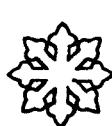


DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM

HEARING BEFORE THE LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES ONE HUNDRED SECOND CONGRESS SECOND SESSION

SEPTEMBER 30, 1992

Printed for the use of the Committee on Government Operations



Legislative Office
MAIN LIBRARY
U.S. Dept. of Justice

U.S. GOVERNMENT PRINTING OFFICE

70-384 CC

WASHINGTON : 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-041430-X

COMMITTEE ON GOVERNMENT OPERATIONS

JOHN CONYERS, JR., Michigan, Chairman

CARDISS COLLINS, Illinois
GLENN ENGLISH, Oklahoma
HENRY A. WAXMAN, California
MIKE SYNAR, Oklahoma
STEPHEN L. NEAL, North Carolina
DOUG BARNARD, Jr., Georgia
TOM LANTOS, California
ROBERT E. WISE, JR., West Virginia
BARBARA BOXER, California
MAJOR R. OWENS, New York
EDOLPHUS TOWNS, New York
BEN ERDREICH, Alabama
GERALD D. KLECKZKA, Wisconsin
ALBERT G. BUSTAMANTE, Texas
MATTHEW G. MARTINEZ, California
DONALD M. PAYNE, New Jersey
GARY A. CONDIT, California
PATSY T. MINK, Hawaii
RAY THORNTON, Arkansas
COLLIN C. PETERSON, Minnesota
ROSA L. DELAURO, Connecticut
CHARLES J. LUKEN, Ohio
JOHN W. COX, JR., Illinois

FRANK HORTON, New York
WILLIAM F. CLINGER, JR., Pennsylvania
AL McCANDLESS, California
J. DENNIS HASTERT, Illinois
JON L. KYL, Arizona
CHRISTOPHER SHAYS, Connecticut
STEVEN SCHIFF, New Mexico
C. CHRISTOPHER COX, California
CRAIG THOMAS, Wyoming
ILEANA ROS-LEHTINEN, Florida
RONALD K. MACHTEY, Rhode Island
DICK ZIMMER, New Jersey
WILLIAM H. ZELIFF, JR., New Hampshire
DAVID L. HOBSON, Ohio
SCOTT L. KLUG, Wisconsin

BERNARD SANDERS, Vermont
(Independent)

*JULIAN EPSTEIN, Staff Director
CAROL BERGMAN, Associate Counsel
DONALD W. UPSON, Minority Staff Director*

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

JOHN CONYERS, JR., Michigan, Chairman

GLENN ENGLISH, Oklahoma
STEPHEN L. NEAL, North Carolina
GERALD D. KLECKZKA, Wisconsin
CARDISS COLLINS, Illinois
RAY THORNTON, Arkansas
COLLIN C. PETERSON, Minnesota

FRANK HORTON, New York
JON L. KYL, Arizona
CHRISTOPHER SHAYS, Connecticut
STEVEN SCHIFF, New Mexico

*ROBERT J. KURZ, Deputy Staff Director
JAMES C. TURNER, Associate Counsel
MIRANDA G. KATSOYANNIS, Professional Staff Member
CHERYL A. PHILPS, Professional Staff Member
ERIC M. THORSON, Professional Staff Member
JOSEPH CIRINCIONE, Professional Staff Member
BENNIE B. WILLIAMS, Clerk
CHERYL G. MATCHO, Clerk
ROSALIND BURKE-ALEXANDER, Clerk
JANE COBB, Minority Professional Staff*

C O N T E N T S

	Page
Hearing held on September 30, 1992	1
Statement of:	
Conyers, Hon. John, Jr., a Representative in Congress from the State of Michigan, and chairman, Legislation and National Security Sub- committee: Opening statement	1
Copeland, Cary H., Director and chief counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, U.S. Department of Justice, accompanied by Art Leach, Assistant Director	78
Jones, William, Nashville, TN	10
Shelden, Mary, Moraga, CA, accompanied by husband Carl Shelden, and Brenda Grantland, Attorney	16
Vander Zee, Harlan, former banker, San Antonio, TX	45
Letters, statements, etc., submitted for the record by:	
Conyers, Hon. John, Jr., a Representative in Congress from the State of Michigan, and chairman, Legislation and National Security Sub- committee: Opening statement	3
Copeland, Cary H., Director and chief counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, U.S. Department of Justice: Prepared statement	82
Shelden, Mary, Moraga, CA: Itemization of costs to date	24
Prepared statement	32
Vander Zee, Harlan, former banker, San Antonio, TX: Prepared state- ment	57
APPENDIX	
Material submitted for the hearing record	101

DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM

WEDNESDAY, SEPTEMBER 30, 1992

**HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.**

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2154, Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Members present: Representatives John Conyers, Jr., Collin C. Peterson, Frank Horton, and Christopher Shays.

Subcommittee staff present: Robert J. Kurz, acting staff director; James C. Turner, counsel; Cheryl G. Matcho, clerk; and Jane Cobb, minority professional staff.

Full committee staff present: Carol Bergman, associate counsel.

OPENING STATEMENT OF CHAIRMAN CONYERS

Mr. CONYERS. Good morning. This subcommittee will come to order.

Last year, an investigative series in the Pittsburgh Press caught the attention of this subcommittee. It's one thing to read about an occasional incident where a person's rights were violated, but in this series there were documented hundreds of cases of innocent victims caught up in a criminal justice nightmare—people who lost their homes, who lost their businesses, their livelihoods, reputations—but they were never found guilty of any criminal conduct.

In fact, 80 percent of the people whose property was seized under the asset forfeiture program were not even charged with a crime. Then the press uncovered a "Drug Courier Profile" in which most of the time the people that were detained were African American or Hispanic or Asian travelers. Now similar reports have appeared elsewhere across the United States, and all this is happening in the name of the war on drugs.

Now, in Government Operations, our investigation shows that innocent individuals who hold a note on a piece of real estate or who loan a vehicle to a friend have a real hard time getting their property back if they're innocent.

I have a lot of letters from people requesting to testify at this hearing about losing their boats, their cars, their homes, their planes, or just file drawers full of their motions and appeals before various courts in the country to get their property back.

So a law designed to give cops the right to confiscate and keep the possessions of drug dealers seems to mostly ensnare the modest

cars and homes and cash of ordinary, law-abiding people. That's not the way it was supposed to work.

The cornerstone of our system of justice is that there is a presumption of innocence until proven guilty. As far as I know, the only part of our criminal justice system that ignores the presumption of innocence is in this forfeiture business.

So it's time to examine this law and learn as much about it as we can.

I'm troubled, as Frank Horton is, by this widespread miscarriage of justice. So there are three questions before us this morning: Where does the money in the forfeiture program come from? How is the property and cash seized, maintained, and managed? Finally, the big one—how is the money spent?

So we're going to look at that.

I'm going to put the rest of my comments in the record, and recognize my friend and the senior member of this committee, the gentleman from New York, Mr. Frank Horton.

[The opening statement of Mr. Conyers follows:]

**OVERSIGHT HEARING ON THE DEPARTMENT OF JUSTICE
ASSET FORFEITURE PROGRAM**

JOHN CONYERS, JR., CHAIRMAN

OPENING STATEMENT

Subcommittee on Legislation and National Security

Committee on Government Operations

September 30, 1992

9:30 a.m.

Last year an investigative series in the Pittsburgh Press caught my attention. It's one thing to read about an occasional incident where a citizen's rights were violated, but this extraordinary series, "Presumed Guilty," documented hundreds of cases of innocent victims caught up in a judicial nightmare — people who lost their homes, their businesses, and their livelihoods, but were never found guilty of any criminal conduct.

In fact, 80 percent of the people whose property was seized under the asset forfeiture program were never even charged with a crime. The press also uncovered a "Drug Courier Profile," which 77% of the time detained black, Hispanic, or Asian travellers. Similar stories have now appeared elsewhere across the United States. And this is all happening under the aegis of War on Drugs.

Our investigation shows that innocent individuals who hold a note on a piece of real estate or who loan a vehicle to a friend have the hardest time getting their property back. I have a stack of letters from people requesting to testify at this hearing about losing their planes, their boats, their cars and their homes, and file drawers full of their motions and appeals before various courts in this country. A law designed to give cops the right to confiscate and keep the luxury possessions of major drug dealers mostly ensnares the modest

homes, cars and hard-earned cash of ordinary, law-abiding people.

This was not the way it was supposed to work.

The cornerstone of our system of justice is supposed to be a presumption of innocence until one is proven guilty. As far as I know this is the only part of our criminal justice system that ignores the presumption of innocence. It would appear that the time has come to change the law.

I have called this hearing because I am deeply troubled by such a widespread miscarriage of justice. In looking at the asset forfeiture program, there are three basic questions:

- **First, where does the money in the forfeiture program come from?**
- **Second, how is property and cash seized maintained and managed?**
- **And finally, how is the money spent?**

Where does the money come from?

In 1984, Congress expanded the asset forfeiture laws to allow the government to take property without even charging the owner of any crime. The intent was to strike at the heart of major drug dealers for whom prison time is just a cost of doing business. Seizing profits

and property would hurt, and the proceeds would pay for more investigations, so that criminals would actually finance their own undoing. Every crime bill since has expanded the use of forfeiture. There are now more than 100 state and federal statutes covering everything from drugs and money laundering to importing tainted meat and carrying intoxicants onto Indian land.

There is no evidence that the program has deterred drug crime, but it has certainly been profitable for the Justice Department. Since 1985, the government has seized \$2.5 billion worth of assets.

What effect do the huge potential asset forfeiture profits have on state and local law enforcement priorities? Stories abound of cops waiting to make a bust until the people get into the Jaguar – in order to seize the car. There is a video of state troopers stopping cars driving south along Florida's I-95 to seize cash, and almost never stopping those traveling north – with the cocaine. We're getting cash off the streets instead of drugs: since when is that the priority for the War on Drugs?

How is the money spent?

The Justice Department is spending a fortune out of the Asset Forfeiture fund on informants, with no guidelines as to how much an

individual can make. DEA spent \$30 million over the last 2 years; the FBI spent \$11 million, with some informants receiving \$250,000, others \$500,000, and one person \$780,000 in one year, more than the combined salaries of the President and Vice-President.

