Forfeiture Endangers American Rights Foundation Journal

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Krimstock v. Kelly: 2nd Circuit rules New York City forfeiture statute violates Due Process by failing to provide prompt post-seizure hearing

by Brenda Grantland

In this period of rapidly shrinking constitutional rights it is *so* refreshing to see a federal court make a constitutional ruling in favor of the citizenry and against abusive government. It is especially delicious when the ruling is a precedent-setting decision of a federal appellate court.

On September 18, 2002, the Second Circuit[1] handed down a landmark victory for civil libertarians and forfeiture victims in *Krimstock v. Kelly*[2], which held that New York City's motor vehicle forfeiture statute[3] violates due process by failing to provide a prompt post-seizure hearings for owners whose cars are detained under the law. The court held that owners have a right to a remedy that will allow them to challenge "the legitimacy of and justification for the City's retention of the vehicles prior to judgment."[4] The court explained:

> A car or truck is often central to a person's livelihood or daily activities. An individual must be permitted to challenge the City's continued possession of his or her vehicle during the pendency of legal proceedings where such possession may ultimately prove improper and where less drastic measures than deprivation...are available and appropriate.[5]

(continued on page 16)

NY: Nassau County Supreme Court justice invites challenges in light of 2nd Circuit *Krimstock* ruling

Nassau County Supreme Court Justice Robert Roberto Jr. invited parties in three separate vehicle forfeiture actions[1] to appeal his previous forfeiture rulings in light of the 2nd Circuit's holding in *Krimstock v Kelly*. The county forfeiture laws are similar to the New York City statute held constitutionally defective by the 2nd Circuit, which held that due process requires prompt post-seizure hearings.

Many defendants challenged the constitutionality of the Nassau County DUI forfeiture laws since their passage in 1999. According to an article by Leigh Jones, published in the *New York Law Review*, prior to the 2nd Circuit ruling in *Krimstock* Justice Roberto generally sided with the county.

Justice Roberto's earlier rulings that have routinely upheld the county's vehicle forfeiture law as providing sufficient due process, even for leasing companies whose vehicles are seized because of the lessee's arrest for driving while intoxicated or ability impaired.

His decision last December referred to a class-action lawsuit that Ford Motor Credit Co. was considering filing as an innocent third party defending against county forfeiture actions. Although the judge's decision denied the possible class action lawsuit as a basis for granting Ford's request for extensive interrogatories, he mentioned an argument by Ford's counsel, *(continued on page 15)*

Court finds New Jersey forfeitures unconstitutional

Police addicted to plunder can't quit cold turkey: state files motion to stay ruling pending appeal.

On December 11, 2002 Superior Court Judge G. Thomas Bowen ruled that New Jersey's civil forfeiture provision allowing police and prosecutors to keep forfeited assets violates the Due Process clauses of the U.S. and New Jersey Constitutions.

(continued on page 14)

Inside:

Forfeiture Endangers American Rights

Foundation Journal

F.E.A.R. is a national non-profit forfeiture reform organization headquartered at 265 Miller Ave., Mill Valley, CA 94941; (415) 389-8551 or if you can't afford the call use our toll free number: 888-FEAR 001. website: http//www.fear.org

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F.E.A.R., Inc. is a nonprofit corporation incorporated in Washington, D.C.. Its purpose is to lobby for the reform of state and federal forfeiture laws.

F.E.A.R. membership is $35 per year. Because our focus is on legal reform, dues and donations to F.E.A.R. Inc. are not tax deductible. F.E.A.R. Foundation, also incorporated in Washington, D.C., is a nonprofit corporation aimed at educating lawyers and the public on forfeiture law, and assisting in legal defense. Donations to F.E.A.R. Foundation are fully tax deductible.

Editor's Page

We're back! When President Clinton signed the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) into law Henry Hyde announced credit for passage of the reform to FEAR's "long and dedicated work on behalf of forfeiture reform." I celebrated the nation's first major federal forfeiture reform with FEAR President Brenda Grantland after hearing the news of the passage of CAFRA on the drive from Southern California to visit her Bay area home.

Under CAFRA, for the first time since civil asset forfeiture laws were passed, the government: must prove its case; is liable for damages to seized property; must return property to owners pending trial when possession would cause substaintial hardship; may no longer require an owner to pay a 10% cost bond just to contest the forfeiture in court; can no longer forfeit property from owners who prove their innocence; and must appoint councel to some indigent claimants. Brenda and I detailed our long sought reforms as well as the last minute expansions of the government's powers to seize built into CAFRA for inclusion in our magnum work, FEAR's ASSET FORFEITURE DEFENSE MANUAL, published in December of 2001.

However, FEAR's newsletter had been on an extended hiatus while I volunteered my efforts on another front. "Serving the forces of compassion," my husband, Lynn, and I produced the *215 Reporter*. Our newsletter detailed the implementation of California's Compassionate Use Act of 1996. I felt extremely rewarded every time one of the articles we published helped someone in court as they battled backwater authorities who refused to acknowledge that medical use of marijuana had become legal for Californians who use cannabis with their doctor's approval.

As judges dismissed bogus charges and ordered confiscated cannabis returned to patients, and juries acquitted patients accused of having more medicine than some prosecutors thought necessary, the law we had worked so hard to help pass court battles settled the law in California and many thousands of patients found alleviation from chronic and acute ailments for which cannabis provides relief—until the feds intervened.

The Ashcroftian crusade against states' rights hit us hard. Reluctant DEA agents, who for five years had been investigating our cooperative efforts with the Los Angeles Sheriff's Department and City of West Hollywood to help people live longer better lives, were forced to arrest Lynn and me on August 13, 2002. Though the agents had found that we were "completely above board," we now face federal criminal charges involving five-year mandatory minimum sentences, and yet another forfeiture action against our ranch home of 26 years. You can read details and updates of the criminal and civil actions against us and our home on our website: www.osburndefensefund.com.

Meanwhile, forfeiture law reforms advanced at state levels. FEAR's national reforms beg for education of attorneys and claimants if they are to become useful. We must also raise public awareness to finish the reforms begun under CAFRA. Therefore, under the guidance of my friend, co-author and, more recently my attorney, Brenda, I'm once again editing FEAR's newsletter. *FEAR Foundation Journal Volume 1 Number 1* contains stories of great advances in forfeiture reforms, as well as some pretty scarry news of the results of our nation's reaction to the tragic events of September 11.

Kevin Kuna © 2003

Much thanks to FEAR Executive Director Leon Felkins for his untiring dedication to keeping forfeiture related news posted on the Internet. I distilled much of the news herein from his daily postings. The resulting journal depicts heroes as well as the urgent need for continued vigilance and heroic efforts—the lifeblood of maintaining a freedom-based democracy.

—Judy Osburn

Now is the time for all good citizens to come to the aid of their country *by Brenda Grantland, Fear Foundation President*

I am very excited about the positive changes in forfeiture law that have happened recently, which we are pleased to report about in this newsletter, the first edition of the FEAR Foundation Journal.

There are still more negative things to report than positive, however. For the forfeiture reform movement, 9-11 was a serious setback. The subject of forfeiture reform instantly became politically incorrect, and we became pariahs for criticizing the government. Things got better over time, but even now, I must say they've beaten us back.

In reaction to the 9-11 terrorist act our elected representatives have passed legislation purporting to take away many of the constitutional guarantees that go to the core of our system of government.. We previously took these constitutional guarantees for granted but somehow erosion of these rights is now tolerated by the American people, in order to prevent terrorism.

I don't see any evidence that these laws and procedures have prevented terrorism. But I do see lots of evidence that our constitutional rights have been diminished. Often when I read the paper now I think to myself that we're now living in a police state, and wonder how we'll survive this as a nation. But the pendulum swings back and forth. Fortunately they haven't completely vanquished us as a people.

It's time for us to rise up and start defending our Constitutional rights again. The horrible 9-11 tragedy taught us to duck and cover, and worry about color coded levels of fear we should be experiencing instead of *(continued on back cover)*

11th Circuit reverses $242,484 cash seizure

Court draws line for probable cause: "More than suspicion is necessary" to separate property from owner

In an opinion by Chief Judge Edmondson, the Eleventh Circuit reversed a $242,484 forfeiture order and instructed the trial court to enter a judgment for the claimant. The appellate court held that "the government's case falls short of the probable cause line." Since the government failed to establish an adequate link between the money and any illegal drugs alleged in the forfeiture complaint, the claimant was not required to prove she had a legitimate source of the cash seized from her by the DEA.

Steven L. Kessler, former head of the New York state forfeiture office who now represents people challenging government claims, commented on the appellate court reversal of the forfeiture order: "Enough smoke in the past has been the basis for forfeitures, and I think the 11th Circuit at least is saying, 'We need a little bit of a fire. The smoke itself won't do it.'"

The January 23 decision ordered return of the cash seized in 1998 from Deborah Stanford, owner of Mike's Import and Export in Florida. Ms. Stanford was en route to Miami in December 1998 when airport security officers in New York questioned her about her packages, and she replied they contained money. She caught her flight as security notified the U.S. Drug Enforcement Agency.

Six Florida DEA agents waited at the airport gate for Stanford's flight to arrive. At the request of two of the agents, Stanford gave them her ticket and identification. They verified her name and returned the items. The agents asked her if she was carrying drugs or money, and she said she was carrying about $200,000 cash in her backpack. Stanford gave one of the agents permission to look into her backpack. The agent saw a "Christmas bag type package," into which he poked a hole revealing bundles of cash.

(continued on page 17)

Law enforcement fails to undermine popular Utah forfeiture reform law

Congratulations to Arnold Gaunt, FEAR coordinator for Utah and proponent of the popular forfeiture reform initiative, Measure B—the Utah Uniform Forfeiture Procedures Act, which voters overwhelmingly approved in November, 2001.

Arnold sounded the alarm about abuses to the new reform legislation, and attempts by law enforcement addicted to police piracy to thwart the new law. Utah police objected to the reform because it curtailed their profit sharing in several ways, including earmarking the majority of forfeiture proceeds to the state education fund.

Prior to Utah voters passing Initiative B, the Uniform Forfeiture Procedures Act, profits from sales of seized property went back to police agencies for their use. The reform initiative put an end to the perversion of law enforcement priorities that accompanies the lure of forfeiture proceeds for police coffers.

