Civil and Criminal Forfeiture Procedure

U.S. Department of Justice
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Part I - pages 154-189

- The burden of proof is now preponderance of the evidence, section 983 (c). Pre-CAFRA, virtually all courts have upheld the constitutionality of putting the burden of proof on the claimant regarding the forfeitability of the property:

1. Post-CAFRA cases:

- *United States v. One Parcel... 2526 Faxon Avenue,* 145 F. Supp. 2d 942 (W.D. Tenn. 2001) (under CAFRA Government must establish the forfeitability of the property without using hearsay; claimant can put the Government to its proof without doing more than denying the forfeitability of the property);

2. Pre-CAFRA cases:

- *United States* v. *One "Piper" Aztec "F" Deluxe Model250 PA* 23 *Aircraft,* 321 F.3d 355 (3d Cir. 2003) (there was no constitutional infirmity in the pre-CAFRA allocation of the burden of proof on the claimant);

- *United States* v. *$129,727.00 U.S. Currency,* 129 F.3d 486 (9th Cir. 1997) (standard of proof in civil forfeiture cases is not probable cause; it is preponderance of the evidence, albeit with the burden on the claimant; the Government must at least equal the claimant's evidence in order to prevail; only where the claimant offers *no* evidence of a legitimate source for the money can the Government obtain a judgment based on probable cause alone) (collecting cases and rejecting *dicta* in *United States v. $49,576.00 in U.S. Currency,* 116 F.3d 425 (9th Cir. 1997), that burden shifting scheme is likely unconstitutional);

- *United States* v. *Land, Winston County,* 163 F.3d 1295 (11th Cir. 1998) (rejecting constitutional challenge to probable cause standard based On Eleventh Circuit precedents);

- *United States* v. *Four Contiguous Parcels,* 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (Table) (declining to overrule Sixth Circuit precedents interpreting *Ursery* as reaffirming view that placing the burden of proof on the claimant is permissible in a civil case);

- *United States* v. *Property, Parcel of Aguilar,* 337 F.3d 225 (2d Cir. 2003) (following *$129,727.00;* pre-CAFRA, the standard of proof was preponderance of the evidence, only the burden was on the claimant instead of the Government; the standard of proof in a civil case may certainly be less than beyond a reasonable doubt, and putting the burden on the claimant did not violate due process);

3. CAFRA carve-out:

Note: Some forfeiture cases are exempted from the burden of proof provision by 18 U.S. C. § 983(I). For those cases, the burden of proof remains on the claimant pursuant to 19 U.S. C. § 1615.

Likewise, section 316 of the USA PATRIOT Act of2001 applies the reverse burden of proof to terrorism cases under 18 U.S. C. § 981(a)(1)(G).

C. Jury instructions:

- *United States v. Wagoner County Real Estate,* 278 F.3d 1091 (10th Cir. 2002) (approving pre-CAFRA jury instruction in which court advised the jury that it had already found probable cause and that the burden was thus on the 'claimant to prove that the property was not used to facilitate a drug offense);

- *United States v. $16,500 in U.S. Currency,* 48 F. Supp. 2d 1268 (D. Or. 1999) (setting forth text of instruction advising jury of significance of court's earlier finding of probable cause);

- Pre-CAFRA jury instructions for civil forfeiture trials are available on AFML Online.

D. Bifurcation of trial:

1. Pre-CAFRA, bifurcation of the trial was required:

- *United States* v. *One Parcel of Real Estate (1012 Germantown Road),* 963 F.2d 1496 (11th Cir. 1992) (trial of civil forfeiture case should be bifurcated so that jury does not hear hearsay evidence in support of the Government's case on probable cause);

- *United States* v. *$189,825,00 in U.S. Currency,* 8 F. Supp. 2d 1300 (N.D. Okla. 1998) (noting that the trial was bifurcated into a "probable cause stage" and a "merits stage");

- *But see United States v. $9.041,598.68,* 163 F.3d 238 (5th Cir. 1998) (trial judge did not abuse discretion in declining to bifurcate trial but requiring that hearsay evidence, admitted only to establish probable cause, be submitted outside the presence of the jury);

E. Peremptory challenges:

Where there are multiple claimants demanding jury trial, it is proper to have claimants share challenges if interests of claimants are not adverse to each other:

- *United States v. All Funds on Deposit in Any Accounts,* 801 F. Supp. 984 (E.D.N.Y. 1992);

F. Joinder and severance:

1. Separate trials not required where multiple claimants' interests are not hostile:

- *United States v. All Funds on Deposit in Any Accounts,* 801 F. Supp. 984 (E.D.N.Y. 1992);

2. *In rem* actions against separate bank accounts should be filed as separate actions under section 981:

- *United States* v. *Certain Accounts,* 795 F. Supp. 39l, 399 (S.D. Fla. 1992);

G. Evidence:

- The Government is not limited to presentation of evidence it had at the time of seizure; after acquired evidence is admissible under section 983(c)(2):

- *United States v. $30,670 in U.S. Funds,* 2002 WL 1483897 (N.D. in. 2002) (Government permitted to support its motion for summary judgment with evidence obtained after the filing of its complaint);

- *See United States v. $87,118.00 in U.S. Currency*> 1995 WL 491502 (N.D. TIL 1995)) *aff'd,* 95 F. 3d 511 (7th Cir. 1996) (pre-CAFRA. case);

H. Invoking the Fifth Amendment:

1. Court may draw adverse inference from invocation of the Fifth Amendment:

- *United States v. U.S. Currency in the Amount ojS119.984.00*> 304 F.3d 165 (2d Cir. 2002) (in contrast to a criminal case, if claimants in civil forfeiture case exercise Fifth Amendment rights, "the Government may be able to obtain an adverse inference based on their refusal to testify");

- *United States* v. *Two Parcels in Russell County,* 92 F.3d 1123, l129-30 (11th Cir. 1996) (court may draw adverse inference from invocation of Fifth Amendment in civil forfeiture case except when a claimant is also a defendant in a criminal case and is forced to choose between waiving the privilege and losing the case on summary judgment);

- *United States v. One* 1996 *Toyota Land Rover Discovery,* 2002 WL 221524 (N.D. m. 2002) ("'it is well established that an adverse inference may be drawn against a party in a civil action who refuses to answer questions by invoking the Fifth Amendment privilege");

- *United States v. Two Parcels... 2730 Highway* 3/,909 F. Supp. 1450 (M.D. Ala. 1995) (it was proper for court to draw adverse inference from assertion of Fifth Amendment privilege once related criminal charges were dismissed);

- *United States* v. $339,884 *in U.S. Currency,* No. 99-2238-CN-HIGHSMITH (S.D. Fla. Mar. 2, 2000) (if court could not draw an adverse inference from a claimant's invocation of the Fifth Amendment, claimants would be free to frustrate the legitimate discovery that is necessary to civil forfeiture proceedings);

- *United States v. $506,641 in U.S. Currency,* 1996 WL 396082, at *3 (N.D. in. 1996) (where claimant asserted the Fifth Amendment in response to the Government's inquiries as to the source of the defendant currency, adverse inference was permitted);

- *United States v. One* 1996 *Lexus LX450,* 1999 WL 617686, *7 (N.D. Ill. 1999) (an adverse inference is properly drawn when a third party witness invokes the Fifth Amendment in response to questions regarding claimant's assertion that the subject funds came nom a legitimate source);

- *Cf Libutti v. United States,* 107 F.3d 110 (2d Cir. 1997) (non-forfeiture case; Government may be entitled to adverse inference from non-party's invocation of Fifth Amendment privilege if there is a close relationship between the party and the non-party);

2. Invoking the Fifth Amendment does not relieve claimant of burden of proof:

- *Arango v. United States Departmel1! of the Treasury,* 115 F.3d 922 (11th Cir. 1997) (assertion of the Fifth Amendment right does not relieve claimant of burden of proof; claimant who asserted the Fifth Amendment failed to establish basis for *in forma pauperis* exemption from cost bond requirement);

- *See* cases on effect of asserting Fifth Amendment on claimant's ability to oppose motion for summary judgment at page 112.

I. Confrontation Clause:

- *United States v. $9,041,598.68,* 163 F.3d 238 (5th Cir. 1998) (the Sixth Amendment's Confrontation Clause does not apply in civil forfeiture cases);

XVI. Post. Trial and Other Issues

A. Stay pending appeal:

1. 28 U.S. C. § 1355(c) provides that a stay pending appeal is mandatory upon the request of the appealing party; the provision was enacted, in part, to protect the Government's interest in property ordered released to the claimant pending appeal:

- 137 Congo Rec. S12238 (daily ed., Aug. 1991) ("the appellate court is obliged to take whatever steps it deems necessary, including ordering the stay of the district court order..., to ensure that while the appeal is pending, the party exercising control over the property does not take any action that would deprive the appellant of the full value of the property should the district court's judgment be reversed; the types of actions that the appellate court must seek to protect against are those listed in 2l U.S. C. § 853(P)...");

- *United States v. All Funds on Deposit in Any Accounts,* 801 F. Supp. 984 (E.D.N.Y. 1992) (claimant granted stay pending appeal without posting bond where funds were in possession of court earning interest);

- *United States* v. $14,876 *in U.S. Currency,* 1998 WL 37522 (E.D. La. 1998) (even if stay pending appeal is not mandatory under section I 355(c), the Government is entitled to stay where return of seized currency pending would result in irreparable harm);

- *United States v. Approximately $25,829,681.80 in Funds,* 2002 WL 1880709 (S.D.N.Y. 2002) (stay pending appeal unnecessary where Government represents it win not disburse forfeited funds to victims until claimant's appeal is final);

