

COMMENTS

CIVIL FORFEITURE OF ASSETS: A FINAL SOLUTION TO INTERNATIONAL DRUG TRAFFICKING?

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I. INTRODUCTION

Drug trafficking is one of the most serious crime problems confronting the United States today.¹ It is a major cause of violence and crime, with effects greatly exceeding the injurious health consequences to

1. Mullen, *Organized Crime and Drug Trafficking*, 10 DRUG ENFORCEMENT, Fall 1983, at 2, 8.

the individual.² The industry is driven by American consumers who ingest hastily bundled shipments of drugs with an insatiable appetite.³ The United Nations estimates that the retail value of the illicit drug trade in the United States is over one hundred ten billion dollars annually.⁴ This estimate represents a significant increase from 1980 estimates; then, a conservative estimate of eighty billion dollars made the illicit drug trade the second largest industry in the United States.⁵

Illegal drugs have been recognized as an international problem since 1909 when the thirteen-nation Shanghai Opium Commission met to discuss drug control.⁶ As the quality of transportation from remote areas of the world improved, narcotics began flowing into the United States from the major drug-producing regions of Latin America,⁷ Southwest Asia,⁸ and Southeast Asia.⁹ Today, more than ninety percent of the illicit drugs consumed in the United States are of foreign origin.¹⁰ The amount of drugs illegally imported into the United States in 1986 was estimated at 3.6 to 4.3 metric tons of heroin,¹¹ 306 to 377 metric tons of cocaine hydrochloride,¹² 9,700 to 13,400 metric tons of marijuana,¹³ and 200 metric tons of hashish,¹⁴ methaqualone¹⁵ and other dangerous drugs.¹⁶

2. Smith, *Drug Traffic Today—Challenge and Response*, 9 DRUG ENFORCEMENT, Summer 1982, at 2.

3. Juber, *Drug Lord*, TEX. MONTHLY, July 1987, at 155.

4. Smith, *supra* note 2, at 2.

5. The illicit drug industry was second only to Exxon's 1980 annual sales of \$103 billion. *Id.* \$80 billion may be a conservative estimate. *International Narcotics Trafficking: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 233 (1981) [hereinafter *Hearings*] (statement of Joseph H. Linne-man, Deputy Assistant Secretary, Bureau for International Narcotics Matters, that financial transactions involved in domestic drug sales total between \$80 billion and \$100 billion).

6. The International Opium Commission met in Shanghai, China on February 1, 1909, to study the worldwide opium problem. The meeting was the first international action taken toward solving the opium problem. See Wright, *The International Opium Commission*, 3 AM. J. INT'L L. 648 (1909).

7. For the purposes of this comment, the term "Latin America" includes the major drug-producing nations of the Caribbean, Central America and South America. These nations include Bolivia, Colombia, Jamaica, Mexico and Peru. Note, *Extradition to Combat Drug Trafficking*, 15 GA. J. INT'L & COMP. L. 285, 287 (1985).

8. The major producers of opium and heroin in Southwest Asia include Afghanistan, Iran and Pakistan. *International Narcotics Policy: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 98th Cong., 1st Sess. 65 (1983) [hereinafter *Narcotics Statistics*].

9. Burma, Thailand and Laos are the primary drug-producing nations in Southeast Asia. *Southeast Asian Drug Trade: Hearings Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 7, 8 (1982).

10. Report by the White House Drug Abuse Policy Office, U.S., *Federal Strategy*, October 1982, reprinted in *The Federal Strategy*, 10 DRUG ENFORCEMENT, Spring 1983, at 10 [hereinafter *Federal Strategy*].

11. *The National Narcotics Intelligence Consumers Committee*, NARCOTICS INTELLIGENCE ESTIMATES 3 (1982) [hereinafter NIE]. A metric ton equals 2,204 pounds.

12. *Id.* at 6.

13. *Id.* at 7.

14. *Id.* at 8.

15. Methaqualone is more commonly known as quaalude. *Id.*

These enormous shipments of illegal narcotics into the United States result in equally large profits for the drug traffickers.¹⁷ Efforts of the Drug Enforcement Administration (DEA)¹⁸ to curtail the drug flow into the United States have focused on the individuals involved and their illegal products.¹⁹ Relatively little attention, however, has been given to the ultimate reward of this criminal activity: the illegal profits.

This comment will explore the U.S. government's ongoing efforts in the war on drugs. The United States spends vast amounts of time and money on *conventional* methods of fighting drug trafficking including crop substitution, interdiction and foreign aid. This strategy, however, ignores the most effective method of attacking traffickers: statutory forfeiture of drug-related assets. Specifically, this comment will focus on the civil forfeiture statute, Title 21 of the United States Code, section 881, and its superior potential to deter the importation and trafficking of illicit drugs in the United States.

Historically, drug traffickers have accepted the risks of arrest and conviction because of the potentially enormous profits. When the drug-related profits remained untouched, the job of replacing the arrested ringleader was quick and easy, leaving the drug ring intact.²⁰ However, 1970 brought the passage of two criminal statutes: United States Code, Title 21, section 848, covering Continuing Criminal Enterprises (CCE), and Title 18, section 1963, the Racketeer Influenced and Corrupt Organizations Act (RICO). These statutes provided the DEA with a new weapon in its fight against drug trafficking: forfeiture. Under the CCE statute, persons convicted of operating large drug-trafficking rings in violation of the Federal Controlled Substances Act²¹ are required to forfeit all illegally acquired "profits," all "interest" in illegal business, and all property or contractual rights connected with the illegal enterprise.²² Forfeiture of this property is mandatory upon conviction under the statute after the tracing and identification of the assets.²³ RICO was ratified at the same time as the CCE statute: they are similar, but not identical.

16. *Id.*

17. *Hearings*, *supra* note 5, at 242 (statement of Francis Mullen, Jr., Acting Administrator, Drug Enforcement Administration).

18. "DEA is the lead agency responsible for the development of overall Federal drug enforcement strategy, programs, planning and evaluation." Drug Enforcement Administration (Office of the Controller), *Drug Enforcement Administration, A Profile: 1984*, 3 (1985) [hereinafter *DEA Profile*].

19. Myers and Brzostowski, *Dealers, Dollars and Drugs*, 9 *DRUG ENFORCEMENT*, Summer 1982, at 7.

20. *See DEA Profile*, *supra* note 18, at 23.

21. 21 U.S.C. § 801 (1982).

22. 21 U.S.C. § 853 (Supp. III 1985).

23. *Id.*; *see also* 21 U.S.C. § 848(a) (1982).

Upon conviction, the RICO statute requires seizure of "all property ordered forfeited upon such terms and conditions as the court shall deem proper."²⁴

Despite the touted potential of these statutes as the answer to drug trafficking, and the diligent efforts of drug enforcement agents and federal prosecutors, relatively little was seized from traffickers.²⁵ In 1978, Congress reacted with a bold new approach. Title 21 of the United States Code, section 881(a)(6), provided that all monies used in, and all assets acquired from, the illicit drug trade belonged to the U.S. government and were subject to civil seizure under the forfeiture power.²⁶

With this statute, Congress authorized federal attorneys to file civil lawsuits asserting the government's right to drug-related property. This statute simplified DEA's war on drug profits because property could now be seized without warning, regardless of the result in criminal proceedings. DEA's struggle was further simplified by the lack of complex procedures followed in criminal cases.²⁷

II. CURRENT UNITED STATES ANTI-TRAFFICKING EFFORTS

Although for twenty years drug abuse and trafficking have been recognized as serious social problems, virtually every strategy of control has failed.²⁸ Attempts by the U.S. government to combat drug trafficking have taken many forms. While the range of these programs has been extensive, the positive results have been limited.

The central strategy of the war on drugs relies upon the supposedly synergistic benefits of a task force approach.²⁹ This strategy employs a variety of attacks on the illicit drug industry. These attacks include crop substitution and eradication; interdiction of drugs at the border; the training of law enforcement officers in both the United States and "host" countries; and the seizure of drug-related assets.

A. *The International Control Strategy*

The United States' efforts to end the traffic in illicit drugs can be

24. 18 U.S.C. § 1963(f) (Supp. III 1985).

25. *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking*, GGD-81-51, April 10, 1981, 1-2 [hereinafter *Asset Forfeiture Report*].

26. 21 U.S.C. § 881(a)(6) (1982).

27. See, e.g., *United States v. 110 Bars of Silver, 3 Crucibles of Silver, 11 Bags of Silver Coins*, 508 F.2d 799 (5th Cir. 1975).

28. Brinkley, *Rampant Drug Abuse Brings Call for Move Against Source Nations*, N.Y. Times, Sept. 9, 1984, § 1, at 1, col. 1.

29. Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1377 (1983).

broken into two components: domestic and international. The international component's ultimate goal is to reduce the availability of illicit drugs in the United States.³⁰ Working toward this goal, the U.S. State Department instituted a two-pronged approach in the host countries. The attack focuses on the interdiction of illicit drugs as close to the source as possible, and crop control at the source of the production through the destruction of drug-related crops in the fields.³¹

1. Interdiction

The rationale of the international law enforcement component is that interdiction close to the source is more cost effective than domestic enforcement efforts. Cost effectiveness is evidenced by the seizure of quantities of drugs that are "much larger and purer than when seized on the streets of (U.S.) cities."³² For this reason, the U.S. Customs Service and DEA have trained and equipped large numbers of South American drug agents.³³ As a result of the autonomous operations of local agents,³⁴ in addition to those operations undertaken in conjunction with DEA agents, huge quantities of cocaine and other illicit drugs have been seized in South America and other major drug-producing areas.³⁵ Despite massive seizures of cocaine in South America (6.7 tons in fiscal year 1979 and 8.4 tons in fiscal year 1980), there has not been any noticeable reduction in the availability, nor increase in price, of cocaine in the United States.³⁶ The production of cocaine is so great that even seizure

30. *Federal Strategy*, *supra* note 10.

31. *Id.*

32. *International Narcotics Control: Hearings Before the House Comm. on Foreign Affairs*, 97th Cong., 2nd Sess. 156, 194 (1982) (statement of Francis M. Mullen, Jr., Acting Administrator of DEA) [hereinafter *INC Hearings*].

33. Between fiscal years 1972 and 1977, DEA and Customs trained a total of 450 agents in Bolivia, 524 in Peru, and 714 in Colombia. GAO, REPORT BY THE COMPTROLLER GENERAL, DRUG CONTROL IN SOUTH AMERICA HAVING LIMITED SUCCESS—SOME PROGRESS BUT PROBLEMS ARE FORMIDABLE, 35 (1978) [hereinafter *DRUG CONTROL IN S. AMERICA*]. From fiscal year 1973 to fiscal year 1977, the Bureau of International Narcotics Matters (BINM) provided equipment worth \$1,210,000 to Bolivia, \$502,000 to Peru and \$3,438,000 to Colombia. *Id.*

34. In 1981, Peruvian interdiction efforts resulted in the seizure of 5,930 kilograms of coca paste, 44 kilograms of cocaine base, 122 kilograms of cocaine hydrochloride, and 26,807 kilograms of coca leaves. See *INC Hearings*, *supra* note 32, at 165. In 1980, half of the cocaine seized worldwide was from Colombia. DEA Office of Intelligence, *Colombia: South America's Cocaine Cornucopia*, 9 DRUG ENFORCEMENT, Fall 1982, at 23. In 1981, Colombian authorities seized 349 kilograms of cocaine and destroyed 237,401 plants, compared to the 1980 totals of 1,545 kilograms seized and 106,665 plants destroyed. DiCarlo, *International Initiatives to Control Coca Production and Cocaine Trafficking*, 9 DRUG ENFORCEMENT, Fall 1982, at 6, 9.