Under the rules of Equitable Sharing, a community involved in the bust gets back a part of the seized assets, but can only spend these funds on law enforcement. However, no one monitors what that spending actually is. But we hear stories:

- **The seaside village of Little Compton, Rhode Island (pop. 3,300) has \$3.8 million to spend on law enforcement. So far their windfall has gone into outfitting cruisers with \$1,700 video cameras and body heat detection devices for a police force of 7.**
- **The Denver police work out on in their 6th-floor gym on weight-lifting equipment acquired after busting a fitness studio.**
- **Philadelphia police spent their cut on air conditioning.**
- **Warren County, New Jersey's chief assistant prosecutor drives around town in a forfeited yellow Corvette.**

Meanwhile, the funds cannot be spent on anything but law enforcement. So the 1991 request from a bi-partisan Florida

Congressional delegation to build a trauma center to handle drug-related violence at the hospital was turned down.

This hearing will examine these problems with the Asset Forfeiture Program. This is not a trial. We are not here to determine if the individuals testifying today are innocent or guilty. We want to hear their stories, and think about what changes should be considered to ensure that the asset forfeiture program is a tool of law enforcement, not of injustice.

###

Mr. HORTON. Thank you, Mr. Chairman.

We are here today for a hearing on the Federal Asset Forfeiture Program. In its investigation of the program, subcommittee staff has received excellent cooperation from the Executive Office for Asset Forfeiture, which is run by Cary Copeland of the Justice Department. I thank him for this cooperation, and look forward to hearing his expertise on the issues before us today.

I'm very proud of the Asset Forfeiture Program's achievements, and believe strongly in the power of the program as a law enforcement tool. According to the 1991 annual report of the Justice Asset Forfeiture Program, since fiscal 1985, more than \$2.4 billion in cash and property has been stripped from drug traffickers and other criminals.

Most of these forfeiture proceeds have been reinvested in law enforcement. Over \$830 million in forfeiture cash and property has been shared with State and local enforcement agencies which participated in cases resulting in Federal forfeitures.

Almost a half billion dollars in forfeiture proceeds have been used to finance Federal prison construction, and over \$350 million has helped finance Federal investigations and prosecution.

In this time of pervasive drug-related crime, this program has provided critically important assistance to our overstretched law-enforcement agencies, as well as taxpayers.

Regarding the concern about paying informants, I must say that I have no problem with this policy, and sometimes it does take large sums of money to secure cooperation from informants. However, \$2.4 billion seized in cash and property shows that this investment makes sense and is dealing a heavy blow to the drug trafficking community.

Federal laws provide for payments up to \$250,000 to individuals for information or assistance directly related to violation of the criminal drug laws of the United States. Those laws also provide for payment for information or assistance leading to a civil or criminal forfeiture, but the payment is limited by amounts realized by the United States from assets forfeited in an investigation. In other words, payments are made to informants from the tainted assets they help law enforcement agencies obtain.

There is also concern about how money from the Federal Asset Forfeiture fund is spent and how it is shared with State and local law enforcement.

Total asset sharing in 1991 was around \$290 million. That means that \$290 million went back into States and localities for law enforcement purposes. No doubt, that's a lot of money. However, let's put the expenditures in their proper perspective. In the same year, total law enforcement expenditures of States and localities amounted to approximately \$66 billion.

In that light, equitable sharing made for a mere drop in the bucket—in other words, sharing equalled less than one half of 1 percent of all moneys spent on law enforcement in 1991.

To believe that the amount of assets shared with State and local enforcement agencies is in any way outrageous, unbalanced, or distorted is to view these expenditures, in my judgment, out of context.

I feel for the individuals who had their property forfeited, if they are innocent or unknowing of the crime which led to the forfeiture of their assets. There is now a system in place for recourse in these situations.

One of the witnesses, Mary Shelden, who is here to testify today, will testify about something that happened in 1984. The program has changed dramatically since then, with the passage of the 1984 Comprehensive Crime Control Act and subsequent legislation.

This is not to say the Department of Justice Asset Forfeiture Program cannot be improved. This subcommittee, and I'm sure Cary Copeland as well, welcomes your help in identifying its weaknesses and ways to improve this program.

With the witnesses invited today, we will no doubt hear more about the problems and alleged abuses of the Asset Forfeiture Program than about the successes of the program. In my judgment, the program deserves a great deal of credit for its accomplishments. But, in order to improve the program, it is necessary to become informed about its problems and weaknesses, and I hope that that is what we can accomplish here today.

Thank you, Mr. Chairman.

Mr. CONYERS. The Chair is pleased to recognize the gentleman from Connecticut, Mr. Chris Shays.

Mr. SHAYS. Thank you, Mr. Chairman. I'm delighted to join you and my ranking member in participating in this hearing and to thank you for holding it and just to say to you that, in general, I'm a strong supporter of the Asset Forfeiture Program, but I would be very interested to see the response of the community.

I just will be very leery, though, of examples that show it doesn't work well if they are, in fact, not common examples.

Thank you, Mr. Chairman.

Mr. CONYERS. We've got a few minutes of 60 Minutes, the CBS show. Can we get it turned on here?

[A videotape was played.]

Mr. CONYERS. The subcommittee will stand in recess until this recorded vote is taken on the floor of the House.

[Recess taken.]

Mr. CONYERS. Mr. Vander Zee, Mr. Shelden, Mrs. Shelden, Mr. Jones, will you all please stand and raise your right hand?

[Witnesses sworn.]

Mr. CONYERS. Let the record show that all of the witnesses have stated in the affirmative. We welcome you to these hearings.

We will start off with the gentleman from Nashville, TN, Mr. William Jones. Welcome to these proceedings, Mr. Jones. Do you think you will ever see your money, or ever get it back?

STATEMENT OF WILLIAM JONES, NASHVILLE, TN

Mr. JONES. I certainly hope so.

Mr. CONYERS. What have you been doing to get it back?

Mr. JONES. We went through legal procedures, and Mr. Edwards, we just recently had a hearing in Nashville, and are waiting for the judge to make a ruling in 30 days.

Mr. CONYERS. You thought it was a pretty fair proceeding?

Mr. JONES. Yes, sir.

Mr. CONYERS. So how do you feel about what's happened to you? How long has this been, by the way?

Mr. JONES. This has been 1½ years.

Mr. CONYERS. Did it cost you much time?

Mr. JONES. Well, yes, sir, it has cost me a lot of time. I'm losing time off of work now, but I feel like it's worth it.

Mr. CONYERS. Has it cost you money in addition to the money they've got?

Mr. JONES. Definitely, sir.

Mr. CONYERS. Has it hurt your reputation in the community?

Mr. JONES. I feel like it has, because I have more or less just had a low profile; now I'm known, not only through the community, I guess, throughout the country, I guess.

Mr. CONYERS. Has it helped your business?

Mr. JONES. No, I can't say it has helped my business.

Mr. CONYERS. Do you want to tell us anything about how this all started and how you got caught up in this part of the law where your money was taken?

Mr. JONES. I'll be more than glad to.

February 27, 1991, I started to Houston, TX, to purchase some shrubbery, or to look at some shrubbery for my business, and I had a friend of mine to make the reservation for me at the Nashville Airport.

As I went out to work on that particular morning, he called me and told me what time the flight would be leaving, and I came in and was able to make it to the airport to try to catch my plane.

I went in and bought a ticket, paid cash for the ticket, and the lady told me that no one had ever paid cash for a ticket, so she had to go talk to her boss about what the rules was and, I guess, whatever.

So after she stayed gone for some 5 minutes or so, she came back and, at that time, I told her, I said "Lady, if there's a problem, I will write you a check." So she told me that she had gotten it straightened out, that cash would be fine.

Mr. CONYERS. This was American Airlines?

Mr. JONES. This was American Airlines. Right.

She told me she had gotten the problem straightened out, that the cash would be fine, and she took my money and gave me the ticket and told me what gate to go to to be able to board the plane, which was C-8.

I proceeded to go to C-8 to board the plane, and stopping one time by the restroom, and going through the checkpoint, which I was checked at the checkpoint. My luggage was checked.

I went on to C-8, and checked in with the gentleman at C-8 to make sure I was in the right place, and went over and had a seat by the window, started watching the activity that was going on below, which was moving, loading the planes, and taking the baggage off the planes and putting it on the planes.

So two agents walked up to me, approached me, and called me by my name, told me that they had reason to believe that I was carrying drugs or a large amount of currency.

At that particular time I was not aware of currency, so I asked them, "What is currency?" So they told me money. They asked me if I would step over to an excluded area so that they could talk

with me. So I agreed to, and we went across the walkway over through some doors where we were joined with a third officer.

At that particular time, he asked me if they could search my luggage. I told them "OK." They proceeded in searching my luggage and didn't come up with anything.

So one of the officers said to me "Where is it?" And I said "Where is what?" And he, at that time, he told me, he said "You might as well tell us, because we're going to search you anyway."

In the meantime, they checked my ticket, asked for identification. I gave them the identification that they needed, which the identification that I gave them was the same that was on the ticket that I had.

One of the officers proceeded to search me. He patted me on my right side and then changing over to the left side, which they felt the pouch in which I was carrying the money.

And he asked me if I would hold out my left arm, which I did and, at that time, he removed the pouch from my waistband of my pants, and he proceeded to open the pouch and, at that time, he saw money.

So Claude Byrum, which was the officer that mostly was doing the talking, he told me at that time that they was going to have to confiscate the money, and asked me if I would step back over or walk over to the office that they had set up out there.

So I felt at that time I didn't really have any choice but to go along with them, because they had my identification, they had my airplane ticket, and they had my cash—currency. And I proceeded to go—

Mr. CONYERS. You were under arrest, then, as far as you were concerned? Is that right?

Mr. JONES. As far as I was concerned I was, but they never had told me that I was actually under arrest, now.

So we proceeded to go over to the office, which was outside of the building, over into a second building. On the way over, we was walking—there was four that was involved—so we was walking two-by-two, and I kept looking back over my shoulder, and the question was asked of me, "What are you looking for?" And I stated that I was looking, watching the officers that actually had my money. So he told me, "Don't worry; the money is in good hands now."

So we proceeded to walk on down the concourse, and another officer made the statement, "Is the dog on duty?" So he told him, "Yes, the dog is on duty, and he has not been fed today." So that kind of bothered me. I didn't know whether they was going to take me over and play some kind of dog trick with me or not.

So we proceeded to go on over to the office that I spoke of earlier, and at that time they told me again that they would have to confiscate the money. And I asked for a receipt. I asked—first of all, I asked if they would count the money.

And they told me no, they could not count the money because that was a company policy—that was the policy, that they were subject to make a mistake, and they have to take a polygraph test every so often and if they made an error in counting the money, that it would show up on the polygraph test. So they refused to count the money.