2. Cases holding that stays pending appeal of forfeitures are not mandatory:

- *United States v. Various Tracts of Land in Muskogee and Cherokee Counties,* 74 F.3d 197, 198 (10th Cir. 1996) (4-part test applicable to motion for stay pending appeal in other situations applies also to a 28 U.S. C. § 1355(c) motion); *In re the Seizure of All Funds in Accounts in the Names Registry Publishing,* 58 F.3d 855, 856 (2d Cir. 1995) (same); *United States* v. 1993 *Bentley Coupe,* 1997 WL 803914 (D.N.J. 1997) (same);

- *See also United States* v. *Fourteen Various Firearms,* 897 F. Supp. 271, 272 (E.D. Va. 1995); *United States v. Premises Known as 205 Daystrom Avenue,* No. 9l-CV-735 (N.D. Pa. Nov. 15, 1996);

B. Certificate of reasonable cause:

- A certificate of reasonable cause may be issued pursuant to 28 U.S. C. § 2465(a):

- *United States* v. $14,876 *in U.S. Currency,* 1998 WL 37522 (E.D. U. 1998) (if the Government lacked probable cause for forfeiture, it follows that certificate of reasonable cause must be denied);

- *United States v. $16,500 in U.S. Currency,* 48 F. Supp. 2d 1268 (D. Or. 1999) (reasonable cause equates with probable cause; if the Government had probable cause for forfeiture, a certificate of reasonable cause win issue);

C. Post-trial motion for return of forfeited property:

1. Motion for the return of seized property is barred by *res judicata* if plaintiffs claim in a civil forfeiture action was denied on the merits:

- *Ortiz-Cameron v. DEA,* 139 F. 3d 4 (1st Cir. 1998) (dismissa1 of claim for failure to comply with time requirements of Rule C(6) was judgment on the merits for *res judicata* purposes);

2. Rule 60(b) motions:

- *United States v. One Rural Lot No. 10,356,238* F.3d 76 (lst Cir. 2001) (Rule 60(b)(4) may be used to challenge forfeiture only for lack of jurisdiction, not to relitigate issue that could have been raised on direct appeal; whether Government's evidence actually applied to property named in the complaint and not other property was not a jurisdictional issue but an element of the Government's case);

- *United States v. Aponte-Vega,* 230 F.3d 522 (2d Cir. 2000) (motion to overturn default judgment in a civil case must be filed pursuant to Rule 60(b), not Rule *41(e),* and must be filed within 1 year of the judgment);

- *Whiting v. United States,* 23l F.3d 70, *i5* n.2 (1st Cir. 2000) (a motion for return of seized property alleging lack of notice must be filed within 6 years, but a motion to undo a valid forfeiture judgment under Rule 60(b) must be filed within 1 year);

- *United States v. Madden,* 95 F.3d 38 (10th Cir. 1996) (claimant seeking relief from civil forfeiture judgment must file Rule 60(b) motion, not Rule 41(e));

3 . Rule 41 (e) motions:

- *United States v. $30,006.25 in U.S. Currency,* 236 F.3d 610 (10th Cir. 2000) (Rule 41(e) is not the proper vehicle for seeking return of property after claimant prevails because section 2465 provides an adequate remedy at law);

- *United States* v. *Gonzalez,* 240 F.3d 14 (1st Cir. 200 l) (even if civil forfeiture was defective, defendant was estopped from filing Rule: 4l(e) motion; it would be inequitable to return property to defendant who agreed to its forfeiture, and to surrender his interest in it, in a guilty plea);

D. Division of jointly held property:

- Section 983(d)(5) authorizes the division of jointly held property irrespective of state law.

- *United States v.* 8 *Curtis Ave.,* 2003 WL 470579 (D. Mass. 2003) (section 983(d)(5) evinces Congress's intent to make wrongdoer's interest in jointly held property subject to forfeiture, irrespective of state law; to give effect to the forfeiture, court chooses option C, forfeiting husband's right of survivorship in a tenancy by the entireties and giving the Government a lien to that effect);

- For pre-CAFRA. and criminal forfeiture cases on division of jointly held property, *see* Criminal Forfeiture Case Outline; *see a/so* 'The Uniform Innocent Owner Defense to Civi1 Asset Forfeiture," 89 *Kentucky Law Journal* 653, 705-08 (200 1), available on AFML Online.

E. Prejudgment interest:

1. Section 2465(b) provides for the payment of prejudgment interest if the claimant prevails:

- *Kadonsky v. United States,* 246 F.3d 681,2001 WL 113825 n.7 (10th Cir. 2001) (Table) (noting that CAFRA waives sovereign immunity to allow recovery of prejudgment interest on returned currency for forfeiture cases commenced on or after August 23, 2000);

2. Pre-CAFRA, the circuits were split as to whether the court could order the Government to pay

prejudgment interest:

- Interest allowed:

- *United States* v. *$277,000,69* F.3d 1491 (9th Cir. 1995) (the Government must disgorge any interest actually earned or, if the money was not deposited in an interest-bearing account, the amount constructively earned as measured by the amount the Government did not have to borrow to finance the national debt);

- *United States* v. *$133,735.30 Seized From U.S. Bancorp Brokerage Account,* 139 F.3d 729 (9th Cir. 1998) (if funds being returned to a claimant were invested **in** an interest-bearing account, the Government need only disgorge the interest it actually earned, not what it could have earned-and not what it saved by avoiding having to borrow; *$277,000's* holding regarding what the Government constructively earned applies only where the seized funds earned no interest while in the Government's control);

- *United States v. $515,060.42 in U.S. Currency,* 152 F.3d 491 (6th Cir. 1998)(to the extent that seized money has actually earned interest, or has provided an indirect financial benefit to the Government by reducing its borrowing, the Government must return such actual or constructive interest to successful claimants along with the *res);*

- *United States v.* 1461 W. *42nd Street,* 251 F.3d l329 (11th Cir. 2001) (prejudgment interest barred by sovereign immunity, except to the extent that it is only a disgorgement of interest actually earned by the Government);

- *United States v. $40,000 in U.S. Currency,* 1998 WL 643818 (D.P.R. 1998)(following *$277,000);*

- *Kadonsky v. United States,* 1998 WL 460293 (N.D. Tex. 1998) (defendant entitled to interest actually earned in interest-bearing account or constructive interest if the money was not deposited in such an account);

- Interest not allowed:

- *United States v. $30,006.25 in U.S. Currency,* 236 F.3d 610 (10th Cir. 2000) (declining to following Sixth and Ninth Circuits; payment of interest requires waiver of sovereign immunity);

- *United States v. $7,990 in U.S. Currency,* 1 70 F.3d 843 (8th Cir. 1999) (courts cannot avoid the "no-interest" rule of *Library of Congress* v. *Shaw* by ordering the Government to pay interest but calling it something else);

- *United States v. Larson,* 266 F.3d 462 (1st Cir. 2001) (before CAFRA, there was no waiver of sovereign immunity and thus no power to award prejudgment interest; legislative history of CAFRA confirms this view of pre-CAFRA law);

- *lkelionwu* v. *United States,* 150 F.3d 233 (2d Cir. 1998) (United States is immune: from award of prejudgment interest under *Library of Congress v. Shaw);*

Settlements:

- *United States* v. *Rand Motors,* 2000 WL 776873 (N.D. in. 2000) (if the settlement agreement is silent as to the payment of interest on funds returned, the Government has no obligation to disgorge whatever interest it may have earned);

F. Abatement:

Civil forfeiture does not abate when claimant dies:

- *United States v. One Parcel...10380 SW 28th Street,* 214 F.3d 1291 (11th Cir. 2000) (civil forfeiture does not abate when claimant dies after forfeiture is affirmed on appeal but before court rules on Rule 60(b) motion challenging forfeiture on excessiveness grounds);

- *United States* v. *Land, WINSTON County,* 221 F.3d 1194 (llth Cir. 2000) (forfeiture under section 1955(d) does not abate upon the death of the property owner because such forfeitures are remedial; citing *Ursery); United States* v. *Unit Number 1105,* No. 00.2827-CIV - SEITZ/GARBER (S.D. Fla. Jan. 25, 2002) (same for money laundering forfeiture under section 981(a)(1)(A));

- *United States* v. *$120,751.00,102* F.3d 342 (8th Cir. 1996) (civil forfeiture does not abate upon the death of the owner);

G. Attorney's fees:

1. EAJA fees: Pre-CAFRA, claimant could recover attorney's fees under the Equal Access to Justice Act:

- *United States* v. *Marolf,* 277 F 3d 1156 (9th Cir. 2002) (EAJA fees awarded to claimant who recovered property forfeited administratively without proper notice; forfeiture without proper notice is not "substantially justified"; that Government had probable cause and claimant lacked valid innocent owner defense is irrelevant);

- *United States* v. *One* 1997 *Toyota Land Cruiser,* 248 F.3d 899, 2001 WL 693921 (9th Cir. 2001) (even if forfeiture action is substantially justified, Government is liable for attorney's fees under EAJA if it settles the case for substantially less than it sought in the complaint; $1,000 settlement, following adverse evidentiary ruling, was substantially less than $40,000 value of vehicle subject to forfeiture);

- *United States v. $515,060.42 in U.S. Currency,* 152 F.3d 491 (6th Cir. 1998) (even though the Government ultimately may have been found incorrect, claimants are not entitled to award of attorney's fees under EAJA where the Government's position was substantially justified and reasonable under the circumstances);

- *United States v. Real Property...* 22249 *Dolorosa Street,* 190 F.3d 977 (9th Cir. 1999) (claimant was prevailing party, even though he prevailed as to only one of eight assets; the Government was not substantially justified even though it succeeded as to seven of eight assets and the remaining asset in the district court; the Government's case must remain substantially justified throughout the litigation; failure to prove nexus between property and crime for which claimant was convicted by circumstantial evidence means that the Government was not substantially justified);

- *United States* v. *Real Property at* 2659 *Roundhill Dr. (Roundhill Dr. II),* 283 F.3d. 1146 (9th Cir. 2002) (continuing forfeiture action after property was purchased at foreclosure sa1e to innocent owner was not substantially justified);

