NACDL Testimony

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Hearings on Bi-Partisan Bill to Provide a More Just and Uniform Procedure for Federal Civil Asset Forfeitures ("Civil Asset Forfeiture Reform Act of 1997")

Statement of David B. Smith

on behalf of
National Association of Criminal Defense Lawyers

before
Committee on the Judiciary, U.S. House of Representatives

Regarding Bi-Partisan Bill to Provide a More Just and Uniform Procedure for Federal Civil Asset Forfeitures ("Civil Asset Forfeiture Reform Act of 1997")

Chairman Hyde, Mr. Conyers, Other Distinguished Co-Sponsors of this bill and Members of the Committee:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I thank you for inviting me to speak at this hearing. Also appearing before this Committee today, and at its hearing last July is my fellow co-chair of our Forfeiture Abuse Task Force, E.E. (Bo) Edwards. And appearing beside me too is our President-Elect, also an asset forfeiture expert, Gerald B. Lefcourt.

NACDL is the preeminent organization in the United States advancing the mission of ensuring justice and due process for persons accused of crime. A non-profit, non-partisan, professional bar association formed in 1958, among our 9,000 direct members and 22,000 state and local affiliate

members are private criminal defense lawyers, public defenders, judges and law professors committed to preserving fairness within the American justice system.

It would be difficult to imagine a more egregious deviation from the American commitment to the rule of law, or one more dangerous to citizen rights and liberties, than the civil asset forfeiture statutes. I want to emphasize our deep appreciation to you. Chairman Hyde, Mr. Conyers, and the other members of the Committee who have taken the lead on forfeiture reform.

I. INTRODUCTION

I am the author of the leading treatise on forfeiture law, Prosecution and Defense of Forfeiture Cases. I was the deputy chief of the Asset Forfeiture Office of the Criminal Division when it was first set up in 1983. I helped draft the forfeiture provisions of Comprehensive Crime Control Act of 1984, which did so much to make forfeiture a powerful weapon in the fight against crime. Back then it was hard to get agents and prosecutors to use forfeiture. It was something most of them weren't familiar with. Certainly, no one then anticipated the widespread use, and frequent abuse, of forfeiture powers we see today.

Reform of the civil forfeiture laws is long overdue. Even most prosecutors and agents I speak with recognize that -- *privately, anyway*.

For your convenience, I have attached our thorough statement from the hearing of July 22, 1996, with its attachments A and B: section by section critiques of the DOJ's proposal (introduced at the urging of DOJ just a couple weeks ago by Congressman Schumer). There is much more in the DOJ and Treasury proposals and our criticism of them than can be addressed in this hearing. But believe me, their proposals are deeply troubling. I hope you will analyze them, and our critiques of them, very carefully.

As our prepared statement from last July's hearing continues to state our position on forfeiture reform, I will make this statement brief. I'll simply update our previous statement and re-emphasize the importance of what I see as four especially key provisions of this praiseworthy bipartisan bill:

- placing the burden of proof on the government, where it belongs, and by an appropriate standard -- clear and convincing evidence;
- providing a mechanism for the court to appoint counsel for indigent claimants;
- establishing a uniform "innocent owner" defense for all civil forfeitures.
- establishing time limits for providing notice of a seizure and for filing a civil forfeiture complaint in court.

II. FOUR KEY PROVISIONS OF THE BILL -- SPECIFICALLY

A. *Burden of Proof*

I'll never forget a speech I heard Judge Stephen Trott give a large group of prosecutors at the DOJ in the mid-1980s. Judge Trott was the Assistant Attorney General in charge of the Criminal Division at the time. (He is now a federal judge on the Ninth Circuit, appointed in 1988 by President Reagan.) He had served for many years as a deputy district attorney in Los Angeles. When he became U.S. Attorney for the Central District of California, Judge Trott discovered federal civil forfeiture. He was simply amazed, he told us, that you could confiscate someone's property merely by showing probable cause for forfeiture. It seemed unbelievable to him coming from the California state system.

