

Overview of asset forfeiture law in the United States

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Abstract

This article provides a brief overview of asset forfeiture law in the United States. It is not intended to treat the subject or any of its sub-parts in depth. Rather, its purpose is to acquaint the reader with the various purposes for which asset forfeiture is employed as a law enforcement tool, with the types of property that can be confiscated, and with the procedures that are available under federal law. It concludes with a comparison of the relative merits of civil forfeiture versus criminal forfeiture.

Introduction to Asset Forfeiture

Asset forfeiture is an integral part of federal criminal law enforcement in the United States. This brief introduction to federal forfeiture law attempts to answer three questions: 1) Why is asset forfeiture important to law enforcement? 2) What types of property are subject to forfeiture, and in what circumstances? and 3) How is forfeiture accomplished?

Why do forfeiture?

There are many reasons to include the forfeiture of assets as part of a criminal case. First, law enforcement agents and prosecutors want not only to arrest wrongdoers and put them in jail for some period of time, but also to remove the tools of the crime from circulation so they cannot be used again, either by the wrongdoers themselves once they have gained their release, or by members of their organisations. Thus, law enforcement wants to seize and forfeit the guns, the airplanes, and the cars with concealed compartments that are used for drug smuggling; it wants to take the computers, printers, and other electronic devices used in child pornography, counterfeiting, and identification fraud cases; and it wants to shut down the 'crack house' where drugs are distributed to children on their way to school, to confiscate the farm used for the marijuana-growing operation, and to close down the business

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used to commit insurance fraud, telemarketing fraud or to run a Ponzi scheme.¹ In this sense, asset forfeiture is a form of incapacitation.

Secondly, in any case where the crime involves innocent victims, such as property offences and fraud, asset forfeiture turns out to be the most effective means of recovering property that may be used to compensate the victims. Indeed, restoration of property to victims in white-collar cases is the first priority of law enforcement when it comes to disbursing forfeited property,² and much time and effort is expended in such cases to ensure that the wrongdoer's assets are preserved pending trial so that they remain available to be used for this purpose once the case is over.

Thirdly, asset forfeiture takes the profit out of the crime. Obviously, there is an element of simple justice in ensuring that wrongdoers are deprived of the fruits of their illegal acts. But there is also an element of general deterrence as well. Surely the incentive to engage in economic crime is diminished if persons contemplating such activity understand that there is high likelihood that they will not be allowed to retain any profits that might flow from their temporary success. Conversely, convicting defendants but leaving them in possession of the riches of wrongdoing gives others the impression that a life of crime is worth the risk.

There is also the matter of the message that is sent to the community of law-abiding citizens when a notorious gangster or fraud artist is stripped of the trappings of what may have appeared to be an enviable lifestyle. Criminals typically spend their spoils on expensive homes, airplanes, electronic goods and other 'toys' that everyone else wishes that they had the resources to acquire. Taking the criminals' toys away, as law enforcement agents typically put it, not only ensures that criminals' enterprises are deprived of their economic resources, and that funds are available for restitution to the victims; it also sends a signal to the community that the benefits of a life of crime are illusory and temporary at best.

Law enforcement professionals would much prefer that persons passing an expensive cliffside mansion on the Pacific Coast say, 'Remember Mr Big that used to control the syndicate here? There is the house he used to own. The government has it now,' and not 'There is Mr Big's house. What a place! And he still owns it too!'

¹ A form of pyramiding in which money paid by later investors or contributors is used to pay inflated returns to earlier investors; named after Charles Ponzi, who ran such a scheme during 1919-1920 in Boston, United States. Charles Ponzi collected \$9,500,000 from 10,000 investors by selling promissory notes promising payment of a fifty per cent profit in forty-five days. The scheme collapsed and thousands of investors were left destitute.

² See 18 U.S.C 981(e)(6) (authorises the government to use forfeited property to pay restitution, in civil forfeiture cases, to the victims of the underlying crime); 21 U.S.C 853(i) (same for criminal forfeiture).

Finally, asset forfeiture constitutes a form of punishment. While taking the instrumentalities of crime out of circulation, obtaining funds for restitution, taking the profit out of crime and achieving some measure of deterrence all constitute remedial aspects of forfeiture, it cannot be denied that depriving wrongdoers of the accoutrements of an expensive lifestyle, or the items that gave them the leverage, prestige or wherewithal to commit criminal acts, is a form of punishment or retribution exacted by the criminal justice system. Forfeiture, in other words, gives criminals their just deserts.

What can the government forfeit?

In most countries, the asset forfeiture laws are written in generic terms. A typical statute will authorise a court to order the forfeiture of 'all proceeds of any crime' (often including foreign crimes), and any property 'used to commit, or to facilitate the commission' of any such crime. Because the asset forfeiture laws in the United States developed piecemeal over a long period of time, however, they were not written in generic terms at all. There is neither a common law of forfeiture nor a single provision authorising forfeiture in all cases. To the contrary, Congress enacted different forfeiture provisions at different times for different offences, so that what can be forfeited varies greatly from one offence to another. Indeed, the first task of a federal prosecutor is always to check the statute for the crime under investigation to see what, if any, asset forfeiture options might be available.

There is almost no rhyme or reason to the process. For some crimes, Congress has not authorised any forfeiture authority at all; for others, law enforcement can confiscate only the proceeds of the offence itself,³ or the instrumentalities used to commit the offence.⁴ Other statutes are broader, permitting the forfeiture of any property 'involved' in the offence,⁵ or property that provides a criminal with economic power over a criminal organisation, whether that property was involved in the offence or not.⁶ Finally, one recently-enacted statute permits law enforcement to confiscate virtually everything the wrongdoer owns.⁷

³ See 18 U.S.C. 981(a)(1)(C) (authorising the forfeiture of the proceeds but only the proceeds of a long list of federal criminal offences).

⁴ See 16 U.S.C. 470(gg) (authorising forfeiture of tools and equipment used to steal archaeological treasures, but not the proceeds of such offence); 18 U.S.C. 492 (authorising the forfeiture of counterfeiting equipment but not the proceeds of such offence).

⁵ See 18 U.S.C. 981(a)(1)(A) and 982(a)(1) (authorising civil and criminal forfeiture, respectively, of all property involved in a money laundering offence).