Police chiefs and prosecutors statewide came out en masse against Initiative B during its emotional public debate, saying it would only help drug criminals. Forfeiture squads had previously helped agencies statewide access millions in federal law enforcement funds. Since the passage of Initiative Measure B, many agencies have lost hundreds of thousands of dollars. The Salt Lake County Sheriff's Office, for example, estimates it has lost as much as $500,000, said deputy Peggy Faulkner.

Proponents argued the seizures were unconstitutional, usually coming before a conviction in a case. Reformers cited horror stories of property taken from innocent third parties and agencies profiting directly from items its officers seized. Voters agreed, passing the initiative by a 69% majority.

Under Initiative B, police are not allowed to keep the proceeds from forfeiture sales. Instead the money is supposed to go into the

(continued on page 12)

Government seizes Internet site, assumes domain name

The Justice Department announced on February 26 that it had seized www.iSONEWS.com, the "leading public Internet site dedicated to online copyright piracy." David M. Rocci, 22, of Blacksburg, VA agreed to the forfeiture of the site and domain name as part of a previous plea agreement for violation of criminal copyright laws.

Rocci, who used the screen name, "krazy8," pled guilty last December to conspiring to import, market and sell circumvention devices known as modification (or "mod") chips in violation of the Digital Millennium Copyright Act.

Mod chips are designed to circumvent copyright protections built into game consoles such as the Microsoft Xbox and Sony Playstation 2, and once installed, allow the unlimited play of pirated games on those consoles.

Once the United States assumed control of the domain name and website the government announced:

> *Individuals who now visit www.iSONEWS.com will no longer find the latest news on new pirated releases by illegal software piracy (or "warez") groups. Instead, they will view information about the case of United States v. Rocci, as well as general information about copyright infringement and the criminal prosecution of individuals engaged in online piracy. In addition to this information, the site now contains links to the website of the Department of Justice's Computer Crime and Intellectual Property Section, www.cybercrime.gov, which contains further information on the Department's criminal anti-piracy efforts.*

"Piracy is not a game or a hobby, it is a crime," said Paul J. McNulty, U.S. Attorney for the Eastern District of Virginia. "This case is another example of our dedication to enforcing the intellectual property laws of this nation online. Whether you are engaged in conduct like David Rocci or you are purchasing mod chips to play pirated games, you should stop," said McNulty. "As David Rocci and others have learned recently, the consequences of copyright infringement are very real."

Paypal threatened with Patriot Act forfeiture

A Missouri prosecutor sent Ebay a letter insisting that its recent acquisition, Paypal, was violating the Patriot Act by processing payments from Internet gambling operations, according to an article titled "Paypal Meets the Patriot Act" by Solveig Singleton.

Internet gambling is illegal in the U.S., but about 5 million Americans use overseas sites. Ebay discontinued Paypal's gambling operations last fall.

Paypal hooks up to internet shoppers' bank accounts or existing credit card to let you make a payment to anyone else with an e-mail address and a Paypal account. Millions of people count on Paypal to quickly make payments for an Internet auction without sending cash in the mail or sending a total stranger your credit card number or a check. Sellers rely on the service to accept payments without taking a check from a total stranger or dealing with the expensive apparatus of credit card acceptance. Paypal even offers a money-back guarantee against fraud or disappointment in the purchase of goods for just a few dollars per transaction.

Paypal's or Ebay's guarantee may be the Internet's only real remedy for online auction fraud. Most of the fraud involves amounts less than $500, with a substantial amount being for less than $200 or even smaller amounts. Prosecutors and police rarely pursue cases involving such small amounts, and seldom track electronic offenders over state lines.

But police are interested in pursuing larger amounts of money, especially when they can seize it and keep it— which explains the state prosecutor's interest in Paypal's past role in gambling. The Patriot Act provisions that Paypal allegedly violated prohibit the transmission of funds known to have come from criminal activity. And they also provide for civil forfeiture. Obtaining a criminal conviction against either Paypal or Ebay would be extremely difficult; Ebay argues that they acted in good faith. The Missouri prosecutors sent a settlement offer along with their letter.

As Singleton wrote for the Competitive Enterprise Institute (www.cei.org):

> Assume, for a moment, that our law against gambling is justified and that those are breaking it are doing something wrong (an assumption that probably wouldn't stand close examination). Paypal is certainly less involved in the wrongful transaction than those who actually gambled. But civil forfeiture means that prosecutorial discretion will be directed not at the actual wrongdoers (under our assumption, gamblers or gambling businesses), but businesses caught up with them because they offer services to everyone without inquiries into the exact nature of their business.
>
> So again the weight of the law comes down on Paypal, despite the amazing service they offer at extraordinarily low cost. And with every layer of litigation and regulation comes costs that they must eventually pass on to consumers, and also a little less courage to experiment next time. Will this zeal for prosecutions only stop when every computer company is as staid and cautious as the phone company? It would be one thing if the law served consumers, or targeted dangerous criminals. But as long as prosecutors and police are tempted by forfeiture laws, law enforcement will remain divorced from ordinary concepts of individual responsibility and the civil servant's duty to the public. And it will begin to look a lot more like legalized extortion.

New Hampshire police arrest 9 students in attempt to forfeit college dormitory

A two-month undercover investigation by city police and the New Hampshire AG's Drug Task Force netted nine arrests of McIntosh College students. Dover City Police Chief William Fenniman said he is pushing federal prosecutors to forfeit the college dormitory where most of the suspects lived. The police chief claims he just wants "to stop the building from being used for illicit activity...Whatever it takes to do that, I'm willing to do."

The undercover operations dubbed "Operation Home Cookin," focused on students at the college's Atlantic Culinary Academy. Jean Weld, an Assistant U.S. Attorney who handles forfeiture claims, explained that to seize a building prosecutors must prove the building owner ignored drug activity. She would not comment specifically on McIntosh College, which according to the statements by police Chief Fenniman, was not even used for the alleged illegal activities of the nine students.

Chief Fenniman admitted there would be "legal hurdles" to a forfeiture proceeding against the college, adding: "But we think we can get over them."

He stated that most of the undercover drug buys took place in the dormitory parking lot or at a gas station next door, and pointed out that one suspect was dealing "openly" in a park. Eleven of the undercover buys also took place in school zones near two elementary schools rather than the anywhere near the college dormitory.

Students who witnessed the raid reported that police used excessive force. They said reporters were present before the raid started and news photographers took pictures as students were thrown to the ground and arrested.

College President David McGuire stated, "We fully support the action taken. It's part of an ongoing effort to enforce our zero-tolerance policy."

New Zealand Thought Police confiscate banned books

While US forfeiture laws call for seizure and forfeiture of "all books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation" of drug laws, the Drug Enforcement Agency has only occasionally used this authority to undermine Americans' freedom of speech privileges.

Although the name of New Zealand's Office of Film and Literature Classification "is classic Orwellian doublespeak," Russ Kick, of the Center for Cognitive Liberty and Ethics, points out, "the title of the agency's head is hilariously forthright: Chief Censor of Film and Literature."

The New Zealand agency's website explains its mission: "Each time the Classification Office makes a classification decision it must consider whether the availability of that particular publication is likely to be injurious to the public good. ...Under the Classification Act, the Classification Office is deemed to exercise expert judgment when making these decisions."

Daniela remarked on the book-burning troopers: "We thought such deprivation of freedom of information only still occurs in communist, Muslim, and Third World countries, but we were

Moving images such as movies and video games are the only form of media that must be viewed, judged, and labeled prior to release. All others may be published without passing through the censorship process, however, the Office warns: "these publications must still comply with the law. In this case, the onus of responsibility rests on the person who intends to supply a publication to ensure that he or she is supplying it appropriately. As one option, a person can choose to submit the publication for classification."

In actuality, the buyer must beware. New Zealand Customs agents bring Ray Bradbury's *Fahrenheit 451* to life.

"Jack-booted firemen" knock at the door.

The Setters never anticipated the science fiction scene that followed their order of a copy of *Psychedelic Chemistry* from an online catalogue. Instead of the book they purchased from Loompanics Unlimited, five Customs agents arrived at their door at 6:30 am on February 1, 2002.

John Setter said that when asked the reason for the search warrant, "the one in charge asked us if we knew a company called Loompanics and mentioned the book *Psychedelic Chemistry*, ordered in my name, as the cause for the raid." The agents seized six other books and a computer from the Setters. The government searched all the Setters' mail for two months after the raid, resulting in confiscation of a Loompanics catalogue, as it purportedly "contains some books that are 'objectionable'."

Daniela Setters remarked about New Zealand's science fiction style reality of book burning troopers invading her house: "We thought such deprivation of freedom of information only still occurs in communist, Muslim, and Third World countries, but we were so bloody wrong!"

On Feb. 27, 2003 the Turanga District Court fined John Setters $6000 ($2680 US) for eight Customs and Excise Act violations—a high cost of his passion for the study of ancient cultures, Shamanism and ancient drug use in religious rituals. Defense counsel Craig Tuck argued that five of the eight books were gardening related. "The implication of sentence has an impact on all the citizens of this country." Tuck stated this prosecution means New Zealanders "can't read about a whole genus of mushrooms and can't read about ancient religions."

John Setters commented outside the courtroom about the dangerous precedent set by his convictions, wondering if "in 1000 years will it be illegal to have a Bible?"

Secret Tribunal expands surveillance powers under the USA Patriot Act

For the first time in spy court history the secret "FISA" court denied a government wiretap request, and sharply criticized widespread abuse by Justice Department and FBI. Government's appeal results in first ever ruling by FISA Court of Review, granting government's appeal for greater powers to spy on US citizens.

One of the expanded powers Congress gave to the Justice Department in the aftermath of the September 11 attacks now involves a secret court almost no one had ever heard of.

On May 17, 2002, for the first time since its creation a quarter century ago the super-secret U.S. Foreign Intelligence Surveillance Court, known by the anachronym FISA, denied a government request for expanded powers and sharply criticized Department of Justice abuse of wiretaps and other surveillance of suspected spies and terrorists.

The May, 2002 ruling was the first one ever released in the history of the high security windowless courtroom atop the Justice Department This was the first denial by the super secret tribunal of over 10,000 surveillance requests submitted by the Justice Department.