They told me that the dog had hit on the money. I never actually seen a dog there. He told me he would give me a receipt for the money, and I questioned him as far as, "Well, how are you going to give me a receipt for the money when you never count the money?" And he told me he'd just give me a receipt for an undetermined amount of U.S. currency.

Mr. CONYERS. What was his name?

Mr. JONES. Claude Byrum.

Mr. CONYERS. Have you ever seen him again?

Mr. JONES. Yes, sir.

Mr. CONYERS. Under what circumstances?

Mr. JONES. We had a hearing last week, and he was there at the hearing, plus the fact I seen him again on the 60 Minutes edition that aired there. And that was basically about the only times that I have actually seen him.

Mr. CONYERS. Did you ever get a chance to tell anybody about the fact that they wouldn't count the money before they took it?

Mr. JONES. Definitely so. I told my lawyer and several other people about the fact that they refused to count the money.

Mr. CONYERS. What about the judge?

Mr. JONES. Yes, sir. That was stated in the court.

So after they confiscated my money and gave me a receipt for an undetermined amount of cash, they asked me had I ever been arrested in the United States for drugs. And I told him no. And he said "Well, you might want to tell me the truth, because we're going to check, anyway."

And at that time, they did run a check on me, and another officer that was there by the name of Woods, he told Mr. Byrum that "He's clean." At that time, I gave them a name of a brother officer of theirs that I had did some work for. I gave them the name of an FBI agent that I had did some work for. I gave them the name of a business associate of mine and people who they could have called and verified who I was.

I presented them with a business card, during the time we was in the office. I pulled my jacket off and I stood up, and when I stood up my checkbook was sticking up out of the back pocket, so the officer asked me, what was that sticking out of my pocket, and I told him it was my checkbook, which had my proper name and address and all on it.

So he told me I was free to go. And I had time to still get the plane and go on to Houston if I wanted to. I returned back to the ticket agent and got my money back, went back to the same lady that I had went to to buy the ticket. So she told me "You're back already, huh?" I said "Yes." And she gave me my money back.

At that time, I walked back out to my pickup truck and left the airport. So I rode down the interstate for a while, and I got to thinking about it, and it just didn't sound right. You know, it just wasn't right.

So I called a friend of mine and was discussing it—met with him and discussed it with him. So we—I went back to the airport, and I walked in, and he asked me how could he help me, and first off told me that I definitely was not going to get the money back if that's what I came back for.

Mr. CONYERS. Who were you talking to?

Mr. JONES. Mr. Byrum, Claude Byrum, again. The same one that had taken the money from me earlier. So this was in a period of like 30 minutes, 45 minutes, when I returned back to the airport.

He told me I was one of the few. I questioned him, "What do you mean, I'm one of the few?" He said that they had taken as much as \$100,000 from people and they would let them go, and that was the last place they wanted to come back to once they would let them go. And they said, "You came back."

I said, "Well, I guess those people had something to run for. I didn't have anything really to hide." So at that time, he started quoting the law to me, which I was not aware of the law. And after talking to him for a few minutes longer, he told me that he had to go, he had other work to do, and kind of left me sitting there. So I didn't have much of a choice but just to leave the second time.

At that time, that's when I was able to talk to some people, and that's how I came up with the name of Mr. Edwards, which has instructed me from that point on.

Mr. CONYERS. But what happened? What was the first thing that happened with your lawyer?

Mr. JONES. Meaning?

Mr. CONYERS. Meaning what did you two do then, I mean, now that you were advised that you weren't going to get the money back if that's what you came back for, and you got a lawyer, and then what happened?

Mr. JONES. Well, this was—this was something like a week or so later when I was able to contact Mr. Edwards. And I told him the complete story of what had happened, and at that time he started working on it as far as filing the necessary papers that was needed to be filed to try to see about getting the money back, or what we could possibly do to get it back.

Mr. CONYERS. Did you have to pay a bond?

Mr. JONES. No, we did not have—they wanted to put up a 10 percent, 10 percent of the money. We did not have the \$900 to post for the bond.

Mr. CONYERS. So what does that mean? What happened?

Mr. JONES. Well, Mr. Edwards at that time had to fill out a form to let them know that we didn't have the 10 percent, and he could probably tell you a lot more about that than I could.

Mr. CONYERS. In other words, that threw you out of the ballpark in trying to get your money back, because you couldn't put up a bond?

Mr. JONES. That is correct.

Mr. CONYERS. So what happened next?

Mr. JONES. Well, he was able to, like I said, fill out the necessary forms that we needed to fill out, and we got a hearing from Washington, and he was able to write back and let them know. They had to give a document of reasons why we could not, was not able to put up a bond. And he had to write back and let them know the reason why we was not able to.

Mr. CONYERS. Then what happened?

Mr. JONES. Well, at that time, we just had to wait it out and see what was going to happen next.

Mr. CONYERS. Then what happened next?

Mr. JONES. After waiting for, I guess, several—several months to get an answer back from Washington, Mr. Edwards called me back into the office and had some more papers that we had to file and some more documents that they had mailed back to us and, like I say again, he could probably tell you more about those than I could.

Mr. CONYERS. I don't want you to tell me about what was in the papers. What happened to you next? You did eventually get to a court.

Mr. JONES. Well, we was able to get a hearing. The judge—

Mr. CONYERS. Tell me about the hearing. Where was it held?

Mr. JONES. It was held in Nashville, TN.

Mr. CONYERS. Do you remember who the judge was?

Mr. JONES. Yes. Thomas Wiseman.

Mr. CONYERS. Do you remember what court it was in?

Mr. JONES. Not directly, no. It was in Federal court, but—

Mr. CONYERS. Well, what happened there, as far as you're concerned?

Mr. JONES. Well, we was able to—it was heard. And a lot of the truth was brought out, what actually happened, the way it happened. The judge, we felt, was fair with us. And, at this time, we're just waiting to—for an answer from the judge, because we have to wait 30 days to see.

Mr. CONYERS. Who testified at that hearing?

Mr. JONES. The three officers that was involved testified; I testified; a friend of mine testified.

There was a lady in Houston that I was going to see while I was there. They had a testimony from her that she was aware that I was coming to Houston, and she was aware that I was going to see her while we were—while we were there. And there were a couple of other witnesses that testified there also.

Mr. CONYERS. Thank you so much.

Mr. and Mrs. Shelden, Mary and Carl Shelden.

Mr. HORTON. Could I just ask Mr. Jones a couple of questions before we get away from him?

Is there a court proceeding going on now?

Mr. JONES. Is it going on now?

Mr. HORTON. When were you before the court in Nashville?

Mr. JONES. Just last week.

Mr. HORTON. Oh, last week.

Mr. JONES. Yes, sir.

Mr. HORTON. And the judge has not made a decision yet; is that what you're saying?

Mr. JONES. That's exactly right.

Mr. HORTON. And Mr. Edwards, who is going to testify later, was the attorney representing you at that hearing in Nashville?

Mr. JONES. That is correct. Mr. Edwards was representing me at that hearing.

Mr. HORTON. And that's the gentleman that's here now who will be testifying further; is that the same person?

Mr. JONES. That is correct.

Mr. HORTON. So he was your lawyer?

Mr. JONES. He is still my lawyer.

Mr. HORTON. OK. Thank you.

Mr. CONYERS. Mary and Carl Shelden, we welcome you to this hearing. Thank you for taking time out to come before the Government Operations Committee.

You were trying to sell your house. Tell us what happened.

STATEMENT OF MARY SHELDEN, MORAGA, CA, ACCOMPANIED BY HUSBAND CARL SHELDEN, AND BRENDA GRANTLAND, ATTORNEY

Mrs. SHELDEN. I'd like to give a little background about us first, if that's all right. We're an average middle-class family. We were raised in the 1950's, believed in our country, Constitution, and Bill of Rights. Carl served in the Marine Corps and the Navy. We had a strong work ethic and were willing to work 7 days a week and up to 12 hours a day, building our American dream.

We weren't asking for very much. We wanted a safe neighborhood to raise the family, good schools, and a chance to build some equity in our home for our children's education, maybe a little money for retirement. We were conservative, spent our money carefully, and we raised our children to have values and respect authority.

In 1976, Carl fell 20 feet and broke his back. And in 1979, we were forced to sell our home.

We followed all the normal procedures. We used a realtor, we conducted a credit check, and had the buyer qualify for the first mortgage. He assumed our first mortgage with a savings and loan. We carried a second deed of trust, which we were going to use to help support the family.

In 1983, we opened a newspaper and read a story that was going to alter the course of our lives over the next 10 years. The owner of the property which we carried the mortgage on was indicted under RICO—the asset forfeiture law. Our mortgage and the security for that mortgage were destroyed while under the control of the U.S. Government.

When a criminal is indicted under RICO, any innocent third parties should be given formal notice of how this indictment would affect them and what their rights are. We were never given a formal notice of the forfeiture case, how it affected our mortgage, what our rights were, or allowed to participate in the proceeding.

We were never told what provisions were made to protect the property and our interest in that property as mortgagees, and we were never consulted about the disposition of the property after it was forfeited. No one ever asked us or told us or let us know what was going on with the property.

We did make several attempts to contact the U.S. attorney's office in San Francisco for information, but they refused to give us any information about the property. The only thing that they would discuss with us at that time was the fact that we had instituted a foreclosure on the property when the owner stopped making payments, and they were really only interested in the details of that foreclosure.

In 1983, a lis pendens was placed on the property by the government and this, in effect, placed a cloud on the title which made it unmarketable.

Then in 1984, an order of forfeiture was done, and the U.S. attorney made a stipulation with the criminal's attorney which allowed the criminal to manage the property pending appeal, while it required the other properties to be sold and the lienholders paid off. It did not even require that our mortgage payments would be made. Our mortgage, basically, was put in limbo.

Since the criminal was incarcerated in a prison out of the State, we made numerous attempts to find out who was managing and living in the property. No one would answer our questions. It was not until 1986 in the bankruptcy court that we learned the criminal's family was allowed to remain on the property.

After months passed again without receiving any mortgage payments, we attempted to foreclose. No one—our attorney included—understood the effect of the RICO law on our foreclosure rights.

During this period, we also were forced to keep the first mortgage current and pay the insurance premium on the property when the government stopped paying them. There were two different times when we were without payments for up to 9 months.