35. DEA agents stationed in "host" countries exchange intelligence information and conduct cooperative investigations in addition to the training of host country agents. Cocaine seizures through cooperative raids amounted to 10,207 pounds in fiscal year 1979, compared to 1,064 pounds seized within the United States by the DEA. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT STATISTICAL REPORT 13, 19 (1980).

36. *Foreign Assistance Legislation for Fiscal Year 1982 (Part 7): Hearings and Markup*

of eight tons, sixteen to twenty percent of the total believed delivered to the United States in that period, did not affect the price.³⁷

2. Eradication and Crop Substitution

As a result of its inability to eliminate the supply of refined drugs at the source by seizure, the United States implemented the second prong of their international program to eliminate the illicit drug problem: displacement of the drugs through eradication and crop substitution. Since the 1970's, the U.S. State Department has funded projects for coca, marijuana and poppy destruction, and crop substitution. These programs involve physical destruction of the illicit crops, and the development of alternate agricultural products to replace them. This effort has been supplemented by financial and technical assistance to the host country's enforcement agencies.³⁸

The United Nations and the United States have spent large amounts of money toward drug eradication in Southeast and Southwest Asia and South America. In a 1978 review of the drug control efforts in South America, however, the General Accounting Office (GAO) concluded that supplies of cocaine to the United States were increasing, and that prospects for limiting coca production in South America were "unfavorable."³⁹ It has also been shown that from 1983 to 1984, there was a thirty-eight percent increase in Thailand's opium poppy production.⁴⁰

Despite these efforts, crop substitution programs generally have not been successful. A major problem stems from the different political, economic and cultural factors in each "host" country.⁴¹ In many drug-producing countries, the growth and use of drugs is a centuries old tradition which has been carried into the present day.⁴² In Bolivia and Peru, for example, some four million of the Andean Indians, perhaps eight million

Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess. 230 (1981).

37. GAO, REPORT BY THE COMPTROLLER GENERAL, FEDERAL DRUG INTERDICTION EFFORTS NEED STRONG CENTRAL OVERSIGHT 15, 16-17 (1983).

38. See Wisotsky, *supra* note 29, at 1338-39.

39. DRUG CONTROL IN S. AMERICA, *supra* note 33, at 19.

40. *Int'l Narcotics Trafficking: Hearings Before the Permanent Subcomm. on Investigation of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 56 (1981) [hereinafter *Int'l Narcotics Trafficking*]. The U.S. Department of Agriculture has been funding projects in Thailand since 1973. *Id.* The United Nations Fund for Drug Abuse Control (UNFDAC) contributed \$2.4 million for 5 years. *Id.*

41. Domestic Council Drug Abuse Task Force, *International Objectives*, 3 DRUG ENFORCEMENT, Winter 1975, at 2, 5 [hereinafter *International Objectives*].

42. Although there is archeological evidence of the use of coca as early as 300 B.C., daily coca chewing by the masses is generally dated after the Spanish conquest of the Incas in the sixteenth century. L. GRINSPOON & J. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION 9-11 (1976) [hereinafter GRINSPOON & BAKALAR].

worldwide, regularly chew coca leaves.⁴³ Coca is thoroughly socialized, particularly in the workplace. It is a mild stimulant that is chewed or drunk as a tea daily for relief of cold, fatigue and hunger.⁴⁴

Although there are troublesome cultural implications of drug eradication and crop substitution, the greatest detriments to these efforts are economic in nature. These programs have not been received enthusiastically because narcotics-derived dollars help the economies of drug-producing nations and provide significant income for native farmers.⁴⁵ In South America, where the per capita income is among the lowest in the world,⁴⁶ and the death rate⁴⁷ and illiteracy are among the highest,⁴⁸ the people who grow and use coca exist at the bottoms of the social and economic ladders. Coca not only grows *well* in these countries, but also it is often the only source of income. Even where alternate crops will grow, the economics of drug crops are compelling. In Bolivia, a hectare of coffee is worth about \$500; a hectare of coca is valued at \$5,000.⁴⁹ Given these financial incentives, it is easy to understand why an estimated 125,000 small farmers in South America earn their livelihood from drug production, particularly coca.⁵⁰ Since crops substituted for illicit products are unlikely to provide the same income as illicit drugs, effective enforcement of a drug-growing prohibition must accompany these projects.⁵¹ A direct result of the peasant's economic reliance on these crops is the native government's justifiable reluctance to destroy crops in the fields.⁵²

An important consideration in the use of crop eradication and substitution is that the elimination of crops at the source of one or two of the larger supplying countries is not, by itself, a solution to the problem.⁵³ The base materials for the illicit drug traffic—opium, coca or marijuana—can be grown in a large number of countries.⁵⁴ Therefore, crop

43. J. PHILLIPS & R. WYNNE, COCAINE: THE MYSTIQUE AND THE REALITY 21-22.

44. See GRINSPOON & BAKALAR, *supra* note 42, at 13.

45. Illegal drug receipts add \$1 billion annually to the Colombian economy. *Stopping "Mother Ships"—A Loophole in Drug Enforcement, 1978: Hearings on S.3437 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 85 (1978) [hereinafter Mother Ships].*

46. THE YEARBOOK OF WORLD RANKINGS 82 (Kurian ed. 1979). Bolivia ranked 97th of 145 countries in per capita GNP.

47. *Id.* at 18. The life expectancy for males is 45.7 years. *Id.* at 282. Female life expectancy is 47.9 years. *Id.* at 283. The infant mortality rate is 77.3 per 100,000 births. *Id.* at 284.

48. *Id.* at 309.

49. Diehl, *Economy Booms in Clandestine Nation of Cocaine*, Wash. Post, Nov. 11, 1982, at A29-30.

50. *Id.* at A29.

51. *International Objectives*, *supra* note 41, at 5.

52. *Int'l Narcotics Trafficking*, *supra* note 40, at 135.

53. *International Objectives*, *supra* note 41, at 5.

54. *Id.*

eradication can only be a short-term measure to control drug availability in one specific area.⁵⁵

Another major problem with current United States' eradication efforts in foreign countries is the widespread corruption in the enforcement agencies, the judiciary and elsewhere in the government.⁵⁶ Illicit trafficking breeds corruption by generating enormous profits. For example, high ranking military and government officials receive millions of dollars in bribes from drug traffickers.⁵⁷ Also, market forces make the drug trade exceptionally lucrative for the growers and governments alike, enabling the nation to accrue huge amounts of foreign exchange.⁵⁸ As a result, the governments and the people of these nations are to some degree dependent upon illicit drug production.

B. *The Domestic Control Strategy*

The domestic component of the United States' war on drugs consists mainly of border interdiction; the occasional disruption of distribution networks; a small number of prosecutions for tax and currency offenses; and increasingly aggressive seizures of assets. Historically, domestic enforcement received primary attention and funding.⁵⁹ The dramatic expansion in the size of the illicit drug trade,⁶⁰ however, demonstrates the inability of domestic law enforcement agencies to suppress the importation of drugs into the United States. Drug enforcement officers themselves make only modest claims about the effectiveness of drug law enforcement in the United States. The officers also concede that the drug "problem will continue until it is ultimately solved on foreign soil through drug eradication."⁶¹

55. *Id.*

56. *See INC Hearings, supra* note 32, at 304-05.

57. Maitland, *U.S. Said to Prepare Drug Case Against a Bolivian*, N.Y. Times, Nov. 9, 1982, at A8, col. 4. Four high-ranking Cuban officials, including the chief of the Cuban Navy, were indicted on narcotics smuggling charges. They allowed for the protection and resupply of ships transporting methaqualone tablets and marijuana from Colombia to the United States. N.Y. Times, Nov. 6, 1982, at A1, col. 1.

58. *See INC Hearings, supra* note 32, at 305.

59. *See Federal Strategy, supra* note 10, at 74. Total funding of the drug law enforcement system for fiscal year 1983 was \$702.8 million, nearly all of which was spent for the domestic enforcement system. *Id.* DEA, Customs and the Coast Guard received the largest allotments. The DEA and Customs budgets for fiscal year 1983 were \$244.6 million and \$91 million, respectively. *Id.* The Coast Guard budget was \$159.8 million. *Id.* Note, however, that federal spending for drug law enforcement in fiscal year 1987 reached \$3.048 billion. The Reagan Administration proposed spending \$2.468 billion in the fiscal year 1988, a reduction of \$580 million. Weinraub, *In Reagan's Drug War, Congress Has the Big Guns*, N.Y. Times, March 15, 1987, § 4, at 5, col. 1 (emphasis added). Former Bahamian Prime Minister Lynden Pindling is reported to have accepted bribes from reputed Colombian cocaine kingpin, Carlos Rivas Lehder. Lehder's organization reportedly gained the Bahamian government's protection for their trafficking operations. Hous. Post, Nov. 17, 1987, at A6, col.1, 2.

60. *See Hearings, supra* note 5, at 233.

61. Caffrey, *The Strategy of Enforcement*, 9 DRUG ENFORCEMENT, Fall 1982, at 2.

Authority for drug law enforcement is distributed among a number of federal agencies including the Coast Guard, the Customs Service and the Drug Enforcement Administration.⁶² The Coast Guard's chief role in the war on drugs is to interdict large carriers of marijuana.⁶³ Because of marijuana's relative bulk, it is necessary for traffickers to resort to trucks, boats or large planes to smuggle sufficiently large quantities of the drug into the country for resale. The Coast Guard has developed increasingly sophisticated methods of identifying and capturing smuggling vessels. However, the effectiveness of these methods has been thwarted because for every law enforcement move there is a smuggling counter-move. Smuggling routes are highly flexible: the Coast Guard's isolation of particular routes merely results in a tactical shifting of supply lines.⁶⁴ Thus, record amounts of drugs continue to reach the United States.⁶⁵

The leading drug enforcement function of the U.S. Customs Service is to interdict illicit drugs at the United States border.⁶⁶ This role of the Customs Service, however, is only a corollary to its primary function of collecting revenue and clearing imported merchandise and travellers from abroad. The size and scope of its operations are vast. Given this huge volume of goods, Customs can inspect for drugs and other contraband only on a random basis.

In addition to pursuing special interdiction initiatives,⁶⁷ in 1981 Customs deployed 4,500 inspectors, 1,200 patrol officers, ninety-six detector dog teams,⁶⁸ and special cargo enforcement teams at major ports of entry to scrutinize suspicious cargo.⁶⁹ Despite these enforcement efforts, most drug seizures by Customs occur randomly.⁷⁰ Routine processing of cargo and travellers without prior informant tips account for ninety-

62. See *Federal Strategy*, *supra* note 10, at 74.

63. From 1977 to 1981, the Coast Guard seized nearly 12,000,000 pounds of marijuana and less than one pound of cocaine. *Int'l Narcotics Trafficking*, *supra* note 40, at 105.

