA expands criminal forfeiture to approximately twenty-five percent of the federal criminal caseload.[75]

### *B. Degree of Nexus Which Must be Shown*

CDPA sets forth procedures for a "permissive" presumption that property obtained by drug traffickers during the time period of their illegal acts is subject to forfeiture.[76] This section draws upon the practice in criminal tax evasion cases of using the defendants' net worth to establish the government's case[77] and cre-

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73. H.R. 4901, 98th Cong., 2d Sess. § 104 (1984).

74. *See supra* notes 59-63 and accompanying text.

75. The felony offenses under Titles I and III of the Comprehensive Drug Abuse Prevention and Control Act are violations of 21 U.S.C. § 841 (1982) (except first offenses involving Schedule V substances and distribution of small amounts of marijuana for no remuneration); 21 U.S.C. § 842 (1982) (repeat violations of certain more serious regulatory offenses); 21 U.S.C. § 843 (1982) (knowing and intentional violations concerning fraud and offenses involving counterfeit substance, and the use of communications facilities in committing felonies under the Act); 21 U.S.C. § 844(a) (1982) (possession); 21 U.S.C. § 845 (1982) (special penalties for distribution to persons under 21); 21 U.S.C. § 846 (1982) (attempt and conspiracy where the underlying offense was a felony); 21 U.S.C. § 848 (1982) (continuing criminal enterprise); 21 U.S.C. § 952 (1982) (importation of controlled substances); 21 U.S.C. § 954 (1982) (knowing or intentional transshipment and in-transit shipment of controlled substances without the approval of the Attorney General); 21 U.S.C. § 955a (1982) (manufacture, distribution or possession with intent to manufacture or distribute, or possession with intent to manufacture or distribute controlled substances on board vessels); 21 U.S.C. § 955c (1982) (offenses and punishment for attempt or conspiracy to commit a violation of 21 U.S.C. § 955a (1982)); 21 U.S.C. § 957 (1982) (export and import by certain non-registrants); 21 U.S.C. § 959 (1982) (manufacture or distribution for purposes of unlawful importation); 21 U.S.C. § 963 (1982) (attempt or conspiracy to commit felony importation offenses of Title II of the Act).

76. H.R. 4901, 98th Cong., 2d Sess. § 104 (1984). CDPA states:

> There may be a rebuttable presumption at trial that any property of a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—
>
> (1) such property was acquired by such person during the offense or within a reasonable time after the offense; and
>
> (2) there was no likely source for such property other than the violation of this title or title III.

*Id.*

77. For a discussion of the net worth method of proof in tax cases, see Holland v. United States, 348 U.S. 121, 125-29 (1954).

> In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year dur-

ates a presumption of forfeitability once the government has established, by a preponderance of the evidence, that two circumstances exist: (1) the defendant acquired the property during the violation period or within a reasonable time thereafter; and (2) there is no likely source for acquisition of the property other than the criminal activity.[78] The consequences of this presumption are straightforward. Once the government has met its burden of proof with respect to the two circumstances, the trier of fact is permitted to find that property is subject to forfeiture. As such, CDPA follows the procedures for a permissive (rebuttable) presumption outlined in *Tot v. United States,*[79] *Leary v. United States,*[80] and *Ulster County Court v. Allen*[81] and should alleviate some of the problems in showing a direct nexus between the illegal activity and the derivative proceeds.[82]

### *C. Concealment or Transfer of Assets to Third Parties*

CDPA outlines the general authority of courts to restrain the transfer of property which might be subject to forfeiture in order to ensure its availability for a forfeiture proceeding.[83] This is iden-

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ing the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct, the likely effect of which would be to mislead or to conceal."

*Id.* at 125 (quoting Spies v. United States, 317 U.S. 492, 499 (1942)).

78. H.R. 4901, 98th Cong., 2d Sess. § 104 (1984).

79. 319 U.S. 463, 467 (1943) (statutory presumption cannot be upheld if there is no rational connection between fact proved and ultimate fact presumed).

80. 395 U.S. 6, 36 (1969) (criminal statutory presumption must be "more likely than not" to flow from the proved fact on which it is made to depend).

81. 442 U.S. 140, 165-66 (1978) (application of statutory presumption requires a " 'rational connection' between the basic facts the prosecution proved").

82. *See supra* notes 65-67 and accompanying text.

83. H.R. 4901, 98th Cong., 2d Sess. § 104 (1984) states:

> In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

*Id.*

tical to the present RICO[84] language and similar to CCE[85] procedures.