And indeed it *is* amazing that a statutory burden of proof so out of line with current notions of due process could have survived this long. Yet, it has. But with your reform efforts, finally, we hope we are on the verge of correcting this abusive anomaly in American law.

Thanks to years of efforts, congressional, litigation, and journalistic, now even the DOJ concedes that the burden of proof must be raised. The Treasury Department still demurs, at least with respect to the specific forfeiture statutes it administers. But its position is increasingly untenable. *See e.g.*, United States v. One Parcel of Property at 194 Quaker Farms Road, 85 F.3d 985, 989 (2d Cir. 1996) ("after [the U.S. Supreme Court's decision in] Austin, it is now an open question whether 21 U.S.C. 881(a)(7) warrants civil or criminal due process protections, or possibly some hybrid of the two"; suggesting that burden of proof may be unconstitutional); United States v. Leasehold Interest in 121 Nostrand Ave., 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (government should be required to prove case under 881(a)(7) by clear and convincing evidence**)**; United States v. $12,390.00, 956 F.2d 801, 807-12 (8th Cir. 1992) (Beam, J., dissenting) (questioning constitutionality of burden of proof under 19 U.S.C. 1615); United States v. $191,910.00 U.S. Currency, 16 F.3d 1051, 1069 (9th Cir. 1994) (disparity between government's and claimant's burdens "involves a serious risk that an innocent person will be deprived of his property"); Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991) (landmark decision striking down Florida's forfeiture law and holding that due process requires state to prove its civil forfeiture case by clear and convincing evidence); Wohlstrom v. Buchanan, 884 P.2d 687, 692 (Ariz. 1994) ("Forfeiture statutes have increasingly been criticized for threatening due process rights by allowing the government to establish probable cause under a lesser standard of proof, and thereafter shifting the ultimate burden to claimants."); State v. Spooner, 520 So. 2d 336 (La. 1988) (state constitutional guarantee of due process requires that government prove its forfeiture case by at least a preponderance of evidence as property owner is entitled to a presumption of innocence similar to that in a criminal case; some members of Court would require clear and convincing evidence or proof beyond a reasonable doubt).

The bill's proposal to raise the bar to clear and convincing evidence is supported not only by due process considerations, but also by state law precedent. Some of our nation's largest states -- including California, New York and Florida -- rightly require clear and convincing evidence by the State to support a civil forfeiture of a citizen's property.

B. ***Appointed Counsel***

Nor is the bill's proposal to give the district judge discretion to appoint counsel for indigent claimants a radical departure from current law. But it *is* an important improvement to the current law. Once again, fundamental due process considerations strongly support the provision. In the U.S. Supreme Court case, Lassiter v. Department of Social Services, 452 U.S. 18 (1981), for example, concerning a parental termination proceeding, the Court held that where the government seeks to deprive a citizen of an important non-liberty (*e.g.*, property) interest, due process may very well require appointment of counsel for an indigent defendant. In fact, courts have already held that, under Lassiter, there is a due process right to appointed counsel in a civil forfeiture case, at least in some circumstances. *See e.g.*, United States v. Forfeiture, Property, All Appurtenances, 803 F. Supp. 1194 (N.D.Tex. 1992); Commonwealth v. $9,847.00 U.S. Currency, 637 A.2d 736 (Pa. Cmwlth. 1994).

District judges currently have authority to appoint *pro bono* counsel for an indigent prisoner claimants, under 28 U.S.C. 1915(d). *See e.g.*, Onwubiko v. United States, 969 F.2d 1392, 1399 (2d Cir. 1992). However, they rarely do so. *See* 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, 11.02, 11-12 (1996). This suggests that they will not make inappropriate appointments of counsel under the similar appointment provision in this bill. On the other hand, the *explicit* provision in the bill for reasonable attorney compensation should result in a much-needed increase in the number of appointments for civil asset forfeiture cases as compared with the experience under 1915(d).