The FISA court approved 1,012 of these warrants in 2000, which permit secret searches and wiretaps for up to one year without ever notifying the target of the investigation.

"The bottom line is that they use FISA because the procedures are so much looser," said James Dempsey, deputy director of the Center for Democracy and Technology.

The intelligence court, created in 1978, is charged with overseeing sensitive law enforcement surveillance by the U.S. government. Twenty-four years later the secret FISA court dealt its the first-ever substantial defeat for the government on a surveillance issue.

Chairman of the Senate Judiciary Committee, Sen. Patrick J. Leahy, said the FISA court's ruling might "save the Justice Department from overstepping constitutional bounds in ways that could have dire consequences in our most serious national security cases."

The government quickly appealed to another secret tribunal, the Foreign Intelligence Surveillance Court of Review, arguing that the lower spy court had "wholly exceeded" its authority and that Congress clearly approved of the greater surveillance authority. That appeal sparked the first action in the history of the FISA Court of Review.

The Court of Review overturned the lower secret court, stating the expanded surveillance powers sought by the government are authorized under the USA Patriot Act.

The 56 page decision was issued by panel of three judges appointed by President Reagan: Ralph B. Guy Jr., a semiretired judge on the 6th U.S. Circuit Court of Appeals in Cincinnati; Edward Leavy, a semiretired judge on the 9th U.S. Circuit Court of Appeals in San Francisco; and Laurence Hirsch Silberman, a semiretired judge on the U.S. Court of Appeals for the District of Columbia.

For the first time since its creation a quarter century ago the super-secret U.S. Foreign Intelligence Surveillance Court denied a government request for expanded powers, and sharply criticized Department of Justice abuse of wiretaps and other surveillance of suspected spies and terrorists.

"The Court of Review's action revolutionizes our ability to investigate terrorists and prosecute terrorist acts," Attorney General John Ashcroft said at a DC news conference. "The decision allows the Department of Justice to free immediately our agents and prosecutors in the field to work together more closely and cooperatively in achieving our core mission, the mission of preventing terrorist attacks."

Ashcroft described a new computer system that will let agents in the field draft and send wiretap requests to headquarters for approval. He also said a new squad of lawyers will be assigned to review the requests, and one prosecutor in every U.S. attorney's office will be designated for "foreign intelligence" surveillance.

The American Civil Liberties Union called the ruling a blow to privacy. "As of today, the attorney general can suspend the ordinary requirements of the Fourth Amendment in order to listen in on phone calls, read e-mails and conduct secret searches of Americans' homes and offices," said ACLU attorney Ann Beeson.

The Review Court ruling "rolled back 25 years of precedent as to the proper boundaries between criminal investigation and foreign intelligence surveillance," said Joshua Dratel, who worked on written arguments in the case for the National Association of Criminal Defense Lawyers.

The government had argued that because of its newly created powers under the USA Patriot Act, the court should approve secret regulations that would allow criminal prosecutors at the Justice Department to give advice to FBI counterintelligence agents and to help direct the use of wiretaps against people suspected of spying.

The lower secret court had ruled that the department was improperly trying to tear down the "wall" that was supposed to exist between criminal prosecutors and FBI counterintelligence agents, which Congress erected in the late 1970s in response to the Nixon administration domestic surveillance scandals. While criminal prosecutors must show probable cause to gain permission to wiretap, improperly labeling a case as counterintelligence makes it far easier to gain permission to wiretap.

The DoJ argued that the under FISA and the USA Patriot Act, "it is the nature of the threat, not the nature of the government's response to that threat, which determines the constitutionality of FISA searches and surveillance. Thus, there is

no constitutional basis for distinguishing between law enforcement efforts and other means of protecting this country against foreign spies and terrorists."

Civil liberties groups urged the Review Court to reject the DoJ's quest for expanded powers, which would jeopardize the rights to privacy and to engage in lawful public dissent, as well as the warrant, notice and judicial review rights guaranteed by the Constitution's Fourth and Fifth Amendments.

The three-judge panel that overturned the lower FISA court stated the new law's provisions on surveillance "certainly come close" to meeting minimal constitutional standards regarding searches and seizures.

The government's proposed use of the Patriot Act, the judges concluded, "is constitutional because the surveillances it authorizes are reasonable."

public but garnered the attention of the 'highest levels of management' inside FBI, said the memo written by senior bureau lawyers and obtained by The Associated Press.

"The level of incompetence here is egregious," said Rep. William D. Delahunt, D-Mass., a member of the House Judiciary Committee who obtained the memo from the FBI and provided it to AP.

Senate Judiciary Committee Chairman Patrick Leahy, D-Vt remarked: "Honest mistakes happen in law enforcement, but the extent, variety and seriousness of the violations recounted in this FBI memo show again that the secret FISA process breeds sloppiness unless there's adequate oversight."

The memo cites specific cases ordinarily kept from public view, including the FBI eavesdropping on conversations long after the subject of one surveillance gave up a cell phone and its number was reassigned to an innocent person. The new owner spoke a different language than the FBI's target, and an interpreter notified investigators. FBI agents did nothing "for a substantial period of time" and failed to report the problem to headquarters, the memo says.

The memo also describes agents in other cases videotaping a meeting of suspects and intercepting e-mails without the court's permission. The *San Francisco Chronicle* continued:

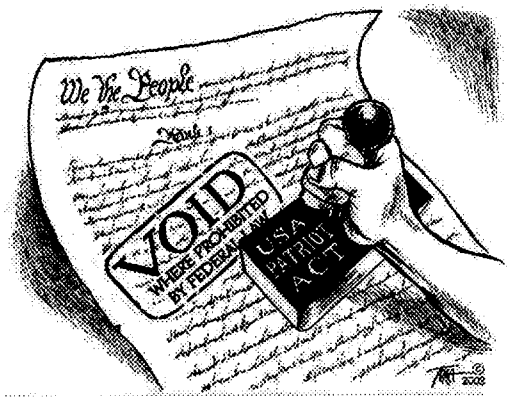
Another memo from the same period, disclosed months ago under a Freedom of Information Act lawsuit, described the FBI mistakenly intercepting e-mails of innocent citizens during an investigation in Denver by its Osama bin Laden Unit and International Terrorism Operations Section.

It indicated the FBI incorrectly used its "Carnivore" Internet surveillance software, now called "DCS-1000," and captured too many e-mails. That memo's author wrote to Bowman describing an oversight official at the Justice Department as unhappy about the incident "would be an understatement of incredible proportions."

Some lawmakers who approved the new powers under the USA Patriot last year have since complained they were not adequately informed of problems under the old rules.

"As the Justice Department pushes the Congress for more powers, we should first be sure that these problems are being corrected and that existing laws are being used responsibly," Sen. Leahy said.

Rep. Delahunt predicted Congress will require the Bush administration to explain such mistakes before it is asked to extend new surveillance powers from the Patriot Act, set to expire in December 2005.



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The three-judge FISA Review Court panel that overturned the lower spy court ruling stated the Patriot Act's provisions on surveillance "certainly come close" to meeting minimal constitutional standards regarding searches and seizures.

The lower FISA court's unprecedented declassified public opinion also documented abuses of surveillance warrants in 75 instances during both the Bush and Clinton administrations.

A *San Francisco Chronicle* article published on October 10, 2002, expanded upon the "mistakes" criticized by the secret FISA court. An April, 2000 FBI memo, marked "immediate" and classified as "secret," describes additional problems to those cited by the court, involving agents conducting unauthorized searches, writing warrants with wrong addresses and allowing "overruns" of electronic surveillance operations beyond their legal deadline:

FBI agents illegally videotaped suspects, intercepted e-mails without court permission and recorded the wrong phone conversations during sensitive terrorism and espionage investigations, according to an internal memorandum detailing serious lapses inside the FBI more than a year before the Sept. 11 attacks.

The blunders—roughly 15 over the first three months of 2000—were never made

Cities across nation denounce Patriot Act

At least 112 cities, counties and states across the county have passed resolutions denouncing the USA Patriot Act of 2001, including: Ithaca, New York; San Francisco, Calif.; Detroit, Mich.; Ann Arbor, Mich.; Amherst, Mass.; Cambridge, Mass.; New Haven, Conn.; and Denver Colorado.

The states of Hawaii and Alaska also passed similar resolutions in defense of civil rights threatened by the USA PATRIOT Act. Likewise, "House Joint Memorial Resolution 40" also passed in the state of New Mexico, and their state Senate version continues to advance.

Various resolutions such as Ithaca's Resolution to Defend the Civil Rights and Liberties of the People of Ithaca can be found on the website of the *Bill of Rights Defense Committee* (BRDC).

Bush signs law that effectively prohibits dancing, music and free speech

The RAVE Act creates new triggers for forfeiture by broadening violations under 21 USC 856. Another bill, dubbed the CLEAN UP Act, is in the works. Both the new law and proposed bill make criminals out of nightclub owners, concert promoters, and employees who host or manage an entertainment event.

President Bush signed the Illicit Drug Anti-Proliferation Act, also known as the RAVE Act, into law April 30. The new Public Law 108-21 will make it easier for the federal government to punish property owners for any kind of drug offense that their customers commit, even if the owners do everything within reason to prevent such offenses.

If the new law is enforced night club, theater and stadium owners will very likely discontinue holding concerts and other events.

Likewise, the proposed CLEAN-UP Act (H.R. 834) would make a federal crime punishable by nine years imprisonment of promoting "any rave, dance, music or other entertainment event" that might attract some attendees that use or sell drugs. It makes no difference under either the new law or proposed bill if the vast majority of people attending the event do not break any laws. Nor does it matter if the property owner and event promoter do everything possible to prevent customers from smuggling drugs into the event.

Both the new law and the CLEAN UP Act expand forfeiture powers. The RAVE Act, which was attached at the last minute to the so-called "Amber Alert" kidnapping legislation, changed 21 USC 856 from the crime of "Establishment of manufacturing operation," to a far broader crime entitled "Maintaining drug-involved premises."