The courts have interpreted this language to authorize restraining orders prior to conviction, even an initial ex parte restraining order.[86] An issue has arisen, however, as to the standard by which these restraining orders will be judged. The Ninth Circuit Court of Appeals has stated, "[i]n the absence of specific language to the contrary, the district court must apply the standards of Rule 65 of the Federal Rules of Civil Procedure which requires [sic] an immediate hearing whenever a temporary restraining order has been granted ex parte."[87] The government has vigorously contested the court's contention that a full eviden-

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84. 18 U.S.C. § 1963(b) (1982).

85. 21 U.S.C. § 848(d) (1982) states:

> The district courts of the United States . . . shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

86. *See* United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (upheld ex parte restraining order in RICO prosecution providing defendant was entitled to prompt hearing once restraining order entered); United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982), *vacated and remanded*, 104 S. Ct. 3575 (1984) (ordered dissolution of ex parte restraining order where CCE defendants had not been given hearing after entry of order).

87. *Crozier*, 674 F.2d at 1297. Rule 65 states in part:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be granted. Every temporary restraining order granted without notice . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

FED. R. CIV. P. 65(b).

tiary hearing is needed for such a restraining order[88] and maintains that such a requirement would require a premature disclosure of certain witnesses,[89] as well as preclude hearsay evidence.[90] The Ninth Circuit Court of Appeals, however, also stated in *United States v. Spilotro*:

> It is not necessary that the hearing duplicate the pending criminal trial; the prosecution need only demonstrate the *probability* that the jury will convict the defendant and find the properties subject to forfeiture. The prosecution must, however, produce sufficient evidence to permit the District Court to independently assess whether the burden has been met; it may not rely simply upon the indictment and its own assessment of the strength of its case.[91]

Another issue regarding restraining orders is their effect on a defendant's right to counsel. In *United States v. Meinster,*[92] the court approved a post-indictment transfer of defendants' assets to their retained counsel in satisfaction of unpaid attorney's fees, thereby depleting by a substantial amount the potentially forfeitable assets.[93] In *United States v. Bello,*[94] however, the court refused to dissolve a restraining order over the defendant's argument that the assets were needed to exercise his sixth amendment right to counsel. The district court held that such refusal did not deprive the defendant of counsel but only of an attorney of his choice, because he was entitled to court appointed counsel.[95]

CDPA also establishes a procedure for restraining property even before indictment or information and details procedures for allowing ex parte hearings under extraordinary circumstances.[96] The ex parte pre-indictment or information procedures would follow severe restrictions similar to Rule 65(b) of the Federal Rules

88. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit at 11, United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982), *vacated and remanded*, 104 S. Ct. 3575 (1984).

89. *Id.* at 12.

90. *Id.* at 15.

91. 680 F.2d at 618 (emphasis in original) (footnote omitted).

92. 664 F.2d 971 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136 (1982).

93. *Forfeiture of Profits on Narcotics Traffickers: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 96th Cong., 2d Sess. 59 (1980) (prepared statement of Dana Biehl, Attorney, Department of Justice).

94. 470 F. Supp. 723, 725 (S.D. Cal. 1979).

95. *Id.*

96. H.R. 4901, 98th Cong., 2d Sess. § 104 (1984) states:

> (1) In addition to any order authorized by subsection (i) [*see supra* note 83], the court may, before the filing of an indictment or information,

of Civil Procedure[97] and would normally be limited to ten days.[98] This process is designed to protect the forfeiture sanction in situations where the property to be forfeited may be easily moved, concealed, or disposed of in the relatively short period of time between the giving of notice and the holding of an adversary hearing concerning the entry of a restraining order.

The permissibility of the postponement of notice and hearing until after the initial entry of a restraining order in a criminal forfeiture case has not been squarely considered by the courts. However, a similar issue was addressed with respect to the more intrusive action of seizure in the context of civil forfeiture. In *Calero-Toledo v. Pearson Yacht Leasing Company,*[99] a yacht carrying marijuana was seized pursuant to a Puerto Rican civil forfeiture statute, without prior notice or adversary hearing. The Supreme Court held that immediate seizure of a property interest, without an opportunity for a prior hearing, was permitted in certain circumstances where: first, ex parte seizure served a significant governmental purpose, i.e., preventing continued criminal use of the property and enforcing criminal sanctions; and second, the property could easily be removed, concealed, or destroyed if advance warning of the seizure was given.[100] The Court went on to state that, unlike the situation in *Fuentes v. Shevin,*[101] a case relied on by the lower courts in holding that the seizure was unconstitutional, the seizure was not initiated by self-interested pri-

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enter an order restraining the transfer of property that is or may be subject to forfeiture.

