

FORFEITURE OF TERRORIST ASSETS UNDER THE USA PATRIOT ACT OF 2001

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The USA Patriot Act¹ contains a number of provisions that may be used by federal law enforcement authorities to seize and forfeit the assets of terrorist organizations, assets that are derived from terrorist acts, and assets that are intended to be used to commit terrorist acts in the future. Some of the new provisions are specifically intended to be used in, and are limited to, the terrorism context. Others apply more generally, but will undoubtedly be used in terrorism cases.

I. 18 U.S.C. § 981(a)(1)(G)

Title 18, United States Code, Section 981 is the general-purpose civil forfeiture statute applicable to most federal crimes. Among other things, it authorizes the forfeiture of property involved in money laundering cases,² property derived from and used to commit certain foreign crimes,³ and the proceeds of any offense designated as a “specified unlawful activity.”⁴

Section 806 of the Patriot Act added a new provision to Section 981 that is an obvious response to September 11. Section 981(a)(1)(G) authorizes forfeiture of all assets of anyone engaged in terrorism, any property affording any person a “source of influence” over a terrorist organization, and any property derived from or used to commit a terrorist act.

This language is extraordinarily broad. Unlike the money laundering statute, which authorizes the forfeiture only of property “involved” in the money laundering offense,⁵ or the drug statute,⁶ which authorizes forfeiture only of property derived from or used to commit the drug offense, Section 981(a)(1)(G) does not require any nexus between the property and any terrorism offense. To the contrary, once the Government establishes that a person, entity, or organization is engaged in terrorism against the United States, its citizens or residents, or their property, the Government can seize and ultimately mandate forfeiture *all assets*, foreign or domestic, of the terrorist entity, whether those assets are connected to terrorism or not.

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¹ Pub. L. 107-56, 115 Stat. 272 (2001).

² 18 U.S.C. § 981(a)(1)(A) (2002).

³ *Id.* § 981(a)(1)(B).

⁴ *Id.* § 981(a)(1)(C).

⁵ *Id.* § 981(a)(1)(A).

⁶ See 21 U.S.C. § 881(a) (2002).

The only parallel in federal law is to the Racketeer Influenced and Corrupt Organizations (RICO) statute, which permits the forfeiture of all interests a person has in a RICO enterprise, or any property affording that person a source of influence over the enterprise, whether or not the forfeited property was tainted in any way by the racketeering activity.⁷ In fact, the “source of influence” language that appears in the RICO statute is repeated in Section 981(a)(1)(G). Enactment of Section 981(a)(1)(G) was necessary because the law previously had no forfeiture provisions tailored to terrorism.

A. Civil Versus Criminal Forfeiture

Section 981(a)(1)(G) appears in the general purpose civil forfeiture statute, but it is really both a civil and criminal forfeiture provision. This is because federal law now provides that any civil forfeiture may also be classified as a criminal forfeiture.⁸ Thus, if the United States apprehends and prosecutes a terrorist, the Government can seek forfeiture of all of his assets in the criminal case under the new statute, provided that the act giving rise to the forfeiture occurred after October 21, 2001, when the new law took effect. Nonetheless, the true utility of Section 981(a)(1)(G) is likely to be in the civil forfeiture context, because in civil forfeiture cases, the Government can proceed against the assets even if it does not apprehend the defendant, because he is dead or because he remains a fugitive from justice.

B. Procedure for Civil Forfeiture

In most respects, a forfeiture under Section 981(a)(1)(G) will work just like any other civil forfeiture action under federal law. The Government can seize property based on probable cause. Generally, the seizure must be pursuant to a warrant, but warrantless seizures are authorized under certain circumstances.⁹ The seizure of the property is, however, only the beginning of the process. Seized property may be under Government control, but it still belongs to the property owner.¹⁰ To convert a seizure into a forfeiture, that is, to take title to the property permanently away from the property owner and transfer it to the Government, the Government must commence a formal forfeiture action.

⁷ See 18 U.S.C. § 1963(a)(2) (2000).

⁸ See 28 U.S.C. § 2461(c) (2002).