⁶ See 18 U.S.C. 1963(a)(2) (authorising forfeiture of any property giving a defendant a source of influence over an racketeering enterprise).

⁷ See 18 U.S.C. 981(a)(1)(G) (authorising forfeiture of all assets of a person engaged in terrorism).

The following is a brief survey of some of the better-known forfeiture provisions in federal law.

Proceeds

The closest Congress has come to enacting one, all-powerful forfeiture statute is 18 U.S.C. 981(a)(1)(C), which authorises the forfeiture of the *proceeds* of over 200 different state and federal crimes.⁸ The federal crimes include all of the common ones, like fraud, bribery, embezzlement and theft, and scores of more obscure ones as well. The state crimes include murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and state drug trafficking.⁹

Many other statutes also provide for the forfeiture of the 'proceeds' or 'gross proceeds' of a particular offence. Indeed, statutes authorising the forfeiture of proceeds in one form or another are scattered throughout the federal criminal code.¹⁰

Proceeds are defined in the case law by a 'but for' test: the proceeds of an offence comprise any property, real or personal, tangible or intangible, that the wrongdoer would not have obtained or retained but for the crime.¹¹ Moreover, the forfeiture of proceeds is not limited to depriving criminals of their net profits. Someone who invests \$10,000 in start-up costs for a fraud scheme, and then bilks a victim of only \$10,000, makes no profit at all. Forfeiting the net profit in such cases would simply leave the criminals where they were when they started. For forfeiture law to achieve its various public policy purposes, it must allow the government to recover the gross proceeds

⁸ See *United States v All Funds Distributed to Weiss*, 345 F3d 49, 56 n8 (2nd Cir 2003) (as amended by CAFRA, 20981(a)(1)(C) permits the forfeiture of all proceeds of an specified unlawful activity: it is no longer necessary for the government to use the money laundering statute to forfeit such proceeds).

⁹ The crimes for which forfeiture is authorised in Section 981(a)(1)(C) are listing in 18 U.S.C. 1956(c)(7).

¹⁰ Some examples include 18 U.S.C. 982(a)(5) (forfeiture of the gross proceeds of trafficking in stolen automobiles); op cit s 982(a)(7) (forfeiture of the proceeds of a federal health care offence); and op cit s 794(d) (forfeiture of proceeds of espionage).

¹¹ See *United States v DeFries*, 129 F3d 1293, 1312 (DC Cir 1997) (because the but2Dfor test usefully articulates the requirement of a nexus between the targeted property and the racketeering activity, we adopt it); *United States v Vasquez-Ruiz*, 2002 WL 1880127 (ND Ill 2002) (services and benefits that defendant received from third party who was the beneficiary of defendants insurance fraud were proceeds received indirectly as a result of the fraud); *United States v Cianci*, 218 F Supp 2d 232 (DRI 2002) (following *United States v Angiulo*, 897 F 2d 1169, 1213 (1st Cir 1990): a but for test is used to determine whether [G]overnment has proven required nexus between interest in question and RICO violation); *United States v Tyson Foods, Inc.*, No. 4:01-cr-061 (ED Tenn Feb 4, 2003) (cost savings realised by an employer who aids illegal aliens in obtaining false documents so that they can work in the employers factory may constitute the proceeds of the false document offence).

of the offence without reduction for overhead expenses or start-up costs. Thus criminals who engage in illegal activity will know from the outset that they risk both their initial investment as well as any potential profits.¹²

While statutes authorising the proceeds of the crime are powerful and necessary law enforcement tools, they are limited in scope. Because only the proceeds of the crime (or property traceable to it) is forfeitable under such statutes, the government may be required to identify property into which proceeds have been invested and return the untainted portion to the wrongdoer.¹³

Drug Cases

The forfeiture statutes for drug offences are broader than those that are limited to forfeiting the proceeds of the offence. Under 21 U.S.C. 853(a) and 881(a) (criminal and civil forfeiture, respectively), a court may order the forfeiture of both the drug proceeds themselves and any real or personal property used to commit, or to facilitate the commission of the drug offence. These are the statutes that a federal law enforcement agency or federal prosecutor would use to take a car, boat, gun, airplane or farm away from a drug dealer.

Facilitating property is defined in the case law to mean any property that 'makes the prohibited conduct less difficult or more or less free from obstruction or hindrance.'¹⁴ The drug cases provide a plethora of examples of cases where houses, businesses, and even medical licences have been forfeited as facilitating property.¹⁵

Other crimes for which the government can forfeit facilitating property

Drug cases, however, are not the only ones in which law enforcement can forfeit more than just the proceeds of the offence. Many other statutes

¹² See *United States v Simmons*, 154 F 3d 765 (8th Cir 1998) (collecting cases and holding that the better view is the one that defines proceeds as the gross receipts of the illegal activity; forfeiture is intended to punish all those who receive income from illegal activity, not just those whose criminal activity turns a profit).

¹³ See *United States v One 1980 Rolls Royce*, 905 F 2d 89, 90 (5th Cir 1990) (claimant could avoid forfeiture to the extent that he could prove what portions of the property were purchased with legitimate funds); *United States v One Parcel Known as 352 Northup St.*, 40 F Supp 2d 74 (DRI 1999) (in proceeds cases, forfeiture limited to portion of property purchased with drug money; portion traceable to subsequent investment of legitimate funds *not* forfeitable; property apportioned after sale).

¹⁴ *United States v Schifferli*, 895 F 2d 987, 990 (4th Cir 1990).

¹⁵ See for example *United States v Premises Known as 3639-2nd St.* 869 F 2d 1093, 1096 (8th Cir 1989) (facilitating property is anything that makes the prohibited conduct less difficult or more or less free from hindrance; use of a house for drug storage and concealment and for place to conduct drug sale makes it forfeitable as facilitating property).

authorise 'facilitating property' as well. Indeed, many older forfeiture statutes authorise the forfeiture of instrumentalities or facilitating property *but not* the proceeds of the offence.

Some typical facilitating property statutes include 8 U.S.C. 1324(b) and 18 U.S.C. 982(a)(6) (civil and criminal forfeiture, respectively, of property used by alien smugglers); 18 U.S.C. 981(a)(1)(B) (forfeiture of the proceeds and property used to facilitate certain foreign crimes, like drug trafficking, crimes of violence and public corruption); and 18 U.S.C. 2253 and 2254 (criminal and civil forfeiture, respectively, of property used to commit a child pornography offence).