64. Displacement of smuggling routes comes from record seizures of drugs in areas of the United States not previously believed to be major transit or distribution points, e.g., 610 pounds of cocaine at the Brookhaven, N.J. airport on June 24, 1982; 1,254 pounds in Cleveland, Tennessee, on July 11, 1982. *Notable Cases*, 9 DRUG ENFORCEMENT, Fall 1982, at 17.

65. Johnson, *Coke Whirl*, City Paper (Wash., D.C.), Dec. 17, 1982, at 1.

66. Its former authority to investigate controlled substances violations and to act as a primary agency for the collection of narcotics-related intelligence was transferred in 1973 to the newly formed DEA. Reorg. Plan No. 2 of 1972, 3 C.F.R. § 785 (1973); Exec. Order No. 11,727, 3 C.F.R. § 785 (1973), reprinted in 21 U.S.C. § 801 app. at 877 (1982).

67. *Federal Drug Strategy: Prospects for the 1980's: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 2d Sess. 73 (1980) [hereinafter *Prospects Hearing*].

68. See Wisotsky, *supra* note 29, at 1349 (citing U.S. CUSTOMS SERVICE, CUSTOMS U.S.A., 19-20 (1981)).

69. See *Prospects Hearing*, *supra* note 67, at 74.

70. *Oversight Hearings on Federal Drug Strategy—1979: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 1st Sess. 238 (1979).

seven percent of the number of drug seizures.⁷¹ Furthermore, because of the ease with which drugs, particularly cocaine and heroin, can be concealed either on an individual or among his belongings,⁷² it is not surprising that in 1982 intensified Customs' seizures netted only ten percent of the estimated forty to forty-eight metric tons of cocaine imported to the United States.⁷³ Given this meager result, one need not wonder why Customs itself claims only that its program reduces smugglers' options for choosing the time, method and place for importing contraband.⁷⁴

The final and most important agency responsible for eliminating drug trafficking in the United States is the Drug Enforcement Administration. DEA was created in 1973 as the chief drug enforcement agency of the federal government.⁷⁵ DEA is primarily a case-making agency. Its function is to immobilize, by arrest and prosecution, "major drug violators" of the Controlled Substances Act, Title 21 of the United States Code.⁷⁶ In addition to case-making by arrest, the DEA's roles include management of a national narcotics intelligence system; cooperative efforts with officials of federal, state and local agencies; coordination of drug control programs with foreign nations; communication with the United Nations, Interpol and other organizations on drug control related matters; and asset seizure and forfeiture.⁷⁷

The United States is losing the war on drugs. Every action taken by the U.S. Government to eliminate the flow of drugs into the country has failed. This fact is particularly significant in light of the proposed cuts in the Reagan administration's overall drug program.⁷⁸ It appears that little can be done to further limit the volume of drugs entering the United States. However, there remains an alternative enforcement tool available to deter drug trafficking: the federal forfeiture statutes. This attack reduces the potential for profits, thereby undermining the ultimate motive of drug traffickers.

71. *Id.*

72. See *Mother Ships*, *supra* note 45, at 88.

73. See Wisotsky, *supra* note 29, at 1350 (citing U.S. CUSTOMS SERVICE at 19-20). Border interdiction does not cover the total amount of drugs removed from circulation because of enforcement activities by other agencies, particularly DEA. Note additionally that the Coast Guard focuses on the interdiction of marijuana freighters and plays no significant role in cocaine and heroin enforcement. See *Mother Ships*, *supra* note 45, at 63.

74. See Wisotsky, *supra* note 29, at 1352 (citing U.S. CUSTOMS SERVICE at 14).

75. Exec. Order No. 11,727, *supra* note 66.

76. The Controlled Substances Act is Title II of the Comprehensive Drug Abuse Prevention Control Act of 1970.

77. See *DEA Profile*, *supra* note 18, at 3.

78. In fiscal year 1987, federal spending for drug law enforcement reached \$3.048 billion. The Reagan Administration proposed spending \$2.468 billion in fiscal year 1988, thus reducing the figure by \$580 million. Similar cuts will result in a drop from \$238 million to \$5 million in assistance for state and local enforcement efforts and a drop from \$553 to \$425 million in funds for Customs Service drug law enforcement. Weinraub, *supra* note 59.

C. *The Use and Development of Forfeiture as a Regulatory Tool in the United States*

Forfeiture is the taking by the government of property illegally used and acquired with illegal proceeds without compensating the owner.⁷⁹ To understand the principle behind forfeiture, it is helpful to distinguish between two types. *In personam*, or criminal forfeiture, is based on a determination of a defendant's personal guilt. As a result, the determination of guilt gives the government a right to certain property possessed by the offender.⁸⁰ *In rem*, or civil forfeiture, is based on the common law fiction that the subject of the forfeiture itself is guilty of wrongdoing. Since the property is the object of the proceedings, the property may be held as forfeited.⁸¹ While *in personam* decisions affect only the parties to the proceedings, *in rem* decisions affect "the whole world"—including unknown claimants.⁸²

Early English law recognized three forms of forfeiture: forfeiture consequent to attainder, *deodand*, and forfeiture pursuant to statute.⁸³ Under forfeiture consequent to attainder, the oldest form of forfeiture, the government could divest convicted felons or traitors of all property, real or personal.⁸⁴ In addition, the children of these individuals could not inherit the forfeited property because the "defendant's 'blood was corrupted' so that nothing could pass by inheritance through his line."⁸⁵ Although forfeiture of estate was used in the American colonies, forfeiture of estate and corruption of blood for treason were banned by the U.S. Constitution in 1787.⁸⁶

The second form of forfeiture, *deodand*, was used by the king to confiscate animate and inanimate objects that directly or indirectly caused the death of one of his subjects.⁸⁷ This forfeiture was based on

79. *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978); *Mayo v. United States*, 413 F. Supp. 160 (E.D. Ill. 1970); *Kahn v. Janowski*, 191 Md. 279, 60 A.2d 519 (Md. 1948).

80. Criminal forfeiture has been defined as "the 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 (1982).

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

82. *Van Oster v. Kansas*, 272 U.S. 465 (1926); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 247 (1818).

83. See Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977).

84. See *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974).

85. *Grande*, 620 F.2d at 1038.

86. The U.S. Constitution provides that "no Attainder of Treason shall work corruption of Blood or Forfeiture except during the life of the person attained." U.S. CONST. art. III, § 3, cl. 2.

87. See *Calero-Toledo*, 416 U.S. at 682.

the legal fiction that an object that had killed one of the king's subjects was capable of future harm and should be destroyed.⁸⁸ This legal fiction stems from the rationale that culpability of the object's owner was irrelevant because the harm was attributable to the object.⁸⁹ For example, if livestock killed a person, the owner would have to forfeit the animal, despite the owner's innocence.⁹⁰ Because the superstitious, religious nature of the *deodand* was repugnant to their developing concept of justice, early American courts rejected it.⁹¹

The third kind of forfeiture recognized by English law were statutes that authorized the government and private individuals to confiscate properties that individuals had used to commit crimes. The broadest of these statutes was the Navigation Acts.⁹² These Acts required transportation of commodities in English-built and manned ships.⁹³ Violators forfeited both the illegally carried goods and the ship transporting them.⁹⁴

Under the Navigation Acts, parties proceeded either *in personam* against the cargo's owner or *in rem* against the cargo itself.⁹⁵ Action *in rem* quickly gained favor among government prosecutors because the owner of the goods had the burden of refuting the violation or acquiescing to the forfeiture.⁹⁶ *In rem* proceedings also offered the procedural advantage of facilitating the convictions of elusive owners by obtaining jurisdiction over the cargo.⁹⁷

The use of *in rem* proceedings to enforce the English Navigation Acts greatly affected forfeiture law in the United States by legitimating this action.⁹⁸ The early American courts began to proceed *in rem*, using

88. *Sollenberger v. Kansas City Publ. Serv. Co.*, 356 Mo. 454, 459-60, 202 S.W.2d 25, 27-28 (1947) (under English common law, personal chattels that had caused death to humans were forfeited to the king).

89. See 1 W. BLACKSTONE, COMMENTARIES NO. 301-302; O. HOLMES, THE COMMON LAW 25 (1881).

90. See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 473 (2d ed. 1959); O. HOLMES, *supra* note 89.

91. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 682-83 (*deodand* not part of the United States common law tradition); *Sollenberger*, 356 Mo. at 459, 202 S.W.2d at 27 (*deodand* never part of American legal system because of its scandalous nature); *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916) (American jurisprudence has fairly and properly denounced superstitious principle of *deodand*).

92. Navigation Act, 1660, 12 Car. 2, ch. 18, § 1(2), repealed by 6 Geo.IV, c.105 (1825), reprinted in 5 STATUTES OF THE REALM 246-50 (1963).

93. *Id.*; L. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH CENTURY EXPERIMENT IN SOCIAL ENGINEERING 387-414 (1964).

94. L. HARPER, *supra* note 93, at 109.

95. *Id.* at 111.

96. See Note, *supra* note 83, at 776.

97. *Id.*

98. *Id.* at 780 (federal courts usually employed *in rem* forfeiture proceedings that resembled English Navigation Acts).

English procedure in admiralty forfeiture cases, and established a precedent for using *in rem* rather than *in personam* forfeiture action.⁹⁹

Throughout the early 1800's, courts attempted to distinguish civil *in rem* forfeiture actions against property from criminal *in personam* actions against the property's owners.¹⁰⁰ However, the distinction was eliminated in 1862 when Congress passed the Civil War Confiscation Acts.¹⁰¹ This Act authorized the President to seize the life estates of Confederate soldiers. Although the statute faced the constitutional prohibition of prosecuting the insurrectionists in their absence,¹⁰² Congress circumvented the impediment by asserting that the Act's applicability depended on the nature of the property rather than the culpability of its owner; the property, not the owner, became the wrongdoer. This statute was upheld by the Supreme Court in *Bigelow v. Forest*¹⁰³ and *Miller v. United States*.¹⁰⁴

Late into the 19th century the Court continued to stress the civil *in rem* qualities of forfeiture proceedings. In *Dobbins's Distillery v. United States*,¹⁰⁵ the Court stated that the owner's ignorance of the illegal use of his property was irrelevant. It was held that the government could confiscate the property through an *in rem* proceeding without first obtaining a criminal conviction against the owner.¹⁰⁶

By the middle of the 20th century, it appeared that the government was using civil *in rem* forfeiture to punish criminal activity.¹⁰⁷ The Court recognized the quasi-criminal character of the action by noting that *in rem* forfeiture proceedings were "firmly fixed" in the punitive jurisprudence of the United States.¹⁰⁸ The Court also noted that the object of the forfeiture proceedings, like that of criminal actions, was to punish those who had broken the law.¹⁰⁹ Thus, in the absence of an *in personam*

99. See, e.g., *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943) (Court has repeatedly declared that district courts should proceed as courts of common law in non-admiralty forfeiture actions); *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823) (seizure made on land should be tried in court of common law with jury).

100. See, e.g., *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844) (vessel subject to forfeiture without regard to owner's conduct); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (*in rem* proceeding under Piracy Acts of 1819 independent of and unaffected by *in personam* criminal proceeding); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) (upholding forfeiture of coffee transferred to bona fide purchaser).

101. Confiscation Act, ch. 195, § 5, 12 Stat. 589, 590, 37th Cong., 2d Sess. (1862).

102. The constitutional guarantees of the right to confront one's accusers and to trial in the district of the offense prevent the government from prosecuting an absent defendant. U.S. CONST. amend. VI.