In 1984, when the U.S. Government found out that we were trying to foreclose, they called us before the judge on the criminal forfeiture case and they asked the judge to enjoin us from foreclosing. We went to two hearings before this judge and never did they attempt to protect our rights, but only the governments' "rights" in the property.

We had tried everything to try to regain our property interest, and foreclosure seemed to be our only legal recourse. The government was not protecting our interest. The RICO judge had told us he didn't have jurisdiction over our mortgage, and none of the lawyers we had consulted knew of anything else that we could do.

This property, which was the security for our second mortgage, was never referred to the U.S. marshal for management and disposition as government regulation required. Instead of selling the property immediately, as the government did with the other properties and as the RICO statute requires, the government hung on to the property and allowed the criminal's family to live there rent-free.

In 1986, the mortgage payments ceased again, and we once again attempted to foreclose. Once the government took over ownership of the property, back in 1983, as we now understand the law, we could not foreclose against the government. But then no one, the courts included, really understood this aspect of the RICO law.

In 1986, the court of appeals reversed the criminal's conviction. The same day, the criminal declared bankruptcy. The RICO case, including the forfeiture verdicts, was sent back to the trial judge for further proceedings. We then had to hire an attorney to go into bankruptcy court to defend our interest in the property.

In the bankruptcy court, we were told that the property was damaged. So we hired an appraiser, who recommended we hire an engineer to survey the damage. The damage was so severe that the bankruptcy court released the property, and we proceeded with our attempts to foreclose again.

As a result of the government's mismanagement, this property seriously declined. A retaining wall which had been erected for additional parking by the criminal was allowed to collapse and was

never repaired. The drainage systems were not maintained, and no measures were taken to alleviate the damage caused by these conditions during the heavy rains which occurred during the years the property was in the government's control.

As a result, the house, which was built on a hillside, was twisted by the stress from the failed retaining wall and cracks broke open throughout the interior and exterior. No one told us of the maintenance problems. According to the order of forfeiture, the United States was supposed to oversee the management of this property. But, as we later discovered, it did nothing.

I feel—we feel the government was completely irresponsible in leaving the responsibility for managing the property on an incarcerated felon and then failing to oversee the management as the order of forfeiture required it to do.

Not only did the government destroy our mortgage of \$160,000 and the security for that mortgage, but they also destroyed the equity of approximately \$100,000 in the property which the United States would have received for the defendant's fines.

In February 1987, we ended up getting—

Mr. HORTON. Mrs. Sheldon, let me interrupt.

Mrs. SHELDEN. Yes.

Mr. HORTON. I'm not following. Did you folks go to court? Did you go to a Federal court? Maybe I missed that.

Mrs. SHELDEN. You mean when I'm speaking of the damages just prior?

Mr. HORTON. No. As I understand it, you owned a home.

Mrs. SHELDEN. Yes.

Mr. HORTON. And then you sold the house.

Mrs. SHELDEN. Yes.

Mr. HORTON. You sold it to a person, whatever his name is, and then you took back a mortgage? Is that what you did?

Mrs. SHELDEN. Yes. We carried a mortgage.

Mr. HORTON. Then the government arrested him under some RICO proceedings?

Mrs. SHELDEN. Yes. And he was convicted and all of his properties were forfeited. He had a total of, I think, 10 properties, and ours was one of them.

Mr. HORTON. But you had the mortgage on the property?

Mrs. SHELDEN. Yes, we carried a mortgage.

Mr. HORTON. Then did the property come back to you ultimately?

Mrs. SHELDEN. Well, in February 1987, when they found out there was so much damage on the property there was no equity—

Mr. HORTON. How much was your mortgage?

Mrs. SHELDEN. Our mortgage was \$160,000 and there was \$100,000 in equity in 1983.

Mr. HORTON. And he paid you some cash when he bought the place?

Mrs. SHELDEN. Yes.

Mr. HORTON. And then you took back a mortgage. There was no other mortgage on it?

Mrs. SHELDEN. Yes. There was a first mortgage—

Mr. HORTON. First mortgage, and then you had a second mortgage?

Mrs. SHELDEN. And we carried a second mortgage.

Mr. HORTON. Then did you ultimately go to court?

Mrs. SHELDEN. We attempted several foreclosure proceedings, but they were never completed, because just before the point where it would have been completed, payments were made to us again, so we had to stop that procedure.

Then at one point, the government realized that they would not be able to bring the loan current, so that's when we were called in front of the Federal judge that handled the RICO case.

The U.S. attorneys and the criminal's attorneys told him that he had jurisdiction over our mortgage. And that wasn't true, because—

Mr. HORTON. Did you have a lawyer?

Mrs. SHELDEN. Yes.

Mr. HORTON. Is your lawyer here, too?

Mrs. SHELDEN. No. That was—we had lawyers as we could afford them back then, for the various courts that we had to go through. And at that time—

Mr. HORTON. Did you ever get any payments on the mortgage?

Mrs. SHELDEN. We did, off and on.

Mr. HORTON. Who paid those?

Mrs. SHELDEN. We got them through the criminal's attorney. He had a checking account, a trust account, and when payments were made to us, it was through that trust account.

Mr. HORTON. Is there still an outstanding balance on that?

Mrs. SHELDEN. I have no idea.

Mr. HORTON. No, I mean on your mortgage.

Mrs. SHELDEN. On the mortgage?

Mr. HORTON. It's not paid off, is it?

Mrs. SHELDEN. The mortgage? Yes.

Mr. HORTON. It's paid off?

Mrs. SHELDEN. I'm not sure I understand your question.

Mr. HORTON. There was a mortgage loan.

Mrs. SHELDEN. First mortgage.

Mr. HORTON. In other words, you sold this RICO criminal the house and then you took back a mortgage, right?

Mrs. SHELDEN. Now, that was the second mortgage.

Mr. HORTON. That's the second mortgage. Was anything ever paid on that second mortgage to you?

Mrs. SHELDEN. Yes, off and on.

Mr. HORTON. Is there an outstanding balance on that mortgage?

Mrs. SHELDEN. On our mortgage?

Mr. HORTON. Yes.

Mrs. SHELDEN. Yes, I mean—

Mr. HORTON. How much is it?

Mrs. SHELDEN. The mortgage was approximately \$160,000.

Mr. HORTON. But how much is outstanding now?

Mrs. SHELDEN. \$160,000.

Mr. HORTON. Oh, so it's still \$160,000. So you haven't had any payments at all.

Mrs. SHELDEN. Well, I'll explain what happened in 1987 so you'll understand why.

Mr. HORTON. OK.

Mrs. SHELDEN. That is kind of off on the side, now.

In February 1987, we ended up getting the property back after a foreclosure sale. This was after we had gone through the bankruptcy court and at the point where the government realized that there was no equity there to even worry about anymore.

We completed a foreclosure sale, and we did get the property back, at least in theory at that time. The criminal's family was still living in there. We had to evict them.

When we re-entered the premises, the house was a wreck. In addition to general neglect and waste of the premises, there were, and still are, cracks throughout the house, some going all the way through from the exterior to the interior. A crack in the brickwork on the facade is big enough to bury your hand up to the top knuckles. Further engineer inspections showed structural damage requiring hundreds of thousands of dollars to repair.

In 1989, the cost to repair the house and property was estimated at \$190,571. With each delay in the court system, the property continues to sustain additional damage, and the current cost is in the hundreds of thousands of dollars.

If the property had been properly managed and the necessary repairs were done in 1985 when the previous owners had an engineer out—we found this out through our engineer—the cost at that time would have been under \$10,000 to repair the damage.

But the United States chose not to accept any responsibility to maintain the property. They would not release the necessary funds from the forfeiture fund for the needed repairs and maintenance.

Worst of all, however, was the hidden defect, which was that we really didn't own the property. The order of forfeiture had transferred all right, title, and interest in the property to the United States in 1984 and provided that, once the appeal was final, the property was irrevocably vested in the United States.

Although the criminal's conviction was reversed, the trial court never vacated the verdict of forfeiture against the house. The criminal was released from prison before we got the house back and never served any more time. In a plea bargain, he got title to two of the properties which had not been sold.

The government did not bother to do the same for us, nor would it agree to reimburse us for the difference between what our mortgage was worth and what the property was worth after the government allowed it to be wasted.

Although we had physical possession of the property in 1987, the United States did not remove the lis pendens and consent to transfer the property to us until October 1990, and this was done only after we again had to resort to legal action to clear the title.

We did attempt to work with the U.S. attorney's office in San Francisco after we learned of the damage, to see what we could do about it, to try to get some compensation. We had no success.

That was the point that we hired Brenda Grantland, a Washington, DC attorney, who filed suit in January 1988 in the U.S. Claims Court—Case No. 164-88L.

Although the court agreed with us, in an opinion issued in January 1990, that the government's action was a taking of our mortgage interest, and that the government would have to pay us just compensation, about a week before we were supposed to go to trial on damages, the government asked the court to reconsider.

On June 24, 1992, almost 2 years later, the Judge reversed his opinion and ruled in favor of the United States.

Mr. CONYERS. Who was the judge?

Mrs. SHELDEN. Judge Loren Smith, chief U.S. claims judge.

Mr. CONYERS. Was this in San Francisco?

Mrs. SHELDEN. No, here in Washington, DC.

Mr. CONYERS. In Washington?

Mrs. SHELDEN. Yes. And the reason was, because the United States was allowed an additional 30 days to bring the loan current in 1984, he felt that we waived all of our rights as mortgagees.

Brenda Grantland, our attorney, filed an appeal on August 12, 1992. We feel the outcome of this case will affect every lienholder in Federal forfeiture cases in the United States. Almost all property that is forfeited includes innocent lienholders.

We are forced to live in the damaged house. Our savings have been exhausted trying to defend our property in the various courts. The condition of the house is continuing to decline, with the cracks that allow the elements in continuing to widen as the cost of repairing the damage continues to accelerate.

What we find incredible is that in spite of the fact that the government had total control over our mortgage, they at no time assumed our mortgage or paid us off. So we're talking from 1983 to today. We feel our mortgage has really been held hostage.

We feel that all of our rights as mortgagees were taken from us.

The right to foreclose for nonpayment of the mortgage payments.

The right to call our note all due and payable.

The right to have the note paid off when the mortgagor's interest transferred to the United States.

The right to make the decision if the United States would be allowed to assume the loan. We were never called in for any hearings, never asked "Could we negotiate with you to extend the loan, or we will pay you off and continue with this prosecution?" We were left totally out of the picture.