Money laundering

One of the most powerful and most popular forfeiture statutes is the one that permits the forfeiture of all property *involved in* a money laundering offence. If someone launders the proceeds of a drug offence or a corruption offence by commingling the money with clean money from another source, or hides the money by investing it in land or in a business, all of the property involved in the offence not just the proceeds being laundered, but the commingled property, the land and the business can be forfeited under 18 U.S.C. 981(a)(1)(A) (civil forfeiture) and 982(a)(1) (criminal forfeiture).¹⁶ Prosecutors obviously like to use the money laundering forfeiture statute because it eliminates the need, in most cases, to distinguish between the portion of the property traceable to the underlying offence, and the portion derived from other sources.¹⁷

'RICO' and Terrorism

Finally, the most powerful federal forfeiture statutes are the ones that apply to racketeering and terrorism. Under RICO, 18 U.S.C. 1963(a), the government can forfeit any property acquired or maintained through the racketeering activity, and any interest that the defendant has in the racketeering enterprise itself. So if someone runs a chain of restaurants or convenience stores as a RICO enterprise a court can order the forfeiture of the defendant's interest in the entire business, whether a given asset or

¹⁶ See *United States v Tencer*, 107 F3d 1120, 1134 (5th Cir 1997); *United States v Wyly*, 193 F3d 289, 302 (5th Cir 1999) (affirming that facilitating property is forfeitable under s 982(a)(1)); *United States v Puche*, 350 F3d 1137, 2003 WL 22663310 (11th Cir Nov 12, 2003); *United States v Bornfield*, 145 F3d 1123 (10th Cir 1998); *United States v McGauley*, 279 F3d 62, 76 n14 (1st Cir 2002); *United States v Baker*, 227 F3d 955 (7th Cir 2000); *United States v All Monies*, 754 F Supp 1467, 1473 (D Haw 1991).

¹⁷ See SD Cassella *The forfeiture of property involved in money laundering offences* (2004) 7 *Buffalo Crim L Rev* 583.

portion of the business was directly involved in the illegal operation of the enterprise or not.¹⁸

The new forfeiture statute for terrorism, 18 U.S.C. 981(a)(1)(G), which was enacted in October 2001, is even more powerful. The statute says that if someone is engaged in planning or perpetrating acts of domestic or international terrorism, the government may seize and forfeit *all* of that person's assets, foreign or domestic, whether the property was involved in the terrorism activity or not. Obviously, the notion underlying this statute was to incapacitate terrorists completely so that they would have no assets whatsoever to perpetrate further acts of violence against governments, their citizens or their property.¹⁹

The three kinds of forfeiture under federal law

So far, we have discussed the reasons to include asset forfeiture as part of a criminal investigation, and have taken a brief look at the kinds of property that might be forfeited in particular cases. Finally, we will briefly discuss the procedural devices that law enforcement agents and prosecutors in the United States may use to accomplish the forfeiture.

Federal law gives the government three procedural options: administrative forfeiture, civil forfeiture and criminal forfeiture. The first applies only to uncontested cases and can, as the name implies, be undertaken by a federal law enforcement agency as an administrative or 'non-judicial' matter without the involvement of either a prosecutor or a court. In contrast, both civil forfeiture and criminal forfeiture are judicial matters, requiring the commencement of a formal action in a federal court, and concluding, if the government is successful, with the entry of a court order directing the transfer of title to the property in question to the United States.

Administrative forfeiture

The vast majority of all federal forfeitures are administrative forfeitures, for the simple reason that the vast majority of all forfeiture proceedings are

¹⁸ See *United States v Anderson*, 782 F2d 908, 918 (11th Cir 1986) ([a] defendant's conviction under the RICO statute subjects *all* his interests in the enterprise to forfeiture regardless of whether those assets were themselves tainted by use in connection with the racketeering activity), quoting *United States v Cauble*, 706 F2d 1322, 1359 (5th Cir 1983); *United States v Busher*, 817 F2d 1409, 1413 (9th Cir 1987) (forfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted persons entire interest in the enterprise); *United States v Angiulo*, 897 F2d 1169, 1211 (1st Cir 1990) (any interests *in* an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is not tainted by the racketeering activity).

¹⁹ See SD Cassella Forfeiture of terrorist assets under the USA Patriot Act of 2001 (2002) 34 *Law and Policy in International Business* 7.

uncontested.²⁰ Basically, an administrative forfeiture begins when a federal law enforcement agency with statutory authority in a given area (eg DEA in a drug case, FBI in a fraud case, BATF in a firearms case) seizes property discovered in the course of an investigation. The seizure must be based on probable cause to believe that the property is subject to forfeiture, and generally must be pursuant to a judicial warrant.²¹ There are, however, numerous exceptions authorising warrantless seizures, such as when property is seized in the course of an arrest, or the property is mobile, making the delay involved in obtaining a warrant impractical.²²

Once the property has been seized, the agency commences the administrative forfeiture proceeding by sending notice of its intent to forfeit the property to anyone with a potential interest in contesting that action, and by publishing a notice in the newspaper.²³ In essence, the agency says to the world, 'We have seized this property and intend to forfeit it to the United States. Anyone wishing to object must speak now or forever hold their peace.' If no one contests the forfeiture by filing a claim within the prescribed period of time, the agency concludes the matter by entering a declaration of forfeiture that has the same force and effect as a judicial order.

An administrative forfeiture then is not really a proceeding at all in the judicial sense. It is more like an abandonment. In 2000, however, Congress substantially revised the rules governing administrative forfeitures to ensure that property owners are afforded due process.²⁴ Under the new law, the seizing agency must begin the forfeiture proceeding within a fixed period of

²⁰ Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested. Since CAFRA, which made it easier to contest a forfeiture action, the number of uncontested DEA cases may have dropped to 80 percent. Other seizing agencies report similar figures.

²¹ See 18 U.S.C. 981(b).

²² See *Florida v White*, 526 U.S. 559 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment where there was probable cause to believe the automobile was subject to forfeiture and it was found in a public place).