103. 76 U.S. (9 Wall.) 339 (1869).

104. 78 U.S. (11 Wall.) 268 (1870).

105. 96 U.S. 395 (1877).

106. *Id.* at 399-400.

107. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

108. *Goldsmith v. United States*, 254 U.S. 505, 511 (1921).

109. *One 1958 Plymouth Sedan*, 380 U.S. at 700.

criminal action, the Court continued to make broad use of the "civil" forfeiture framework to handle both civil and quasi-criminal proceedings.

III. STATUTORY FORFEITURE ACTIONS IN THE UNITED STATES

A. *Criminal Forfeiture Statutes*

Forfeiture actions typically have been used to control the particular vice of the era.¹¹⁰ Although criminal forfeiture, as provided for in CCE and RICO, is an ancient legal device, it was prohibited statutorily in the United States until 1970.¹¹¹ Prior to the enactment of CCE and RICO, several statutes provided for *civil* forfeiture through *in rem* proceedings by the government against a defendant's property. Most noteworthy among these is Title 21 of the United States Code, section 881, the civil forfeiture section of the Controlled Substances Act.

When enacted by Congress, these criminal forfeiture provisions were perceived as a bold and innovative attack on the economic base of criminal activity, particularly drug trafficking.¹¹² The legislative history is replete with references to a broad "hit them where they hurt" philosophy.¹¹³ The anticipated effect of forfeiture of assets as both deterrent and penalty is clear. The detrimental effect was anticipated openly by such notables as Senator Robert Byrd, a member of the Senate Judiciary Committee, who 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 mighty deterrent to any further expansion of organized crime's economic power."¹¹⁴

Despite the fanfare surrounding the 1970 passage of CCE and RICO, forfeiture of drug-related assets has occurred infrequently.¹¹⁵ As a result, the burden of finding an effective tool to combat drug trafficking

110. Comment, *Rendering Illegal Behavior Unprofitable: Vehicle Forfeiture Under the Uniform Controlled Substances Act*, 8 CREIGHTON L. REV. 471 (1974).

111. The use of forfeiture of estate and corruption of blood for treason was banned by the Constitution in 1787. U.S. CONST. art. III, § 3, cl. 2. *In personam* forfeiture is prohibited for all federal convictions and judgments. 18 U.S.C. § 3563 (1982).

112. See U.S. DEP'T. OF JUSTICE, CRIMINAL FORFEITURE UNDER THE RICO AND CCE STATUTES (1980).

113. *United States v. Martino*, 681 F.2d 952, 957 n.17 (5th Cir. 1982).

114. 116 CONG. REC. S.30 (daily ed. Jan. 21, 1970) (remarks of Senator Byrd) (emphasis in original).

115. Between 1970 and 1980, law enforcement officials obtained only 97 CCE and RICO indictments. Of these, the total value of actual and potential forfeitures has been only \$2 million. See *Asset Forfeiture Report*, *supra* note 25, at 49. CCE forfeitures constitute only one-third of that total. Given that narcotics enterprises make in excess of \$80 billion annually, clearly, the government has not made significant advances in eliminating those organizations. *Id.*

through seizure and forfeiture of assets has fallen on the civil statute, Title 21 of the United States Code, section 881.

B. Limitations of the Two Criminal Forfeiture Statutes

There are numerous reasons why the forfeiture provisions in RICO and CCE have not been as effective as anticipated in attacking the economic base of drug trafficking. These reasons include the *in personam* nature of the proceedings; the burden of proof required in these actions; the notice requirement of the statutes; the degree of "nexus" which must be shown between the property to be forfeited and the illegal activity; and the time at which forfeiture occurs under the statute.¹¹⁶

Like their ancient predecessors, the criminal forfeiture provisions of CCE and RICO are *in personam* actions against an individual. Each criminal provision of the RICO statute expressly applies to "any person."¹¹⁷ RICO defines a "person" as "any individual or entity capable of holding a legal or beneficial interest in property."¹¹⁸ Unlike RICO, which applies to any person in a criminal enterprise, the CCE statute is strictly limited to "organizers, supervisors or managers."¹¹⁹ An "organizer" brings together people engaged in separate activities and arranges them in one enterprise.¹²⁰ A "supervisor" directs, oversees or manages the activities of others.¹²¹

Under both statutes, the court must establish that it has personal jurisdiction over each "person," "supervisor" or "organizer" in order to proceed with an indictment.¹²² If the court cannot establish *in personam* jurisdiction, then no conviction, with its accompanying mandatory forfeiture, can result.¹²³ This problem of establishing personal jurisdiction is compounded by the fact that so many of the "kingpins" in the drug trafficking rings are foreign nationals. As a result, they are often unextraditable or uncapturable in their homelands.¹²⁴ Without their presence

116. *Id.* at 30-42.

117. 18 U.S.C. § 1962 (1984).

118. 18 U.S.C. § 1961(c) (Supp. III 1986).

119. 21 U.S.C. § 848(b)(2)(A) (1982).

120. *See, e.g.,* United States v. Valenzuela, 596 F.2d 1361 (9th Cir. 1979); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979); United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Collier, 358 F. Supp. 1351 (E.D. Mich. 1973).

121. *See Cravero*, 545 F.2d at 411.

122. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

123. United States v. Kravitz, 738 F.2d 102 (3d Cir. 1984); United States v. L'Hoste, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

124. It is common practice in Mexican prisons, for example, for those who have money to buy privileges, protection and whatever personal items they desire for their cells. For example, note the incarceration of reputed Mexican drug baron, Rafael Caro Quintero. While imprisoned, Quintero is protected by his codefendants who act as private bodyguards; has his food brought to him from the outside; is allowed unlimited use of the telephone; and is allowed

in court, conviction and forfeiture under the criminal forfeiture statutes are barred.¹²⁵

Another problem faced by the government in its attempt to confiscate traffickers' assets via the criminal forfeiture statutes is the standard of proof necessary to convict an individual under the statutes. This burden is "proof beyond a reasonable doubt." An example of the degree of proof required under this standard is:

Each of you jurors are to be so convinced by the evidence . . . that as prudent men you would feel safe to act upon such conviction in matters of the highest concern and importance to your own dearest and most important interests, under the circumstances where there is no compulsion or coercion upon you to act at all¹²⁶

This burden flows from the requirement of a criminal conviction before forfeiture under both RICO and CCE.¹²⁷

This criminal standard contrasts the lower "proof by a preponderance of the evidence" standard used in civil forfeiture cases.¹²⁸ Therefore, as a practical matter, the government does not carry as heavy a burden of proof in the civil arena and stands in a better position to recover forfeitable assets under the statute.

The principal impediment to the success of criminal forfeiture statutes is the requirement that the defendant be given notice that the government has taken actions against him.¹²⁹ Because the government is required to give this notice in establishing *in personam* jurisdiction, the defendant has both the incentive and time to transfer his property from United States' jurisdiction, thereby avoiding the possibility of divestiture upon conviction.¹³⁰ This problem is often compounded by the liquidity

frequent and unquestioned female visitors. In addition, Quintero's cell is equipped with a television, videocassette recorder and stereo. He walks around the prison wearing gold jewelry without fearing attacks from other inmates. Hous. Chronicle, Nov. 12, 1987, § 1, at 12, col. 1-2. Within months after entering prison in 1985, Quintero had confederates dig a 780 foot long tunnel from the west side of the prison to free him. Hous. Post, Nov. 12, 1987, at A1, A16, col. 1. Note additionally, the ruling by the Colombian Supreme Court that the enabling legislation allowing the United States to extradite Colombian nationals for drug trafficking is unconstitutional. This ruling allowed many imprisoned traffickers, including reputed drug kingpin Jorge Luis Ochoa, to remain safe from U.S. prosecution. Hous. Post, Nov. 24, 1987, at A4, col. 1.

125. 18 U.S.C. § 1963(a) (Supp. IV 1986); 21 U.S.C. § 848(a) (Supp. III 1985).

126. *Chambers v. State*, 232 Ind. 349, 356, 111 N.E.2d 816, 819 (1953).

127. 18 U.S.C. § 1962(a) (1976); 18 U.S.C. § 1963(a) (Supp. IV 1986); 21 U.S.C. § 848(a) (Supp. III 1985); see S. REP. NO. 97-520, 97th Cong., 2d Sess. 4 (1982).

128. *United States v. One 1978 Chevrolet Impala VIN-1L69U8S156817*, 614 F.2d 983 (5th Cir. 1980); *United States v. One 1950 Buick Sedan*, 231 F.2d 219 (3d Cir. 1956) (citing *Brinegar v. United States*, 338 U.S. 160 (1949)); *United States v. One 1975 Chevrolet K-5 Blazer Vehicle Identification Number CKY185F135794*, 495 F. Supp. 737 (W.D. Mich. 1980).

129. FED. R. CRIM. P. 7(c)(2).

130. Destruction or removal of property in order to frustrate seizure or forfeitable assets

of assets involved. Most drug deals are cash transactions; the immediate proceeds are repeatedly transferred and readily invested in legal business concerns.¹³¹ The tracing of assets is also hampered by the ready availability of financial institutions which are shielded from discovery by Bank Secrecy Regulations.¹³² By successfully transferring assets, even upon conviction under RICO or CCE, the trafficker has preserved that which the statutes were created to destroy.¹³³ As a result, these assets allow the drug ring to continue operation through either a new ringleader or proxy management from prison.¹³⁴ Thus, the primary goal of destroying large-scale narcotics operations by eroding their economic base has been circumvented.

A fourth factor limiting the effectiveness of CCE and RICO in attacking drug traffickers' assets involves the degree of nexus which must be shown between the illegal activity and property to be forfeited. The scope of forfeitable property under CCE and RICO is restricted to those assets that have a "nexus" between the illegal act and the property forfeited.¹³⁵

There are two major classes of property, and two subsets of these classes, which are subject to forfeiture under both CCE and RICO.¹³⁶

constitutes obstruction of justice, a federal offense. 18 U.S.C. § 2232 (Supp. IV 1986) provides: "Whoever, before, during, or after seizure of any property, in order to prevent the seizure . . . destroys, or removes the same, shall be fined not more than \$10,000 or imprisoned not more than five years, or both." *Id.* Although the penalties have increased slightly since the 1976 provision, which involved a \$2,000 fine and one year prison term, these increases have not served as an effective deterrent. *Id.* See 18 U.S.C. § 2232 (1976). To the drug trafficker trying to prevent the forfeiture of millions of dollars worth of assets, the prospect of serving a prison term, being fined, or both, is meaningless.

131. See, e.g., *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980) (noting use and problems arising from defendants' use of commingled funds, interim deposits and surreptitious accounting techniques); *United States v. Parness*, 503 F.2d 430, 435-37 (2d Cir. 1974) (noting repeated transactions by defendant to conceal source of funds), *cert. denied*, 429 U.S. 820 (1976).

132. Hong Kong, Switzerland and the Cayman Islands attract launderers of illicitly obtained money due to their status as major international financial centers. See NIE, *supra* note 11, at 3. Their bank secrecy laws cloak the movement of the large sums of money involved in the drug trade. *Id.* See generally *Offshore Tax Havens: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 174-77 (1979). For a list of tax havens and the details of their secrecy laws, see Department of Treasury, IRS, TAX HAVEN INFORMATION BOOK (Feb. 1982).