- *United States v. McHan,* 2001 WL 635957 (4th Cir. 2001) (Table) (following *Dolorosa Street;* justification for filing the case in the first place is not sufficient; Government must have been substantially justified in continuing the litigation for 10 years);

- *United States* v. *$16,500 in U.S. Currency,* 48 F. Supp. 2d 1268 (D. Or. 1999) (issuance of certificate of reasonable cause not dispositive; claimant entitled to EAJA fees even though the Government had probable cause--evidence was weak and amount seized was not large in comparison to claimant's cost in litigating the case);

- *United States v. Eleven Vehicles,* 937 F. Supp. 1143, 1154 (ED. Pa. 1996)(claimant entitled to EAJA fees even though court issued certification of reasonable cause and seizure was based on probable cause; the Government's litigating position was not justified);

- *United States* v. *Eleven Vehicles,* 966 F. Supp. 361 (E.D. Pa. 1997) (counsel not entitled to EAJA fees at "market rate"; where counsel had no special forfeiture expertise, compensation limited to statutory rate plus COLA adjustment);

- *United States v. Eleven Vehicles,* 966 F. Supp. 36l (E.D. Pa. 1997) (EAJA fees not available for work counsel did on behalf of claimant while claimant was appearing *pro se;* claimant cannot recover "costs" under EAJA, but may recover "expenses");

- *Creative Electric v. United States,* 1997 WL 151779 (N.D.N.Y. 1997) (if after filing claim and cost bond, claimant has to go to court to force the Government either to file complaint or return property, claimant is entitled to EAJA fees);

- *Importex International, Inc. v. United States,* No. 96-2134-CN-MORENO (S.D. Fla. July 18, 1997) (the Government's prompt action in agreeing to informal consideration of innocent owner claim militates against EAJA fees);

- *United States v. One* 48 *Ft. White Colored Sailboat Named "Libertine,* "59 F. Supp. 2d 362 (D.P.R. 1999) (the Government is liable for EAJA fees in alien smuggling case where the Government would have been aware that elements of sections 1324(a)(I)(A)(I) and (iv) were not satisfied if it had paid closer attention to the facts);

- *Kreicoch v. United States,* 316 F.3d 684 (7th Cir. 2003) (Government was substantially justified in continuing administrative forfeiture even though attempt at notice was constitutionally inadequate with respect to 1 percent of the property; Government's good faith attempt to give notice and success as to 99 percent of property must be taken into account; *pro se* defendant is not entitled to EAJA fees);

2. Section 2465(b) makes attorney's fees available whenever the claimant substantially prevails:

- *In re Seizure of One* 1999 *Lexus ES300,* CV 01-10868 SVW (Ex) (CD. Cat. May 14,2002) (section 2465(b)(1)(A) does not apply when the Government declines to pursue judicial forfeiture and returns the property without any intervention of the court); *In Re Seizure of $11,501.00 in U.S. Currency v. Nichols,* CV 01-10871 WMB (pJWx) (CD. Cat. June 25, 2002) (same);

- *Cf Buckhannon Board and Care Home, Inc.* v. *West Virginia Department of Health and Human Resources,* 531 U.S. 1004 (2001) (when Congress uses the term "prevailing party" in a statute awarding attorney's fees, it refers only to those parties who prevail by securing a judgment on the merits or a court-ordered consent decree; parties who prevail only in the sense that their lawsuit served as a catalyst for the defendant to take unilateral action that served to moot the cause of action are not prevailing parties for purposes of a statute awarding attorney's fees);

3. Calculating the amount of the fee award:

- *United States v. $60,201.00 U.S. Currency,* - F. Supp. 2d _,2003 WL 22700905 (C.D. Cal. 2003) (attorney fee awards under *CAFRA* are not subject to EAJA caps and therefore must be paid at market rates);

H. Actions against the Government:

1. Federal Tort Claims Act:

- *Aguilar* v. *United States,* 1999 WL 1067841 (D. Conn. 1999) (claims against the Government for intentional torts of conversion and false pretenses not actionable under FTCA);

- *United States v. Real Property Known as* 2916 *Forest Glen Court,* 162 F. Supp. 2d 909 (S.D. Ohio 2001) (denying claimant's motion for interlocutory sale of seized property on ground that FTCA gives claimant remedy against the Government if his property is worthless by the time he prevails in the forfeiture case);

2. Replevin (18 U.S. C. § 981(c))):

- *Yellen v. Illinois,* 2000 WL 1016940 (N.D. m. 2000) (claimant cannot file lawsuit against United States to recover property he agreed to forfeit in a settlement agreement; section 981(c) bars replevin of forfeited property; claimant's remedy is to file motion in the forfeiture case);

I. Substitute *res:*

- *United States v. Twelve Pieces of Real Property,* 54 Fed. Appx. 461, 2003 WL 103052 (9th Cir. 2003) (Table) (when parties agree to substitute cash for defendant real property, nexus issues regarding the forfeitability of the property are evaluated as if the real property were still in the case);

XVII. Parallel Civil Forfeiture and Criminal Prosecution

A. The Government is entitled to file parallel civil forfeiture:

1. Parallel case may be filed while criminal case is pending:

- *United States* v. *One Parcel...Lot* 41, *Berryhill Farm,* 128 F.3d 1386 (l0th Cir. 1997) (civil case stayed pending criminal trial; once stay was lifted, court granted motion to strike property that was forfeited in the criminal case);

- *United States* v. *Four Contiguous Parcels,* 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (Table) (defendant has no right to insist that the Government use criminal forfeiture instead of maintaining parallel civil forfeiture that was filed first);

2. Civil forfeiture necessary where wrongdoer has died:

- *United States v. Real Property at 40 Clark Road,* 52 F. Supp. 2d 254 (D. Mass. 1999) (defendant died while criminal forfeiture was pending, making civil forfeiture necessary);

- *United States* v. *Unit Number* 1 *Ja5,* No. OO.2827-CN-SEITZ/GARBER (S.D. Fla. Jan. 25,2002) (there is nothing improper in the Government's filing a civil forfeiture action against property that was the subject of a criminal forfeiture action until the defendant died);

B. Civil forfeiture does not implicate double jeopardy:

- *United States v. Ursery,* 518 U.S. 267 (1996) (forfeitures under sections 881(a)(6) and (7) and 981 are not punitive for double jeopardy purposes);

- *United States* v. *One 197036.9' Columbia Sailing Boat,* 91 F.3d 1053 (8th Cir. 1996) *(Ursery* applies to civil forfeiture under section 881(a)(4); *United States v. Perez,* 110 F.3d 265 (5th Cir. 1997) (same);

- *United States* v. *Williams,* 132 F.3d 1055 (5th Cir. 1998) *(Urse1)'* applies to forfeitures for alien smuggling under 8 U.S. C. §1324(b));

- *United States v. $273,969.04 U.S. Currency,* 164 F.3d 462 (9th Cir. 1999) (neither section 5317 nor section 1497 civil forfeitures constitute punishment for double jeopardy purposes);

- *United States v. Alvarez,* 235 F.3d 1086 (8th Cir. 2000) (state civil forfeiture does not bar subsequent federal criminal prosecution; double jeopardy does not bar successive prosecutions by separate sovereigns);

- *United States* v. *Real Property...Parcel 03179-005R,* 287 F. Supp. 2d 54 (D.D.C. 2003) *(Ursery* forecloses any double jeopardy objection to a motion for summary judgment based on claimant's conviction for the same offense in a criminal case);

- *United States* v. *Ogbonna,* 1997 WL 785612 (E.D.N.Y. 1997) (no double jeopardy when undeclared currency is forfeited under section 5317 prior to commencement of criminal prosecution under section 53 16);

- *United States* v. *Amlani,* 1ll F.3d 705 (9th Cir. 1997) (under *Ursery,* defendant's argument that section 981(a)(1)(A) forfeiture was punitive attempt to prevent him from adequately defending himself has no merit);

- *United States v. Jones,* 111 F.3d 597 (8th Cir. 1997) (stay of parallel civil forfeiture pending outcome of criminal case indicates that jeopardy never attached in a separate proceeding, not that the civil forfeiture was punitive; argument that *Ursery* should be distinguished rejected);

- *United States v. One Lot of $17,220 in U.S. Currency,* 183 F.R.D. 54 (D.R.I. 1998) (section 881 (a)(6) forfeiture of proceeds was remedial, not punitive, even though action was not filed until defendant was found guilty on less serious offenses than were al1eged in the indictment; argument that *Ursery* should be distinguished rejected);

- *Gumbs v. Kelly,* 2000 WL 1172350 (S.D.N.Y. 2000) (double jeopardy does not bar state criminal conviction following state civil forfeiture; *Ursery* applies even though state forfeiture was based on New York's *in personam* civil forfeiture statute);

- *Rivera* v. *United States,* 200l U.S. Dist. LEXIS 15469 (S.D.N.Y. 2001) (rejecting attempt to distinguish *Ursery* on the ground that (he section 881 forfeiture was intended to pauperize the defendant so that he had no funds (0 pay for his crimina1 defense);

- *Cf Bennis* v. *Michigan,* 516 U.S. 442, 452 (1996) ("forfeiture also serves a deterrent purpose distinct from any punitive purpose");

C. No criminal conviction required:

- *United States* v. *One Assortment of 89 Firearms,* 465 U.S. 354 (1984) (acquittal on gun violation under section 922 does not bar civil forfeiture under section 982(d);

- *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972) (acquittal on criminal smuggling charge does not bar later civil forfeiture);

- *United States v. One "Piper" Aztec "F" Deluxe Model 250 PA* 23 *Aircraft,* 321 F.3d 355 (3d Cir. 2003) (that claimant's criminal conviction for alien smuggling was overturned has no effect on civil forfeiture under section 1324(b));

- *United States v.* 1988 *Oldsmobile Cutlass Supreme,* 983 F.2d 670 (5th Cir. 1993) (acquittal of claimant does not undermine finding of forfeitability in civil forfeiture case); *United States v.*