²³ For a summary of the pre-CAFRA administrative forfeiture procedure, see *United States v Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir 2001); *United States v \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999); *United States v Derenak*, 27 F. Supp. 2d 1300 (MD Fla 1998); *Concepcion v United States*, 938 F. Supp. 134 (EDNY 1996); *United States v \$50,200 In U.S. Currency*, 76 F. Supp. 2d 1247 (D Wyo 1999). For a discussion of the application of CAFRA to administrative forfeitures, see SD Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded government forfeiture authority and strict deadlines imposed on all parties* (2001) 27 *Journal of Legislation* 97.

²⁴ The procedural statutes governing administrative forfeiture procedure are 18 U.S.C. 983(a)(1) and (2) (enacted by CAFRA), and 19 U.S.C. 1602 et seq. See *United States v \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 77 n7 (2d Cir 2002) (procedures set forth in 19 U.S.C. 201602 et seq. are superceded by CAFRA where inconsistent).

time, and must give the property owner ample time to file a claim. Then, if someone does file a claim, the agency has another fixed period of time in which to refer the matter to a prosecutor for the commencement of a judicial forfeiture action, or to simply return the property. The agency's failure to follow these procedures is subject to judicial review.²⁵

Most types of property may be seized and forfeited administratively. The most important exception is real property which must always be forfeited judicially.²⁶

If someone does file a claim contesting the administrative forfeiture, the government has two options: civil forfeiture and criminal forfeiture.²⁷

Criminal forfeiture

Criminal forfeiture is part of the sentence in a criminal case.²⁸ That is, the forfeiture order is entered following the defendant's conviction for a criminal offence, and is made part of the sentencing process. It is an *in personam* action that is directed at the defendant personally.²⁹

For that reason, criminal forfeiture is the more limited of the two judicial forfeiture alternatives that are available to the government. Because the defendant is the only one on trial, and is the only one being punished, only property belonging to the defendant can be forfeited in a criminal case. Property that belongs to third parties cannot be forfeited criminally, even if the defendants used it to commit the offences for which they were convicted.³⁰ Moreover, because the forfeiture is part of the sentence imposed

²⁵ See *United States v Schinnell*, 80 F3d 1064 (5th Cir 1996) (once the administrative forfeiture was completed, the district court lacked jurisdiction to review the forfeiture except for failure to comply with procedural requirements or to comport with due process; defendant cannot, as part of double jeopardy challenge in criminal case, contend that uncontested forfeiture was not limited to proceeds). See also 18 U.S.C. 983(e) (providing procedure to challenge procedural sufficiency of administrative forfeiture).

²⁶ In general, property may be forfeited administratively only if it is currency or has a value under \$500,000. see 19 U.S.C. 201607; real property may never be forfeited administratively, see 18 U.S.C. 20985(a).

²⁷ See 18 U.S.C. 983(a)(3).

²⁸ See *Libretti v United States*, 516 US 29 (1995).

²⁹ See *United States v Totaro*, 345 F3d 989 (8th Cir 2003).

³⁰ See *United States v Totaro* supra (n29) (criminal forfeiture is *in personam*; if a third party's interest could be forfeited, the forfeiture would become an *in rem* action in which the third party would have the right to contest the forfeiture on more than ownership grounds); *United States v ODell*, 247 F3d 655 (6th Cir 2001) (criminal forfeiture entitles the Government to forfeiture of a convicted defendant's interests and nothing more); *United States v Gilbert*, 244 F3d 888, 919 (11th Cir 2001) (because it seeks to penalize the defendant for his illegal activities, *in personam* forfeiture reaches only that property, or portion thereof, owned by the defendant); *op cit* at 920 (what distinguishes criminal forfeiture from civil forfeiture is that the property itself is not forfeited; rather, the defendant's *interest* in the property is forfeited)

for a specific offence, only property that was derived from or used to commit that offence can be forfeited.³¹ To forfeit property that belonged to third parties at the time the crime was committed, or that was derived from or used to commit crimes other than the one for which the defendant has been convicted, the government must use civil forfeiture.

However, criminal forfeiture does provide the government with one significant advantage over civil forfeiture. Because the forfeiture is directed against the defendant personally and not at particular pieces of property, the court can enter a money judgment against the defendant for the value of the property, or can order the forfeiture of substitute assets, if the property has been dissipated or cannot be found.³²

Various statutes and Rule 32.2 of the Federal Rules of Criminal Procedure govern the criminal forfeiture process. In short, to initiate a criminal forfeiture action, a prosecutor must give the defendants notice of the government's intent to forfeit their property by including a forfeiture allegation in the indictment.³³ The cases then proceed to trial in the normal fashion for any criminal case, except that if the property is not already in government custody, the government may apply for a pre-trial restraining order preserving the property pending the conclusion of the criminal trial.³⁴

At trial, no mention is made of the forfeiture until and unless the defendant is convicted. In other words, the trial is bifurcated. Once the defendant is convicted, however, the court (or the jury, if a party so requests) hears additional evidence, argument and instructions on the forfeiture and returns a special verdict finding, by a preponderance of the evidence, that the government has established the requisite nexus between the property and the crime.³⁵ That is, the court (or jury) must determine that the property in question was in fact the proceeds of the offence, or constituted facilitating property, property 'involved' in the offence, or whatever relationship between the property and the offence that the applicable forfeiture statute

(emphasis in original); *United States v BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F3d 1185, 1190 (DC Cir 1995) (only the property of the defendant including property held by a third party pursuant to a voidable transaction can be confiscated in a RICO proceeding).

³¹ See *United States v Garcia-Guizar*, 160 F3d 511 (9th Cir 1998) (where defendant is charged with selling \$5,000 worth of drugs but \$43,000 is seized from his locker, only the amount traceable to the offences for which defendant is convicted can be forfeited in the criminal case; same for conspiracy count if it is limited to commission of the substantive offence).

³² See *United States v Candelaria-Silva*, 166 F3d 19 (1st Cir 1999) (criminal forfeiture order may take several forms: money judgment, directly forfeitable property, and substitute assets); *United States v Davis*, 177 F Supp 2d 470 (ED Va 2001) (same, following *Candelaria-Silva*).

³³ See Rule 32.2(a).

³⁴ See 21 U.S.C. 853(e).