133. According to RICO's prefatory Statement of Findings and Purpose:

It is the purpose of this Act [Organized Crime Control Act of 1970] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Pub. L. No. 91-452, 84 Stat. 922, 923 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 1073.

134. See *United States v. Rubin*, 559 F.2d 975, 991 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979).

135. 18 U.S.C. § 1962(a) (1976); 21 U.S.C. § 853 (Supp. II 1984).

136. *Asset Forfeiture Report*, *supra* note 25, at 2.

The first of these classes of forfeitable assets is "contraband."¹³⁷ Contraband is the most commonly forfeited asset. It includes goods or merchandise whose possession, importation, or exportation is forbidden by law,¹³⁸ including the drugs themselves.¹³⁹ Mere possession of this "property" is a crime; thus, forfeiture of contraband is relatively simple and requires no tracing by the government.¹⁴⁰ The subset of this classification is "derivative contraband."¹⁴¹ It includes assets such as cars, boats, airplanes and storage houses which serve the purpose of facilitating or conveying illegal drug transactions.¹⁴²

"Proceeds" comprise the second major classification of forfeitable property. "Direct proceeds" include cash and other property received in an illegal transaction.¹⁴³ The subset of proceeds under both CCE and RICO is deemed "derivative or secondary proceeds."¹⁴⁴ This is property that may be unrelated to the trafficking operation, but which is purchased and maintained with direct proceeds.¹⁴⁵

While the government has little difficulty in establishing the required link between cash or other direct proceeds and the illegal enterprise, serious problems arise when prosecutors seek forfeiture of derivative proceeds. Because derivative proceeds are the result of comingling, laundering and other activities intended to distance the proceeds from the original drug transaction, the government has great difficulty demonstrating the nexus between the item and the transaction.¹⁴⁶ Multiple transfers of cash and property are a part of complex laundering schemes through which proceeds are often transferred out of the United States. These proceeds are later returned after a series of sham business transactions or deposited in a "safe" offshore banking institution.¹⁴⁷ As a result of these transactions, an intensive investigation is often needed to gather evidence of a defendant's acquisition and present ownership of derivative proceeds subject to forfeiture.

The major limitation in this area is the lack of technical expertise of the Drug Enforcement Administration in dealing with complex financial tracing cases.¹⁴⁸ Both CCE and RICO have a strict tracing requirement; once traffickers remove direct proceeds from their possession and begin

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 2-3.

144. *Id.* at 3.

145. *Id.*

146. See *supra* note 131 and accompanying text.

147. See *supra* note 132 and accompanying text.

148. See *Asset Forfeiture Report*, *supra* note 25, at 19-21.

to manipulate these assets, the statutory requirement that the government prove the connection between these newly created "derivative proceeds" and the original transaction greatly increases the government's task.¹⁴⁹

A final provision of both CCE and RICO that greatly limits their potential as a tool in the war against drugs is the time at which forfeiture occurs. Forfeiture under the criminal statutes is *in personam*; there is no basis for forfeiture until an individual is convicted. Upon conviction, RICO instructs the courts to authorize the Attorney General to seize all property or interests declared forfeitable under the statute.¹⁵⁰ CCE, on the other hand, is silent as to when seizure should occur, but judges and scholars believe the procedure should mirror RICO.¹⁵¹

In 1972 the Supreme Court amended Rule 32(b)(2) of the Federal Rules of Criminal Procedure to provide:

Criminal Forfeiture: When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture fixing such terms as the Court shall deem proper.¹⁵²

The application of Rule 32(b)(2) to both CCE and RICO is made clear by the Notes of the Advisory Committee.¹⁵³ The Attorney General, therefore, cannot seize forfeitable assets under either statute until *after* there has been a conviction, declaration of forfeiture, and court order of seizure.¹⁵⁴ This requirement keeps the trafficker's options to safely shield his assets viable.

C. Civil Forfeiture of Assets

Despite the demonstrated ineffectiveness of both CCE and RICO as tactics to force the forfeiture of assets by drug traffickers, an alternative does exist: civil forfeiture of assets under the Controlled Substances Act, section 881. This statute was enacted in 1970 as part of the Controlled Substances Act of 1970.¹⁵⁵ Its purpose was to strengthen law enforcement authority against drug trafficking while assuring the forfeiture of

149. *Id.*

150. 18 U.S.C. § 1963(f) (Supp. III 1985).

151. H. MYERS & J. BRZOSTOWSKI, DRUG AGENT'S GUIDE TO FORFEITURE OF ASSETS, U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION 273 (2d ed. 1987) [hereinafter DRUG AGENT'S GUIDE].

152. FED. R. CRIM. P. 32(b)(2).

153. DRUG AGENT'S GUIDE, *supra* note 151, at 273.

154. *Id.*

155. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236 (codified at 21 U.S.C. § 881 (1976, Supp. II 1978, & Supp. III 1979)).

drug-related assets.¹⁵⁶ Although no minimum amount of a controlled substance is necessary to trigger forfeiture, the Act provides severe criminal penalties for persons manufacturing or selling controlled drugs primarily for profit.¹⁵⁷

The original Act was supplemented in 1978 by subsection 881(a)(6) to provide for the forfeiture of moneys, negotiable instruments, or other valuables used or intended to be used in violation of the Controlled Substances Act.¹⁵⁸ This was the first statute to permit civil forfeiture of accumulated profits of criminal activity. This provision, attaching the proceeds of trafficking, is extremely valuable to the government and has recently become established as the preferred attack by DEA.¹⁵⁹ Now, drug agents have a very real and powerful weapon to strike at the profits of drug trafficking. Investigators are no longer restricted to the procedure of arrest, seizure, and trial, resulting in neither conviction nor forfeiture.¹⁶⁰ Through section 881, the means now exist to *directly* attack the third element of the drug-trafficking organization; namely, the illegally accumulated assets of its members.¹⁶¹

IV. THE DIFFERENCES BETWEEN CIVIL AND CRIMINAL FORFEITURE

A. *The Nature of the Proceedings*

All forfeiture actions must take place pursuant to a statute. Unless a forfeiture statute expressly requires a conviction, the statute is considered a civil action against property.¹⁶² In contrast to the *in personam* nature of the criminal statutes, CCE and RICO, the civil forfeiture statute, Title 21 of the United States Code, section 881, is a proceeding *in rem*. The legal proceeding is directed solely against property in order to determine the ownership of that property. This action is limited to the question of ownership and cannot impose personal obligations.¹⁶³

In the civil forfeiture action, the property itself is considered the

156. H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 1-26, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS, 4566, 4566-92.

157. *Id.* at 4575-76; CONG. DIG., Feb. 1979, at 37.

158. 21 U.S.C. § 881(a)(6) (1982) (The Controlled Substances Act is U.S.C. Title 21).

159. DRUG AGENT'S GUIDE, *supra* note 151, at 291-93.

160. This is often the case with CCE and RICO cases. See *Asset Forfeiture Report*, *supra* note 25, at 11.

161. See DRUG AGENT'S GUIDE, *supra* note 151, at 1.

162. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. One (1) 1975 Thunderbird*, 576 F.2d 834 (10th Cir. 1978); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976); *United States v. 110 Bars of Silver*, 508 F.2d 793 (5th Cir. 1975); *United States v. One (1) 1969 Buick Riviera*, 493 F.2d 553 (5th Cir. 1974).

163. See *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917); *Yokohama Specie Bank v. Wang*, 113 F.2d 329 (9th Cir. 1940); *Strong v. United States*, 46 F.2d 257 (1st Cir. 1931).

defendant.¹⁶⁴ The power of the court to subject an item to civil forfeiture depends on obtaining jurisdiction over the object.¹⁶⁵ While *in personam* decisions affect only the parties to the proceedings, *in rem* decisions affect "the whole world" including unknown claimants to the property.¹⁶⁶

B. *The Burden of Proof*

To begin a forfeiture action under section 881, one must show "probable cause" that the property was used illegally or acquired with illegally obtained proceeds.¹⁶⁷ This probable cause can be founded solely on a reasonable basis for belief of guilt. Reasonable belief is more than mere suspicion, but less than *prima facie* proof.¹⁶⁸ This "reasonable basis for belief of guilt exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed"¹⁶⁹ In a criminal case, on the other hand, the government must prove the defendant's guilt "beyond a reasonable doubt."¹⁷⁰ Given the low threshold requirements for initiating a forfeiture action under the civil forfeiture statute, section 881, the relative ease with which the civil proceeding can be instituted is apparent. The result of this more convenient procedure is to open the door to further forfeiture of trafficking-derived assets.

A showing of probable cause is sufficient for the government to declare property forfeited.¹⁷¹ Once the presumption of probable cause is established, the burden of proof shifts to the party claiming the property.¹⁷² Since 1799, once the government has shown probable cause for seizure of assets, federal statutes have put the burden of proof on owners to show that their property is not forfeitable.¹⁷³ The current federal statute encompassing practically all civil forfeiture statutes states: "[i]n all suits or actions . . . brought for forfeiture . . . , where the property is claimed by any person, *the burden of proof shall lie upon such claimant* ;

164. See *Freeman v. Alderson*, 119 U.S. 185 (1886).

165. *Id.* at 188-89.

166. See *Van Oster v. Kansas*, 272 U.S. 465 (1926); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818).

167. *United States v. One 1950 Buick Sedan*, 231 F.2d 219 (3d Cir. 1956) (citing *Brinegar v. United States*, 338 U.S. 160 (1949)).

168. See generally *United States v. One 1978 Chevrolet Impala VIN-1L69U8S156817*, 614 F.2d 983 (5th Cir. 1980); *United States v. One 1975 Chevrolet K-5 Blazer Vehicle Identification Number CKY185F135794*, 495 F. Supp. 737 (W.D. Mich. 1980).

169. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

170. See *supra* note 126 and accompanying text.

171. See *supra* notes 167-69 and accompanying text.

172. See *Rubin v. United States*, 289 F.2d 195, 200 (5th Cir. 1961).

173. *Id.*

... PROVIDED, that probable cause shall be first shown for the institution of such suit or action"¹⁷⁴ Two exceptions to this rule exist when owners of forfeited property come forward and prove, by a preponderance of evidence that: the property was neither used, nor intended to be used illegally;¹⁷⁵ or the property fits into an express statutory exception, such as a common carrier or stolen conveyance.¹⁷⁶ This requirement of probable cause is incorporated expressly,¹⁷⁷ as well as by reference,¹⁷⁸ in the forfeiture section of the Controlled Substances Act. Because the owner is faced with a showing of probable cause, federal courts must enter a judgment of forfeiture against the contested property if the owner fails to appear.¹⁷⁹

The practical results of this aspect of the civil forfeiture statute are twofold. First, it places principal responsibility for establishing legality of possession on the "owner."¹⁸⁰ This lies in contrast to the government's burden of showing the defendant guilty beyond a reasonable doubt to trigger forfeiture under CCE and RICO.¹⁸¹ Secondly, because this civil forfeiture statute is often used in conjunction with a wide variety of other federal and state statutes aimed at deterring and prosecuting drug traffickers, the possibility of an "owner's" appearance in court provides a link to establish *in personam* jurisdiction over the individual for further criminal proceedings.