Dunn, 802 F.2d 646, 647 (2d Cir. 1986) (same);

- *United States v. Ford,* 64 Fed. Appx. 976, 2003 WL 21212547 (6th Cir. 2003) (acquittal on gambling and money laundering charges does not bar civil forfeiture of the property involved);

- *United States* v. *Four Contiguous Parcels,* 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (Table) (acquittal on section 1956 count does not bar subsequent civil forfeiture under sections 981 and 1957, at least where civil forfeiture was already pending before verdict in criminal case);

- *United States v. Real Property...Parcel 03179-005R.* 287 F. Supp. 2d 45 (D.D.C. 2003) (because "a criminal conviction is not a prerequisite for civil forfeiture," it did not matter that the defendant's conviction for money laundering had been vacated);

- *United States v. Two Parcels of Real Property... 101 North Liberty Street,* 80 F. Supp. 2d 1298, 1303 n.18 (M.D. Ala. 2000) (because no conviction is required for civil forfeiture, defendant can be made to forfeit property involved in offense of conviction as well as property involved only in another
offense);

- *Hendron v. Mattina,* 1999 WL 1007343 (E.D.N.Y. 1999) (nothing wrong with basing civil forfeiture on section 1956 violation where defendant's guilty plea was to a CMIR offense);

- *Pimentel v. DEA,* 99 F. Supp. 2d 420 (S.D.N.Y. 2000) (AUSA's decision to decline criminal prosecution has no bearing on existence of probable cause for forfeiture);

D. Collateral estoppel/res *judicata:*

1. Collateral estoppel bars parties from relitigating, in civil proceeding, issues determined in a criminal case:

- *United States v. Beaty,* 245 F.3d 617 (6th Cir. 2001) (because claimant's entrapment defense was litigated in his criminal case, he is barred by collateral estoppel from raising it as a defense to the parallel civil forfeiture);

- *United States v. Real Property... Parcel 03179-005R,* 287 F. Supp. 2d 45 (D.D.C. 2003) (doctrine of issue preclusion bars a defendant from relitigating factual issues in a civil forfeiture case that a jury found against him in a criminal case);

- *United States v. One* 1987 *Mercedes Benz 300£,* 820 F. Supp. 248 (E.D. Va. 1993) (collateral estoppel bars claimant from relitigating in civil proceeding issue of fact necessary and essential to criminal conviction);

- *United States* v. *Two Parcels of Real Property... 101 North Liberty Street,* 80 F. Supp. 2d l298 (M.D. Ala. 2000) (defendant who has been convicted of a criminal offense is barred from denying involvement in the crime in the civil forfeiture case);

- *United States* v. *All Funds in Home Savings of America Account Number 092-011336 in the Name of Custom Lab Supply, Inc.,* No. CV-F-OO-5277 REC (E.D. Cal. July 25,2003) (collateral estoppel bars corporate claimant from relitigating issues determined in criminal case against the corporation 1 s controlling shareholders);

2. Collateral estoppel does not apply to issues determined at a sentencing hearing in a criminal case:

- *United States v. U.S. Currency in the Amount of$119,984.00,* 304 F.3d 165 (2d Cir. 2002) (Government's acquiescence, for sentencing purposes in criminal case, to defendant's assertion that unreported currency came from legal source does not bar Government from contesting source of money in civil forfeiture case; g1ven differences in discovery and unavailability of defendant's testimony in criminal case, Government did not have full and fair opportunity to litigate the source of the seized currency in the sentencing hearing), *rev 'g* 129 F. Supp. 2d 471 (E.D.N.Y. 200l);

3. *Res judicata* does not bar civil forfeiture following criminal conviction:

- *Tiney* v. *United States,* 1998 WL 812395 (N.D. Tex. 1998) *(res judicata* does not bar civil forfeiture where the Government could have, but did not, seek criminal forfeiture as part of the criminal case);

- *United States* v. *Wade,* 230 F. Supp. 2d 1298, 1308 D.9 (M.D. Fla. 2002) *(res judicata* does not bar administrative forfeiture following criminal case in which Government did not seek forfeiture);

E. Effect of civil forfeiture on criminal case:

1. C1vil forfeiture is not a basis for downward departure [rom sentencing guidelines in related criminal case:

- *United States v. Hoffer,* 129 F.3d 1196 (l1th Cir. 1997) ("civil forfeiture can never be the basis for a downward departure from the sentencing guidelines"; it is a prohibited factor) (collecting cases);

- *United States* v. *Weinberger,* 91 F.3d 642 (4th Cir. 1996) ("authorizing downward departures based on collateral forfeiture actions would only benefit those defendants whose crimes subject them to forfeiture");

2. Ass1stance in civil forfeiture is not "substantial assistance" under Rule 35:

- *United States* v. *Garcia,* 2000 WL 489703 (S.D.N.Y. 2000) (court has no authority to overrule AUSA's refusal to move for Rule 35(b) reduction in sentence despite defendant's assistance in a civil forfeiture case);

3. But voluntary surrender of meritorious defense to forfeiture may be evidence of extraordinary

acceptance of responsibility:

- *United States v. Faulks,* 143 F.3d 133 (3d Cir. 1998) (distinguishing between exposure to forfeiture, which is not a ground for departure, and voluntarily agreeing not to contest administrative forfeiture); *on remand,* 1998 WL 964223 (E.D. Pa. 1998) (acquiescing in forfeiture of property that the Government would have recovered anyway, or that claimant claims belongs to other people, is not indicative of extraordinary acceptance of responsibility);

4. Relationship of forfeiture and criminal fine:

- *Ikeliomvu* v. *United States,* 150 F.3d 233 (2d Cir. 1998) (if claimant prevails in civil forfeiture action, seized money may nevertheless be retained by the Government to offset defendant's criminal fine);

5. Court may not grant motion for return of seized property in criminal case if parallel civil case is pending:

- *United States v. Ruedlinger,* 1997 WL 808662 (D. Kan. 1997) (even though property is named in a criminal indictment, the court lacks authority to release it to the defendant if the property was seized in a parallel civil case that is pending before another judge);

6. Appeal in one case does not affect jurisdiction of the district court over the other:

- *United States* v. *McCullough,* 229 F.3d 1160 (9th Or. 2000) (Table) (defendant's appeal of criminal forfeiture judgment while parallel civil forfeiture was pending in the district court did not divest district of jurisdiction over the civil case);

7. Civil forfeiture may follow criminal case in which defendant was ordered to pay restitution:

- *United States* v. *Various Computers,* 82 F.3d 582 (3d Cir. 1996) (forfeiture and restitution are not mutually exclusive; defendant may be ordered to make the victim whole in the criminal case while the proceeds of the crime are forfeited to the Government in a civil case, thus "forc[ingJ the offender to disgorge a total amount equal to twice the value of the proceeds of the crime");

F. Use of grand jury information:

- *United States* v. *Bulger,* 2002 WL 31921385 (D. Mass. 2002) (obtaining evidence for use in a civil forfeiture case may not be the "principal motivation" for calling witness before the grand jury, but grand jury information may be used in civil case per Rule 6(e) order);

XVIII. Application of CAFRA

A. Application to pending cases:

1. CAFRA does not apply to cases pending on appeal on August 23,2000:

- *United States* v. *Wagoner County Real Estate,* 278 F.3d 1091, 1095 n.l, *1097* n.5 (10th Cir. 2002) (CAFRA applies only to forfeiture proceedings commenced after August 23,2000, and thus does not apply to cases pending on appe31); .

- *United States* v. *Ahmad,* 213 F.3d 805, 808 n.l (4th Cir. 2000) (CAFFRA does not apply to case pending on appeal when the new law was enacted); *United States v. Santiago,* 227 F.3d 902, 906 n.3 (7th Cir, 2000) (same);

- *United States* v. *Carrell,* 252 F.3d l193, 1198 n.4 & 10 (11th Cir. 2001) (neither the new innocent owner defense nor the amendment to statute of limitations enacted by CAFRA applies to cases pending on appeal);

- *Cosomar Shipping* v. *United States,* 2002 WL 3155802 (S.D. Ga. 2002) (amendment to Federal Tort Claims Act in CAFRA.. does not apply where underlying forfeiture was instituted before August 23,2000);

- *United States v. U.S. Currency in the Amount of$898,719.00,* 2003 WL 21544283 (W.D. Mo. 2003) (CAFRA's burden of proof does not apply to pending cases);

- *But see United States v. Real Property in Section* 9 *(Gahagan),* 241 F.3d 796 (6th Cir. 2001) (burden of proof provision in CAFRA applies to an pending cases); *United States* v. *$181,087.14 in U.S. Currency,* 2002 WL 31951270 (S.D. Ohio 2002) (despite law in other circuits, district courts in the Sixth Circuit are required to apply CAFRA to pending cases);

- *United States v. 549.000 in U.S. Currency,* 330 F.3d 371, 375, n.8 (5th Cir. 2003) (finding it unnecessary to decide whether CAFRA applies to pending cases or not);

2. Cases on remand:

- *United States v. One Parcel of Land. Parcel* 22, 16 Fed. Appx. 16,2001 WL 958745 (1 st Cir. 2001) (Table) *(CAFRA.* does not apply to pre-CAFRA case on remand);

- *United States v.* 5 S 351 *Tuthill Road,* 233 F .3d 1017 (7th Cir. 2000) (leaving it to the district court to determine, on remand, whether to apply CAFRA to a case pending on appeal when the new law took effect); *United States* v. *McHan,* II Fed. Appx. 304, 2001 WL 635957 (4th Cir. 2001) (Table) (same);

- *United States v. Lot Numbered One of the Lavaland Annex,* 256 F.3d 949 (lath Cir. 2001) (leaving it to district court to determine on remand whether CAFRA applies to new trial);