³⁵ See Rule 32.2(b).

happens to require. Once that finding is made, the court enters a preliminary order of forfeiture that is made final and included in the judgment of the court at sentencing.³⁶

Neither the court nor the jury is concerned with the ownership of the property at this stage of the case. While only the defendant's property may be forfeited in a criminal case, that issue is not litigated until and unless a third party contests the forfeiture on ownership grounds in a post-trial ancillary proceeding.³⁷

Civil forfeiture

Civil forfeiture is *not* part of a criminal case. In a civil forfeiture case, the government files a separate civil action *in rem* against the property itself, and then proves by a preponderance of the evidence that the property was derived from or was used to commit a crime. Because civil forfeiture does not depend on there being a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all.³⁸

It is because civil forfeiture actions are brought against the property directly that federal civil forfeiture cases have, what appears to the outsider to be, very peculiar names, such as *United States v Ninety-Three (93)*

³⁶ Ibid.

³⁷ See Rule 32.2(b) and (c): *United States v Pelullo*, 178 F3d 196 (3d Cir 1999) (criminal forfeiture occurs in two steps: (1) the jury determines the forfeitability of the property and the district court enters an order of forfeiture; and (2) third parties assert their interests in an ancillary proceeding); *United States v Cianci*, 218 F Supp 2d 232 (DRI 2002) (under Rule 32.2(b)(2), the determination of the nexus between the property and the offence is made without regard to any legitimate interest that a third party might have because the Rule affords third parties the opportunity to assert such claims before a final forfeiture order is entered); *United States v Weidner*, 2003 WL 22176085 (D Kan 2003) (defendant cannot object to the entry of a preliminary order of forfeiture on the ground that the property really belongs to a third party; determination of the extent of the defendant's interest in the property is postponed until the ancillary proceeding); *United States v Gaskin*, 2002 WL 459005 9 n4 (WDNY 2002) (ownership is a question for the court alone to determine in the ancillary proceeding).

³⁸ See *United States v All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F3d 23 (DC Cir 2002) (Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest.); *United States v \$734,578.82 in U.S. Currency*, 286 F3d 641 (3d Cir 2002) (civil forfeiture is an *in rem* action against the property itself; the forfeiture is not conditioned on the culpability of the owner of the defendant property); *United States v One-Sixth Share*, 326 F3d 36 (1st Cir 2003) (Because civil forfeiture is an *in rem* proceeding, the property subject to forfeiture is the defendant. Thus, defences against the forfeiture can be brought only by third parties, who must intervene.); *United States v Cherry*, 330 F3d 658, 666 n16 (4th Cir 2003) (the most notable distinction between civil and criminal forfeiture is that civil forfeiture proceedings are brought against property, not against the property owner; the owner's culpability is irrelevant in deciding whether property should be forfeited).

Firearms,³⁹ or *United States v One 1992 Ford Mustang GT*,⁴⁰ or *United States v \$557,933.89, More or Less, in U.S. Funds*.⁴¹

At one time it was said that civil forfeiture was based on the legal fiction that the property itself was guilty of the offence. That is not so. It is true that the property is named as the defendant in the civil forfeiture case, but not because the property itself did anything wrong. Things do not commit crimes; people commit crimes that give rise to forfeiture of things. The *in rem* structure of civil forfeiture is simply procedural convenience. It is a way for the government to identify the thing that is subject to forfeiture and the grounds therefor, and to give anyone and everyone with an interest in that property the opportunity to come into court at one time and contest the forfeiture action.⁴² The alternative a separate civil action against every person or entity with a potential legal interest in the property, would be administratively impossible.

Essentially then, when the government commences an *in rem* forfeiture action it is saying, 'This property was derived from or was used to commit a criminal offence. For a variety of public policy and law enforcement reasons, it should be confiscated. Anyone who has a legal interest in the property and who wishes to contest the forfeiture may now do so.'

Procedurally, civil forfeiture actions are much like other civil cases. The government, as plaintiff, files a verified complaint alleging that the property in question is subject to forfeiture in terms of the applicable forfeiture statute, and claimants are required to file claims to the property and to answer the forfeiture complaint within a certain period of time.⁴³ Thereafter, the case moves forward through civil discovery, motions practice (eg, motions to dismiss on the pleadings, motion for judgment for the government for lack of standing on the part of the claimant, and motion for summary judgment on the merits), and trial. A trial by jury is guaranteed by the Seventh Amendment if the claimant chooses to assert that right.⁴⁴ The government bears the burden of establishing the forfeitability of the property by a preponderance of the evidence.⁴⁵

Even if the government succeeds in establishing the nexus between the

³⁹ 330 F3d 414 (6th Cir 2003).

⁴⁰ 73 F Supp 2d 1131 (CD Cal. 1999).

⁴¹ 287 F 3d 66 (2d Cir 2002).

⁴² See *United States v Ursery*, 518 US 267 (1996) (Kennedy J, concurring).

⁴³ Civil forfeiture procedure is governed by 18 U.S.C. 983 and by Supplemental Rules C and E of the Federal Rules of Civil Procedure.

⁴⁴ See *United States v One Lincoln Navigator 1998*, 328 F3d 1011, 1014 n2 (8th Cir 2003) (claimant has a Seventh Amendment right to a jury trial on her innocent owner defence).

⁴⁵ See 18 U.S.C. 983(c).

property and an offence, the case is not over. To protect the interests of truly innocent property owners who were unaware that their property was used for illegal purposes, or who took all reasonable steps under the circumstances to stop it, Congress has enacted a 'uniform innocent owner defence.'⁴⁶ Under that statute, persons contesting the forfeiture must establish their ownership interests and their innocence by a preponderance of the evidence.⁴⁷

Ultimately, if the government establishes the forfeitability of the property, and no claimant succeeds in proving the elements of an innocent owner defence, the court will enter judgment for the government and title to the property will pass to the United States.

For a variety of reasons, in certain cases civil forfeiture can be a much more powerful tool of law enforcement than criminal forfeiture. As discussed below, it is the option of choice in numerous instances when criminal forfeiture is unavailable or provides an inadequate remedy. But civil forfeiture has an important limitation of its own: because the forfeiture is limited to the specific property involved in the crime, the government can only forfeit the actual property derived from or used to commit the offence.⁴⁸ There are no money judgments, and no forfeiture of substitute assets, if the property directly traceable to the crime turns out to be missing or has been dissipated or spent.