The new law also amends §856 (a) *"by striking `open or maintain any place' and inserting `open, lease, rent, use, or maintain any place, whether permanently or temporarily,'"* and striking paragraph (2) and inserting: *"manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.'"*

The new law also adds civil fines of up to $250,00 or twice the gross receipts for each violation to the existing prison term of up to 20 years and/or $250,000 criminal fine. Any property used to facilitate a violation of §856 is subject to forfeiture under 21 USC 881.

The RAVE Act was introduced by Senator Joe Biden (D-DE) last year and was defeated. Rep. Lamar Smith (R-TX) introduced a House version that also died after much public outcry. Determined supporters again pushed similar legislation with a new RAVE Act in the House introduced by Rep. Howard Coble (R-NC), and a Senate version entitled Illicit Drugs Anti-Proliferation Act sponsored by Senator Biden.

Senator Biden angrily deplored the fact that his bill met "fierce resistance." Senator Leahy, who originally co-sponsored the RAVE Act,1 then later turned against the bill, said the new law had faced "serious grass roots resistance."

This year's CLEAN-UP (Clean, Learn, Educate, Abolish, and Undermine Production) of Methamphetamines Act, introduced by Rep. Doug Ose, has over 60 co-sponsors. Hidden within this bill that provides more money and training for the clean up of illegal methamphetamine labs is a section that specifically makes dancing and music federal crimes.

Section 305 of the CLEAN-UP Act adds a new paragraph to 21 USC 856, that would provide: *"Whoever, for a commercial purpose, knowingly promotes any rave, dance, music, or other entertainment event, that takes place under circumstances where the promoter knows or reasonably ought to know that a controlled substance will be used or distributed in violation of Federal law or the law of the place where the event is held, shall be fined...or imprisoned for not more than 9 years, or both."* If passed commercial promoters could face a lighter maximum sentence than the 20 year maximum term for anyone who hosts an event under the newly signed law.

Under the proposed provision, any concert promoter, nightclub owner, arena or stadium owner could be fined and jailed, since a reasonable person would know some people use drugs at musical events.

Opponents of the RAVE Act expected enforcement to be selective. After all, a reasonable person knows that drug use and distribution also occurs in most prisons, high schools and college campuses.

Indeed, within two months of its passage, DEA agent Dan Dunlop showed up at the Fraternal Order of Eagles Lodge in Billings, Montana a few hours before a fund raising concert was scheduled to begin there. Proceeds of the fund raiser were help qualify a medical marijuana measure for the ballot. The agent brandished a copy of the new law, stating that if undercover agents found any drugs on the premises the owners would be subject to the quarter-million dollar fine. Lodge chairman Roger Diehl immediately canceled the event.

Denver-based Special Agent in Charge Jeff Sweetin stated the law is "pretty broad" and an "aggressive approach." He added the DEA is still seeking guidance from the Department of Justice, saying "We don't know how it's going to shake out."

The new law affected a political rally in Sonoma, CA. Another in Wisconsin was moved to Canada Thousands of faxes and letters to Senator Biden prompted him to voice his concern over the Billings incident to the DEA administrator The DEA subsequently issued guidelines aimed toward preventing such abuse. Though a good first step, the guidelines don't go far enough to protect innocent business owners and free speech.

Police confiscate motor home because they don't like pro-life message.

A California man filed suit on August 13, 2002, in U.S. district court in Detroit after police from Royal Oak, Mich., confiscated his motor home because it allegedly bore "obscene" pro-life messages.

Ronald Brock claims police in the southeastern Michigan city illegally took possession of his motor home during an automotive rally last year "in an investigation of obscenity" because it bore "aborted baby photographs."

Brock's attorneys, from the Thomas More Law Center, said the vehicle "displayed messages and photographs informing the public about [Brock's] political and religious views against abortion."

The incident took place in August 2001 during an annual event known as the Woodward Dream Cruise Weekend, celebrating the cars, music and memories of cruisin' in the '50s and '60s in the place that put America on wheels." It attracts 1.5 million visitors and some 30,000 cars.

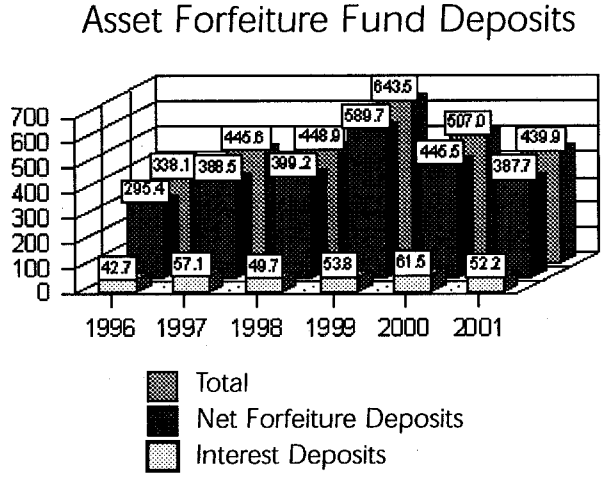
Lawyers for Brock charge that while police confiscated his motor home, they ignored "the customized vehicles displaying spray-painted murals of naked women and men displaying 'Show Us Your [breasts]' signs to women. ..."

"Despite finding no evidence of a crime, the police towed away Mr. Brock's motor home, leaving him stranded on the streets of Royal Oak with a few personal belongings in a duffel bag," said the law center.

Law Center attorneys said that in an effort to "cover their activities," police sought search warrants from the city's attorney and the county prosecutor's office, but both were denied.

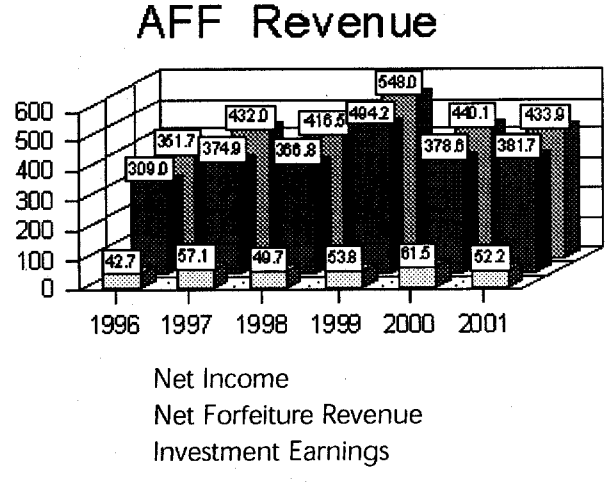
US Asset Forfeiture Fund slips

In June, 2002, the Justice Department's Office of the Inspector General issued its "Commentary and Summary: Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement Fiscal Year 2001." The audit report also included financial statement for the year 2000. The government charts and colorful bar graphs show that, although police piracy is still a lucrative business, the Civil Asset Reform Act of 2000 (CAFRA) may have contributed to a slight reversal of the increasing asset forfeiture profits reaped by the federal government. In most instances CAFRA went into effect in August of 2000.



A six-year history of the Asset Forfeiture Fund shows steadily increasing deposits from $338 million in 1996 to $643 million in 1999. But deposits peaked in 1999, then declined to $507 in 2000, sliding to $439.9 million in 2001.

The government forfeited $406 million in cash in 2000, compared to $357.9 million in 2001, which accounted for about 80 percent of total forfeited assets in both years. Proceeds from sales of forfeited property declined from $101.9 million in 2000 to $67.10 million in 2001. (The remainder of total deposits came from interest earnings on seized assets—$56.3 million in 2000, and $51.9 million in 2001.) While federal agents and their cohorts seized around $15 million worth of monetary instruments during each of the two years, government deposits of the seized monies declined from $28,612 to $8,250.



U.S. Forfeiture Goes Offshore

by Robert E. Bauman, JD

*Mr. Bauman, who is legal counsel to the Sovereign Society, (http://www.sovereignsociety.com) served as a member of the U.S. House of Representatives (R-Md) from 1973 to 1981. He is an author and lecturer on many aspects of wealth protection. A member of the District of Columbia Bar, holds a juris doctor degree from the Law Center of Georgetown University (1964) and a degree in international relations from the Georgetown University School of Foreign Service (1959). He served on the board of Forfeiture Endangers American Rights from 1996 to 200_*

The Civil Asset Reform Act of 2000 (CAFRA), which took effect on August 23, 2000, would never have become law if it were not for some last minute legislative bargaining between its chief sponsor, Rep. Henry Hyde (R-Ill) and representatives of the US Department of Justice.

Days before Congress finally acted on April 11, Rep. Hyde made known he would rather see no bill passed than one that he considered a sham. Hyde, chairman of the House Judiciary Committee, has been the forceful leader of forfeiture reform for over six years in the Congress. It was he who put together the unusual coalition of liberals and conservatives that passed the bill in the House with more than enough votes to override a presidential veto.

That overwhelming House vote and that unique coalition forced the White House and the Department of Justice to backdown from what had been complete opposition to any bill. But in the final analysis, forfeiture reform advocates are questioning whether this was really a "reform" victory.

One series of DOJ demands which finally made its way into the law (Public Law 106-185) adds ominous new powers to the federal government forfeiture program. Title 18 USC sec. 986(d) in effect forces a person with US assets under government claim of civil forfeiture to choose between waiving offshore secrecy laws governing any "material" information about their offshore assets or finances. Failing that, the person losses all right and claim to the US based property that is the subject of the forfeiture action. Hardly a quid pro quo!

The DOJ claims that this provision is aimed at reducing the secrecy of offshore tax haven nations that insist on strict financial privacy as a matter of law. Of course, that very guarantee of privacy is a major attraction for offshore investors, bank account holders and others who are not engaged in any illegal conduct. That it also attracts criminals is undoubtedly true.

In another expansion of offshore forfeiture powers, the law adopts the theory known as "fugitive dis-entitlement." That will permit the US government to "disallow" a person from claiming any interest in property involved in a civil forfeiture proceeding if that person flees the US to avoid prosecution, or if they refuse to return to the US to face charges.

The new law also allows the government to seize immediately any assets located in the US owned by a foreign person that are the subject of a foreign court forfeiture judgment. The DOJ claims this is to prevent "emptying bank accounts" within an arrest by foreign authorities occurs.

Taken together, these provisions greatly extend government forfeiture jurisdiction beyond the national borders. The demand for forced waiver of offshore financial privacy laws will undoubtedly be used to pressure prospective defendants into surrendering financial information, leading to even further forfeiture actions.