3. CAFRA only applies to forfeiture cases commenced on or after August 23, 2000:

- *United States v. One "Piper" Aztec "P" Deluxe Model 250 PA* 23 *Aircraft,* 321 F.3d 355 (3d Cir. 2003) (CAFRA does not apply to case commenced before August 23,2000; that appeal was taken after that date is irrelevant; it's all one proceeding);

- *United States v. $242,484.00,* - F.3d -' _n.2, 2003 WL 22723431 (l1th Cir. Nov. 20, 2003) (11 th Cir. 2003) (heightened burden of proof established by CAFRA does not apply to case filed in 1999);

- *United States v. $80,180.00 in U.S. Currency,* 303 F.3d 1182 (9th Cir. 2002) (preponderance standard does not apply to judicial forfeiture cases that were pending in the district court on August 23, 2000);

- *United States v.* $557,933.89, *More or Less. in U.S. Funds,* 287 F,3d 66, 76 n.5 (2d Cir. 2002) (CAFRA does not apply to cases commenced before August 23,2000; court applies "old law" regarding innocent owner defense, standing, and delay in commencing forfeiture action); *United States* v. *Property. Parcel of Aguilar,* 337 F.3d 225, 227 n.1 (2d Cir. 2003) (same; applying pre-CAFRA allocation of burden of proof);

- *Alli-Balogun* v. *United States,* 28l F.3d 362, 367 n.3 (2d Cir. 2002) (CAFRA's burden-shifting provisions and innocent owner defense apply only to cases commenced on or after August 23, 2000);

- *Larson v. United States,* 274 F.3d 643 (1st Cir. 200l) (Congress did not make changes to 28 U.S. C. § 2465 retroactive to pre-CAFRA cases as it could have done);

- *Touros Records v. DEA,* 259 F.3d 731 (D.C. Cir. 2001) (abolition of cost bond applies only to cases commenced after August 23,2000);

- *United States* v. *$30,006.25 in U.S. Currency,* 236 F.3d 610 (10th Cir. 2000) (amendment to section 2465 allowing payment of prejudgment interest does not help claimant because it applies only to cases commenced on or after August 23, 2000);

- *United States v. One Parcel of Real Property Known as* 16614 *Cayuga Road,* 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (appointment of counsel provision in CAFRA is not applicable to a civil complaint filed prior to August 23,2000);

- *United States* v. *Real Property at* 221 *Dana Ave.,* 261 F.3d 65,67 n.l (lst Cir. 2001) (new innocent owner defense in section 983(d) applies only to cases commenced on or after August 23,2000);

- *United States v. Twenty-seven Parcels of Real Property,* 236 F.3d 438 (8th Cir. 2001) (amendment to statute of limitations in section 1621 does not help Government because case was filed before August 23,2000);

- *United States v. Vereda, Llda.,* 27l F.3d 1367 (Fed. Cir. 200 1) (CAFRA does not app1y to a forfeiture case commenced in 1993 when a collateral attack is made in the Court of Federal Claims);

- *United States v. U.S. Currency in the Sum of $261,480,* 2002 WL 827420 *1 n.1 (E.D.N.Y.2002) (CAFRA does not apply to complaint filed before August 23, 2000); *United*

States v. $10,000 in U.S. Currency, 2002 WL 1009734 *4 n.3 (M..D.N.C. 2002) (same);

- *United States v. $100,348 U.S. Currency,* 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (burden of proof provision in CAFRA does not apply to judicial forfeiture filed on August 22, 2000, the day before Ci\FRA took effect; explicitly declining to follow the Sixth Circuit);

- *United States v. The Premises and Real Property...* 191 *Whitney Place,* 2000 WL 1335748 (W.D.N.Y. 2000) (new innocent owner defense in CAFRA applies only to proceedings commenced after August 23,2000);

- *United States v. 5122,000 in U.S. Currency,* 198 F. Supp. 2d 106 (D.P.R. 2002) (amendment to statute of limitations made by CAFRA does not apply to case filed before August 23, 2000);

- *United States v. De Armas,* No. 00-0288-CR-SEITZ (S.D. Fla. June 29,2001) (CAFRA. does not apply retroactively to cases in which notice of the administrative forfeiture proceeding was sent before August 23, 2000);

- *United States* v. *Wade,* 230 F. Supp. 2d 1298 (M.D. Fla. 2002) (CAFRA's deadlines for filing claim and answer do not apply to case commenced before August 23, 2000);

- *Cartwright* v. *United States,* No. 00-4400-CIV-JORDAN (S.D. Fla. Feb. 26,2001) (90-day deadline for filing complaint does not apply to case where notice of administrative forfeiture was sent before August 23,2000);

- *United States v. $25,829.681.80 in the Court Registry Investment System,* 2002 WL 31159116 "'4 n.2 (S.D.N.Y. 2002) (all procedures applicable in 1998 to forfeiture under section 981 apply to case pending when CAFRA took effect);

- *See* "The Civil Asset Forfeiture Reform Act of 2000," 27 *Journal of Legislation* 97, 117, Notre Dame Law School (200l) (discussing legislative history of the effective date provision in section 2l of CAFRA), available on AFML Onhne.

4. Application of section 983(e) to administrative forfeiture cases commenced before August 23,2000.

- AFMLS takes the view that an action against the Government to vacate an administrative forfeiture case is a "new" proceeding, such that the terms of section 983(e) apply if the action was filed after August 23, 2000, even if the administrative forfeiture itse1fwas commenced at an earlier date.

- *See* brief available on AFML Online; 27 1. Legis 97, *supra,* at page ll8;

- *Jacobs v. United States,* 2002 WL 31386533 (D. Md. 2002), *aff'd w/o op.* 2002 WL 802196 (4th Cir. 2002) (applying section 983(e), without discussion, to pre-CAFRA forfeiture);

- *But see United States v. Duke,* 229 F.3d 627 (7th Cir. 2000) (stating without discussion that section 983(e) applies only to administrative forfeitures commenced after August 23,2000);

- *Cf Longenette v. Krusing,* 322 F.3d 758 (3d Cir. 2003) (section 983(e) does not apply to action filed in 1992 to challenge administrative forfeiture);

5. Amended complaints filed after August 23, 2000:

- *United States v. Portrait a/Wally,* 2002 WL 553532 (S.D.N.Y. 2002) *(Wally in)* (CAFRA does not apply to cases filed before August 23, 2000; amended complaint relates back to the date: the: original complaint was filed);

6. Sixth Circuit cases:

- *United States v. One Parcel...* 2526 *Faxon Avenue,* 145 F. Supp. 2d 942 (W.D. Tenn. 2001) (in Sixth Circuit, under *Gahagan, CAFRA* applies to burden of proof and innocent owner defense regardless of when case was commenced);

- *United States* \I, *Six Negotiable Checks,* 207 F. Supp. 2d 677 (E.D. Mich. 2002) (in the Sixth Circuit, the innocent owner defense in section 983(d) applies to pre-CAFFRA forfeitures under 31 U.S. C. § 5317(c)));

B. Retroactivity:

1. Forfeiture of all proceeds, under section 981(a)(1)(C), applies retroactively:

- *United States v. All Funds on Deposit at Dime Savings Bank,* 256 F. Supp. 2d 56 (E.D.N.Y. 2003) (section 981(a)(1)(C) applies retroactively to offenses that occurred before August 23, 2000; section 21 of CAFRA makes the congressional intent clear); *United States v. Real Properly...Parcel 03179-005R,* 287 F. Supp. 2d 45 (D.D.C. 2003) (same, following *Dime Savings Bank);*

- *See* Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 *Journal of Legislation* 97, 119-21, Notre Dame Law School (2001), available on AFML Online.

Pre-CAFFRA law:

2. Civil forfeiture statutes are not penal in nature and therefore may be applied retroactively without violating the *Ex: Post Facto* Clause:

- *United States v. Four Tracts..,on the Waters of Leiper's Creek,* 181 F.3d 104,1999 WL 357773 (6th Cir. 1999) (Table) (enactment of section 881(a)(6) in 1978, authorizing the forfeiture of drug proceeds, applies retroactively to conduct occurring in 1974 because a person has no right to possess drug proceeds, and so the new law created no additional legal consequences);

- *United States* v. *Certain Funds (Hong Kong and Shanghai Banking Corporation),* 96 F.3d 20 (2d Cir. 1996) (using analysis in *Ursery* to hold that sections 981 and 88l may be applied retroactively without violating the *Ex Post Facto* Clause);

- *Cf United States v. Larson,* 266 F.3d 462 (1st Cir. 2001) (Congress could have applied prejudgment interest provision in section 2465 retroactively but did not do so);

3. Money laundering forfeitures:

- *United States v. Eleven Vehicles,* 898 F. Supp. 1143 (E.D. Pa. 1995) (in light of *Landgraf,* 1988 amendments to section 981(a) (1)(A) cannot apply retroactively to pre-1988 conduct), *rev 'g previous holding on this point in* 836 F. Supp. 1147, 1156-57, 1162 (E.D. Pa. 1993);

4. FIRREA forfeitures:

- United States v. 403-1/2 *Skyline Dr.,* 797 F. Supp. 796 (C.D. Cat 1992) (FIRREA forfeiture under section 98 l(a)(l)(C) applies retroactively to offense committed before 1989 effective date because statute is remedial in nature); *United States* v. *All Monies in Account #42032964,* 1992 WL 301257 (E.D. Pa. 1992) (same);

- For retroactivity of jurisdictional statutes, *see* page 61.