Tactical Choices: Civil versus Criminal Forfeiture

The best way to appreciate the differences between civil and criminal forfeiture under federal law in the United States may be to run through the checklist of tactical considerations that a federal prosecutor takes into account when deciding whether to pursue the forfeiture civilly or criminally. It is entirely appropriate (and commonplace), of course, for the prosecutor to commence parallel civil and criminal cases in order to keep all options open.⁴⁹

What are the advantages of doing the case civilly versus criminally?

⁴⁶ See 18 U.S.C. 20983(d).

⁴⁷ See *United States v One Parcel. . . 2526 Faxon Avenue*, 145 F Supp 2d 942 (WD Tenn 2001) (under CAFRA, claimant still has the burden of proving the affirmative innocent owner defence by a preponderance of the evidence); *United States v 2001 Honda Accord EX*, 245 F Supp 2d 602 (MD Pa Jan 30, 2003) (CAFRA preserved the rule that the burden of proof shifts to the claimant to establish the innocent owner defence); see also SD Cassella *The uniform innocent owner defence to Civil Asset Forfeiture* (2001) 89 *Kentucky LJ* 653.

⁴⁸ See *United States v \$8,221,877.16 in U.S. Currency*, 330 F3d 141 (3rd Cir 2003) (in civil forfeiture cases, the government is required to trace the seized property directly to the offence giving rise to the forfeiture).

⁴⁹ See *United States v One Parcel. . . Lot 41, Berryhill Farm*, 128 F3d 1386 (10th Cir 1997) (civil case stayed pending criminal trial; once stay was lifted, court granted motion to strike property that was forfeited in the criminal case).

The advantages of civil forfeiture

The lower burden of proof

In a civil case, the government is only required to prove the forfeitability of the property by a preponderance of the evidence. That applies both to the proof that the crime was committed, and to the proof that the property was derived from or was used to commit that crime. In contrast, in criminal cases, the government must prove that the crime was committed, and that the defendant committed the crime, beyond a reasonable doubt. Only the nexus between the property and the offence can be shown by the preponderance standard.

There is no need for a criminal conviction.

Because the civil forfeiture is a separate civil proceeding against the property *in rem*, there is no requirement that the property owner, or anyone else for that matter, be convicted of the crime giving rise to the forfeiture in a criminal case.⁵⁰ Thus, civil forfeiture is an essential tool when the government seeks to forfeit the property of fugitives or of defendants who have died,⁵¹ or where it can prove that the property was involved in a crime but cannot prove who the wrongdoer was. A typical example of the latter situation is the one that arises when law enforcement officers find a stash of currency bearing all of the indicia of money derived from a drug deal (drug residue on large quantities of small denomination bills, bundled in rubber bands and wrapped in plastic or brown paper), but have no idea who the drug dealer was or who assembled the currency.⁵²

Civil forfeiture is also available as a means of recovering property for the benefit of victims, and for imposing a sanction on the wrongdoer, when the

⁵⁰ See *United States v One Assortment of 89 Firearms*, 465 US 354 (1984) (acquittal on gun violation under 20922 does not bar civil forfeiture under 20982(d)); *One Lot Emerald Cut Stones and One Ring v United States*, 409 US 232 (1972) (acquittal on criminal smuggling charge does not bar later civil forfeiture); *United States v One Piper Aztec F Deluxe Model 250 PA 23 Aircraft*, 321 F3d 355, (3rd Cir 2003) (that claimants criminal conviction for alien smuggling was overturned has no effect on civil forfeiture under 201324(b)); *United States v 1988 Oldsmobile Cutlass Supreme*, 983 F2d 670 (5th Cir 1993) (acquittal of claimant does not undermine finding of forfeitability in civil forfeiture case); *United States v Dunn*, 802 F2d 646, 647 (2d Cir 1986) (same).

⁵¹ See *United States v Real Property at 40 Clark Road*, 52 F Supp 2d 254 (D Mass 1999) (defendant died while criminal forfeiture was pending, making civil forfeiture necessary).

⁵² See for example, *United States v \$30,670 in U.S. Funds*, 2002 WL 31093587 (ND Ill 2002) (dog sniff, purchase of one-way ticket with cash, quantity of currency concealed in womans girdle on couriers person, and implausible story all supported by follow-up investigations satisfied preponderance of the evidence standard); *United States v \$22,991.00, More or Less, in U.S. Currency*, 227 F Supp 2d 1220 (SD Ala 2002) (dog sniff, quantity of currency, history as drug user/dealer, and presence of drugs in car sufficient to establish forfeitability by preponderance

crime is a relatively minor offence, and the interests of justice do not require bringing to bear the full force of the federal criminal justice apparatus against the accused. For example, teenagers who use their home computers to produce counterfeit \$20 bills are more likely to have the computer confiscated in a civil forfeiture case than to be prosecuted and sent to prison for the offence.

The forfeiture is not limited to property related to particular transaction

As already mentioned, because criminal forfeiture is part of sentencing, the forfeiture order imposed by a court in a criminal case is limited to the property involved in the particular offence for which the defendant was convicted. In contrast, civil forfeiture actions *in rem* may be brought against any property derived from either a specific offence or from a course of conduct. For example, criminal forfeiture in a drug case might be limited to the proceeds of the specific transaction charged in the indictment, but a civil forfeiture could reach all proceeds of someone's long-running career as a drug dealer.⁵³

Forfeiting the property of third parties

Again, because criminal forfeiture is part of the sentence imposed on the defendant, only the defendant's property can be forfeited. But the focus of civil forfeiture is on the property, not on the person who committed the crime. Thus it makes no difference in a civil case that the crime giving rise to the forfeiture was committed by someone other than the owner. Thus, if a criminal defendant uses a third party's property to commit a crime, eg, using another's gun to rob a convenience store, civil forfeiture is the only way of confiscating the property, subject, of course, to the innocent owner defence.

of the evidence); *United States v \$345,510.00 in U.S. Currency*, 2002 WL 22040 (D Minn 2002) (following *\$141,770.00*; positive dog alert to suitcase in baggage compartment of Amtrak train, odour of marijuana, quantity of currency and packaging in plastic and paper bags, and inconsistent story sufficient to establish forfeitability by preponderance of the evidence); *United States v \$118,170.00 in U.S. Currency*, 69 Fed Appx 714 (6th Cir 2003) (presence of small amount of marijuana, dog alert, quantity of currency, evidence of involvement in prior drug deal, and tax returns showing lack of legitimate income, was sufficient to establish forfeitability of currency by preponderance of the evidence).