(2) An order shall be entered under this subsection if the court determines that—

(A) there is a substantial probability that the United States will prevail on the issue of forfeiture;

(B) there is substantial probability that failure to enter the order will result in unavailability of the property for forfeiture; and

(C) the need to assure availability of the property outweighs the hardship on any person against whom the order is to be entered.

(3)(A) Except as provided in subparagraph (B), an order under this subsection shall be entered only after notice to persons appearing to have an interest in the property and opportunity for a hearing.

(B) A temporary order under this subsection may be entered upon application of the United States, without notice or opportunity for a hearing, if an information or indictment has not been filed and the United States demonstrates that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, except that the court may extend the effective period of the order for not more than 10 days for good cause shown and for a longer period with the consent of each person affected by the order.

97. *See supra* note 87 and accompanying text.

98. *See supra* note 96 and accompanying text.

99. 416 U.S. 663 (1974).

100. *Id.* at 678-80.

101. 407 U.S. 67 (1972).

vate parties, but rather by government officials.[102] Because these considerations are also present where the government seeks simply to restrain the transfer or disposition of property that may be subject to criminal forfeiture, the postponement of notice and hearing in CDPA is also likely permissive.

### *D. What CDPA Does Not Do*

This article has defined certain problems which law enforcement officials have encountered in the effective use of "in personam" forfeitures and some solutions to these problems in drug felonies as proposed in CDPA. However, there are a few things that CDPA does not do.

#### 1. CDPA Does Not Amend RICO

CDPA does not amend RICO[103] for two reasons. First, CDPA is aimed at where the need for change is greatest.[104] Second, RICO is an extremely broad statute that includes criminal activity far afield from the more insidious drug trade[105] and has been increasingly attacked by scholars[106] and, most recently, by the American Bar Association's Section on Criminal Justice in their 1982 Convention.[107] Under such circumstances, it was deemed advisable to

102. 416 U.S. at 679.

103. 18 U.S.C. §§ 1961-1968 (1982).

104. *See supra* notes 5-18 and accompanying text.

105. Included in the definition of racketeering activities encompassed by RICO are "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion. . . ." 18 U.S.C. § 1961(1)(A) (1982).

106. *See* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO,* 65 IOWA L. REV. 837 (1980); Tarlow, *Due Process Pays the Price for Forfeitures High Cost,* NAT'L L.J., June 15, 1981, at 26; Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 FORDHAM L. REV. 165 (1980); Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon,* 17 AM. CRIM. L. REV. 379 (1980); Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective,* 1 N. ILL. U.L. REV. 225 (1981); Comment, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under RICO Section 1962(a),* 82 COLUM. L. REV. 574 (1982).

107. ABA SECTION OF CRIM. JUST., 1982 REPORT TO THE HOUSE OF DELEGATES (1982). The ABA Section of Criminal Justice made the following recommendations as to RICO at their 1982 meeting in San Francisco:

1. Replace the term "racketeering activity" by less pejorative phrase "criminal activity."
2. Provide that a criminal activity may be charged only if it occurs within five years of the date of the indictment.
3. Provide that the criminal activities must occur in different criminal episodes which are separate in time and place yet sufficiently related by purpose to demonstrate a continuity of activity.

limit the expansion of in personam forfeitures and a number of CDPA's extraordinary procedures to drug felonies only, pending a full review of the ramifications of these other questions about the RICO statute.[108]

2. CDPA Does Not Include a Substitute Asset Provision

The Senate and Administration proposals also included a section regarding substitute assets under both RICO and CCE which is not included in CDPA.[109] This provision would permit the forfeiture of assets with no known nexus to the violations involved if other property subject to forfeiture has been removed, concealed, transferred, or substantially depleted.[110] Because CDPA broadens the scope of forfeiture to proceeds (or gross profits) from profits in all drug felonies, substantially increases fines (up to twice the gross profits), and includes a permissible presumption that property acquired during the violation is forfeitable, a further inclu-

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4. Provide that the criminal activities must be related by a common scheme or plan.
5. Require that a pattern of criminal activity include at least one offense other than a violation of § 1341 [wire fraud], § 2314 [interstate transportation of stolen goods], and § 2315 [sale or receipt of stolen goods].
6. Apply § 1962(a) only to those who are involved as principals in a pattern of criminal activity or collection of an unlawful debt.
7. Provide that § 1962(b) and (c) include a mens rea element requiring that the accused knowingly commit the proscribed activities.
8. Repeal § 1962(d) (conspiracy count).
9. Repeal the liberal construction clause, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.
10. Provide that § 1963(a), relative to forfeiture, reads "may have forfeited" rather than "shall forfeit."
11. Require that parties not charged with RICO offenses be granted a jury hearing, to be held immediately after the verdict in the initial prosecution and prior to any final judgment of forfeiture, regarding their claim to ownership in any property sought to be forfeited.
12. Add this language to § 1963(b): "A hearing shall be held in accordance with rule 65 of the Federal Rules of Civil Procedure."