C. *The Requirements of Notice and a Hearing*

The Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that the government provide a person with notice and an opportunity to be heard prior to the taking of his property through civil forfeiture.¹⁸² There are a number of "extraordinary situations," however, in which the government can *postpone* notice and a hearing until *after* a seizure. The common thread binding these extraordinary situations include: a responsible government official who initiates the seizure pursuant to statutory authority; the seizure serves an important government interest; and there is a need to expedite

174. 19 U.S.C. § 1615 (Supp. III 1985) (emphasis added).

175. 21 U.S.C. § 881(a)(4)(A) (1982).

176. 21 U.S.C. § 881(a)(4)(B) (1982).

177. See 21 U.S.C. §§ 881(a)(4)(B), 881(a)(6), 885(a)(1) (1982).

178. 21 U.S.C. § 881(a) (1982). The standard is also incorporated by reference in the Contraband Seizure Act, 49 U.S.C. § 784 (1976).

179. FED. R. CIV. P. 56. See *United States v. One 1975 Mercedes 280*, 590 F.2d 196 (6th Cir. 1978).

180. Although the result seems harsh, this burden is not unconstitutional. *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976).

181. See *supra* note 126 and accompanying text.

182. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

the proceedings.¹⁸³ For various reasons, the seizure of trafficking-related forfeitable property has been recognized as one of these "extraordinary situations."¹⁸⁴

The first factor characterizing the attachment of drug-related assets as an extraordinary situation and allowing seizure without notice is the transferability problem. As noted earlier, both CCE and RICO require that an individual be given notice¹⁸⁵ prior to proceedings, thus facilitating the transfer of title of potentially forfeitable assets to a third party including a relative, an attorney, or a bona fide purchaser. As a result, even if a trafficker is convicted under one of the criminal statutes, the illegally-acquired assets remain intact.¹⁸⁶ Under the civil forfeiture statute, however, forfeitable assets can be seized without prior notice of impending proceedings, thereby eliminating or reducing the traffickers' opportunity to fraudulently transfer the assets that would be forfeited under the statute.¹⁸⁷

An important policy consideration behind the war on drugs is the serious threat drugs pose to American society, particularly children and teenagers.¹⁸⁸ The three elements that make up drug-trafficking organizations are drugs, people and assets. The one element most difficult to replace by drug organizations is the illegal assets.¹⁸⁹ By proceeding against property without notice, government prosecutors can deprive traffickers of their assets and operating tools, and hamper their ability to function, if not shut down the operations completely.

Another factor rationalizing the attachment of drug-related assets without notice as an "extraordinary situation" is the duty imposed on DEA agents and other law enforcement officials. These officials receive special training in the law of forfeiture as well as search and seizure techniques.¹⁹⁰ Consequently, they have a positive duty to *insure* that probable cause exists to forfeit property prior to attachment of drug-related assets.¹⁹¹ For these reasons,¹⁹² the seizure of drug-related forfeitable property without prior notice or hearing is constitutional.¹⁹³

It is significant to note that, although pre-seizure notice of forfeiture

183. *Id.* at 91-92.

184. *Fell v. Armour*, 355 F. Supp. 1319, 1326 (M.D. Tenn. 1972).

185. *See supra* notes 129-30 and accompanying text.

186. *See supra* notes 132-34 and accompanying text.

187. *See* DRUG AGENT'S GUIDE, *supra* note 151, at 158.

188. *Id.*

189. Zimmerman, *Asset Forfeiture*, 10 DRUG ENFORCEMENT, Fall 1983, at 17, 18.

190. *Id.*

191. DRUG AGENT'S GUIDE, *supra* note 151, at 159.

192. In addition, it would seem foolish to require notice and a hearing prior to seizing the proceeds of crime, but not to require notice and a hearing before arrest of a criminal. *United States v. One 1967 Porsche*, 492 F.2d 893, 894 (9th Cir. 1974).

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

need not be given to an individual, post-seizure notice and hearing are required. The due process clauses of the Constitution¹⁹⁴ require that a person be given notice and an opportunity to be heard before being deprived of property or important interests.¹⁹⁵ In forfeiture cases, the constitutional right that entitles "owners" to notice and a hearing is simply postponed, and not eliminated.¹⁹⁶

D. *The Time at Which Forfeiture Occurs*

Another significant difference between the criminal statutes and the civil forfeiture provision, section 881, is the time at which forfeiture occurs. Criminal forfeiture is an action against a person; there is no basis for forfeiture until there is a conviction under the statute.¹⁹⁷ Therefore, a transfer of potentially forfeitable property prior to conviction will usually circumvent forfeiture.¹⁹⁸ Civil forfeiture, on the other hand, uses the "personification fiction," which characterizes forfeitable property as guilty at the moment it is illegally used.¹⁹⁹ Civil forfeiture may be judicially imposed at some time after the illicit use, but its vesting in the government is deemed to "relate back" to the time of illegal use.²⁰⁰ The subsequent finding of forfeiture goes to the perfection of this legal conclusion.²⁰¹

Because forfeiture must be specifically authorized by a statute, Congress and state legislatures are, in fact, free to decide when ownership passes to the government pursuant to statutory requirements.

Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend

194. U.S. CONST. amends. V, XIV.

195. See generally *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (loss of utilities); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (repossession of furniture); *Goldberg v. Kelly*, 397 U.S. 203 (1970) (loss of welfare benefits).

196. See generally *Calero-Toledo*, 416 U.S. at 663 (constitutional right to notice and a hearing in forfeiture actions could be postponed until after seizure). See also *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) ("The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.").

197. See *supra* notes 150-54 and accompanying text.

198. See *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

199. The concept of "offending" property has been referred to as the "personification fiction." Note, *supra* note 83, at 768 n.1. The fiction is that the owner need not be punished because the forfeiture is directed against the "guilty" property. *Id.*

200. See *United States v. Stowell*, 133 U.S. 1, 17-18 (1890); *United States v. One 1975 Chevrolet K-5 Blazer Vehicle Identification Number CKY185F135794*, 495 F. Supp. 737, 744 (W.D. Mich. 1980).

201. See *United States v. 160 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814); *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978); *United States v. Mills*, 440 F.2d 647 (6th Cir. 1971); *Florida Dealers & Growers Bank v. United States*, 279 F.2d 673 (5th Cir. 1960); *But see United States v. 396 Barrels Distilled Spirits*, 28 F. Cas. 121, 125 (1866) (No. 16,503).

upon the construction of the statute.²⁰²

In early American statutes, neither Congress nor state legislators specified when forfeiture was to take place. It was left to the Supreme Court to establish a presumption that the forfeiture of both real and personal property takes place at the moment of the illegal use or criminal act, unless the forfeiture statute specifically states otherwise.²⁰³ This presumption of "relation back" is now followed in state and federal jurisdictions.²⁰⁴

The relation back concept is the single most significant aspect of this provision. This is particularly apparent in cases where the property is transferred to a third party after it has been "tainted" by illegal activity. Under the civil statute, a person whose illegal activity taints the property cannot prevent forfeiture by transferring the property to an innocent purchaser.²⁰⁵ Courts in civil forfeiture actions focus on the use made of the property, and not on the good faith of the third party.²⁰⁶ Forfeiture takes place at the moment of illegal use; therefore a third party cannot acquire a legally recognizable interest in the property after the act that subjects it to forfeiture.

E. *The Scope of Forfeitable Assets*

Another factor that distinguishes the civil forfeiture statute from its less effective criminal counterpart is the scope of assets forfeitable pursuant to statutory law. Before property can be forfeited, it must fall within a provision of a forfeiture statute. Unless property fits into a specific section of these statutes, it will escape forfeiture.²⁰⁷ As noted, forfeitable property is divided into two larger categories: contraband and proceeds.²⁰⁸ Each asset forfeitable under a federal statute is classified as one of these types of contraband.

Federal law classifies all controlled substances under five control

202. *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 351 (1806).

203. *Id.*; *1960 Bags of Coffee*, 12 U.S. (8 Cranch) at 398; *In re Henderson's Distilled Spirits*, 81 U.S. (Wall. 14) 44, 44 (1871); *Stowell*, 133 U.S. at 1.

204. These statutes include 21 U.S.C. § 881 (1982), the civil forfeiture section of the Controlled Substances Act; 21 U.S.C. § 505 (repealed 1982), the civil forfeiture section of the State Uniform Controlled Substances Act; 21 U.S.C. § 848 (1970), the criminal forfeiture section of federal law relating to Continuing Criminal Drug Enterprises and felony forfeitures; and 18 U.S.C. § 1963 (1982), the criminal forfeiture section of the Racketeer Influenced and Corrupt Organizations Act (RICO).

205. *In re Henderson's Distilled Spirits*, 81 U.S. 44; *Simons v. United States*, 541 F.2d 135 (9th Cir. 1976); *7 Fifths Old Grand-Dad Whiskey v. United States*, 158 F.2d 34 (10th Cir. 1946).

206. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974).

207. *United States v. Lane Motor Co.*, 199 F.2d 495 (10th Cir. 1952), *aff'd*, 344 U.S. 630 (1953).

208. *See supra* notes 136-45 and accompanying text.

groups called "Schedules."²⁰⁹ The controls and penalties for violations of the Controlled Substances Act vary with the Schedules. There are three basic factors used to determine in which Schedule a drug belongs. These include: its potential for abuse; lack of accepted medical use for the drug; and its high likelihood of dependence or serious risk of harm.²¹⁰ When all three of these conditions exist, a drug is classified as one presenting the greatest danger to the public and is deemed "Schedule I."²¹¹ This category includes opium derivatives, natural opiates, and "hallucinogens," including LSD, mescaline, heroin and marijuana.²¹²

Schedule I drugs fall within the definition "contraband per se."²¹³ They are virtually always illegal to possess, except for bona fide research purposes, and are therefore always forfeitable.²¹⁴ Under federal law, both Schedule I and II drugs are "summarily" forfeited to the government.²¹⁵ Neither special forfeiture proceedings nor paperwork is required prior to seizure.²¹⁶

For federal forfeiture purposes, all other non-Schedule I or II drugs are "derivative contraband."²¹⁷ Unlike Schedule I and II drugs, other controlled substances, including valium, codeine, morphine and amphetamines, have accepted medical uses. They are both produced and prescribed for legitimate medical purposes. Whereas Schedule I and II drugs are forfeitable as contraband per se, prior to the forfeiture of Schedule III, IV and V substances, the government must show probable cause that the drugs have been illegally "manufactured, distributed, dispensed, or acquired."²¹⁸ These substances are subject to forfeiture as derivative contraband.²¹⁹

A second type of property forfeitable under the civil forfeiture statute includes "[a]ll 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."²²⁰ The statute and prior case law have not defined the terms "raw materials, products, and equipment." As a result, courts are likely

209. 21 U.S.C. § 812(a) (1982).

210. 21 U.S.C. § 812(b)(1) (1982).

211. 21 U.S.C. § 812 (1982).

212. *Id.*

213. *See supra* note 136 and accompanying text.

214. 21 U.S.C. § 881(f) (1982).

215. Pub. L. No. 95-570, Oct. 27, 1986, Schedule II drugs are considered "contraband" for forfeiture purposes. *Id.*

216. *Id.*

217. *See supra* note 137 and accompanying text; *see also* 21 U.S.C. § 881(a)(1) (1982).

218. 21 U.S.C. § 881(a)(1) (1982).