⁹ See 18 U.S.C. § 981(b)(2) (2002). See also *Florida v. White*, 526 U.S. 559, 565-66 (1999) (holding that the Fourth Amendment does not require the police to obtain a warrant prior to seizure if they have probable cause to believe the property—here a vehicle—is contraband).

¹⁰ See *United States v. Cayos de Barca*, 185 F. Supp.2d 117, 121 n.7 (D.P.R. 2001) (finding that seizure may be based on probable cause to believe the property will ultimately be proved forfeitable, but it entails only taking possession and control; to become the owner of the property, i.e., to transfer title to the property to the United States, the Government must commence a forfeiture action).

The provisions of the Civil Asset Forfeiture Act of 2001 (CAFRA) set forth the procedure for converting a seizure into a forfeiture.¹¹ In short, the Government has sixty days from the date of the seizure to send notice of the forfeiture action to all interested parties.¹² If no one files a claim challenging the forfeiture within thirty days,¹³ the Government can declare the property forfeited by default.¹⁴ If someone does challenge the forfeiture, however, the Government has ninety days to return the property or to commence either a civil or criminal forfeiture action in federal court.¹⁵

All of that is standard civil forfeiture law. It would work the same way in a terrorism case as in any other case. In other words, if the United States seizes a terrorist's assets under § 981(a)(1)(G), the Government could be in federal court, trying the case to a jury, in less than six months. The only concession Congress has made to the unique nature of terrorism cases concerns the procedure at trial. Under Section 316 of the Patriot Act, if the case goes to trial under Section 981(a)(1)(G), and the property involves the assets of "suspected international terrorists," the normal burden of proof is reversed: once the Government makes its initial showing of probable cause, the claimant has the burden of proving, by a preponderance of the evidence, that his property is *not* subject to confiscation. In almost all other forfeiture cases, of course, the Government has the burden of proving the forfeitability of the property.¹⁶ Moreover, in the forfeiture trial, hearsay is admissible if the evidence is reliable and compliance with the normal Rules of Evidence might "jeopardize the national security interests of the United States."

These two exceptions aside, the forfeiture of terrorist assets under Section 981(a)(1)(G) would proceed along a very short timetable, would likely involve a full-blown jury trial if contested, and could result in the payment of attorneys fees to the claimant if the Government fails to prevail.¹⁷

C. Relationship to IEEPA

For a variety of reasons, there have been few instances since September 11 in which the Government has sought to seize or forfeit terrorist assets under the new statute. The fact is that the Treasury Department has separate authority to freeze and confiscate terrorist assets under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702 *et seq.*, which is specifically exempted from CAFRA and from virtually all of the other evidentiary and due process requirements of federal forfeiture law.¹⁸ Therefore, since September 11, 2001, virtually

¹¹ See 18 U.S.C. § 983 (2002).

¹² *Id.* § 983(a)(1).

¹³ *Id.* § 983(a)(2).

¹⁴ 19 U.S.C. § 1609 (2002).

¹⁵ 18 U.S.C. § 983(a)(3) (2002).

¹⁶ See *id.* § 983(c).

¹⁷ See 28 U.S.C. § 2465 (2002).

¹⁸ See 18 U.S.C. § 983(i) (2002). Property owners, however, may challenge IEEPA actions under other provisions of law. See, e.g., *Holy Land Foundation v. Ashcroft*, 2002 U.S. Dist. LEXIS 14641 (D.D.C. Aug. 8, 2002) (challenging a

all of the press reports concerning the freezing of terrorist-related bank accounts have been IEEPA cases, not cases brought by the Justice Department under Section 981(a)(1)(G).

Under IEEPA, the Office of Foreign Asset Control (OFAC) of the Treasury Department can freeze (i.e. seize) suspected terrorist assets indefinitely based on a presidential order. Furthermore, if Treasury ultimately decides to convert its blocking order into a forfeiture (or “confiscation,” which is the same thing), it would not be bound by any of the CAFRA procedures, except for the right of the property owner to contest the forfeiture by filing a claim in federal court.¹⁹

On the other hand, Treasury could decide to refer a case to the Department of Justice for formal forfeiture of the property under Section 981(a)(1)(G). The Justice Department stands ready to pursue any such cases that are referred.