The DOJ in recent years has had a mixed record of success in convincing US courts to extend forfeiture to offshore bank accounts and other foreign assets claimed by the government. It appears they now have a new and potentially powerful tool to effect what the courts have denied.

By any measure, that's hardly reform, but rather an unhealthy expansion of forfeiture powers.

TEXT OF SECTION:

The "Civil Asset Forfeiture Reform Act of 2000" - effective date: August 23, 2000

Adds new: Title 18 USC sec. 986(d) as follows:

SEC. 17. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.

Section 986 of title 18, United States Code, is amended by adding at the end the following:

(d) ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.—

(1) IN GENERAL.—In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), in which—

(A) financial records located in a foreign country may be material—

(i) to any claim or to the ability of the Government to respond to such claim; or

(ii) in a civil forfeiture case, to the ability of the Government to establish the forfeitability of the property; and

(B) it is within the capacity of the claimant to waive the claimant's rights under applicable financial secrecy laws, or to obtain the records so that such records can be made available notwithstanding such secrecy laws, the refusal of the claimant to provide the records in response to a discovery request or to take the action necessary otherwise to make the records available shall be grounds for judicial sanctions, up to and including dismissal of the claim with prejudice.

(2) PRIVILEGE.—This subsection shall not affect the right of the claimant to refuse production on the basis of any privilege guaranteed by the Constitution of the United States or any other provision of Federal law."

What happens if the government seizes property and fails to forfeit it: do they have to give it back? *Clymore III & Aguirre II Consolidated in the 10th Circuit*

by Jody Neal-Post, Esq., Albuquerque NM

On September 19, 2003, the Tenth Circuit in Denver will hear oral arguments in the consolidated cases of *Clymore v. United States* (Clymore III) and *United States v. Aguirre* (*Aguirre II*). The two cases share the same district court judge (Judge Conway, who is now serving on the FISA court) and prosecutor (Steve Kotz), and somewhat the same fact pattern: property was seized in the early 1990's and not validly forfeited (or not forfeited at all). After the government's statute of limitations ran, the claimants both filed Rule 41(e) motions for return of property. The government raised numerous arguments and the district judge agreed with the government on all of them. The claimants appealed and won, establishing precedent. The cases were remanded to the same district judge, where the prosecutor raised many of the same arguments that had been rejected on appeal in the other case. The district judge predictably ruled in favor of the government on each and every argument raised, and claimants appealed again. This process was repeated three times for Clymore; twice so far for the Aguirres.

The two cases also share an important legal issue: whether the government should be allowed to prove its grounds for forfeiture in a Rule 41(e) proceeding brought after the government blew its statute of limitations for forfeiture. On this issue both claimants seek to overturn *Clymore II*. They argue that because *Clymore II* conflicts with *Clymore I* on that issue, the earlier decision governs, under the law of the case doctrine and the rules for preventing intracircuit conflict.

In *Clymore I*, Mr. Clymore alleged that a 1992 administrative forfeiture was void because the federal government failed to give Mr. Clymore notice of the administrative forfeiture. The Tenth Circuit agreed and voided the administrative forfeiture of Mr. Clymore's airplane and currency. The appellate court sent the case back to the District Court for the District of New Mexico, instructing that when an administrative forfeiture is void for lack of notice, the forfeiture should be vacated and the statute of limitations should be allowed to operate, subject to any government arguments tolling the statute.

In 2001, the Tenth Circuit decided *Clymore II*. Mr. Clymore asserted that the District Court had mistakenly applied equitable tolling, or the principle that the government should be allowed to proceed with its case despite having missed its statute of limitations, because it was fair to relax the rules to allow the government to proceed anyway. The Tenth Circuit said it was fair to consider relaxing the rules to benefit the government, but that in Mr. Clymore's case, the District Court had abused its discretion in "relying on a mistake of fact upon which to find equitable tolling." Inexplicably in Clymore II, the Tenth Circuit also advised the District Court to apply the federal forfeiture statute anyway if the District Court found no way to toll the statute of limitations in the Government's favor. This conflicts with what the Tenth Circuit said in *Clymore I*.

Shortly thereafter, the Tenth Circuit issued its opinion in *Aguirre I*. Aguirre joined Clymore as two of a flood of defective forfeiture cases arising out of the District of New Mexico in 1991-1992. *Aguirre I* involved standing issues— whether the Aguirres had a recognizable interest in the property (personal property which was found on real estate owned or rented by them when the underlying real estate was seized), as well as the question of what should be required of the government regarding property it seized but never returned or forfeited. The decision in *Aguirre I* recognized that all a forfeiture claimant need show is "a colorable ownership, possessory or security interest" in the claimed property, which the Tenth Circuit found the Aguirres had done. The decision also lined up with *Clymore I* on not allowing the government to raise its grounds for forfeiture in the Rule 41(e) proceeding if the government blew its statute of limitations.

Last summer, both the Clymore and Aguirre cases were again before the District Court of New Mexico. Judge Conway ruled against Mr. Clymore on the ultimate issue of the return of his property based upon *Clymore II*, even after finding that the government had failed to present any good reasons to allow tolling of its statute of limitations. The Aguirres suffered a dismissal of their request for return of their seized but unforfeited and unreturned property, with Judge Conway making the rather amazing conclusion that the property depicted in the government's own seizure videos had not ever been seized. Therefore, the Court reasoned, what was not seized could not be returned. In coming to this conclusion, the court also relied upon *Clymore II* to allow the government to show grounds for forfeiture even though the government had blown its statute of limitations for forfeiture.

Mr. Clymore and the Aguirres have now been deprived of their property for over 10 years—without a constitutionally valid administrative or judicial forfeiture. The length of this deprivation of their property is outrageous in a system that proclaims over and over that forfeitures are disfavored in law. At some point, a point which has certainly passed for these claimants, the government should have perfected a transfer of lawful title to itself or the government should be presumed to be constitutionally required to return the claimants' properties.

Hopefully the Tenth Circuit will join the majority of the circuits in enforcing the government's statute of limitations in forfeiture cases by overturning the dicta in *Clymore II*, and finally, after more than a decade, force the government to return the property they didn't legally forfeit.

Jody Neal-Post, who represents Clymore in his appeal, is FEAR's new state coordinator for New Mexico. Brenda Grantland, President of FEAR's Board of Directors, represents the Aguirres. Other precedent on this issue was established by California FEAR coordinator Shawn Perez, in *U.S. v. Marolf* [cite] and by Ms. Grantland in *Shelden v. United States* [cite], as well as by Craig

Utah forfeiture reforms withstand attack by plunder addicted law enforcement (continued from page 3)

Uniform School Fund. Since the passage of the initiative, forfeitures have all but stopped, and no money has been deposited in state coffers.

State Senator John Valentine introduced SB31, stating the bill was intended to balance the interests on both sides of the debate. Law enforcement liked the bill because it would have restored the ability of police to keep the property they seized. The proceeds from sales of seized property would have been divided between statewide drug court programs and a new grant program for police agencies to be administered by the Attorney General's Office.

SB31 would have also freed up some $3.8 million in federal funds that have been earmarked for Utah police agencies but cannot be awarded because current federal law requires that all shared forfeiture assets returned to states go *only* to law enforcement agencies.

Opponents argued that SB31 would go too far in undermining the reform initiative efforts. Because police and the courts stood to benefit from profits, the bill created a financial incentive for police to make seizing property their top priority. Making the attorney general the gatekeeper of those proceeds set up a political incentive for that elected office. Arnold Gaunt wrote:

The confiscation lobby has redrafted the bill attacking private property protections in Utah law. As with the previous bill [attacking Measure B], it has not been disclosed on the Legislature's web page.

In addition, the state auditor has released another letter, detailing the 154 forfeiture cases for which there has been no public accounting. I believe you will find the information is damaging to the confiscators, and reemphasizes the importance of opposing their attack.

A report from the Utah State Tax Commission made it pretty clear that the Narcotics Task Force procedures were woefully inadequate to prevent insider abuses.

The "Utah State Tax Commission report on irregularities with State Narcotics Task Force disbursing of forfeited property" detailed the "inadequate procedures and supporting documentation regarding vehicle seizures."

The Tax Commission reviewed all 876 closed cases involving vehicles from December 1994 through December 1999. They found that files related to 36 sold vehicles did not contain sufficient sales documentation:

Of the 36 vehicles..., five had related sales documentation that conflicted with the sales documentation on file at the Tax Commission. All five of these vehicles were sold to one individual (Individual A) for $40 each as part of a group. The Task Force indicated that the vehicles were considered unsellable and were sold for scrap. However, the Tax Commission records showed subsequent owners for all five vehicles (after Individual A purchased the vehicles from the Strike Force), which indicates the possibility that all five vehicles had value and should have been sold at a public auction. Also, the conflicts between reports on file at the Strike Force vs. the Tax Commission seem to indicate that records may have been altered. Based on our review of records from various sources, we noted the following:

Strike Force records indicated that three of the vehicles were sold to Individual A, but Tax Commission records indicate that different persons, Individuals B, C, and D, purchased the vehicles one month before Strike Force records indicate the sale to Individual A. Strike Force records indicate that the other vehicle was sold to Individual A, but Tax Commission records indicate that a different person, Individual E, obtained title to the vehicle one month after the date the Strike Force sold the vehicle to Individual A.

The commission described Bills of Sale with sellers and buyers names left blank, whereas Tax Commission records listed several third party buyers with the previous Strike Force Lieutenant's name as the seller on all four.

State Auditor Austin G. Johnson went on to say law enforcement agencies have kept nearly $500,000 in drug seizures in defiance of the 2001 voter initiative directing that those funds flow to the state treasury earmarked for education.

The withheld money included forfeitures valued at $200,509 by the Weber-Morgan Narcotics Strike Force, according to an audit by Johnson's office. "It's the law, and they are disregarding it," Johnson said, referring to Initiative B.

Johnson said Salt Lake, Weber and Davis counties account for all of the money cited in his audit, and county attorneys there claim revisions to the state's Uniform Commercial Code supercede Initiative B and allow agencies to return the money to law enforcement.

The initiative took effect on March 29, 2002, while the changes to the commercial code took effect on July 1, 2002, therefore negating the initiative according to the prosecutors' arguments. "We're just not buying their argument," State Auditor Johnson said.