C. Legislative history:

- *United States v. Twenty-seven Parcels of Real Property,* 236 F.3d 610 (8th Cir. 200l) (1997 committee report explaining unenacted language identical to what was later enacted in CAFRA is part of the legislative history);

- *United States v. Larson,* 266 F.3d 462 (1st. Cir. 2001) (1997 Committee Report is legislative history of prejudgment interest provision in 28 U.S. C. § 2465);

D. Rules of statutory interpretation:

- *Rucker v. Davis,* 237 F.3d 1113 (9th Cir. 2001) (where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress did so intentionally and purposely; quoting *Russello v. United States,* 464 U.S. 16,23 (1983); "as a matter of statutory construction, we presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts");

- *United States v. Craft,* 535 U.S. 274 (2002) (Congress's failure to enact a legislative proposal is "dangerous ground" on which to rest the interpretation of a statute; congressional inaction may only mean that a proposal intended to clarify existing law was considered unnecessary);

XIX. Forfeiture and Restitution

- CAFRA. amended 18 U.S. C. § 981(e)(6) to permit civilly forfeited funds to be used to pay restitution through the remission process:

- *United States v. Approximately $25,829,681.80 in Funds,* 2002 WL 1880709 (S.D.N.Y. 2002) (Government advises court that it win apply forfeited funds to restitution, but win make no disbursement until claimant's appeal is final);

XX. Policy Directives

A. Policies create no enforceable rights:

- *Arango v. United States Department of the Treasury.* 115 F.3d 922 (11th Cir. 1997) (Department of Justice policy directives create no enforceable rights);

- *United States v. Two Parcels of Real Property...101 North Liberty Street,* 80 F. Supp. 2d 1298 (M.D. Ala. 2000) (policy regarding minimum threshold value of property not enforceable by the claimant);

XXI. Forfeiture and Taxes

A. Forfeiture does not satisfy the claimant's tax. liability; forfeiture does not give "defendant a tax deduction:

- *United States v. Hahn)* 1998 WL 751838 (E.D. Tenn. 1998) (district court rejected a taxpayer's suggestion that his tax liability was satisfied when "the Government" forfeited his personal property; "this court has no power to order that forfeited property derived from the sale of controlled substances be credited to his income taxes");

- *Flores v. C.I.R.,* 1999 WL 1087473 (T.C. 1999) ($99,880 seized from the spare tire of a taxpayer's truck and forfeited as drug proceeds was taxable income even though the taxpayer disclaimed ownership of the cash and did not contest the forfeiture);

- *King v. United States,* l52 F.3d l200 (9th Cir. 1998), *aff'g* 949 F. Supp. 787 (E.D. Wash. 1996) (drug dealer cannot claim forfeiture of $636,940 either as a credit or a deduction for a business loss);

- *Wood* v. *United States,* 2002 WL 31973260 (S.D. Fla. 2002) (funds forfeited administratively as part of a plea agreement in a criminal case are not deductible from defendant's tax return either as "losses" or "business expenses"; it makes no difference that the forfeiture arose out of a crime committed in the course of legitimate business activity and not drug trafficking);

- *Thrower v. C.I.R.,* T.C. Memo. 2003.139,2003 WL 21107675 (T.C. 2003) (10sses resulting from the forfeiture of a drug trafficker's assets are disallowed as contravening public policy);

B. Government is not liable for state taxes that accrue on forfeited property:

- *United States v. A Group of Islands,* 185 F. Supp. 2d 117 (D.P.R. 2001) (because the Government's interest in forfeited property relates back to the date of the offense, the Government is not liable for state taxes that accrue on the forfeited property after that time; that is true even if the property is later awarded to a third party in the ancillary proceeding);

C. Forfeiture Fund versus IRS:

- *Wood v. United States,* 2002 WL 31973260 (S.D. Fla. 2002) (when forfeiture is imposed as penalty for failing to pay excise taxes, the funds go into the Forfeiture Fund and do not go to the IRS as a substitute for the unpaid taxes);

XXII. Forfeiture and Bankruptcy

A. Courts are divided as to whether property subject to forfeiture is part of the bankruptcy estate:

l. "Automatic stay" does not bar forfeiture proceedings:

- *In re Chapman,* 264 B.R. 565 (9th Cir. Bank. App. 2001) (at least in drug cases, a civil forfeiture action is an exercise of the police power and therefore is exempt from the automatic stay provision of the bankruptcy code; that the Government's ownership interest under the relation back doctrine is inchoate until an order of forfeiture is issued does not mean the Government is merely a creditor in the bankruptcy or that it cannot proceed with its forfeiture claim outside of the bankruptcy court; once the forfeiture is complete, the Government will be the owner of the property, which will no longer be part of the bankruptcy estate);

- *In re James,* 940 F.2d 46, 51 (2d Cir. 1991) ("a civil forfeiture action proceeding is an exception to the automatic stay under the "police power" exception of section 362(b)(4)");

- *In re Thena, Inc.,* 190 B.R. 407 (D. Or. 1995) (property that has been seized for forfeiture does not become part of bankruptcy estate);

- *In re Brewer,* 209 B.R. 575 (Bankr. S.D. Fla. 1996) (civil forfeiture action is an exercise of the Federal Government's police power and so is not stayed by a filing in bankruptcy);

2. Automatic stay applies to civil forfeiture proceedings:

- *In re Finley,* 237 B.R. 890 (Bankr. N.D. Miss. 1999) (the exemption to the automatic stay provision does *not* apply to civil forfeitures; the Government must apply to the bankruptcy court for relief !Tom the stay before filing forfeiture action);

- *Bell v. Bell,* 215 B.R. 266 (Bankr. N.D. Ga. 1997) (automatic stay applies, but court grants relief from stay for limited purpose of allowing the Government to establish title to the property in the forfeiture case, after which the Government's claim win be treated as any other creditor's claim in the bankruptcy proceeding);

B. Forfeitures that predate bankruptcy filing:

- *In re Wolfson,* 261 B.R. 369 (Bankr. E.D.N.Y. 2001) (civil forfeiture order divests the debtors of any interest they had in the forfeited property; such property therefore does not become part of the bankruptcy estate, and even if it did, civil forfeiture is not dischargeable in bankruptcy);

C. Settlement with bankruptcy trustee:

- *United States v. Assets of Revere Armored, Inc.,* 131 F.3d 132, 1997 WL 794460 (2d Cir. 1997) (unpublished) (Table) (because law at the intersection of bankruptcy and forfeiture is "unsettled and potentially contradictory," it was reasonable for the Government and bankruptcy trustee to settle the forfeiture case, splitting funds between bankruptcy and forfeiture; attorney whose fee would be paid out of funds marshaled by trustee had no grounds to object);

XXIII. Obtaining Financial Records

A. Right to Financial Privacy Act:

- *Miranda v. Coutts* & *Co.,* 250 F.3d 1351 (11th Cir. 2001) (safe harbor provision in RAPA, 12 U.S. C. § 3403(c), protects bank from liability when it discloses to the Government the attempt to move $500,000 from an account frozen pursuant to an arrest warrant *in rem);*

B. Use of administrative subpoena:

- *United States* v. *Doe,* 235 F.3d 256 (6th Cir. 2001) (administrative subpoena issued under 18 U.S. C. § 3486 may request financial records relevant to a federal health care offense, including records that may lead to the forfeiture of the proceeds of the offense);

C. Mutual legal assistance:

- *United States v. Real Property Located at* 22 *Santa Barbara Dr.,* 264 F.3d 860 (9th Cir. 2001) (Swiss records obtained in criminal case and limited by treaty to use only in that case and related matters are admissible in civil case based on same criminal conduct);

XXIV. Constitutional Issues

A. Right to counsel:

- *United States v.* 817 *NE. 29th Drive, Wilton Manors,* 175 F.3d 1304, 1311 n.14 (l1th Cir. 1999) (there is no right to counsel in a civil forfeiture proceeding);

B. Takings C1ause:

- *United States v. $7,999,00 in U.S. Currency,* 170 F.3d 843 (8th Cir. 1999) (civi1 forfeiture does not violate the Takings Clause; it is an exercise of the police power; following *Bennis);*

- *United States v.* 1461 *w: 42nd Street,* 251 F.3d 1329 (11 th Cir. 2001) (a *Good* violation is a due process violation, not an unconstitutional taking of private property);

- *Baranski v. Fifteen Unknown Agents of ATF,* 195 F. Supp. 2d 862 (W.D. Ky. 2002) (civil forfeiture of firearms is not a taking; following *Bennis);*

C. Supremacy Clause:

- *United States v. 817 NE. 29th Drive. Wilton Manors,* 175 F.3d 1304, l311 n.14 (11th Cir. 1999) (federal forfeiture trumps homestead exemptions under the Supremacy Clause); *United States* v. *One Single Family Residence at 2200 SW 28th Ave..* 204 F. Supp. 2d 1361 (S.D. Fla. 2002) (same); *United States v. Wagoner County Real Estate,* 278 F.3d 1091 (10th Cir. 2002) (same); *United States* v. *One Parcel of Real Property Known as* 16614 *Cayuga Road,* 69 Fed. Appx. 915,2003 WL 21437207 (10th Cir. 2003) (same, following *Wagoner); United States v. Lot* 5, *Fox Grove,* 23 F.3d 359,363 (l1th Cir. 1994) (same); *In re: Brewer,* 209 B.R 575 (Bankr. S.D. Fla. 1996) (same);

- *United States v. Curtis,* 965 F.2d 610,616 (8th Cir. 1992) (federal criminal forfeiture law preempts Iowa homestead law);

- *But see United States* v. *Real Property at* 2659 *Roundhill Drive,* 194 F.3d 1020 (9th Cir. 1999) (state law regarding award of ownership to purchaser at foreclosure sale trumps the Government's forfeiture interest);

- Standing requirements under state law are irrelevant to federal forfeiture cases;

- *United States v. $79,000 in Account Number 216805016749900,* 1996 WI. 648934 (S.D.N.Y. 1996) (more libera1 standing requirements of state law are inapplicable in a federal forfeiture action under the Supremacy Clause);

- *See* constitutionality of burden of proof under section 1615 at page l55.