⁵³ See *United States v Two Parcels in Russell County*, 92 F3d 1123 (11th Cir 1996) (when probable cause is based on evidence that the participants are generally engaged in the drug business, have no other source of income, and bought the properties with drug proceeds, it is not necessary to identify specific drug transactions in the complaint); *United States v 5443 Suffield Terrace*, 209 F Supp 2d 919 (ND Ill 2002) (forfeiture complaint does not have to detail specific transactions supporting governments theory of forfeiture).

There is less work for the criminal prosecutor

Criminal prosecutors like to point out that asset forfeiture law is somewhat of a specialty in the United States, and that specialties are best handled by specialists. Thus, in some jurisdictions, policy makers have decided that it is preferable to have a forfeiture specialist handle the forfeiture in a separate civil case, rather than have the overburdened criminal prosecutor go through the trouble of learning forfeiture law so that the forfeiture can be made part of the criminal prosecution and sentence.

The disadvantages of civil forfeiture

There is more work for everyone else

The other side of the last point of course, is that when a forfeiture that could have been made part of a pending criminal case is handled separately as a civil matter, the effort saved by the criminal prosecutor is offset by the additional work that must be done by everyone else. A civil forfeiture requires the filing of a separate action and relitigating all of the issues that were litigated in the criminal case, thus making work for civil specialists, their support staff, and the courts.

Filing deadlines

If property is initially seized for the purpose of civil forfeiture, the government must file its complaint against the property within 90 days of the filing of any claim contesting an administrative forfeiture proceeding. If the government fails to comply with this deadline, civil forfeiture of the property in connection with the offence for which it was seized is forever barred.⁵⁴ In contrast, criminal forfeiture actions are not subject to any statutory deadlines.

Unless stayed by the court, a parallel civil case can interfere with a criminal investigation or trial

Once a civil forfeiture action is commenced, both sides have the option of requesting the other side to produce evidence in support of its case through the process of civil discovery. Claimants who are also defendants in parallel criminal matters often seek to use this procedure to gain access to the government's witnesses and evidence in ways that would not be allowed in the criminal case. For example, the claimant may seek to get a preview of the government's criminal case by noticing the deposition of the government's case agent or confidential informant. In reality, however, this is rarely a

⁵⁴ See 18 U.S.C. 983(a)(3).

serious problem, as the government's reciprocal right to notice the deposition of the defendant himself usually persuades both sides that it would be preferable for the court to order the stay of the civil case until the parallel criminal matter is resolved.⁵⁵

The forfeiture is limited to property traceable to the offence

The most serious limitation of civil forfeiture is that, as an *in rem* action, it requires the government to prove that the defendant's property is directly traceable to the underlying criminal offence. The court may not, in other words, order the forfeiture of a money judgment or substitute assets. This is a particular problem in cases involving cash proceeds of, say, a drug deal or a fraud offence, where the money actually involved in or derived from the crime has been commingled with other funds or dissipated. The only salvation for the government in such matters and for the victims on whose behalf the government may be seeking to recover the property is that cash and electronic funds are considered fungible for one year after the offence is committed.⁵⁶ In cases where that statute applies, it is unnecessary for the government to comply with the strict tracing requirements that otherwise govern civil forfeiture cases.⁵⁷

A successful claimant is entitled to attorneys' fees

The 'American Rule' is that parties to civil cases pay their own costs and attorneys' fees. But Congress has provided that claimants who prevail in civil forfeiture cases are entitled to have the government pay their attorneys' fees and other litigation expenses.⁵⁸ That is so regardless of how meritorious the government's case might have been. In contrast, in criminal forfeiture cases, third parties are entitled to attorneys' fees only in the relatively rare case in which the government's case was not 'substantially justified.'⁵⁹

⁵⁵ See 18 U.S.C. 981(g) (providing for the stay of a civil forfeiture case at the request of either side).

⁵⁶ See 18 U.S.C. 984; *United States v U.S. Currency Deposited in Account No. 1115000763247 For Active Trade Company*, 176 F3d 941 (7th Cir 1999) (once the government has established probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under s 20984).

⁵⁷ See *Marine Midland Bank, N.A. v United States*, 11 F3d 1119, 1126 (2d Cir 1993) (s 984 eliminates tracing requirement).

⁵⁸ See 28 U.S.C. 2465(b).

⁵⁹ See *United States v Douglas*, 55 F3d 584 (11th Cir 1995) (the government's position in obtaining preliminary order of forfeiture not substantially justified where the government failed to take notice that property had been awarded to third party in action enforcing civil judgment).

The advantages of criminal forfeiture

A single proceeding takes care of the forfeiture of the defendant's interest

A civil forfeiture is a separate proceeding that can take years to process through a federal district court. If there is a parallel criminal case, filing a separate civil case means relitigating many if not all of the issues that the government already established in the criminal trial. In contrast, criminal forfeiture permits the court to dispose of the forfeiture as part of the sentencing phase of the criminal trial or guilty plea, thus saving substantially in terms of time and resources.

The court can order the forfeiture of a money judgment and/or substitute assets

Criminal forfeiture has a distinct advantage in that it allows the court to order a defendant to pay a money judgment in an amount equal to the value of the proceeds which the defendant realised from the crime. Thus, a defendant who defrauds a victim of \$10 million may be ordered to pay a \$10 million judgment to the government, even if the actual money derived from the crime has disappeared.⁶⁰ Moreover, the court can order the forfeiture of some unrelated, untainted asset of equal value to satisfy the money judgment.⁶¹ In contrast, civil forfeitures, because they are *in rem* proceedings, are limited to property directly traceable to the underlying offence. The court could no more order the forfeiture of a substitute asset for a missing *in rem* defendant in a civil forfeiture case, than it could order the conviction and sentence of a substitute individual for a missing human defendant in a criminal case.