We didn't even have the right to know who was living in the property at the time. We asked the U.S. attorney's office. We tried to reach the criminal's attorney. No one would tell us who was managing it and who was living in it. They refused to say anything.

We also lost the right to information regarding how our mortgage would be affected by the forfeiture.

Mr. HORTON. Excuse me. Let me interrupt again. You said there was a first mortgage?

Mrs. SHELDEN. Yes.

Mr. HORTON. Who had the first mortgage?

Mrs. SHELDEN. Santa Barbara Savings and Loan. It was—

Mr. HORTON. What did they do all this time?

Mrs. SHELDEN. Well, they just sat back and watched, because we were in second place. We had to keep them current, otherwise they would have foreclosed on us.

Mr. HORTON. So you made payments to them?

Mrs. SHELDEN. We had to keep the first current, yes.

Mr. HORTON. So the payments have all been made on that? Is there still a mortgage on it now?

Mrs. SHELDEN. On the first? No, not any longer. But we had to keep that first up, to protect our interest.

Mr. HORTON. Is it paid off now?

Mrs. SHELDEN. Yes.

Mr. HORTON. Who paid it off?

Mrs. SHELDEN. We had some insurance money, and when we spoke to the first mortgage, they insisted that we pay the mortgage off because of the damage on it.

Mr. HORTON. What was the insurance money for?

Mrs. SHELDEN. We had an earthquake in San Francisco on top of all of this, and we had—it escalated our damage 2 to 3 years. So we were able to get some money for repairs, but we couldn't even use that money for the repairs. We had to pay off that first mortgage.

Mr. HORTON. But you had enough money in the insurance to pay off the mortgage? Is that it?

Mrs. SHELDEN. Yes. It was a small mortgage. It was \$50,000.

Mr. HORTON. So that's been paid off?

Mrs. SHELDEN. Approximately \$50,000.

Mr. HORTON. So they got 100 percent of theirs?

Mrs. SHELDEN. They got it.

Mr. HORTON. Do you own the house now?

Mrs. SHELDEN. I think so. We had to do various things. Let me go through this.

We had to have the lis pendens removed.

Mr. HORTON. Has that been removed?

Mrs. SHELDEN. That has been removed. And then we had to obtain a quit claim deed from the government which transferred title of the property to us.

We had to remove approximately or deal with approximately \$8,500 in property taxes which were unpaid during the U.S. control of the property.

There were certificates—we had to obtain certificates of release of Federal tax liens on the property.

We had to obtain a right of redemption release for Federal tax liens.

We had California State tax liens that needed to be removed.

And we had to have a title search done to see—

Mr. HORTON. Have you got an itemization of how much all that cost?

Mrs. SHELDEN. Yes.

Mr. HORTON. Maybe you could furnish it for the record. I think it might be well for us to have it, and then we could have the staff take a look at how much you spent. Do you know what the total is?

Mrs. SHELDEN. The last time that we worked with the total was in 1989. That's when we thought we would go to trial.

Mr. HORTON. What was it then, if you know?

Mrs. SHELDEN. Actually, just getting the property back and making it somewhat livable, it was about \$34,000, just to get it to the point where we could, you know, go into it.

Mr. HORTON. So in 1989 it was approximately \$34,000? Is that what you're saying?

Mrs. SHELDEN. Yes.

Mr. HORTON. Thank you.

Mrs. SHELDEN. And there were attorney fees included in that, court costs, expert testimony, depositions.

Mr. HORTON. That's all included in the \$34,000?

Mrs. SHELDEN. Yes. Right. And that's not including attorney fees.

Mr. HORTON. Oh, not including attorney fees.

Mrs. SHELDEN. I mean, some very basic attorney fees at the very beginning when we just hired attorneys to help us go to hearings.

Mr. HORTON. Now, you've had some expenses since 1989?

Mrs. SHELDEN. Oh, yes.

Mr. HORTON. Have you itemized those?

Mrs. SHELDEN. Actually, I didn't bring that, but if you need that itemized, I could—

Mr. HORTON. You could send it to us and we can put it in the record at that point.

[The information follows:]

ESTIMATED EXPENSES
1983 THRU SEPTEMBER, 1992
1065 WICKHAM DRIVE, MORAGA, CA

Except for items marked (*), the following represents out-of-pocket expenses incurred by the Sheldens:

A. Current Attorney Fees

Brenda Grantland (attorney): * \$ (5 years)

B. Miscellaneous Expenses

Attorney Fees (Misc):	16,091.78
Court Costs/Fees:	189.80
Legal Costs (Misc):	460.30
Transcripts:	1,747.50
Reports:	552.50
Photos:	132.52
Experts:	1,634.40
Traveling Expenses: (hearings)	1,403.33
Telephone Costs:	2,777.17
Copies:	938.52
Postage:	599.15
Office Supplies:	132.18
Maintenance to prevent further water damage to open cracks (40' X 60' tarps, sand bags, sealer)	542.53
Cost of Repossession: (Repair, clean-up, maintenance in 1987. Took 4 months to get house in rentable condition)	9,903.30

* Amount is a contingency based on recovery.

Misc. Continued

Loss of Rental Income: (4 months)	\$ 7,200.00
Moving Expenses: (In 1989 had to move from San Diego because of liability at house)	4,266.35
Subtotal	<u>\$ 48,571.33</u>

C. Second Deed of Trust

At the time of the 1986-1987 foreclosure Trustee Sale the following amounts were owed to the Sheldens:

Balance owing on Sheldon's Second Mortgage:	\$132,635.22
Expenses/Advances/interest:	<u>22,655.33</u>
Subtotal	\$155,290.55 Due Sheldens

Balance owing on First Mtg: (Sheldens became responsible for)	47,850.00
---	-----------

Note: Our Second Mortgage became
all due and payable on June 1, 1986.

As of January, 1990 cost for
repairs: * \$500,000.00 (approx)

Note: Although the Trustee Sale was in February, 1987, it
was not until October, 1990 that the United States agreed to
transfer their interest in this property to us.

* Amount has not been paid as yet.

Mrs. SHELDEN. So we had a title search run on the property, and we think we've cleared everything off of it to the point that we would be able to sell it someday.

When a property is forfeited to the United States, the transfer of title to that property becomes very cloudy, and if there's a break in the paper trail of ownership on that property, title companies will refuse to issue title insurance on the property. They don't want to accept the liability. They want a clear path from one owner to another owner. They don't want any breaks in that path.

In fact, they feel so strongly about it, they have reservations about the constitutionality of real property forfeitures. There's a GAO report that deals with this.

[GAO Report entitled, "Real Property Seizure and Disposal Program Improvements," dated September 25, 1987 (p. 19).]

Mrs. SHELDEN. If a person cannot get title insurance, banks will refuse to loan money on it, finance that property, and that means that the property becomes unsellable. The only recourse a person would have would be to pass the property down from generation to generation within their own family.

Mr. HORTON. As I see it, there are two questions here.

One, and we'll have to ask Mr. Copeland about that—the law was changed in 1984—and determine whether or not the type of situation you've described is now covered and, if so, how the law takes care of this type of situation.

I'm not asking you, but I think that's something we could ask Mr. Copeland when he comes up.

The other thing is the question of what can be done in the situation involving you folks, where you've actually had out-of-pocket expenses and loss of value of property.

Did you ever go to court on it? Did you ever sue the government? You say you went to the claims court.

Mrs. SHELDEN. U.S. Claims Court, yes. We are suing under a taking, under the fifth amendment.

Mr. HORTON. But the court decided first for you and then the court—

Mrs. SHELDEN. Reversed it.

Mr. HORTON [continuing]. Reversed itself. We'd have to take a look at the decision, but you don't have that here with you.

Mrs. SHELDEN. The opinions are in the package that I sent.

Mr. HORTON. Oh, we have that here?

Mrs. SHELDEN. And the other report I'm sure is in the—

Mr. HORTON. Well, we'll take a look at that and see what can be done in that respect. I don't know whether you have a right to appeal from that or not.

Mrs. SHELDEN. We'll find out.

Mr. HORTON. How long ago was that?

Mrs. SHELDEN. We're in the process now—pardon?

Mr. HORTON. How long ago was that, that you were in the claims court, and that the court made that decision and reversed it?

Mrs. SHELDEN. 1992 was when they reversed it, June 1992.

Mr. HORTON. I don't know what the statute is on that. Well, we'll have to look into that.

Mrs. SHELDEN. OK.

Mr. HORTON. Because it may be that you could have appealed. I don't know.

Mrs. SHELDEN. Well, we're trying to do that now. We're trying to appeal it, and—

Mr. HORTON. The time has not run, yet, on the appeal? In other words, you could still appeal it?

Mrs. SHELDEN. Yes. She's filed an appeal already—Brenda Grantland.

Mr. HORTON. She?

Mrs. SHELDEN. She has filed an appeal.

Mr. HORTON. Who is she?

Mrs. SHELDEN. Brenda Grantland, our attorney.

Mr. HORTON. Oh, the attorney.

Mrs. SHELDEN. Yes.

Mr. HORTON. Your attorney has filed an appeal.

Mrs. SHELDEN. Yes.

Mr. HORTON. Oh, OK. In other words, it is now on appeal?

Mrs. SHELDEN. Yes, it is.

Mr. HORTON. OK. So you're in the courts now, then?

Mrs. SHELDEN. Yes. We're still in the U.S. Claims Court with an appeal.

Mr. HORTON. And all this—all that you've told us here, now, is before that court and will be involved in that appeal?

Mrs. SHELDEN. Yes. Yes, there's pages and pages.

Mr. HORTON. So justice may still be done, you hope.

Mrs. SHELDEN. Let's hope.

Mr. CONYERS. What do you think was the reason for the reversal of the decision?

Mrs. SHELDEN. I don't know. It didn't make any sense to us. It just didn't make any sense.

Mr. CONYERS. Mr. Shelden, what do you think was the reason?

Mr. SHELDEN. My understanding is that when we gave the defendant in the government's case—allowed them 30 days, back in April 1984, to bring the loan current—additional 30 days, after they were late up to 9 months—that's what the judge now, in June 1992, is saying. That's why we have now lost the damned case. And I am very heated up over this.

He's saying, because we gave the government 30 days back in 1984, we screwed ourselves, because he's saying we had a chance back then to get the house back while it was still whole and it wasn't damaged, and that we messed ourselves up by giving the government 30 days back then. And our understanding is, from our attorney, Brenda Grantland, that we couldn't have foreclosed back in 1984 anyway, because the property at that time belonged to the government.