The forfeiture lobby claimed that Initiative B was effectively repealed by S.B. 168, which enacted major changes to the Uniform Commercial Code, and made three insignificant (to S.B. 168) changes to a section pertaining to forfeiture. Therefore, alleged the forfeiture lobby, the original forfeiture code section was reenacted as if Initiative B had never been made law! Two of these changes were technical clarifications immaterial to the subject of S.B. 168, while the other change updated a Commercial Code reference.

Initiative B also modified this same forfeiture section. In actuality, says Arnold Gaunt, there is no technical conflict between S.B. 168 and Initiative B. If there were a conflict, such that the intent of S.B. 168 was to modify forfeiture procedure as well as the Uniform Commercial Code, then S.B. 168 would be illegal. The Utah Constitution, Article VI, Section 22 states that bills

passed shall not contain more than one subject.

The forfeiture lobby cannot have it both ways. Either S.B. 168 does modify and did intend to modify forfeiture procedure (invalidating it under Utah Constitution Article VI, Section 22), or it does not modify forfeiture procedure.

Arnold Gaunt focused on this issue and galvanized popular action against the law enforcement attempt to destroy Initiative B. Gaunt's call to action worked and Senator John Valentine withdrew his bill. Heeding the pleas of constituents, he decided to halt his efforts to retool the state's asset-forfeiture laws this legislative session. "Senate Bill 31 is dead for this year," he said while at the American Fork Library, where some 100 forfeiture opponents—most from Valentine's District 14—gathered to ask questions about the bill. "They have raised legitimate issues with the bill, so I've decided that I will no longer pursue it."

Opponents of SB31 said they will be watching closely to see if the bill is resurrected by others. "There are other mechanisms by which the Legislature can revive things," said Arnold Gaunt. "I've seen it happen in the past."

Sure enough, a May 5 headline in the *Salt Lake Tribune* announced "AG's Office Targets Forfeiture Law." Utah Attorney General Shurtleff "is beside himself" says attorney Janet Jenson, a co-author of Measure B who successfully defended a law enforcement challenge of the constitutionality of the reform initiative in federal court last year. "They have the motive to keep fighting—at taxpayer expense," she said of the Attorney General's Office. "It grinds everyone down."

Utah Assistant Attorney General Kirk Torgensen "is busy working on a new revision of the law, hoping to find a sponsor for the 2004 legislative session. Not even the growing body of national law favoring forfeiture reform seems to deter him" says the *Tribune*, noting the "constitutional challenge in New Jersey stopped police and prosecutors from holding assets they seized, and put some $32 million on hold pending a state Supreme Court review."

On June 24 Utah citizens, represented by the Washington, D.C.-based Institute for Justice, took matters into their own hands and filed papers with the state's attorney general, demanding that law enforcement officials follow the initiative and the U.S. Constitution.

State Auditor Austin G. Johnson went on to say law enforcement agencies have kept nearly $500,000 in drug seizures in defiance of the 2001 voter initiative directing that those funds flow to the state treasury earmarked for education. "It's the law, and they are disregarding it," Johnson said, referring to Initiative B.

"A bedrock principle of our system of government is that police and prosecutors follow constitutional laws passed by the legislature or the people—even if they might personally disagree with them," stated Scott Bullock, the lead attorney in an Institute for Justice case that recently struck down New Jersey's civil forfeiture law (*see page 1*). "We filed our action today to hold public officials accountable to the people they serve. Police and prosecutors must make decisions on the basis of justice, not on the potential for profit," said Bullock.

Despite the clear mandate of Initiative B, prosecutors from Weber, Salt Lake and Davis counties, using a completely illegitimate justification, have thus far diverted nearly a quarter of a million dollars of forfeited proceeds into their own accounts rather than to the education fund, as required under the initiative.

Represented by the Institute for Justice, Utahns for Property Protection along with a group of Utah citizens filed a "notice of claim" with Utah Attorney General Mark Shurtleff, demanding that he take immediate action against the district attorneys to end their unlawful behavior and to secure the return of the funds that should have gone to public education and to the victims of crime. If the attorney general does not act, Utah citizens will go to court to hold public officials accountable for their illegal actions.

"We intend to expose the legal chicanery of these district attorneys and law enforcement officials, to hold them fully accountable for blatantly ignoring the will of Utah citizens and to slam shut any remaining incentive to forfeit property for profit," said Andy Stavros, one of the primary drafters of Initiative B and co-counsel of Utahns for Property Protection.

"General Shurtleff's response to the district attorneys' unlawful behavior has been timid and toothless, which is not surprising considering that he is the leading opponent of Initiative B," said Bullock.

In the wake of Utah State Auditor Johnson's report and the district attorneys' flagrant disregard of the law, General Shurtleff wrote a letter stating that he, too, believed the prosecutors were wrong in their interpretation of the law. He had little choice to do otherwise as the prosecutors' argument border on the frivolous. Shurtleff also filed papers in three current forfeiture cases stating it was the position of his office that Initiative B should be followed in those particular cases. However, he has taken no steps to demand that the previously diverted forfeiture proceeds be turned over to the education fund or to enjoin the district attorneys from any further diversions of forfeiture funds to their own accounts beyond those three cases. This gives rise to the need for citizen action.

"Initiative B was sponsored by citizens, and now citizens must come to its defense against public officials who refuse to abide by it," said Bullock. "This litigation by Utah citizens will ensure that all law enforcement officials in the state follow the initiative overwhelmingly passed by the voters," Bullock concluded.

Court finds New Jersey's forfeiture scheme allowing police and prosecutors to profit from the assets they seize is unconstitutional violation of Due Process

(continued from page 1)

Congratulations to FEAR board member Scott Bullock and the Institute for Justice for this major victory!

Institute for Justice senior attorney Scott Bullock, who serves on FEAR's board of directors, remarked, "We are thrilled with the court's ruling" that New Jersey's method of financing police and prosecutors through the assets they seize is unconstitutional. "The decision will ensure that police and prosecutors make decisions on the basis of justice, not on the potential for profit."

"This court concludes, that the augmentation of the county prosecutors' budgets, . . . provides to those in prosecutorial functions financial interests which are not so remote as to escape the taint of impermissible bias in enforcement of the laws, prohibited by the Due Process clauses of the New Jersey and U.S. Constitution."

State of New Jersey v. One 1990 Ford Thunderbird could be the forerunner of future challenges to similar laws in other states. Scott Bullock added: "We will challenge laws in other states to guarantee that the due process rights of property owners are protected when confronted with civil forfeiture"

Former Justice Department asset forfeiture office deputy chief—turned forfeiture defense attorney—David Smith declared "This is the single most important civil forfeiture case being litigated anywhere."

The state of New Jersey filed a motion on January 2 to stay the ruling, which would allow police and prosecutors to continue collecting the proceeds from the assets they seized and distribute it as they want until a higher court affirms Judge Bowen decision.

According to the Institute for Justice, a law firm based in Washington D.C that litigated the *State of New Jersey v. One 1990 Ford Thunderbird* on behalf of owner Carol Thomas:

From 1998 to 2000, New Jersey police and prosecutors collected an astonishing nearly $32 million in property and currency through the application of the civil forfeiture law. During that same period, on average, close to 30 percent of the discretionary budgets of county prosecutor offices came from civil forfeiture proceeds.

As the judge recognized in his opinion, forfeiture money has been used for "rent for a motor pool crime scene facility, office furniture, telecommunications and computer equipment, automobile purchase, fitness and training equipment purchase, a golf outing, food, including food for seminars and meetings, and expenses of law enforcement conferences, at various locations."

***State of New Jersey v. One 1990 Ford Thunderbird* could be the forerunner of future challenges to similar laws in other states. Scott Bullock added: "We will challenge laws in other states to guarantee that the due process rights of property owners are protected when confronted with civil forfeiture"**

As the court further declared: "In theory and in practice, there is no limitation upon the motivation for enlargement to which a county prosecutor is subject in deciding upon seizure of property. . . . This court concludes, that the augmentation of the county prosecutors' budgets, . . . provides to those in prosecutorial functions financial interests which are not so remote as to escape the taint of impermissible bias in enforcement of the laws, prohibited by the Due Process clauses of the New Jersey and U.S. Constitution."

Carol Thomas, a former Cumberland County, NJ sheriff's officer began the fight to have her car returned in 1999 after it was seized because her son, age 17 at the time, used the car without her knowledge to sell marijuana to an undercover officer. Her son was arrested and punished and the state filed a civil forfeiture action against the car.

Thomas was a seven-year veteran with the Cumberland County Sheriff's Office when her son was arrested. She subsequently left the sheriff's department and decided to fight abusive forfeiture laws.

The non-profit Institute for Justice won a first-round victory in 2001 when it obtained release of Thomas' car, at which time Judge Bowen allowed Thomas's challenge to New Jersey's unconstitutional profit motive to continue. After three years in court Bowen issued his December 2002 opinion holding New Jersey's forfeiture scheme to be unconstitutional.

The state's appeal did not surprise the Institute for Justice. Bullock stated, "We of course are fully prepared to defend Judge Bowen decision and we are confident that the appeals court will uphold his judgment and if necessary the Supreme Court of New Jersey will do so as well."

Judge Bowen granted the state's motion to stay his order pending review from a higher court. The government and defense filed briefs in the appeals court last May.

Misappropriated plunder used for personal gain

Federal forfeiture revenues kicked back to local agencies in Minnesota illegally funded a personal political agenda. Franklin, MN, Police Chief Ken Bohn said he will file complaints with five county, state and federal agencies. Chief Bohn alleges that Milwaukee County Sheriff David Clarke misused drug forfeiture dollars for political gain.

Bohn questions Clarke's use of nearly $10,000 to buy his department's Chevrolet Tahoe, which Bohn said the sheriff has used while campaigning, as well as $2,000 spent on billboards about an identity theft awareness campaign - that included Clarke's photograph—three weeks before the September primary election.

Second Circuit's *Krimstock* ruling spurs more Due Process challenges

(continued from page 1)

which asserts the county's seizure law as applied may be "disparate, unequal and unconstitutional."