219. *Id.*

220. 21 U.S.C. § 881(a)(2) (1982).

to construe them according to their ordinary dictionary meanings.²²¹ These definitions are broad enough to encompass all contraband other than land or buildings, and are limited only by additional language in the statute.²²²

In order to confiscate these items of contraband, the government need not show actual use. The wording of the statute indicates that *intended for use* is sufficient to violate the statute.²²³ No constitutional provision requires that the government wait for an illegal use prior to forfeiture. In fact, many statutes make it a crime to possess property intended for illegal use,²²⁴ and also provide for the civil forfeiture of the property.²²⁵ Because the issue of intent is a question of fact, unless the individual in control of the forfeitable property admits his intent, the issue must be proved by circumstantial evidence²²⁶ based on the time and distance between the property and the illegal activity.²²⁷ As the time and distance between the illegal activity and the property increases, it becomes more difficult to prove the property was intended for illegal use.

Although section 881(a)(2) is broad in scope, it is interesting to note that it does not apply to paraphernalia commonly associated with the illegal use of illicit drugs including "bongs," syringes, "roach clips" and rolling papers.²²⁸ The section is confined to property connected with manufacturing, delivering and importing drugs.²²⁹

Another type of property forfeitable under the civil forfeiture statute is "[a]ll property which is used, or intended for use, as a container" for forfeitable drugs.²³⁰ The use, or intended use, of the object is controlling

221. See 2 A. SOUTHERLAND, STATUTORY CONSTRUCTION § 45.08 (4th ed. 1973).

222. See 21 U.S.C. § 881(a)(6) (1982) (regarding the forfeitability of money); 21 U.S.C. § 881(a)(4) (1982) (regarding the forfeitability of conveyances).

223. 21 U.S.C. § 881(a)(2) (1982).

224. See 25 U.S.C. § 5686 (1982) (making it a crime to "have or possess any liquor or property intended for use in violating the federal liquor laws"); 18 U.S.C. § 492 (making "any material or apparatus used or intended to be used, in the making of counterfeit [money]" illegal); 26 U.S.C. § 5763(d) (1982) (providing for the forfeiture of "all property intended for use in [the illicit production and distribution of tobacco products]").

225. *United States v. \$73,277, 710 F.2d 283* (7th Cir. 1983) (defendant admitted taking money to Florida in an unsuccessful effort to buy marijuana, subject to forfeiture).

226. See *One 1941 Ford 1/2 Ton Pickup Truck v. United States, 140 F.2d 255* (6th Cir. 1944); *GMAC v. United States, 32 F.2d 121* (8th Cir. 1929).

227. See *United States v. One Ford Truck, 46 F.2d 176* (S.D. Tex. 1931); *Marggraf v. Lewis, 45 F.2d 247* (D. Mass. 1930).

228. See 21 U.S.C. § 881(a)(1), (2) (1982); 21 U.S.C. § 505(a)(2) (repealed 1982).

229. In 1979, the Office of Chief Counsel of the Drug Enforcement Administration drafted a Model State Paraphernalia Act which amended 21 U.S.C. § 505 to provide for the forfeiture of "use" paraphernalia. This Act was approved by the United States Department of Justice and was recommended for enactment by the White House. The Model Act was enacted in most states, was supported by every Federal Court of Appeals to consider it, and resulted in the closing of "head shops" throughout the United States. 21 U.S.C.A. § 505(a), (s) (1979).

230. 21 U.S.C. § 881(a)(3) (1982).

under this provision, rather than its character. As a result, almost anything used to hold, wrap, package, store or conceal forfeitable drugs and property, with the exception of conveyances, land and buildings,²³¹ can be included.²³²

One of the most significant aspects of the civil forfeiture statute is its ability to attach "[a]ll 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 forfeitable drugs, products, equipment and raw materials."²³³ Attaching the mobility of drug traffickers was a major purpose behind the initiation of the civil forfeiture statute.²³⁴ With this purpose in mind, the draftsmen of section 881(a)(4) chose the word "conveyances" rather than limiting the law solely to aircraft, vehicles or vessels. A conveyance has traditionally been defined as "that by which anything is borne along, carried, conveyed or transported; or which serves as a means or way of carriage."²³⁵ As a result, vast numbers of various conveyances are subject to forfeiture under the statute.²³⁶

This provision of section 881 has been particularly useful to attach drug-related assets because the transportation of drugs for any purpose, in any amount,²³⁷ subjects the conveyance to federal forfeiture. In spite of the expansive language of section 881(a)(4), claimants frequently challenge forfeiture involving only small amounts of drugs. Their reasoning runs: federal forfeiture statutes were passed by Congress to address commercial drug trafficking; transportation of small amounts of drugs, particularly for personal use, is not significantly related to commercial trafficking; therefore, there should be no forfeiture in such cases.²³⁸ Despite this seemingly well-reasoned argument, federal courts have refused to restrict the broad language of section 881(a)(4) to commercial trafficking in large quantities of drugs.²³⁹ The transport of any quantity of illicit

231. See *supra* note 222 and accompanying text.

232. See DRUG AGENT'S GUIDE, *supra* note 151, at 59.

233. 21 U.S.C. § 881(a)(4) (1982).

234. See generally *Drug Abuse Control Amendments—1970 Hearing on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970).

235. 18 C.J.S. *Conveyance*, § 9 (1939).

236. See *Biasotti v. Clarke*, 51 F. Supp. 608 (D.R.I. 1943) (mobile home).

237. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (one marijuana cigarette); *United States v. One 1975 Ford F100 Pickup Truck SNF10YUV83579*, 558 F.2d 755 (5th Cir. 1977) (two grams of cocaine); *Associates Investment Co. v. United States*, 220 F.2d 885 (5th Cir. 1955) (two marijuana cigarette butts).

238. See DRUG AGENT'S GUIDE, *supra* note 151, at 65.

239. This reasoning has failed on a number of counts. First, it has been noted that federal courts should not attempt to "read the mind" of Congress when the language of the statute is clear and unambiguous. *Ex parte Collett*, 337 U.S. 55 (1949). Second, although Congress' major purpose in instituting this statute was to strike at commercial drug traffickers, Congress

drugs subjects the conveyance to federal forfeiture.

The ultimate boundaries of forfeitable conveyances under this civil forfeiture statute are expansive.²⁴⁰ It is significant to note, however, that there are two exceptions to this statute: common carriers²⁴¹ and stolen conveyances.²⁴² Examples of common carriers include commercial airplanes, buses, trains or taxis. The rationale for exempting these carriers from federal forfeiture is that unlike owners of private conveyances, common carriers are generally required by law to accept all persons and parcels for carriage.²⁴³ Although as early as 1808, the Supreme Court suggested that it might be unconstitutional to forfeit stolen property,²⁴⁴ the statute expressly states that the conveyance must have been stolen before an owner can rely on this solution.

Probably the single most significant provision of section 881 related to federal forfeiture of drug-related assets is section 881(a)(6) which involves currency and proceeds. Prior to November 10, 1978, however, the civil forfeiture provisions of federal law did not even reach "drug money" or profits. On that date, section 881 of the Controlled Substances Act was expanded to include:

can and usually does have more than one purpose in mind in passing any law. See DRUG AGENT'S GUIDE, *supra* note 151, at 65. Third, section 881(a)(4) was modeled after federal forfeiture laws which have not been restricted to large-scale commercial trafficking. *Ted's Motors v. United States*, 217 F.2d 777 (8th Cir. 1954); *Associates Investment Co.*, 220 F.2d at 885.

240. To "transport" includes providing the moving power, and such power is subject to forfeiture. See *United States v. One (1) 1972 Wood 19 Ft. Custom Boat*, 501 F.2d 1327 (5th Cir. 1974); *Uitley Wholesale Co. v. United States*, 308 F.2d 157 (5th Cir. 1962); *United States v. Bryan*, 265 F.2d 698 (5th Cir. 1959).

Transporting drug carrying passengers subjects a conveyance to forfeiture. See *United States v. One 1971 BMW 4-Dr Sed.*, 652 F.2d 817 (4th Cir. 1981); *One 1975 Ford F100 Pickup Truck SNF10YUV83579*, 558 F.2d at 755; *United States v. Addison*, 260 F.2d 908 (5th Cir. 1958).

Conveyances used, or intended for use to "facilitate" the transport of illegal drugs are forfeitable. See *United States v. One 1979 Mercury Cougar*, 666 F.2d 288 (5th Cir. 1982) ("escort" conveyance); *United States v. One (1) 1971 Chevrolet Auto.*, 496 F.2d 210 (5th Cir. 1974).

Transferring drug money in a conveyance subjects it to federal forfeiture. See *United States v. One 1980 Cadillac Eldorado & \$43,000*, 705 F.2d 862 (6th Cir. 1983); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976). Negotiating details of a drug delivery in a conveyance subjects it to federal forfeiture. *Id.* See *United States v. One 1950 Chevrolet 4-Door Sedan*, 215 F.2d 482 (10th Cir. 1954).

241. 21 U.S.C. § 881(a)(4)(A) (1982).

242. 21 U.S.C. § 881(a)(4)(B) (1982).

243. *United States v. One 1957 Oldsmobile Auto.*, 256 F.2d 931 (5th Cir. 1958).

There can, we think, be no clearer case of reasonableness in classification for purposes of enforcing the narcotics statutes than the one made here. The opportunity of the owner of a common carrier to detect or prevent carriage by one of its passengers (who must be carried without discrimination) of a small quantity of narcotics is obviously slight as compared with the opportunity of the owner of an automobile who reserves the full right of inviting to ride whom he wishes.

Id. at 933.

244. *Peisch v. Ware*, 8 U.S. (3 Cranch) 347, 365 (1808).

All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter [the Controlled Substances Act], 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.²⁴⁵

This section provides for the civil forfeiture of anything valuable furnished or intended to be furnished illegally in exchange for a controlled substance.²⁴⁶ Although this "exchange" section refers to "moneys, negotiable instruments and securities," it is not limited to them and applies to "(any) other things of value" exchanged, or intended for exchange for illicit drugs.²⁴⁷

All proceeds traceable to illicit drug exchanges are subject to federal forfeiture.²⁴⁸ The term "proceeds" in Title 21 of the United States Code section 881(a)(6) is intended to apply to the profits of drug trafficking.²⁴⁹ Regardless of the number of times proceeds are transferred in exchange for other property, the newly acquired property becomes proceeds. Additionally, "proceeds" refer to "gross proceeds" of an exchange and not merely "net proceeds."²⁵⁰ As a result of this section, any assets which have a "link" to an illegal drug transaction are readily forfeitable under this section.

The final provision of section 881 enumerating the type of assets forfeitable to the government is also the most recent. On October 12,

245. Although these provisions are written as one paragraph in the statute, 21 U.S.C. § 881(a)(6) (1982), they are actually four distinct sections: Exchange; Proceeds; Facilitation Money; and the Innocent Owner.

246. 21 U.S.C. § 881(a)(6) (1982).

247. *DRUG AGENT'S GUIDE*, *supra* note 151, at 100.

248. 21 U.S.C. § 881(a)(6) (1982).

249. This point was made clear by Senator John Culver (D-Iowa), who along with Senators Lloyd Bentsen (D-Tex), William Hathaway (D-Me), and Sam Nunn (D-Ga), sponsored the statute, when he introduced the law into the United States Senate:

Mr. President, the third title of the amendment which I am offering would authorize U.S. officers to seize any moneys or other property that was furnished or intended to be furnished in exchange for illegal drugs. [I]t would authorize Federal officers to seize such moneys much as they now seize illicit drugs and vehicles that are used to transport or conceal these substances. In certain cases, they would also be able to seize property that is traceable to such illegal transactions. Finally, the provision would allow authorities to seize certain money, negotiable instruments and securities if they are used or intended to be used to facilitate such an illegal exchange.