Mr. CONYERS. Well, do you have any—I don't want you to try to become a psychoanalyst, but if the judge was going to rule that way, why didn't he rule that way in the beginning, rather than to—did somebody come in and—I mean, how did we get into a reversal?

Mr. SHELDEN. I felt the first decision was done by the law, and he was following the procedure of the law. And I felt the second time that was not done, as far as following the laws.

Mr. HORTON. Well, I assume from what Mrs. Shelden said earlier that after the decision was made, which was in your favor, that the government asked the court to reconsider. Now there must have been some legal proceeding there.

Mr. SHELDEN. Well, that's exactly—

Mr. HORTON. You had an attorney to represent you at that point, I assume?

Mr. SHELDEN. Well, the judge now is saying that we gave the government 30 days to bring the loan current back in 1984, and by us doing that, giving the additional time, we screwed ourselves.

Mr. HORTON. Well, that may be—

Mr. SHELDEN. That's what the judge is saying now.

Mr. HORTON. But this is a legal matter that—

Mr. SHELDEN. No, that's what's in the opinion.

Mr. HORTON. Well, I understand, but that's a court decision, and the court made that judgment after it was requested by the government to reconsider. And so what we'll have to do is look at that decision and see what the basis of it was as far as the court was concerned.

Mr. SHELDEN. Well, my understanding is—at that time we didn't know—

Mr. HORTON. Well, I understand what you've said. You've said that—

Mr. SHELDEN. Well, let me finish, now. We felt that we could foreclose. At least, that's what we thought. The property was owned by the government when they pulled us and hauled us into court in 1984. And my understanding is—

Mr. HORTON. Well, it sounds to me as though the court is finding a very narrow place in which to say that you waived whatever rights that you had, and I have a question as to whether or not that's accurate. But we'd have to check into that.

Mr. SHELDEN. Well, my understanding is that is not accurate, because you cannot foreclose against the government—private party once an individual has—once that property has been forfeited. And we were mortgagees on a property, so we could not foreclose, as we know the law now. Back in 1984, we could not have.

The judge now is saying that we could have resorted to State law back in 1984, and that's not true. We could not. Of course, back then we thought we could. That's why we tried to foreclose. And now—what this judge is saying now, Mr. Loren Smith, is because we were nice people back in 1984 we got hundreds of thousands of dollars damage on the property that's our fault, now, because we were being nice in 1984.

We went without payments for 9 damn months. That's why we were—tried to be nice. We didn't have a choice. I didn't have a job, and I broke my back in 1976, and I'm trying to support my family. That's why I carried the mortgage on the property. My wife has some more stuff here that's very important, that she would like to read. And then I'd like to make some more statements again after that.

Mr. CONYERS. Well, you're sure going to get a chance.

Mr. SHELDEN. Thank you.

Mr. CONYERS. Attorney Brenda Grantland, can you give us your view of this reversal?

Ms. GRANTLAND. First of all, I think this was the first case in the country to raise the issue of whether it's a taking in a forfeiture case for an innocent lienholder to lose his interest.

Mr. HORTON. Excuse me, Mr. Chairman, I don't know who this lady is.

Ms. GRANTLAND. I'm sorry. My name is Brenda Grantland. I'm the attorney for the Sheldens.

Mr. HORTON. Oh, I asked her earlier if you were here, and she said no.

Ms. GRANTLAND. Well, I don't think she understood what you said.

Mr. HORTON. Well, perhaps not. OK. But she is here. You are the attorney that's represented them through all this.

Ms. GRANTLAND. I've represented them since 1988. I represent them in the U.S. Claims Court, and now in the Federal circuit.

Mr. HORTON. OK, good. Fine. Thank you.

Ms. GRANTLAND. This is the first case, as far as I know, in the whole country, in which a lienholder in a forfeiture case went into claims court saying that it was a taking, that they'd lost their interest and it was a taking, requiring just compensation under the fifth amendment. In fact when Judge Loren Smith issued his first opinion, he said that, that this is the first case involving a taking.

And I think he was a bit uncomfortable with that, because there was not precedent for it, and that after many months of—in fact, over 2 years passed between the first opinion, finding it to be a taking, and the one in which he granted the government's motion to reconsider and vacated his previous opinion. He was just not sure whether this was the proper basis for this.

The unfortunate thing about this is that most claimants would not have the stamina, much less the money, to fight it 10 years, the way the Sheldens have, which is why this issue has never been presented before. And it looks like now the only resort is to go all the way to the Supreme Court on this issue.

Mr. HORTON. Would you explain what Mr. Shelden and Mrs. Shelden were talking about with regard to the government's request for a reconsideration? And then also let us know, is it on appeal?

Ms. GRANTLAND. It is on appeal. It's on appeal in the Federal circuit. What Judge Smith found in getting around having to find this to be a taking, is that the Sheldens—well, first, he's assumed that the lienholder can foreclose at any time if the mortgage isn't kept current. Well, that's not true in any forfeiture case, so his law was—his legal reasoning is faulty.

But he was assuming that this mortgage just went right on being alive, with the government owning the property, but the criminals still owing the mortgage to the Sheldens, and that since the Sheldens allowed the government 30 days, beyond the time they could have foreclosed, to cure, back in 1984, that they waived all their rights at that point.

Mr. HORTON. And you say that legally that is wrong? That's your contention?

Ms. GRANTLAND. I believe it's wrong. That's my opinion.

Mr. HORTON. No, I know. That's your contention.

Ms. GRANTLAND. That's correct.

Mr. HORTON. And that's what you're claiming in the appeal process; is that correct?

Ms. GRANTLAND. That's what we're claiming. It's an uphill battle, though, as you can imagine.

Mr. HORTON. Yes, sure.

Ms. GRANTLAND. My clients have no money to pay me, and it's been 5 years of—of hell for me. Ten years of hell for my clients.

Mr. HORTON. Well, thank you very much for your testimony.

Mrs. SHELDEN. We feel our rights as innocent third-party lienholders were not protected. The RICO statute states the government must make due provisions for the rights—excuse me, due provisions to protect the rights of innocent third parties. Our case clearly shows there is not adequate protection under RICO for the rights of innocent third parties.

Proper notification should have been given to us, as lienholders on the property, with specific information as to how the forfeiture affects lienholders' interest and what our rights were. We were kept uninformed during the entire process and had no say in the disposition of the property. Upon the forfeiture of the property we should have been paid off immediately and not be forced to finance the prosecution of a criminal, as we were.

All of our rights as lienholders were violated. Our mortgage was held hostage since 1983. The United States took control of it without ever assuming that loan or paying us off. The filing of the lis pendens on the property in December 1983 clouded our title and rendered the property unsellable, yet the United States argues that they did not have control over our mortgage.

By not giving the property to the U.S. marshal's service for management and by putting an incarcerated felon in charge of managing that property, knowing full well they had financially ruined him, they were completely irresponsible to our interest in that property. We were not informed of the damages on the property, and the U.S. attorney's office refused to make the minor repairs that were brought to their attention in 1985.

Rather than requesting the funds from the asset forfeiture fund for repairs, that would have been under \$10,000 at the time, they allowed this property to deteriorate. When the United States interfered with our attempt to foreclose in 1984 by threatening to restrain us and telling our attorney that they would sell the property immediately and we would be paid off, they misrepresented their intentions.

We are into our 10th year of defending our mortgage rights, with no end in sight. We have been dragged through every court and legal process imaginable: Foreclosures, U.S. district court hearings, bankruptcy court, eviction, title issues, U.S. Claims Court, and now an appeal process. We feel that when the property of innocent third parties can be destroyed as ours was during the prosecution of criminals under RICO, the law needs to be amended to protect innocent third parties like us.

If this is not done, all property owners and lienholders in the United States are at risk. We should be able to have a hearing with a jury of peers and not have to resort to a U.S. Claims Court, with a government employee making the final decision on a case where the government is the defendant. Punitive damages should

be made available to innocent third parties to act as a strong incentive to government to take the management of real estate very seriously.

The law should also be made retroactive to 1980, so that all the innocent victims can get relief without having to go through the financially draining and so far ineffectual legal process we have gone through. This nightmare we have been through has caused irreparable damage to our lives and the lives of our children. They can barely remember a time when we were not fighting the government to defend our property.

Our story is all the more frightening since it depicts the loss of fundamental rights protected under the U.S. Constitution, rights we've all taken for granted. What happened to our family could just as easily happen to many middle class families in the United States. The fifth amendment of the Constitution clearly states, "No person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

They have taken our mortgage and the security for that mortgage, our ability to control our finances and our own lives, years of time which could have been spent with our family which are now lost and cannot be regained, our health, our happiness, and our belief in the judicial system of this country, our belief in the very basic constitutional rights which have made this a great Nation. No amount of money—

Mr. HORTON. Take your time, now. We're not going to hurt you. We're trying to help you. What you're saying is that—it's been very unfair, the way this thing has been handled, and I think your attorney was talking to us about that, too. And as I indicated, we're going try to take a look at the judge's opinion, and our staffs will look at them, and maybe we can be helpful in that connection, too.

Mrs. SHELDEN. What I was trying to say—and we're almost at the end, here—no amount of money could ever make up for what we've been through.

Mr. HORTON. That's true.

Mrs. SHELDEN. And our heartfelt sympathy goes out to all the innocent victims in this country. Thank you.

[The prepared statement of Mrs. Shelden follows:]

**TESTIMONY
OF
MARY SHELDEN
MORAGA, CALIFORNIA**

**BEFORE
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
COMMITTEE ON GOVERNMENT OPERATIONS**

ASSET FORFEITURE HEARING

SEPTEMBER 30, 1992

SEPTEMBER 30, 1992
CONGRESSIONAL HEARINGS
R.I.C.O. - ASSET FORFEITURE LAW

We are an average middle-class family. We were raised in the fifties and believed in our Country, Constitution, and Bill of Rights. Carl served in the Marine Corps and the Navy. We had a strong work ethic and were willing to work seven days a week and up to 12 hours a day building our "American Dream." We were not asking for much, a safe neighborhood to raise our family in, good schools, and a chance to build some equity in our home for our children's education and some money for our retirement. We were conservative and spent our money carefully. We raised our children to have values and respect authority.

In 1976 Carl fell 20 feet and broke his back. In 1979 we were forced to sell our home. We followed all the normal procedures including using a realtor, conducting a credit check and having the buyer qualify to assume our first mortgage. We carried a Second Deed of Trust, which we needed to support our family.