II. FORFEITURE OF PROPERTY INTENDED TO BE USED TO COMMIT TERRORISM

There are some other provisions in the Patriot Act that are actually much more likely to be used to confiscate assets from terrorists. The key is to understand the interrelationship between the asset forfeiture and the money laundering statutes.

Under Section 981(a)(1)(A), the United States can forfeit any property involved in a money laundering offense. That property can be either “clean” or “dirty,” as long as it is involved in the money laundering.²⁰ The problem has always been that United States’ money laundering statutes are “backward looking.” Most of them focus on what the criminal is doing with the proceeds of a crime that has already been committed.²¹ Terrorism cases, however, usually do not involve someone who is trying to hide the proceeds of a past crime, but rather someone who is moving money into or through the United States with the intent to use it to commit a crime—a terrorist act—in the future. This is called “reverse money laundering.”

Only two federal money laundering statutes address reverse money laundering, but the Patriot Act has expanded both statutes considerably. Under 18 U.S.C. § 1956(a)(2)(A), it is an offense for anyone to bring any money—tainted or untainted—into the United States for the purpose of using it to commit any “specified unlawful activity.” That is not new. What is new is

blocking order issued by the United States Attorney General, which blocked a Muslim foundation from its assets, on the grounds that the order violated the Administrative Procedure Act, various constitutional rights, and the Religious Freedom Restoration Act).

¹⁹ See USA Patriot Act, 115 Stat. 272, § 316(a) (2002).

²⁰ See *United States v. McGauley*, 279 F.3d 62, 76 n.14 (1st Cir. 2002) (suggesting that §§ 981 & 982 extend to funds that facilitate money laundering, including property that violates §§ 1956 & 1957) (internal citations omitted).

²¹ See, e.g., 18 U.S.C. § 1956(a)(1)(B)(i) (2002).

that the Patriot Act greatly expanded the list of “specified unlawful activities” to include approximately forty-seven offenses generally associated with terrorism, such as assassination, attack with biological weapons, or sabotage of a nuclear facility. The complete list is in 18 U.S.C. § 2332b(g)(5)(B), which has been incorporated into the RICO statute,²² which in turn is incorporated into the list of “specified unlawful activities.”²³

Thus, if someone brings “clean” money—that is, money not derived (as far as the Government knows) from any criminal offense—into the United States with the intent to use it to commit one of the acts of terrorism listed in 2332b(g)(5)(B), he is guilty of a money laundering offense under § 1956(a)(2)(A) violation, and the money is immediately subject to civil or criminal forfeiture as “property involved” in a money laundering offense.

There are significant practical and procedural obstacles to using the forfeiture statutes in this context, however. In particular, seizure under the civil forfeiture statutes requires strict tracing of the seized funds back to the money laundering offense giving rise to the forfeiture. Money that a person intends to use to commit a terrorist act, however, is usually in the form of cash or electronic funds—property that is hard to trace and moves quickly from one place to another. To address this problem, Congress enacted 18 U.S.C. § 984, which says that cash and electronic funds are considered fungible for a period not to exceed twelve months. However, this time limit has proven all too short. It means, for example, that if today, the Government located an account into which money designated for the terrorist attacks on September 11, 2001 was deposited, the “fungible property” provision would not apply, and the Government could confiscate the funds only if forensic accountants could establish, by a preponderance of the evidence, that the money in the account today was the same money—not just property of equal value found in the same account, but the very same money—that was in the account at the time of the offense.

The criminal forfeiture statutes are even more limited. Except in a handful of courts that interpret the law differently, no property not directly traceable to a criminal offense—including cash and electronic funds—can be restrained pre-trial in a criminal case. Clearly, these are two areas that Congress needs to address to make it possible to use the asset forfeiture laws effectively against terrorist assets.

III. 18 U.S.C. § 1960

The other “reverse money laundering” statute is found in a newly-enacted subsection of 18 U.S.C. § 1960. Section 1960 was enacted in 1992 to make it a crime to conduct a money transmitting business without a license. It was little used because it was too hard to prove that

²² *Id.* § 1961(1).