D. Vagueness:

- *United States v. Search of Music City Marketing, Inc.,* 212 F.3d 920] 925 n.3 (6th Cir. 2000) (contraband is not subject to return under Rule 41 (e); whether statutory definition of drug paraphernalia as contraband is unconstitutionally vague is determined by lower stand in a civil forfeiture case than it would be in a criminal case);

XXV. Substantive Forfeiture Statutes

A. Proceeds and "traceable" property:

- Proceeds of all offenses defined as "specified unlawful activity," *see* 18 U.S. C. § 1956(c)(7), may be forfeited under 18 *U.S. C.* § 981(a)(I)(C).

- *United States* v. *All Funds Distributed to Weiss,* 345 F.3d 49, 56 n.8 (2d Cir. 2003) (as amended by CAFRA, § 981(a)(1)(C) permits the forfeiture of a1l proceeds of specified unlawful activity; it is no longer necessary for the Government to use the money laundering statute to forfeit such proceeds);

1. Section 981(a)(2) establishes two categories of proceeds cases: cases where the Government is entitled to "gross proceeds" and cases where the Government may only recover "net profits":

- *United States* v. *All funds on Deposit in United Bank of Switzerland (Sawan Exchange Company),* 188 F. Supp. 2d 407 (S.D.N.Y. 2002) (if the forfeiture is brought under the specified unlawful activity prong of section 981(a)(1)(C), the term “proceeds" always means "gross proceeds," not "net profits," because section 981(a)(2) authorizes the forfeiture of the gross proceeds of any unlawful activity);

2. Property that appreciates in value:

- *United States v. Real Property Located at* 22 *Santa Barbara Dr.,* 264 F.3d 860 (9th Cir. 2001) (property traceable to criminal proceeds is forfeitable in its entirety even it has appreciated in value);

3. Insurance proceeds and other traceable property:

- *Counihan v. United States,* 194 F.3d 357 (2d Cir. 1999) (where residence forfeited as facilitating property under section 881(a)(7) is destroyed by fire, the Government is entitled to forfeit insurance proceeds as beneficiary of constructive trust);

- *United States* v. *Real Property Described in Deeds,* 962 F. Supp. 734 (W.D.N.C. 1997) (insurance proceeds received when facilitating property was destroyed are forfeitable as property traceable to the offense under section 853(a)(2);

4. Proceeds of a false loan or bank fraud:

- *United States v.* 3814 *Thurman Street,* 164 F.3d 1191 (9th Cir. 1999)(money obtained as a consequence of false loan application is proceeds; equity acquired with such borrowed funds is also proceeds);

- *United States v. Real Property* 874 *Gartel Drive,* 79 F.3d 918 (9th Cir. 1996) (forfeiture of real property purchased with proceeds of section 1014 violation);

5. Interest:

- *United States v. $25,829,681.80 in the Court Registry Investment System,* 2002 WL 31159116 *1 n.l (S.D.N.Y. 2002) (the Government is entitled to interest that was earned on forfeited funds);

- *See* "Property Subject to Forfeiture" in the Criminal Forfeiture Outline.

Note: Forfeiture under a proceed-only forfeiture statute is limited to the portion of the property traceable to the proceeds, *see* page 115.

B. Facilitating real property (21 U .S.C. § 881 (a)(7)):

- *United States v. Premises Known as 3639-2nd St.,* 869 F.2d *1093,* 1096 (8th Cir. 1989) (facilitating property is anything that makes the prohibited conduct "less difficult or more or less free from hindrance"; use of a house for drug storage and concealment and for place to conduct drug sale makes it forfeitable as facilitating property);

- *United States* v. *One Parcel...* 7715 *Betsy Bruce Lane,* 906 F.2d 110, 113 (4th Cir. 1990) (house used to store, prepare, package. and consume cocaine forfeitable under section 881 (a)(7));

- *United States* v. *Schifferli,* 895 F.2d 987, 990 (4th Cir. 1990) (property need not be integral, essential, or indispensable; to facilitate an offense, "the property need only make the prohibited conduct less difficult or more or less free from obstruction or hindrance");

- *United States v. One Parcel... 916 Douglas Ave.,* 903 F.2d 490, 494 (7th Cir. 1990) (use of home telephone to set up drug deals makes house forfeitable as facilitating property);

- *United States* v. *Real Property...3097 S.W. 111th Ave.,* 921 F.2d 1551,1556 (llth Cir. 1991) (residence forfeited as facilitating property where driveway served as "planned site" of drug deal, and was chosen so that deal would take place on familiar territory);

- *United States v. One Parcel...Plat 20, Lot 17,* 960 F.2d 200,205 (1st Cir. 1992) (land used to grow marijuana, even if for personal use) forfeitable as facilitating property);

- *United States v. RD. 1, Box 1, Thompsontown*, 952 F.2d 53, 58 (3d Cir. 1991) (land pledged as collateral for loan to finance drug deal forfeited as facilitating property; the property need only make the crime less difficult or more or less free from hindrance);

- *United States v.* 817 *NE. 29th Drive. Wilton Manors,* 175 F.3d 1304 (11 th Cir. 1999) (whether real property is forfeitable as a single parcel turns not on " description in deed or in land records. but on character of property where criminal activity took place and whether all of the land is of the same character; where two parcels constitute residence and front yard, both are subject to forfeiture);

- *United States v. Real Property...* 221 *Dana Ave.,* 81 F. Supp. 2d 182 (D. Mass. 2000) (court declines to sever real property even though drug trafficking was confined to first floor of 2-story duplex), *rev'd on other grounds,* 261 F.3d 65 (1st Cir. 2001);

- *See* cases discussing the "substantial connection" requirement for facilitating property at page 105.

C. Firearms:

1. 120-day rule:

- *United States v. Ninety-Three* (93) *Firearms,* 330 F.3d 414 (6th Cir. 2003) (requirement in l8 U.S. C. § 924(d)(l) that forfeiture of firearms or ammunition must be commenced within 120 days of seizure is satisfied by commencement of either administrative or judicial forfeiture proceedings within that period); *United States v. Twelve Firearms,* 16 F. Supp. 2d 738 (S.D. Tex. 1998) (same);

- *United States* v. *Twelve Miscellaneous Firearms,* 816 F. Supp. 1316, 1317 (C.D. Ill. 1993) (forfeiture action is timely so long as at least an administrative action is commenced within 120 days of seizure); *United States v. Miscellaneous Firearms,* 150 F. Supp. 2d 988 (CD. m. 2001) (same; rejecting *Fourteen Various Firearms); United States v. 60 Firearms,* 186 F. Supp. 2d 538 (M.D. Pa. 2002) (same); *United States v. Assorted Firearms,* 201 F. Supp. 2d 496 (D. Md. 2002) (same);

• The Fourth Circuit's view on this issue is unclear:

- *United States* v. *Fourteen Various Firearms,* 889 F. Supp. 875,877 (E.D. Va. 1995) (interpreting "any" to mean the same as "every" and concluding that any administrative forfeiture action and any judicial forfeiture action must be commenced within l20 days of seizure);

- *But see United States v. Mowatt,* 2003 WI. 21958315 (4th Cir. 2003) (affirming district court on this point and citing 93 *Firearms* with approval);

2. Application of section 924(d):

- *United States v. Twelve Firearms,* 16 F. Supp. 2d 738 (S.D. Tex. 1998) (section 924(d)(1) authorizes forfeiture for any "wilful violation" including misdemeanor record keeping violations under section 922(m));

- *United States* v. *Libretti,* 161 F.3d l8, 1998 WL 644265 (10th Cir. 1998) (unpublished) (Table) (if the district court lacks a basis for the forfeiture of firearms under federal law, it does not necessarily have to release the firearms to the defendant; instead, the; court may release the firearms to a state court that has its own forfeiture action underway);

- *United States v. Assorted Firearms,* 201 F. Supp. 2d 496 (D. Md. 2002) (basis for section 924(d) forfeiture remains valid if defendant was a convicted felon on the date the firearms were seized even if his underlying conviction was later vacated);

- *See* Customs cases, *infra.*

D. Vehicles:

- *United States* v. *One* 1993 *Ford Thunderbird,* 2000 WL 1l54628 (N.D. Il1. 2000) (vehicle with secret compartment, used by look-out for counter surveillance at drug deal, is facilitating property);

E. FIRREA:

- *United States v. 3814 Thurman Street,* 164 F.3d 1191 (9th Cir. 1999) (mail fraud "affected a financial institution" within the meaning of section 981(a)(1)(C) where claimant submitted false loan application to a bank and received proceeds);

- *United States v. Approximately $25,829,681.80 in Funds,* 1999 WL 1080370 (S.D.N.Y. 1999) ("affecting a financial institution" does not limit section 981(a)(1)(C) to situations where a financial institution is a victim; when claimant fraudulently induced victim to send money to claimant's account, the financial institution was "affected" because it had to file an interpleader to sort things out);

- *United States v. Esterman,* 135 F. Supp. 2d 917 (N.D. I1L 200 1) (for purposes of section 982(a)(A), wire fraud affects a financial institution only if there is an impact On the bank, favorably or unfavorably use of bank account not sufficient);

- *United States* v. *Grass,* 2003 WL 21715878 (M.D. Pa. 2003) (following *Esterman;* underlying fraud must adversely affect the financial institution; not enough that money was withdrawn from victim's bank account);

F. Alien smuggling:

- *United States v. One* 48 *Ft. White Colored Sailboat Named "Libertine,"* 59 F. Supp. 2d 362 (D.P.R. 1999) (there is no violation of section 1324(a)(1)(A)(I) if the person enters at a port of entry and there is no violation of subparagraph (A)(iv) if there is no second person involved);

G. Customs offenses:

- *United States v. Ahmad,* 213 F.3d 805 (4th Cir. 2000) (forfeiture of value of property involved in section 545 offense is valid even if offense deprived Government only of accurate information, not revenue);

- *United States v. An Antique Platter of Gold,* l84 F.3d 131 (2d Cir. 1999) (misstatement of country of origin is material violation of section 542; supporting forfeiture under section 545);