In 1983 we opened our morning paper and read a story that would alter the course of our lives over the next 10 years. The owner of the property, which we carried a mortgage on, was indicted under RICO, the asset forfeiture law. Our mortgage and the security for that mortgage were destroyed while under the control of the United States government.

When a criminal is indicted under RICO, any innocent third parties should be given formal notice of how this indictment affects them and what their rights are.

We were never given an official notice of the forfeiture case, how it affected our mortgage, what our rights were, or allowed to participate in the proceeding. We were never told what provisions were made to protect the property and our interest in the property as mortgagors and we were never consulted about the disposition of the property after forfeiture.

We made several attempts to contact the U.S. Attorney's office in San Francisco for information, but they refused to give us any information. The only thing they would discuss with us was our pending foreclosure. They were only interested in obtaining information to block that foreclosure.

A lis pendens was placed on this property by the government in 1983. This placed a cloud on the title which made it unmarketable.

In 1984 in the Order of Forfeiture, the U.S. Attorney made a stipulation with the criminal's attorney which allowed the criminal to manage the property pending appeal while it required the other properties to be sold and the lien holders paid off. It did not even require them to pay our mortgage which put our mortgage in limbo. (See Order of Forfeiture)

Since the criminal was incarcerated in a prison out of the state, we made numerous attempts to find out who was managing and living in the property. No one would answer our questions. It was not until 1986 in the bankruptcy court that we learned the criminal's family was allowed to remain on the property.

After months passed without receiving any mortgage payments, we attempted to foreclose. No one, our attorney included, understood the effect of the RICO law on our foreclosure rights. During this period, we also were forced to keep the First Mortgage current and pay the insurance premium on the property when the government stopped paying them. At two different times, we were without payments on our mortgage for nine months.

In 1984 when the U.S. Government found out that we were trying to foreclose, they called us before the judge on the criminal forfeiture case and asked the judge to enjoin us from foreclosing. We went to two hearings before this judge and never did they attempt to protect our rights, but only the "Government's rights" in the property.

We had tried everything to try to regain our property. Our interest and foreclosure seemed to be our only legal recourse. The government was not protecting our interest, the RICO judge had told us he didn't have jurisdiction, and none of the lawyers we had consulted knew of anything else we could do.

This property which was the security for our Second Mortgage was never referred to the U.S. Marshall for management and disposition as government regulation required. Instead of selling the property immediately as the government did with the other properties and as the RICO statute requires, the government hung on to the property and allowed the criminal's family to live there rent free.

In 1986 the mortgage payments ceased again, and we once again attempted to institute foreclosure procedures. Once the government took over ownership of the property back in 1983, as we now understand the law, we could not foreclose against the government -- but then, no one (the courts included) really understood this aspect of the RICO law.

In 1986 the Court of Appeals reversed the criminal's conviction. The same day, the criminal declared bankruptcy. The RICO case, including the forfeiture verdicts, was sent back to the trial judge for further proceedings. We then had to hire an attorney and go into bankruptcy court to defend our interest in the property.

In the bankruptcy court we were told that the property was damaged, so we hired an appraiser and then an engineer to survey the damage. The damage was so severe that the bankruptcy court released the property, and we proceeded with our attempts to foreclose again.

As a result of the government's mismanagement, this property seriously declined. A retaining wall which had been erected for additional parking by the criminal was allowed to collapse and was never repaired, the drainage systems were not maintained, and no measures were taken to alleviate the damage caused by these conditions during the heavy rains which occurred during the years the property was in the government's control. As a result, the house, which was built on a hillside, was twisted by the stress from the failed retaining wall and cracks broke open throughout the interior and exterior. No one told us of the maintenance problems. According to the order of forfeiture the U.S. was supposed to oversee the management of this property, but, as we later discovered, it did nothing.

The government was completely irresponsible in leaving the responsibility for managing the property on an incarcerated felon and then failing to oversee the management as the Order of Forfeiture required it to do. Not only did the government destroy our mortgage (\$160,000) and the security for that mortgage, but they also destroyed the equity of approximately \$100,000 in the property which the United States would have received for the defendant's fines.

In February, 1987 we ended up getting the property back after the foreclosure sale, at least in theory. The criminal's family was still living there, and we had to evict them. When we re-entered the premises the house was a wreck. In addition to general neglect and waste of the

premises, there were (and still are) cracks throughout the house -- some going all the way through from the exterior to the interior. A crack in the brickwork on the facade is big enough to bury your hand up to the top knuckles. Further engineer's inspections showed structural damage requiring hundreds of thousands of dollars to repair.

In 1989 the cost to repair the house and property was estimated at \$190,571.00. With each delay in the court system, this property continues to sustain additional damage and the current cost is in the hundreds of thousands of dollars.

If the property were properly managed and the necessary repairs were done in 1985 when the previous owners had an engineer out, per our engineer, the cost would have been under \$10,000. But the United States chose not to accept any responsibility to maintain the property. They would not release the necessary funds from the forfeiture fund for the needed repairs and maintenance.

Worst of all, however, was the hidden defect -- we didn't really own the property. The order of forfeiture had transferred all right, title and interest in the property to the U.S. in 1984, and provided that, once the appeal was final, the property was irrevocably vested in the U.S.

Although the criminal's conviction was reversed, the trial court never vacated the verdict of forfeiture against the house. The criminal was released from prison before we got the house back and never served any more time. In a plea bargain, he got title to two of the properties which had not been sold.

The government did not bother to do the same for us, nor would it agree to reimburse us for the difference between what our mortgage was worth and what the property was worth after the government allowed it to be wasted.

Although we had physical possession of the property in February, 1987, the United States did not remove the lis pendens and consent to transfer this property to us until October, 1990. This was done only after we again had to resort to legal action to clear the title.

After attempting to work with the U.S. Attorney's office in San Francisco to get compensation for damages, we had no success. We hired Brenda Grantland, a Washington, D. C. attorney, who filed suit in January 1988 in the U.S. Claims Court - Case No. 164-88L.

Although the court agreed with us, in an opinion issued in January 1990, that the government's action was a "taking" of our mortgage interest, and that the government would have to pay us just compensation, about a week before we were supposed to go to trial on damages the government asked the court to reconsider.

On June 24, 1992 the judge reversed his opinion and ruled in favor of the United States. Because the United States was allowed an additional 30 days to bring the loan current in 1984, the judge feels we waived all our rights as mortgagees. (See opinions)

Brenda Grantland, our attorney, filed an appeal on August 12, 1992. The outcome of this case will affect every lien holder in federal forfeiture cases in the United States. Almost all property that is forfeited includes innocent lien holders.

We are forced to live in the damaged house. Our savings have been exhausted trying to defend our property in the various courts. The condition of the house is continuing to decline, with the cracks that allow the elements in continuing to widen as the cost of repairing the damage continues to accelerate.

In spite of the fact that the government had total control over our mortgage, the government at no time assumed our mortgage or paid our mortgage off. All of our rights as mortgagees were taken from us:

- a. The right to foreclose for non-payment of the mortgage payments.
- b. The right to call our Note all due and payable.
- c. The right to have the Note paid off when the mortgagor's interest transferred to the United States.
- d. The right to make the decision if the United States would be allowed to assume the loan.
- e. The right to know who was living in the property at the time.
- f. The right to information regarding how our mortgage would be affected by the forfeiture.
- g. The right to have a say in the disposition of the property.

- h. The right to expect the property to be maintained.

- i. The right to a clear title on the property.

It took us from 1987 to 1990 to get the title on the property cleared. We had to clear the following items from the property:

1. Lis pendens
2. Obtained a Quit Claim deed from the government which transferred title to the property to us.
3. Deal with approximately \$8,500.00 in property taxes which were unpaid during the U.S. control of the property (1983-1987).
4. Had to obtain a Certificate of Release of Federal Tax Liens in the amount of \$53,318, \$19,561.00, and \$3,267.55.
5. Had to obtain a Right of Redemption Release for Federal Tax liens on the property.
6. Have California State Tax Liens removed from the property.
7. Have title searches done to be sure we had a clear title.

When a property is forfeited to the United States, the transfer of title of that property becomes cloudy. If the paper trail of ownership has a break in it, title companies will refuse to issue title insurance on the property. They do not want to accept the liability. In fact they have reservations about the constitutionality of real property forfeitures. (See GAO report - "Real Property Seizure and Disposal Program Improvements Needed", dated September 25, 1987, page 19.)

If a person cannot get title insurance, banks will refuse to finance that property. Which means that the property becomes unsaleable. The only recourse a person has would be to pass the property down from one generation of the family to another.

Our Rights as Innocent Third Party lien holders were not protected. The RICO statute states the government must make due provisions to protect the rights of innocent third parties. Our case clearly shows there is not adequate protection under RICO for the rights of innocent third parties.

1. Proper notification should have been given to us as lien holders on the property with specific information as to how the forfeiture affects the lien holders interest and what our rights were. We were kept uninformed during the entire process and had no say in the disposition of the property.

2. Upon forfeiture of real estate, we should have been paid off immediately and not be forced to finance the prosecution of a criminal as we were.

3. All of our rights as lien-holders were violated, our mortgage was held hostage since 1983. The United States took control of it without ever assuming that loan or paying us off.

4. The filing of the lis pendens on the property in December, 1983 clouded our title and rendered the property unsaleable. Yet the United States argues that they did not have control over our mortgage.

5. By not giving the property to the U.S. Marshall's Service for management and putting an incarcerated felon in charge of managing the property, knowing full well, they had financially ruined him, they were completely irresponsible to our interest in that property. We were not informed of the damages on the property, and the U.S. Attorney's office refused to make the minor repairs that were brought to their attention in 1985 by the prior owners, per our engineer. Rather than requesting the funds from the asset forfeiture fund for repairs that would have been under \$10,000 at the time, they allowed the property to deteriorate to the point when the cost to repair it is now in the hundreds of thousands of dollars.

6. When the U.S. interferred with our attempt to foreclose in 1984 by threatening to restrain us and telling our attorney they would sell the property immediately and we would be paid off, they misrepresented their intentions.

We are into our 10th year of defending our mortgages rights, with no end in sight. We have been dragged through every court and legal process imaginable: foreclosures, U.S. District Court hearings, bankruptcy court, eviction, title issues, U.S. Claims Court, and an appeal process.

When the property of innocent third parties can be destroyed, as our was, during the prosecution of criminals under RICO the law needs to be amended to protect innocent third parties like us. If this is not done, all property owners and lienholders in the United States are at risk.