*Id.*

108. The delay seems somewhat justified, because, at least, the proceeds question has been decided in favor of the government. *See supra* notes 72-75 and accompanying text.

109. S. 948, 98th Cong., 2d Sess. (1984).

110. *Id.* For instance, Title III of S. 948 would set up a new § 1963(d) of Title 18.

> (d) If any of the property described in subsection (a)—
> (1) cannot be located,
> (2) has been transferred to, sold to, or deposited with a third party,
> (3) has been placed beyond the jurisdiction of the court,
> (4) has been substantially diminished in value by any act or omission of the defendant, or
> (5) has been commingled with other property which cannot be divided without difficulty, the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

*Id.* at § 101.

sion of substitute assets would have come dangerously close to the constitutional problems under the eighth amendment and prohibition of forfeiture of estate discussed earlier.[111]

Although the courts generally have held that the in personam forfeiture provisions of both RICO and CCE are constitutional as previously applied,[112] there have been numerous indications that "[s]uch a penal foray bespeaks a need for circumspection."[113] For instance, the court in *United States v. Marubeni America Corporation*[114] noted:

> The forfeiture provision [RICO] could, indeed, be read to produce penalties shockingly disproportionate to the offense. For example, a shopkeeper who over many years and with much honest labor establishes a valuable business could forfeit it all if, in the course of his business, he is mixed up in a single fraudulent scheme. This example raises issues of statutory construction and constitutional law which we leave for another day.[115]

Similarly, the court in *United States v. Huber*[116] warned:

> We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime. We further note that where the forfeiture threatens disproportionately to reach *untainted* property of a defendant, for example, if the criminal and legitimate aspects of the "enterprise" have been commingled over time, section 1963 permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision.[117]

Thus, the courts have taken pains to assert that "the forfeiture authorized by RICO is, like the traditional *in rem* action, limited to interests or property rights put to an illegal use under [the statute]."[118] Any attempt to take the nexus out of in personam forfeiture by use of a substitute asset scheme is a giant step in the direction of forfeiture of estate and would needlessly raise

111. *See supra* notes 31-34 and accompanying text.

112. *See, e.g.,* United States v. Grande, 620 F.2d 1026 (4th Cir. 1980); United States v. Marubeni Amer. Corp., 611 F.2d 763 (9th Cir. 1980); United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied,* 445 U.S. 926 (1980).

113. United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *vacated and remanded,* 439 U.S. 810 (1978).

114. 611 F.2d 763 (9th Cir. 1980).

115. *Id.* at 769 n.12 (citing United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975)).

116. 603 F.2d 387 (2d Cir. 1979).

117. *Id.* at 397 (emphasis added).

118. United States v. Thevis, 474 F. Supp. 134, 141 n.10 (N.D. Ga. 1979), *aff'd,* 665 F.2d 616 (5th Cir.), *cert. denied,* 103 S. Ct. 57 (1982).

constitutional questions. Accordingly, CDPA does not include such a provision.

## VI. Conclusion

This article outlines the problems involved in criminal forfeiture and a proposal to expand criminal forfeiture when it involves drug trafficking. It would be remiss, however, to exclude a final cautionary note:

> Whether or not an improved asset forfeiture program will make a sizeable dent in drug trafficking is uncertain. The almost insatiable demand for drugs and the huge dollar amounts involved may be obstacles too great for law enforcement alone to overcome. But a successful forfeiture program would provide an additional dimension in the war on drugs by attacking the primary motive for such crimes—monetary gain.[119]

It is important to reiterate Judge Politz's observation that a forfeiture that has an in personam application "is to be most charily assessed."[120] Drug trafficking is an area where in personam forfeitures are warranted, but future expansion of this concept to other crimes should be made only after intensive scrutiny and justification.

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119. *See* Asset Forfeiture Report, *supra* note 7, at 1.

120. United States v. Martino, 681 F.2d 952, 962 (5th Cir. 1982) (Politz, J., dissenting).