124 CONG. REC. § 17,644 (1978).

250. 21 U.S.C. § 881(a)(6) (1982).

1984, a new provision²⁵¹ was added to the civil forfeiture statute which allows the forfeiture of real estate used in any felony violation of the Controlled Substances Act.²⁵² This section now provides DEA with the option to proceed to forfeit such property as real estate used as laboratory sites, growing lands, airstrip locations and drug storage facilities.²⁵³ Though a relatively recent addition to the civil forfeiture statute, this provision should prove a powerful weapon to both deter and punish drug traffickers.

V. LIMITATIONS OF THE CIVIL FORFEITURE STATUTE

Although the civil forfeiture statute provides a significantly more effective alternative against drug trafficking than its criminal counterpart, it is not without limitations. Among these are the "tracing" requirement as to proceeds; the bona fide purchaser exception; individually and as it relates to attorneys' fees; and the logistical problems of forfeiture.

The forfeitability of "proceeds" under the civil forfeiture statute section 881(a)(6) provides a far-reaching opportunity for the DEA to attack the illegally-derived assets of drug traffickers. But, this powerful economic "weapon" is accompanied by the same limitation as its criminal counterparts, the "tracing" of assets. Each time proceeds change form, a "link" is added to the "chain" that connects them to an illicit drug transaction. Before an asset can be forfeited under the "proceeds" section of the civil forfeiture statute, this chain must be identified with reasonable accuracy.²⁵⁴ Congress incorporated this requirement in section 881(a)(6) by inserting the term "traceable" after the term "tracing" in the Joint House-Senate explanation of the law:

[The statute] . . . provides for forfeiture of property which is the proceeds of an illegal drug transaction only if there is a traceable connection between such property and the illegal exchange of controlled substances. Thus if such proceeds were, for example, co-mingled with other assets, involved in intervening transaction, or otherwise changed in form: they would still be subject to forfeiture, but only to the extent that it could be

251. 21 U.S.C. § 881(a)(7) (Supp. III 1985).

252. Pub. L. No. 98-473, Oct. 12, 1984, codified at 21 U.S.C. § 881(a)(7) (Supp. III 1985).

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land 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 title 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.

253. 21 U.S.C. § 881(a)(7) (Supp. III 1985).

254. 21 U.S.C. § 881(a)(6) (1982). *See also supra* notes 168-69 and accompanying text.

shown that a traceable connection to an illegal transaction in controlled substances existed.²⁵⁵

As a result, if the proceeds of an illegal drug transaction cannot be traced to a specific, identifiable asset, there is, legally, nothing to seize and forfeit.

This problem of tracing is complicated by a number of factors. Chief among these is the already overwhelming case load on the Drug Enforcement Administration.²⁵⁶ Furthermore, because drug trafficking is, in fact, international in scope, the tracing aspect of the statute requires extensive investigation through a labyrinth of international banks, corporations, laundries and fronts.²⁵⁷

A noteworthy exception to all forfeiture provisions concerns bona fide purchasers.²⁵⁸ A bona fide purchaser (BFP) is an innocent party who gives something of legal value in exchange for proceeds and who has no knowledge that what he is acquiring is connected to drug trafficking.²⁵⁹ Both of these requirements must be met to qualify as a BFP. Under this doctrine, money and property loses its status as "tainted proceeds" upon transfer to a BFP.²⁶⁰

For the most part, this rule is beneficial. BFPs are protected under a theory that they take property free from unknown claims.²⁶¹ The government is also protected, at least to the extent that they can trace and

255. 1978 U.S. CODE CONG. & ADMIN. NEWS at 9522.

256. The DEA is the primary case-making authority for Drug Law Enforcement in the United States. See *supra* notes 76-77 and accompanying text.

257. See DEA Profile, *supra* note 18, at 3. This international tracing requirement is not only very expensive, but it also involves an extensive commitment of time and energy from DEA agents, as well as the possibility of a lost link between the proceeds and drug-related illegal activities. *Id.*

258. 21 U.S.C. § 881(a)(6) (1982).

259. A bona fide purchaser is:

One who has purchased property for value without any notice of any defects in the title of the seller. *Walters v. Calderon*, 25 Cal. App.3d 863, 102 Cal.Rptr. 89, 97. One who pays valuable consideration, has no notice of outstanding rights of others, and acts in good faith. *J.C. Equipment, Inc. v. Sky Aviation, Inc.*, 498 S.W.2d 73, 75. Bona fide purchaser for value is one who, without notice of another's claim of right to, or equity in, property prior to his acquisition of title, has paid vendor a valuable consideration. *Snuffin v. Mayo*, 6 Wash.App. 525, 494 P.2d 497. One who buys property or to whom negotiable document of title is transferred in good faith and without notice of any defense or claim to the property or document. U.C.C. § 7-501. One who takes trust property for value and without notice of breach of trust and who is not knowingly part of an illegal transaction. Restatement, Second, Trusts § 284; Uniform Probate Code § 2-202(3).

BLACK'S LAW DICTIONARY 161 (5th ed. 1979).

260. See U.C.C. §§ 8-301, 302 (1985); RESTATEMENT, RESTITUTION §§ 172-76 (1937). The Law of Restitution states: "Sec. 172 BONA FIDE PURCHASER Where a person acquires title to property under such circumstances that otherwise he would hold it subject to (a) lien, he does not so hold it if he gives value for the property without notice of such circumstances." *Id.* at § 172.

261. DRUG AGENT'S GUIDE, *supra* note 151, at 117.

claim the property given to the trafficker by the BFP as proceeds. But tracing is difficult. The government is also hampered by the loss of any forfeitable property if the proceeds of drug-related activities are exchanged with a BFP for unrecoupable services.²⁶²

This problem of services rendered in consideration of potentially forfeitable proceeds is particularly significant in regard to defense attorneys' fees. Although a thorough examination of this topic is beyond the scope of this comment,²⁶³ it is important to note that the civil forfeiture statute does not specifically exempt attorneys' fees.²⁶⁴ Only five decisions have considered the relationship between forfeiture and attorneys' fees.²⁶⁵ In *Payden v. United States*,²⁶⁶ the court found no statutory or constitutional obstacle to fee forfeiture. However, the opinions in *United States v. Reckmeyer*,²⁶⁷ *United States v. Ianniello*,²⁶⁸ *United States v. Badalamenti*,²⁶⁹ and *United States v. Rogers*,²⁷⁰ dealt with the inconclusive legislative history, and declared the statutes inapplicable to legitimately paid legal fees.²⁷¹ Although these cases, holding attorneys' fees were not forfeitable, provided a variety of reasons for their decisions, an attorney seeking to preserve assets paid to him as a legal fee has two arguments against their forfeiture. The first is that Congress did not intend the forfeiture provisions to reach assets transferred in exchange for legitimate legal services. The second is, even if the statutes apply to legal fees, an attorney is a BFP with title superior to the government's.²⁷² While both arguments have been used successfully by attorneys, this issue has not been litigated concerning the civil forfeiture statute, and thus a legitimate concern remains for the legal community as to how the courts would rule.

262. *Id.*

263. See also, Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures On the Right to Counsel*, 72 VA. L. REV. 493 (1986); Comment, *Forfeiture of Attorney's Fees Under RICO and CCE*, 54 FORDHAM L. REV. 1171 (1985-1986); Comment, *Forfeitability of Attorney's Fees Traceable as Proceeds From a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499 (1986).

264. 21 U.S.C. § 881 (1982 & Supp. III 1985).

265. Although all five cases involved the criminal forfeiture statutes, the defenses to forfeiture in these actions should be applicable to civil forfeiture, when, and if, it occurs.

266. See *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

267. No. Cr. 85-00010-A, slip op. (E.D. Va. Mar. 27, 1986).

268. No. § 85 Cr. 115, slip op. (S.D.N.Y. Sept. 3, 1985).

269. 614 F. Supp. 194 (S.D.N.Y. 1985).

270. 602 F. Supp. 1332 (D. Colo. 1985).

271. See *Reckmeyer*, No. Cr. 85-00010-A, slip op. at 7-14 (E.D. Va. Mar. 27, 1986) (modifying final order of forfeiture to exclude fees); *Ianniello*, No. § 85 Cr. 115, slip op. at 8-15 (S.D.N.Y. Sept. 3, 1985) (granting motion to exclude fees from forfeiture and to modify a restraining order preventing payment of fees); *Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985) (rejecting fee 23 forfeiture as justification for subpoena to lawyer); *Rogers*, 602 F. Supp. 1332, 1346-50 (D. Colo. 1985) (granting motion to modify restraining order).

272. Brickey, *supra* note 263, at 498-99.

A final difficulty encountered through use of the civil forfeiture provision is the seizure and subsequent maintenance of major assets by the DEA and other federal drug enforcement agencies. Although forfeitable assets often result in "bonuses" to the DEA in the form of functional equipment,²⁷³ as a result of increased use of forfeiture actions, particularly *in rem* proceedings, there is a concomitant increase in the expense and effort necessary to maintain these forfeited and forfeitable assets.²⁷⁴ This burden concerns assets attached both prior, and subsequent, to a final decree of forfeiture. Many of the problems involved in storing, cataloging and eventually liquidating this contraband²⁷⁵ are necessarily being considered by other federal agencies in addition to the DEA.²⁷⁶

VI. CONCLUSION

The United States is losing the war on drugs. At a cost of billions of dollars to American taxpayers, every strategy employed by the United States government to curb the traffic in illicit drugs has failed. The institution and use of the CCE and RICO criminal statutes, with their mandatory forfeiture provisions, marked a major step in targeting both drug traffickers and their drug-related assets. But, due to the stringent procedural and legal requirements of these statutes, neither CCE nor RICO is effective as a deterrent to drug trafficking.

While all other efforts, including criminal forfeiture, have met with limited success, a better alternative does exist: the civil forfeiture statute, Title 21 of the United States Code section 881. By making the traffickers' drug-related assets the primary target of enforcement efforts, this statute allows the government to remove the very basis of all drug operations: their illegally-derived assets. This forfeiture of assets not only undercuts the trafficking operations themselves, but also provides a significant source of revenue to financially-strapped drug law enforcement agencies. This income allows the DEA and other agencies to continue the costly and time-consuming investigations necessary to combat drug trafficking, as well as creates new incentives for undertaking these actions. As a result of the increasing use of the civil forfeiture statute, the drug law enforcement program has a weapon that will not only deter

273. Zimmerman, *Asset Forfeiture*, 10 DRUG ENFORCEMENT Fall 1983, at 2, 19.

274. *Id.*

275. In addition to seizing and forfeiting cars, boats and airplanes, DEA has also confiscated such assets as real estate, on-going businesses, securities and artwork. As a result of major drug prosecutions and subsequent civil forfeitures, the U.S. government currently owns one of the largest and most extensive single collections of Tiffany artwork in the world. *Id.* at 18-19.

276. *Id.* at 19.

the ever-increasing traffic in illegal drugs, but also pay for the continued operation of the enforcement agencies themselves.

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