- *United States* v. */,100 Machine Gun Receivers,* 73 F. Supp. 2d 1289 (D. Utah 1999) (interpreting regulations to find violation of 19 U.S. C. § l595a(c)(2)(B) and requisite intent to support forfeiture under 18 U.S. C. § 545);

- *United States v. Portrait of Wally,* 2002 WL 553532 (S.D.N.Y. 2002) *(Wally II)* (stolen artwork transported to United States on loan to museum is forfeitable under sections 545 and 1595a as property imported in violation of 18 U.S. C. § 2314);

- *United States v. One Lucite Ball,* 252 F. Supp. 2d 1367 (S.D. Fla. 2003) (moon rock stolen from government of Honduras in violation of Honduran law forfeitable under 19 U.S. C. § 1595a);

H. Gambling:

- *United States v.* $734,578.82 *in U.S. Currency,* 286 F.3d 641 (3d Cir. 2002) (money wired to New Jersey company to be deposited into account of offshore internet gambling business could be forfeited under section 1955(d) because underlying New Jersey law makes it illegal to promote gambling; irrelevant that gambling is legal in the offshore location; distinguishing *United States v. Truesdale,* 152 F.3d 443 (5th Cir. 1998));

I. IEEPA:

- *United States v. All Funds on Deposit in United Bank of Switzerland,* 2003 WL 56999 (S.D.N.Y. 2003) (money that money exchange was planning to send to Iran on behalf of customers was proceeds of IEEPA offense forfeitable under section 981(a)(l)(C); wilfulness is not an element of the offense for civil forfeiture purposes; IEEPA's exception for family remittances does not apply to money sent through a money remitter instead of a bank);

J. Foreign tax offenses:

- *United States v. 1,920,000 Cigarettes,* 2003 WL 21730528 (W.D.N.Y. 2003) (cigarettes smuggled with intent to deprive Canada of tax revenue are proceeds of wire fraud forfeitable under section 981 (a)(1)(C));

K. Intangible property:

- *United States v. Daccarett)* 6 F.3d 37 (2d Cir. 1993) (electronic funds exist as a credit at the intermediate bank used in a wire transfer) and constitute a *res* that may be seized FROM the intermediate bank);

XXVI. When Forfeiture Is Unnecessary

A. Proceeds:

- *United States v. Vanhorn,* 296 F.3d 713 (8th Cir. 2002) (defendant convicted of fraud and money laundering not entitled to return of seized proceeds even though Government failed to obtain forfeiture order; proceeds are contraband, which defendant has no right to possess);

- *United States v. Dusenbery,* 223 F.3d 422 (6th Cir. 2000) (because defendant conceded he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek remedy for Government's destruction of property without formal forfeiture procedures)) *aff'd on other grounds,* 534 U.S. 161 (2002);

B. Restitution:

- *United States* v. *Lavin,* 299 F.3d 123 (2d Cir. 2002) (no forfeiture necessary where Government applied seized funds to satisfy restitution order; Rule 41 (e) motion denied);

- *Viola v. United States,* 2003 WL 21143078 (ED.N.Y. 2003) (following *Lavin;* property seized from the defendant may be retained and used to satisfy a restitution order, even though the property was not forfeited, as long as it was lawfully seized and belonged to the defendant at the rime it was seized) ;

C. Sting money/bribe money:

- *Mantilla v. United States,* 302 F.3d 182 (3d Cir. 2002) (Government docs not have to initiate forfeiture proceedings to retain sting money that is voluntarily turned over to undercover agents; that the Government could have forfeited the money under section 881 (a)(6) does not bar application of the common law doctrine barring recovery of property that was the subject of an illegal contract by one who is *in pari delicto);*

- *Acheampong* v. *United States,* 2000 WL 1261908 (S.D.N.Y. 2000) (sting money, like bribe money, belongs to the Government, which is entitled to keep it without having to institute formal forfeiture proceedings) ;

- *United States v. Parlavecchio,* 192 F. Supp. 2d 349 (M.D. Pa. 2002) (denying Rule 41(e) motion for the return of property defendant bribed a corrections officer to obtain even though the property was not forfeited because Ru1e 41(e) is an equitable remedy, and defendant did not have clean hands);

D. Instrumentalities:

- *Shirazi* v. *United States,* 2002 WL 31055964 (N.D. in. 2002) (defendant "is not entitled to the return of the instrument of his crime"; denying Rule 41(e) motion for return of computers used to store information on stolen and counterfeit crimes because they facilitated the offense);

E. Evidence in the criminal case:

- *United States v. Jones,* 225 F 3.D 468 (4th Cir. 2000) (Government may not unilaterally destroy property seized from the defendant when it is no longer needed as evidence in his criminal case; Rule 41(e) does not authorize payment of damages, but defendant has other avenues to seek compensation);

F. Firearms:

- There is a split in the circuits over whether it is possible for the Government to retain possession of a firearm following a criminal conviction without initiating formal forfeiture proceedings.

1. The Fifth Circuit holds that the firearm must be forfeited:

- *Cooper v. City of Greenwood,* 904 F.2d 302 (5th Cir. 1990) (defendant has constitutionally protected property interest that can only be extinguished through formal forfeiture proceedings);

- *Watts v. United States,* 2002 WL 999320 (N.D. Tex. 2002) (following *Cooper;* if Government seizes but does not forfeit handguns, it does not have to return them to convicted felon but it may be ordered to pay defendant fair market value of the guns);

- *See a/so United States v. Posey,* 217 F.3d 282 (5th Cir. 2000) (following *Cooper;* because the Government did not institute forfeiture proceedings against the property in question or include criminal forfeiture counts in the indictment, there was no basis to grant the Government's postconviction motion for an order authorizing disposal of the firearms used in the drug trafficking offense for which the defendant was convicted);

2. Other courts, led by the Eighth Circuit, hold that if the Government fails to initiate forfeiture proceedings, it may nevertheless refuse to return a firearm to a convicted felon:

- *United States v. Felici,* 208 F.3d 667 (8th Cir. 2000) (forfeiture is not necessary to prevent the return of seized firearms and drug paraphernalia to convicted drug dealer);

- *United States* v. *Harvey,* 78 Fed. Appx. 13, 2003 WL 21949151 (9th Cir. 2003) (following *Felici;* convicted felon has no right to seek return of seized firearms even though they were not forfeited and are no longer needed as evidence);

- *United States v. Story,* 2001 WL 392008 (D. Minn. 2001) (defendant not entitled to return of firearms even if they were not forfeited because he is now a convicted felon, but baggies and scales are not contraband *per se);*

- *United States v. Blackshear,* 2002 WL 1765603 (N.D. in. 2002) (even if guns were not forfeited, defendant would not be entitled to there return under Rule 4l(e) because he is now a convicted felon);

- *United States v. Henderson,* 2002 WL 1611653 (N.D. In. 2002) (convicted defendant's Rule 41(e) motion for return of firearms and ammunition denied because he is a convicted felon);

G. Drug forfeitures/contraband:

- *United States v. Rodriguez-Aguirre,* 264 F.3d 1l95, l204 n.l3 (10th Cir. 2001) (property that is contraband *per se,* such as cocaine, need not be forfeited; because the property is unlawful to possess, any property interest is automatically extinguished; in contrast, "derivative contraband." such as property used to facilitate a crime, can only be forfeited in accordance with the requirements of due process);

- *United States* v. *Radunovich,* 2002 WL 31803000 (9th Cir. 2002) (Table) (district court properly denied motion for the return of pseudoephedrine tablets or their monetary equivalent; tablets were properly destroyed as contraband);

- *United States* v. *Henderson,* 2002 WL 1611653 (N.D. m. 2002) (Rule 41(e) motion for return of plastic baggies denied; items used to package drugs are contraband);

H. Non-innocent Owner:

- *United States v. Clymore.* 245 F.3d ll95 (10th Cir. 2001) (if Government misses a deadline in forfeiture proceeding, return of property to claimant is not automatic; claimant must file a Rule 41(e) motion, which win be denied if: (l) the initial seizure was lawful, (2) the Government establishes the forfeitability of the property, and (3) claimant does not establish that he is an innocent owner);

L. Contraband:

- *United States v. Simmons,* 2000 WL 33138083 (E.D. Cal. 2000) (claimant cannot oppose forfeiture of counterfeit coins on ground that seizure was illegal; counterfeit coins are illegal to possess, and must be forfeited to Secret Service);

- *Helton v. Hunt,* 330 F 3d 242 (4th Cir. 2003) (property that is intrinsical1y illegal in character may be summarily confiscated and destroyed, but property such as video gaming machines that is not inherently illegal cannot be disposed of without affording the property owner due process, such as a forfeiture proceeding);

J. Laches:

- *Carter v. United States,* 160 F. Supp. 2d 805 (E.D. Mich. 2001) (even though property was never forfeited, defendant's unexcused delay of 8 years in requesting return of property seized at time of arrest is barred by laches);

XXVII. Forfeiture and Retirement Plans

- *See* Criminal Forfeiture Outline.

XXVIII. International Forfeitures

A. Enforcement of foreign judgments and restraining orders:

- 28 U.S. C. § 2467 sets forth the procedure for registering and enforcing a foreign restraining order or judgment of forfeiture.

18 U.S. C. § 981(b)(4) sets forth the procedure for temporarily restraining the U.S. assets of a person arrested in another country.

B. Abstention doctrine:

- *United States v. Portrait of Wally,* 2002 WL 553532 (S.D.N.Y. 2002) *(Wally III)* (court with jurisdiction over civil forfeiture action need not abstain because a treaty or foreign law provides alternative means for parties to recover stolen property);

C. Section 2314:

- *United States v. Portrait of Wally,* 105 F. Supp. 2d 288 (S.D.N.Y. 2000) *(Wally J)* (when property is forfeited as proceeds of section 2314, whether property is "stolen" is determined by federal, not foreign, law; determining whether a painting is stolen is different from determining the owner, which turns on state law).