It is important in this respect to remember that counsel appointed under the Criminal Justice Act (CJA), to represent a criminal defendant may also represent that defendant in a related civil forfeiture proceeding under current law. 18 U.S.C. 3006A(c) states that once counsel is appointed under CJA, he is to represent his client "at every stage of the proceedings..., including ancillary matters appropriate to the proceedings." *See e.g.*, the Guide to Judiciary Policies and Procedure, Vol. VII, Chapter 2, specifically indicating that representation in a civil forfeiture proceeding or on a motion for return of property pursuant to Rule 41(e) is appropriate under section 3006A(c).[1]

All this bill would do is extend the same authority to appoint counsel for indigent civil forfeiture claimants who do *not* face related criminal charges. Representation should not depend on the "fortuity" of whether one faces a related criminal case.

No matter how fair the formal civil forfeiture procedures are, the process can never really *be* fair if a claimant is forced to represent herself. This is a critical provision that must be in the final bill.

The Government's primary objection to this provision is that the cost of providing counsel would be paid from the DOJ and Treasury Asset Forfeiture Funds -- that is the funds that are derived from forfeited property from which the agencies seizing the property now derive a direct

pecuniary benefit. But the question of where the money comes from is an issue that should remain entirely separate from the merits of this provision. NACDL is not necessarily opposed to a different funding mechanism if that is what it takes to get this badly needed provision enacted. However, we have concerns about deploying the much less certain annual CJA appropriations. At the very least, if that mechanism is to be used, the Administration must commit itself to using its ample influence to help ensure an adequate increase in the annual CJA appropriations. I must stress, though, that NACDL's position is that the current CJA appropriations are, and have been for several years, quite inadequate to cover *current* demands. And rather than placing a new tax burden on Americans, it would seem much more economical and fair, and certain, to have the appointment dollars come the Asset Forfeiture Fund now the essentially exclusive till of the government seizors.

C. *Innocent Owner Provision*

The third key pillar of the bill in my opinion is the uniform provision for an innocent property owner defense to forfeiture. You might well ask: Who could argue with that, especially when the defense provided merely tracks current law under 21 U.S.C. 881 and 18 U.S.C. 981? But somehow, the Government nonetheless opposes even this modest provision.

The DOJ says it favors a uniform innocent owner defense, but then says it wants a defense that is *much narrower* than the one currently provided under the two main federal civil forfeiture statutes! That is not civil asset forfeiture *reform*. Clearly, the purpose of the worthy reform effort reflected in the bill is to make it *harder* for the Government to confiscate the property of innocent persons, *not easier*.

Meanwhile, the Treasury Department is opposed to adding *any kind* of innocent owner defense to the many statutes it enforces -- even a defense as unreasonably narrow as the one the DOJ supports. This is an especially outrageous position.

In his concurring opinion in the unfortunate 5-4 Supreme Court decision in Bennis v. Michigan, 516 U.S. ____, 116 S.Ct. 994 (1996), Justice Thomas actually urged Congress to take the responsibility he did not think the courts could properly take (i.e., without being unduly activist), for protecting innocent property owners. *See* Bennis, 116 S.Ct. at 1002. And his call to Congress has been echoed by every editorial writer and commentator writing about Bennis. *See e.g.*, Nation's Founders Would Gasp at Court's Stance, USA Today, March 5, 1996 (in "an appallingly unfair decision" Court has "given police the go-ahead to prey on and plunder innocents"); George F. Will, Mrs. Bennis' Car, Washington Post, March 10, 1996 at C7 ("So it is time for the political branches of state governments and the federal government to act on the clear signals from [Justice] Thomas and others concerning the need to protect innocent persons who cannot reasonably be considered negligent concerning the misuse of their property").

Treasury simply has its head stuck in the sand. Its adamant opposition to any innocent owner defense with respect to "its" forfeiture statutes, certainly speaks volumes about the unreasonableness of Treasury's views on the whole subject of forfeiture.

D. ***Enforceable Time Limitations for Notice and Commencement of Forfeiture Suit***

The final critical pillar of the bi-partisan bill is its establishment of enforceable time limits for the government to provide notice and commence a forfeiture suit. First, the measure establishes a much-needed, 60 day time limit for the government to provide notice of the seizure and its intent to forfeit the property. Second, if a person files a claim letter with the seizing agency, the U.S. Attorney would then have to file a civil forfeiture claim within 90 days of the receipt of the claim letter.