⁶⁰ See *United States v Henry*, 850 F Supp 681, 683 (MD Tenn 1994) (court enters money judgment for \$191,206, which was the amount of Medicare fraud proceeds defendant was convicted of laundering), *affd.* 64 F3d 664, 1995 WL 478635 (6th Cir 1995) (Table); *United States v Puche*, 350 F3d 1137, 2003 WL 22663310 (11th Cir Nov 12, 2003) (affirming money judgment equal to the combined value of the commission paid to the money launderer, the proceeds laundered, and the untainted money used to facilitate the offence); *United States v Baker*, 227 F3d 955 (7th Cir 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offence; the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond).

⁶¹ See *United States v Candelaria-Silva* supra (n32) (once the government has obtained a money judgment, it may forfeit defendants real property in partial satisfaction of that judgment); *United States v Baker* supra (n60) (same); *United States v Carroll*, 346 F3d 744 (7th Cir 2003) (defendant may be ordered to forfeit every last penny he owns as substitute assets to satisfy a money judgment).

There are no statutory time limits on filing an indictment following seizure of the property

If property is seized in the first instance for civil forfeiture, and someone files a claim, the government must commence judicial forfeiture proceedings within 90 days.⁶² But if the property is seized in the first instance for criminal forfeiture, as would be the case if the property were seized pursuant to a criminal seizure warrant,⁶³ the time limits for instituting judicial forfeiture proceedings do not come into play. The trade-off, however is that, in that instance, the government probably must forego the option of disposing of the case as an uncontested administrative forfeiture matter. Generally, the government would prefer to start every case as an administrative forfeiture case so that uncontested matters can be disposed of quickly.

Third parties have no right to recover attorneys' fees

The right to attorneys' fees in 28 U.S.C. 2465(b) applies only to civil forfeiture cases. It does not apply to any part of a criminal forfeiture case, including the ancillary proceeding in which third party rights are litigated.

The disadvantages of criminal forfeiture

Forfeiture is limited to the property interests of the defendant

Because criminal forfeiture is part of the sentence in the criminal case and because only the defendant had the right to contest the evidence the government introduced in that person's criminal trial to establish the underlying crime, only the defendant's property can be forfeited. Any person who establishes that he or she was the true owner of the property that was forfeited in the criminal case is entitled to have the forfeiture declared void in a post-trial ancillary proceeding.⁶⁴ Most importantly, a third party challenging a criminal forfeiture does not have to be innocent. He or she must establish *superior* ownership, not *innocent* ownership.⁶⁵ Thus, in criminal cases, non-innocent spouses and unindicted co-conspirators can recover the forfeited

⁶² 18 U.S.C. 983(a)(3).

⁶³ See 21 U.S.C. 853(f).

⁶⁴ See 21 U.S.C. 853(n).

⁶⁵ *United States v Totaro* supra (n29) (an innocent owner defence would be superfluous in a criminal case; as only the defendant's property may be forfeited, a third party need only show superior ownership, not innocent ownership); *United States v Lester*, 85 F3d 1409 (9th Cir 1996) (s20853(n)(6) is not an innocent owner statute: it requires only a showing of superior ownership; because only defendant's interest is forfeitable in a criminal case, an innocent owner defence is unnecessary); *United States v Kennedy*, 201 F3d 1324, 1332 n14 (11th Cir 2000) (same).

property in the ancillary proceeding. To forfeit the interests of such persons, the government must resort to civil forfeiture, and rebut the claimant's attempt to establish an innocent owner defence.

Bifurcation of trial and additional jury instructions and special verdicts add to the length of the criminal trial

Most criminal forfeiture proceedings are short in duration. Nevertheless, it is undeniable that even the most straightforward criminal forfeiture proceeding will add to the length of what may already have been a protracted criminal proceeding. Often all parties, including the judge and the jury, will be exhausted at the end of the criminal case, and will prefer to abort the criminal forfeiture in favour of a separate civil proceeding at another time.

Criminal forfeiture requires a criminal conviction

Because criminal forfeiture is part of the defendant's sentence, there can be no forfeiture without a conviction.⁶⁶ This eliminates criminal forfeiture as an option in cases where the defendant is a fugitive or is dead, or where, in the interests of justice, the government has decided not to prosecute the owner of the property, such as a spouse who played a minor role in the commission of the offence. It also means that if the defendant pleads guilty to just one count of a multi-count indictment, the forfeiture is limited to the property involved in that single count.⁶⁷ To forfeit the property involved in the remaining counts, or in offences that were never charged in the criminal case at all, the government must use civil forfeiture.

The ex post facto clause bars some criminal forfeitures

Prior to 25 April 2000, the date that the President signed the Civil Asset Forfeiture Reform Act into law, criminal forfeiture was not available as a sanction for most crimes. That changed with the enactment of 28 U.S.C. 2461(c), which makes criminal forfeiture available in any case in which civil forfeiture is available. However, including a forfeiture judgment as part of the

⁶⁶ See *United States v Aramony*, 88 F3d 1369 (4th Cir 1996) (because s201957 conviction was reversed on appeal, s 982 forfeiture order had to be vacated); *United States v Tencer*, 107 F3d 1120 (5th Cir 1997) (same for s201956); *United States v Ahmad*, 213 F3d 805 (4th Cir 2000) (same for structuring offence); *United States v Hanafy*, 124 F Supp 2d 1016 (ND Tex 2000) (same for ss 1956 and 1957).

⁶⁷ See *United States v Hasson*, 333 F3d 1264, 1279 n19 (11th Cir 2003) (the court in a money laundering case may not impose a forfeiture order based on a money laundering offence with which defendant was not charged or for which he was acquitted, but once the conviction is obtained, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he was acquitted).

sentence in a criminal case for a crime committed before 25 April 2000 could, in some circumstances, violate the *ex post facto* clause of the Constitution.⁶⁸

Conclusion

Asset forfeiture has become an essential and routinely-employed tool of law enforcement in the United States. By making judicious and strategic use of the various procedures, federal prosecutors can greatly enhance their ability to control and deter criminal activity, and to recover the proceeds of crime for the benefit of the victims.

⁶⁸ See *United States v Colon-Munoz*, 192 F3d 210 (1st Cir 1999) (application of s20982(a)(2) to conspiracy that began before effective date violates *ex post facto* clause where no overt act occurred after that date); cf. *United States v Sudeen*, 2002 WL 1897095 (ED La 2002) (whether forfeiture of proceeds of fraud conspiracy that straddles effective date of CAFRA would violate *ex post facto* will be determined if there is a conviction; pretrial motion is premature).