Due to the 2nd Circuit *Krimstock* ruling Justice Roberto invited a test to the constitutionality of Nassau's law, calling on the three individuals to seek review of his forfeiture decisions from a court of binding appellate authority under *Krimstock.*

Justice Roberto wrote that while the 2nd Circuit declined to follow an state Appellate Division First Department decision upholding the city's statute on similar challenges, until the Second Department makes it's own determination or the state Court of Appeals rules otherwise, he must follow the First Department's ruling. "This Court cannot act on the analysis of the 2nd Circuit even if it were certain—which it is not—that the procedures currently in place in Nassau County would run afoul of its analysis."[2]

Justice Roberto compared Nassau's law to New York City's, noting that unlike the city, Nassau provides notice of a possible forfeiture action at the time of seizure. He pointed out that he previously held the county must justify it's retention of the vehicle to the court "upon any challenge to its possession by the owner," adding that such challenge is "not limited to any particular point in time."

Justice Roberto wrote that although Nassau's law provides written notice at the time of arrest, it does not contain a provision that notifies the owner of an opportunity to challenge the forfeiture.

In October Justice Roberto had denied a motion by General Motors Acceptance Corporation to dismiss a forfeiture action against an innocent leasing company,[3] ruling the law enables Nassau County to seize vehicles from innocent third parties. He relied on forfeiture prosecutors' favorite Supreme Court case, *Calero-Toledo v. Pearson Yacht Leasing Co.*, which upheld the forfeiture of a yacht leased by customers who brought a small amount of marijuana on board. Justice Roberto determined that innocent lessors are not helpless against the forfeiture action because they are free to buy back the cars at county auctions and sue the lessee for the losses.

Nassau County hired outside counsel Andrew J. Campanelli, of Perry and Campanelli in Garden City, last year to handle nearly 1,600 backlogged forfeiture actions. Campanelli, who receives 26 percent of the proceeds from the forfeited cars he auctions, said that Nassau County typically settles with third-party lessors for about $2,000, but that Ford is "taking a very hard position."

Hopefully we will see more trickle down effects regarding Due Process as lower courts begin implementing the Second Circuit's *Krimstock* holding.

Endnotes:

1. *Nassau v. Spinelli*, 10578-00; *Nassau v. Palion* 10712-02; and *Lachuk v. Nassau*, 13272-02.
2. *Nassau v. Spinelli*, 10578-00.
3. *Nassau v. Sierra*, 1595-02.

Georgia audit questions disposition of $12 million in forfeited assets

Last year Georgia lawmakers asked State Auditor Russell Hinton to find out how state and federal officials handled cash and property forfeitures following drug busts.

The Georgia Department of Audits and Reports found that a lack of any uniform reporting system meant no one at the state level knew how this money was received and spent. Some law enforcement agencies squandered forfeiture revenues on golf tournaments, cookouts, flowers, and Christmas parties.

"Little of the money state police officers seize from drug traffickers winds up helping them fight crime as a 1974 law intended," the *Savannah Morning News* reported on April 25. "Instead, state law-enforcement agencies opt to let local police claim the money in hopes they'll donate a share to the state."

A May 3 editorial by the newspaper remarked:

It's bad enough that the state of Georgia doesn't know what happened to much of the $12 million in cash and private property that authorities confiscated from drug criminals in 2001. But it's even worse that the Georgia Legislature and Gov. Sonny Perdue won't lift a finger to find out and make needed changes — even when it's in the taxpayers' interests.

In 2001, state judges in Georgia ordered the forfeiture of more than $8 million worth of cash and property, according to the Georgia audit. Until the Audit department published its report in October, 2002, no one knew how much was forfeited because there is no mechanism for the state to regularly collect the data.

Because of its size and proximity to the Latin American countries where many drugs originate, Georgia seized the sixth most drug assets of any state.

Krimstock v. Kelly: 2nd Circuit upholds due process challenge

(continued from page 1)

The court ordered that all "claimants be given a prompt post-seizure retention hearing, with adequate notice, for motor vehicles seized as instrumentalities of crime pursuant to N.Y.C. Code § 14-140(b)," but, noting that "[t]here is no universal approach to satisfying the requirements of meaningful notice and opportunity to be heard in a situation such as this" the Second Circuit remanded the case to the district court, stating: "we leave it to the district court, in consultation with the parties, to fashion appropriate procedural relief."[6]

Krimstock is an astounding ruling for several reasons.

Anyone needing to research the right to a prompt post-seizure hearing when property is detained pending trial would do well to start with this decision.

First, the sheer amount of work the Second Circuit panel put into the opinion was impressive. This hefty opinion surveys the various post-seizure hearing and detention procedures,[7] and innocent owner defenses[8] found in various state and local forfeiture statutes. It analyzes and applies the due process principles set out in numerous Supreme Court decisions in painstaking detail.

***Krimstock* is blueprint for release of property pending trial.**

Second, this was a major victory on a very serious problem common under most forfeiture schemes. Forfeiture statutes typically allow the police to seize private property such as cars (often without a warrant) and detain it pending the forfeiture trial, which may be years later. When the property seized is an automobile, the problem of pretrial detention is particularly acute. Loss of use of a vehicle may lead to dire consequences for the car owner – loss of employment is common, and often it spirals into insolvency or even homelessness. Even when a forfeiture victim can afford to replace the seized vehicle during the period of detention, the economic consequences from renting or purchasing a replacement vehicle quickly add up to and exceed the value of the seized car.

Cars depreciate rapidly, especially when not being used and serviced regularly. In my litigation against the District of Columbia in *Patterson v. D.C.* several of the plaintiffs got their cars back after winning the forfeiture case only to find that they were damaged beyond repair, never to run again.[9]

CAFRA dealt with that problem federally by allowing the court to return automobiles and certain other types of property to the owner pending trial on a showing of substantial hardship.[10] Eventually release of cars pending trial should become the norm because of the financial factors discussed above.

In state and federal forfeiture schemes that do not allow release of the property pending trial, *Krimstock* is an excellent blueprint for a constitutional challenge – and we hope all of the public interest lawyers stop and stew on this one. All of the research is already done for you in this opinion. The Second Circuit is very persuasive authority, usually with a conservative pro-government slant. If you succeed – especially on a constitutional ground, you may be entitled to reimbursement of your attorney's fees under EAJA, the Civil Rights Act, or CAFRA. Windfall attorney's fee awards have a deterrent effect on the government, at the same time it has an encouraging effect on defense counsel.

***Krimstock v. Kelly* is the first federal appellate decision requiring a post-seizure probable cause hearing in civil forfeiture cases.**

Third, the legal arguments used here have been tried before, with mixed success. Clearly, the time for this argument has finally come. The argument raised in this case was not a new one. The question of whether due process requires a prompt post-seizure hearing – prior to the trial itself – has been addressed numerous times, with mixed success.

Several circuits have held that a pretrial, post-seizure hearing must be held when assets are restrained in a criminal forfeiture case if the defendant shows the seized assets are needed to retain counsel.[11] The Ninth Circuit held that a post-restraint hearing was required in criminal forfeiture cases even if the defendant didn't allege he needed release of assets to retain counsel.[12] The Eleventh Circuit held that, although pretrial restraint of assets triggers Due Process requirements, the trial itself fulfilled those requirements.[13]

This issue has not enjoyed as much success in the civil forfeiture context. Several circuits have held that due process in civil forfeiture cases requires only that forfeiture proceedings be commenced without unreasonable delay, and that the forfeiture trial itself (or summary judgment proceedings) provided the only post-seizure hearing that was constitutionally required.[14] Now we have federal appellate precedent requiring a prompt post-seizure probable cause hearing in civil forfeiture cases.

Last but not least, this case shows that a powerful new force has joined our battle for forfeiture reform!

This case was brought by the Legal Aid Society of New York City – a non-profit organization funded by the Legal Services Corporation, which provides counsel for indigents in civil litigation. LSC is the government agency which CAFRA saddled with the responsibility of implementing CAFRA's right-to-counsel provisions for forfeiture victims not charged with any crime. (When FEAR's ASSET FORFEITURE DEFENSE MANUAL went to press in December 2001, the LSC still had not even formulated their policy on how they would comply with that mandate.)

We have been trying for years to encourage public defenders and civil poverty law organizations in this country to help defend indigent forfeiture victims. CAFRA nudged LSC and public defender organizations to help provide legal services for forfeiture victims – by allowing them to get their attorney's fees reimbursed – and this case shows it worked! Hopefully the *Krimstock* victory will inspire other legal defense organizations to get involved with forfeiture reform by taking on class action suits raising constitutional issues.

Endnotes on page 18

Eleventh Circuit reverses $242,484 forfeiture for lack of probable cause

(continued from page 3)

The agents asked Stanford to accompany them to the DEA office. She agreed, and upon further questioning told them she was in New York for a court case. She later said she was there to pick up money. According to court records she could not, or would not, reveal where she stayed in New York nor who gave her the cash other than to say that she received a call from her brother, who told her to meet some people and pick up money for Mike's Import and Export. She did not produce any documentation connecting the currency to Mike's.

The agents brought in "Rambo," a drug-sniffing dog, and placed the backpack in a hallway with other packages of similar weight and shape. The dog alerted on the backpack with the cash and agents took the money in exchange for a receipt for the seized currency. No criminal charges were filed, but federal prosecutors sought civil forfeiture of the money, claiming it was linked to drug crimes.

The appellate court stressed that because the forfeiture was based on 21 USC 881(a)(6), the drug proceeds forfeiture provision, "not just any criminal activity will support the forfeiture: the form of the criminal wrongdoing must involve 'the exchange of a controlled substance.'"

The district court had relied on a number of circumstances to establish its finding of probable cause: (1) "the quantity of cash and its physical condition;" (2) "the route and circumstances surrounding Ms. Stanford's travel;" (3) "Ms. Stanford's lack of knowledge concerning the circumstances surrounding her trip to New York and the receipt of this money, including her inability to identify from whom she received it;" (4) "that Ms. Stanford twice was a 'no show' for her scheduled departure from New York to Miami;" and (5) "a narcotics dog alerted on the cash."