These time limits give the government ample time to initiate the forfeiture action. In fact, they provide much more time than most state forfeiture statutes allow. Moreover, the time limits are flexible. The government may ask a court to extend them for good cause.

Although the time limits in the bill are flexible, they do have necessary teeth. If the government fails to comply with the time limits and fails to obtain an extension of time for good cause shown, it may not proceed with the forfeiture action. The same remedy is found in most state forfeiture statutes. And it is found in the federal code, at 21 U.S.C. sec. 888(c). However, Section 888 covers only conveyances seized for drug-related offenses.[2] The same protection against government foot-dragging should be afforded to *all property owners*, and not just alleged drug dealers.

III. CONCLUSION

I would like those members of the Committee who may still be reluctant to get behind this bi-partisan forfeiture reform bill to know that NACDL and this Committee's staff counsel have made *every effort* to accommodate the Administration's concerns and objections and to craft a bill that the law enforcement agencies can support. But we simply cannot accede to demands to support a "compromise" bill that fails to ensure that the procedures by which property gets forfeited are fundamentally fair. We cannot endorse any bill that "compromises" away American liberties.

We are greatly concerned that while leaders of this Committee have been working to reform the civil asset forfeiture laws, DOJ has been vigorously lobbying Congress and the U.S. Judicial Conference Committee on Rules of Practice and Procedure for extreme changes to our nation's *criminal* forfeiture laws. These criminal forfeiture laws are also in need of reform, though not as critically as the civil forfeiture laws. But the DOJ's proposals in this area are not those of reform. The DOJ's proposals include for example a radical diminution of the historic American right to

trial by jury. Indeed, they would do away with the right to *any trial at all* on the issue of forfeiture.[3]

We would hate to see this Committee's worthy *civil* forfeiture reform efforts negated by another bill turning criminal forfeiture into just another, even worse instrument of oppression.

The DOJ's criminal forfeiture efforts, including its encouragement of the power-wishlist recently introduced by Representative Schumer, strike me as completely inconsistent with the DOJ's claim that it favors forfeiture reform.

I urge the DOJ to reconsider these proposals. And I respectfully urge Mr. Schumer, and every member of the Committee, to review NACDL's very detailed critiques of the DOJ and Treasury civil and criminal forfeiture proposals, in the Statement of July 22, 1996 before the Committee, attached to this Statement, at Attachments A and B.[4] If the DOJ succeeds in turning this bill into a law enforcement Christmas Tree, it will be worse than no reform.

NACDL's legislative director, Leslie Hagin, is available at any time in our Washington, D.C. office. And my office is right across the river in Alexandria, Virginia. We would be happy to meet with any Member or their staff at any time to discuss this bill or the larger subject of forfeiture reform at greater length than we can do here.

Once again, Mr, Chairman, thank you for the opportunity to testify on this important matter, and for your leadership in bringing forward this vital reform bill. I am pleased to see it already enjoys such strong bi-partisan support.

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1. Guidelines 2.01(F)(5)(v) and (vi), reprinted as an appendix to United States v. One 1985 BMW 318I, 691 F. Supp. 1074 (N.D. Ill. 1987). (However, in this case, the court held that it was without authority under the Criminal Justice Act to appoint counsel to represent the *wife* of a CJA defendant who was contesting the forfeiture of *her* property.)

2. Interestingly too, sec. 888 (c) gives the government only *60 days* to file a complaint. This bill gives the government an extra 30 days to do that.

3. Rather, the DOJ wants to wrongly treat criminal forfeiture as a simple sentencing matter -- just like a sentencing guidelines issue.

4. Please see also the second attachment to this Statement, also contained in the July 22, 1996 Hearing Report. This is a detailed 21 page letter I wrote on behalf of NACDL to Stefan B.

Cassella, on September 5, 1996. That letter also sets forth our views on some of the DOJ's most objectionable criminal forfeiture proposals, as well as its civil forfeiture proposals.

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