²³ *See id.* § 1956(c)(7)(A).

the defendant knew that operating without a license was a crime. The Patriot Act amended Section 1960 to allow the prosecution of a money remitter in three situations:

- when he operates without a license, whether he knows that doing so is a crime or not,
- when he operates in violation of the Treasury regulations on money transmitters, and
- when he transfers money knowing that the funds being transmitted are derived from a criminal offense, or are intended to be used for an unlawful purpose.

Note that the third alternative does not require proof that the business was unlicensed. Someone who sends money for a living, knowing it came from a criminal act *or* that it is intended for a future criminal act, is guilty of an offense under Section 1960.

Note also the conjunction “or.” If the money remitter is sending money that he knows is intended to be used to commit a criminal act, neither does he need to know, nor is it necessary to prove that the money was derived from an unlawful source. The act of sending “clean” money with the intent to commit any unlawful act is sufficient. This is obviously a better law enforcement tool than, say, Section 1956, the general money laundering statute, because Section 1956 requires proof that the money is dirty *and* that the launderer intends to use it to commit another unlawful act.²⁴

Moreover, the Patriot Act gives the Government forfeiture authority for Section 1960 violations.²⁵ The only problem is that Section 1960 only applies to persons in the business of remitting money. What the Government really needs is a domestic counterpart to Section 1956(a)(2)(A) so that it can prosecute anyone engaged in reverse money laundering in the United States whether or not he is a money remitter or not, and whether or not the money crosses an international border. Currently, it appears that only the State of Florida has such a domestic reverse money laundering statute.

IV. 18 U.S.C. § 981(k)

Finally, there is one other new tool relating to asset forfeiture in the Patriot Act that is worth mentioning. Historically, it has been very difficult for the United States to recover forfeitable property that has been deposited into a foreign bank. The federal courts have jurisdiction to enter forfeiture orders against funds in foreign banks if the act giving rise to the forfeiture occurred here,²⁶ but the forfeiture still requires the cooperation of the foreign government. Sometimes that cooperation is forthcoming, and sometimes it is not.

Congress addressed this in the Patriot Act by enacting a new provision at 18 U.S.C. § 981(k). Under that statute, if the Government can show that forfeitable property was deposited

²⁴ *Id.* § 1956(a)(1)(A)(i).

²⁵ *Id.* § 981(a)(1)(A).

²⁶ *See* 28 U.S.C. § 1355(b) (2002).

into an account at a foreign bank, the Government can now recover the property by filing a civil forfeiture action against the equivalent amount of money that is found in any correspondent account of the foreign bank that is located in the United States. It is not necessary to trace the money in the correspondent account to the foreign deposit. Furthermore, the foreign bank does not have standing to object to the forfeiture action. Only the customer who deposited the forfeitable funds into the foreign bank has standing to contest the forfeiture.

For example, if the United States learns that the assets of an international terrorist are on deposit in a bank on a Pacific island, and that bank has a correspondent account at a bank in New York, the Government may effectively seize the terrorist's assets by bringing a civil forfeiture action under § 981(k) against the equivalent sum in the correspondent account of the foreign bank in New York.

The theory is that when the U.S. forfeiture action results in the forfeiture of a given sum of money from the correspondent account of the foreign bank, the bank will then debit the customer's account abroad, leaving the bank in a wash situation, and depriving the foreign customer of the funds that have been forfeited to the United States. Before Section 981(k) was enacted this would have been impractical, because the foreign bank would have had the right to object to the forfeiture of funds in its correspondent account, claiming that the money belongs to it, not its customer, and raising the innocent owner defense. Because this will be controversial, however, forfeitures under § 981(k) require approval from Main Justice.

V. CONCLUSION

Congress has by no means exhausted the list of law enforcement tools that must be enacted or enhanced to deal with the new phenomenon of terrorist financing. Reverse money laundering, the use of formal and informal money service businesses, the movement of bulk cash within the United States as well as across international borders, and the inconsistencies between national approaches to seizing assets all present new, difficult and important twenty-first century problems that must be addressed. As a first step, however, the provisions in the USA Patriot Act give law enforcement in the United States some useful tools to employ and to build upon in the coming years.