The appellate court found Stanford's inability or unwillingness to state where she stayed in New York or identify the persons who gave her the cash to be "troubling," stating that such "evasive answers are suspicious and add to the Government's case for probable cause." However, the Eleventh Circuit held that:

> under the law, a claimant is under no duty to show that "the property derived from a legitimate source" until the Government first can establish probable cause of a substantial connection to a controlled-substance transaction.[2] Allowing the Government to base probable cause on the failure to identify a legitimate source of the currency unlawfully reverses this burden. Stanford's failure to identify the people who gave her the currency and to provide receipts is relevant to her ability to show a legitimate source or innocent ownership, but she is not required to make this showing until the Government establishes probable cause.[3]

The appellate justices also agreed with the district court that "the narcotics-detection dog's alert to the currency is also worth noting, although perhaps worth little else" in the totality of circumstances of the case, stating: "The probative value of dog alerts to the smell of narcotics on currency has been called into question of late.[4] Testimony indicated that as much as 80% of money in circulation may carry residue of narcotics."

The court noted the irony that on the day after seizing the cash the DEA exchanged this drug-tainted currency for a cashier's check at a local bank, where the currency was possibly placed back into circulation for innocent people to possess. The court concluded "the dog alert, at best, tells us that this currency (like most circulated currency) may have been exposed, at some point, to narcotics."

The Eleventh Circuit reversed the forfeiture order, concluding:

> Given the weakness of the elements presented, and the complete lack of evidence connecting the seized money directly to illegal narcotics, the Government's case falls short of the probable-cause line. This citizen can keep her property.

Endnotes:

1. *United States v. $242,484,* 11th Cir. (2003) No, 01-16485, DC Docket No. 99-01259 CV-DMM
2. *$121,100.00*, 999 F.2d at 1505.
3. *Id.*
4. See *United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 453 (7th Cir. 1997); *United States v. $53,082.00 in U.S. Currency*, 985 F.2d 245, 250 n.5 (6th Cir. 1993).

Aussies mimic harsh US forfeitures: "Sentence first, verdict afterward"

It is sickening to see the politicians of Australia and Britain so gleefully suck up to the United States government and adopt every tyrannical measure that our politicians come up with.

—Leon Felkins

The Australian state of Victoria is adding wide ranging forfeiture changes to their Confiscation Act that will freeze the assets of accused thieves, drug dealers, abalone poachers, and many others upon or before arrest.

Police Minister Andre Haermeyer stated the changes would make Victoria' s criminal asset seizure laws the toughest in Australia

Krimstock v. Kelly Endnotes

(from pages 1 and 16)

1. The Second Circuit hears appeals of the U.S. District Courts located in Connecticut, New York and Vermont. This ruling is binding precedent in those courts.
2. 2002 U.S. App. Lexis 19182 (September 18, 2002).
3. Id at * 3.
4. Id at * 3.
5. Id at *15.
6. Id at 76 - 77
7. Id at *33 - 38.
8. Id at * 38 - 45.
9. We sued for, and recovered, damages for loss of use and depreciation.
10. 18 U.S.C. § 983(f).
11. See *United States v. Jones*, 160 F.3d 641, 647 (10th Cir.1998); *United States v. Michelle's Lounge*, 39 F.3d 684, 700-01 (7th Cir. 1994); *United States v. Monsanto*, 924 F.2d 1186, 1203 (2nd Cir. 1991); United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir. 1985); *United States v. Long*, 654 F.2d 911, 915-16 *(3rd Cir.1981).*
12. *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985).
13. *United States v. Bissell*, 866 F.2d 1343, 1352-55 (11th Cir.1989).
14. *United States v. One 1985 Mercedes*, 917 F.2d 415, 420 (9th Cir. 1990); *Gonzalez v. Rivkind*, 858 F.2d 657, 660-62 (11th Cir. 1988); *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2nd Cir. 1986); *United States v. $160,916.25*, 750 F.2d 900 (11th Cir. 1985).

The seal of the Inspector General on the cover of the US Department of Justice' Asset Forfeiture Fund Report seems to depict the American eagle flying away with the continental US. The emblem invited my addition of a police piracy flag. *—J.O.*

Expansion of forfeiture powers under the USA PATRIOT Act

excerpted from *FEAR's Asset Forfeiture Defense Manual*

The so-called USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001) was passed in a wave of hysteria, with little time to reflect, little debate, and reportedly very few Congressmen actually reading it,[1] and it shows.

Expansion of federal forfeiture statutes is a key feature of the Patriot Act. The bill came very close – but did not manage to derail CAFRA's positive reforms (although the Administration tried!) Senator Leahy said in his remarks to Congress: "I am also pleased that a number of provisions that would have undermined the Civil Asset Forfeiture Reform Act of 200, which I sponsored in the Senate, have been removed."[2]

Although the Patriot Act doesn't appear to have tinkered with forfeiture procedure, it does add a host of new forfeitable offenses—not all of them related to terrorism.

Among the expanded forfeiture powers is an amendment to the powers the president already had under the International Emergency Economic Powers provisions, 50 U.S.C. § 1702, by adding the following:

> [W]hen the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, [the U.S. may] confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe....[3]

The Patriot Act vastly expanded bank and financial transaction reporting requirements under the Bank Secrecy Act and other statutes requiring reports which are fed into the FinCEN database and shared with law enforcement nationwide.[4]

The Patriot Act also vastly expanded the power of law enforcement to intercept wire, oral and electronic communication relating to terrorism[5] and computer fraud,[6] and allows the government access to voice mails (with a court order and probable cause, or with a single search warrant that is valid nationwide.)[7] It expands authority under the Foreign Intelligence Surveillance Act of 1978 to allow roving surveillance (wiretaps can now jump from phone to phone following a person).[8]

The Act increases the number of federal district judges who may serve on the special Foreign Intelligence Surveillance Act court – from seven to eleven. Most people have never heard of this court, although the statute authorizing it was enacted in 1978. The judges on this special court, though comprised of regular Article III federal judges appointed in the traditional manner, are hand selected by the Chief Justice[9] and probably don't include any card-carrying members of the ACLU.

"Sneak and Peak" search warrants

These judges meet in secret to approve special search warrants that allow law enforcement to search premises (inside the U.S.) without disclosing that they've been searched, among other things.

(continued next page

The Patriot Act also expands the use of these warrants for secret searches beyond the FISA court to include warrants obtainable from any federal district court judge. Patriot Act § 213 amends 18 U.S.C. § 3103a—an innocuous statute that says search warrants may be issued to search for evidence of any federal criminal offense and refers to Federal Criminal Rule 41 for procedures and requirements—to add this language:

With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if:

- the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result...
- the warrant prohibits the seizure of any tangible property, any wire or electronic communication... except where the court finds reasonable necessity for the seizure; and
- the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.[10]

The Act gives immunity from law suits to "any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under [the FISA] Act."[11]

If any of this sounds unconstitutional to you, don't worry. Section 901 – in the words of Congress's "section by section analysis" – "requires the DCI [the Director of the Central Intelligence Agency] – to assist the Attorney General in ensuring that FISA efforts are consistent with constitutional and statutory civil liberties." With the Director of the CIA himself protecting our constitutional rights and civil liberties, what more can we want?

Endnotes:

1. Senator Feingold said, in his statement to Congress, 107 Cong. Rec. S11005, 11020 (October 25, 2001):

   > The administration's proposed bill contained vast new powers for law enforcement, some seemingly drafted in haste and others that came from the FBI's wish list that Congress has rejected in the past. You may remember that the Attorney General announced his intention to introduce a bill shortly after the September 11 attacks. He provided the text of the bill the following Wednesday, and urged Congress to enact it by the end of the week. That was plainly impossible, but the pressure to move on this bill quickly, without deliberation and debate, has been relentless ever since.

2. 107 Cong. Rec. S11005 (October 25, 2001).
3. USA Patriot Act § 106.
4. The Bank Secrecy Act, FinCEN and other Big Brother mechanisms by which the U.S. gathers information on its citizens by imposing reporting requirements on banks and other third parties will be covered in volume 2, in the chapter on Criminal Investigation and Discovery.
5. USA Patriot Act § 201.
6. USA Patriot Act § 202.
7. USA Patriot Act § 209.
8. USA Patriot Act § 206.
9. See 50 U.S.C. § 1803. "The Chief Justice of the United States shall publicly designate seven district court judges from seven of the United States judicial circuits who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act..." 50 U.S.C. § 1893(a). Subsection (b) of that statute creates a three-judge court of appeals so to speak, comprised of three judges also hand-picked by the Chief Justice. If any judge from the first tier refuses to approve a government request for electronic surveillance, they must submit their reasons in writing to the three-judge court of review, who can override the first judge's decision. If the court of review denies the government's request, they must submit a written statement of reasons to the Supreme Court, which then reviews the request. This statutory scheme has been in effect since 1978.
10. USA Patriot Act § 213
11. USA Patriot Act § 225

Message from FEAR Foundation president Brenda Grantland

(continued from page 3)

doing anything that might be interpreted as disagreement with the federal government's agenda. I don't know about you, but, during this period I have begun to fear my own government.

It's time we all get involved again. It's time we start talking to our elected representatives about the need for further forfeiture reform, as well as the return of the other constitutional rights we had before 9-11. Our organization would like to spearhead this dialog. We need people knowledgeable or concerned about the Constitution and/or forfeiture laws to volunteer as state coordinators for those states in which we don't have an active state coordinator.

We need lawyers with some forfeiture experience to sign up for our Attorney Directory and help field the calls from all the forfeiture victims who call FEAR because they have no one else to turn to. We need other forfeiture lawyers to contribute their sample pleadings, motions and briefs to FEAR's brief bank, so that lawyers tackling a forfeiture case for the first time can find models to work from.

We also need money. FEAR went into virtual hibernation in the late 1990s for lack of funding. We didn't have enough money to have a full time paid employee, or put out a newsletter. We have been a volunteer-run organization since then – which severely limits what we can accomplish. But the grass-roots spirit kept us going, and the volunteers who believed in our cause stayed true to their beliefs, and kept doing the work for free to keep the organization going.

We're still here. We made it through, and it's time to revitalize our movement. I don't think any of us really want to live in the unconstitutional environment in which we have seen our own government set up shop – in this country – in response to 9-11.

Please join with us in rolling back the clock to the rights we had before 9-11-2001—and let's keep working for further forfeiture reform on the state and national levels.

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