We should be able to have a hearing with a jury of peers and not have to resort to a U.S. Claims Court with a government employee making the final decision on a case where the government is a defendant.

Punitive damages should be made available to innocent third parties to act as a strong incentive to government to take the management of real estate very seriously.

The law should also be made retroactive to 1980 so that all innocent victims can get relief without having to go through the financially draining and, so far ineffectual, legal process we have gone through.

This nightmare we have been through has caused irreparable damage to our lives and the lives of our children. They can barely remember a time when we were not fighting the government to defend our property.

Our story is all the more frightening since it depicts the loss of fundamental rights protected under the United States Constitution. Rights we have all taken for granted. What happened to our family could have just as easily happened to many middle-class families in the United States.

The Fifth Amendment of the Constitution clearly states: "no person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

They have taken our mortgage and the security for that mortgage, our ability to control our finances and our own lives, years of time which could have been spent with our family, which are now lost and cannot be regained, our health and happiness, our belief in the judicial system of this country and our belief in the very basic Constitutional rights which have made this a great nation. No amount of money could ever make up for what we have been through and what we have lost.

Our heartfelt sympathy goes out to all the other innocent victims in this country.

Sincerely,


Carl & Mary Shelden

Mr. CONYERS. Carl Shelden.

Mr. SHELDEN. Well, this thing started back in 1983, when we read the newspaper—I'll make it very brief, so we won't be at this too long—in March 1983. And at that time we confronted a few attorneys—

Mr. HORTON. Mr. Shelden, I want to point out that we do have a vote on, and so we're going to have to leave in just a moment or two, when the second bells ring.

Mr. SHELDEN. Go right ahead.

Mr. HORTON. And then unfortunately I have a meeting that I have to attend. I'm the dean of New York delegation, and we're having a delegation meeting very shortly after that. So I may not be able to get back before your testimony.

Mr. SHELDEN. Let me ask you one quick question, then. People like us should never have been in the court system. We shouldn't even have been there to begin with, from day 1. My understanding is, the property was seized in December 1983. A few months after that we should have been paid off, and that was going to be the end of that.

I've got a daughter that's 18 years old, that's been hearing about this garbage for 10 damn years. And I've got a son that's 22, that's been hearing it since he was 11 or 12 years old. Now I joined, and I served my country in the Marine Corps and the Navy. And what the hell do I get for it? I get this kind of garbage, and I think something should be done about it, and I mean, right away.

Mr. CONYERS. We quite agree with you, Mr. Shelden, and I'm not cutting you off. We're going to go vote and come back and proceed with this matter.

Mr. SHELDEN. Thank you, Mr. Chairman.

Mr. CONYERS. You're welcome.

[Recess taken.]

Mr. CONYERS. The subcommittee will come to order. Mr. and Mrs. Shelden, Mr. Jones, Mr. Vander Zee, you've been exceedingly patient. As you know, we've had over a half dozen recorded votes today as the Congress attempts to wind down. We have no other recourse but to recess during the time those votes are being taken. So, again, we thank you.

Mr. Shelden, you were reviewing the nature of the agony that you've been put through for about 10 years, the hurt that has been visited upon your wife and family, the approximately \$200,000 that would be required to make you whole, the agonizing trip up and down the court system. I would like to ask you to just put that into the record for the benefit of the committee.

Mr. SHELDEN. The damage amount?

Mr. CONYERS. Everything.

Mr. SHELDEN. OK. I'd like to start off by saying, you know, everybody hears on TV about a kinder and gentler Nation and about family values. I'd like to know how the hell this administration feels about this family's values and other family values that have been hurt by their government and were victimized also like ourselves.

We have almost \$500,000 in damage on this property, and we have engineering reports to back it up. That's up since, I think, at

the end of 1990. So it's about \$500,000. It probably cost more to repair the property than it would be to replace it.

I've got an 18-year-old daughter that, for her mental capacity, felt that she had to move out of the house because she's been hearing about this stuff for 10 damn years, every day. So she had to see a psychiatrist or a psychoanalyst to be able to understand this.

I've got a 23-year-old son who is studying to be a chemical engineer that is scared to death. He hears it every day that his assets, whatever he earns in the future, is going to be taken by our government. So he's already off on that footing. What I'm concerned over, what's the long term effect that my family is going to suffer with this?

I wish that these people that put us in this position would have the same dosage for their family they have put us through. Unfortunately, that's not possible, but they should be made accountable for their actions, monetarily and otherwise. They put us through the court system, and I think it's only fair that they should be put through the court system, too.

We have a judge that was in the U.S. Claim Courts that is working and being paid by the government, making a decision for us as a government employee, which is wrong. We should have jurors of our peers making that decision, and this would have been over with way over 9 years ago. The judge should be there sitting on the bench to make sure the legal process is being done correctly and not to have the final damn say in the court system, which is very ineffective for almost 10 damn years now and no end in sight.

Thank you very much for your time, Mr. Chairman, and the committee.

Mr. CONYERS. Well, this is where some readjustment to this plight is going to start. In this committee room, I pledge you that.

Mr. SHELDEN. Thank you.

Mr. CONYERS. It starts with letting the American people know how they can be mistreated by their own government, by their own court system, by their own employees in the Federal system, and have it done in an arrogant way. I mean, not—you know, it would be one thing if you were telling me how sympathetic people were to your plight.

I may be wrong, but I don't hear that coming out of any of you about the government that has operated in such an inhospitable way. I don't hear you telling me how someone has tried to explain to you how they felt even though they were not in your moccasins. I haven't heard you tell me that someone came and said, "We understand that this is wrong and it ought to be corrected."

Maybe someone did that and it hasn't come into the record. But I haven't heard anybody telling me about any sort of courtesies, not to mention sympathy, coming from any of the parties, any of the parts of the government responsible for treating you like this.

Guess what? Since this hearing has been announced, we're flooded with letters and telephone calls saying, "Me, too. Wait until you hear my story. Wait until you guys hear this." Do you know what? We're going to hear everybody's story in this country.

Mr. SHELDEN. God bless you and the committee.

Mr. CONYERS. We're going to take this to every single branch of government that's responsible. We're going to change the laws

since we're supposed to be making the laws. If they are being misapplied, we're going to oversight everybody in the government, nobody excluded, courts included, President included, Secretaries included, Department of Justice included, U.S. attorneys included, DEA included, FBI included, all the gumshoes, law enforcement officers, and the whole bunch for what they have done to you.

Mr. SHELDEN. Maybe then we'll have a kinder and gentler Nation at that time.

Mr. CONYERS. Well, we probably don't need people like that in the government anyway. They can apologize as they go out the door.

Mr. SHELDEN. I agree completely, and they should be accountable for it. I really would like to see that.

Mr. CONYERS. Well, you've come to the right committee, because that's exactly what we want to do. We want an accounting. That's why this is called the oversight committee.

Mr. SHELDEN. I want to say one other thing, if I could, and I'm sorry. I know this gentleman wants to have his time, but I'll just say one other thing.

In 1983, when we heard about the article in the newspaper about the defendant being convicted under the RICO law, my wife phoned the U.S. attorney's office, the assistant, and spoke to the prosecuting attorney on the case. Instead of giving her answers to what our mortgage had to do with the legal process of the law, he's asking her when we are going to be foreclosing.

She gets off the phone. She's very upset. The next 2 or 3 months in a row she's waking up at 2 or 3 a.m. She's very upset. So I get on the phone. I spoke to the U.S. attorney, not the assistant. I ran through the story with him. He said, "Don't make waves, and don't ever bother to call me back again."

Mr. CONYERS. Would you tell me his name for the record?

Mr. SHELDEN. I would love to, and he's an ex-U.S. attorney now. His name is Joseph Russoniello. That's what he told me, "Don't ever bother to call me back again." That's the way we've been treated from them since that time.

Another incident—I'll leave that aside.

Mr. CONYERS. I think you ought to put it on the record now.

Mr. SHELDEN. I'd love to if you don't mind.

Mr. CONYERS. No.

Mr. SHELDEN. OK. In 1986, when we found out about the damages, I phoned the U.S. attorney's office and I spoke to an assistant U.S. attorney, the same one my wife spoke to. I said, "Look," I said, "I phoned up the U.S. marshal's service and they told me that they don't have the property listed for them to manage it, that they're supposed to be managing the property but they don't know why they don't have it."

I said, "Look, the property is damaged and it's damaged \$125,000," at that time. He said, "Look, you keep your damn mouth shut." He said, "If you don't, we'll find out where you are when we get ready."

Mr. CONYERS. Who was that that uttered those remarks?

Mr. SHELDEN. That was Robert Dondero, the prosecuting attorney on the case, on the defendant's case.

Mr. CONYERS. You have been under pressure.

Mr. SHELDEN. Well, they did something, too, a couple months ago and they lived up to that threat.

Mr. CONYERS. Well, you know, we've had people who have been under threats come before this committee before, and our advice is always the same, "You better tell everybody you can rather than keep a secret when you have threats like that." I would have given you that same advice if you'd ask me, and I'm glad you came forward without asking me.

Mr. SHELDEN. OK. The chief of police in the town that we live in, July 9, 1992, sent up a sergeant to our home. He came up on the behalf of the Berkeley Police Department. He said, "We want to use one of your cars on a game show." My son is standing about 15 feet away, and I said, "Steve, come here. I want you to hear this."

So he repeated the same thing to my son, he wants to use one of our cars on a game show. This deals with Baby Kerri that was kidnapped from the Berkeley Hospital. So I finally got it out of him that they want to take a picture of one of our cars that's supposed to have been in—that has a similar ID that wants to—they want to use that picture on the Most Wanted program. Out of all the damn cars that's owned by people in the San Francisco Bay area, why in the hell do they come to me?

I said, "Well, let me think about it," because I don't want them to be upset with me. I said, "I'll talk to my attorney. She's going to be in town that Monday. I will have her give you a call." I gave her the information and she gave them a call and said, "No. We're not going to do that."

Now, to me, they lived up to their threat. They were going to use the car on the Most Wanted. They were going to put a job on me, you know, eventually, and this and that. Finally, the case has been settled about 3 weeks ago. They did find the kidnapper. She's being prosecuted right now in the Berkeley area.

They were going to use my damn car on the Most Wanted program. That's what they had in mind. So, to me that's a threat and they lived up to it, the threat that was made back in late 1986.

Mr. CONYERS. I think that's clear to most people that are listening to you. The disturbing thing, Mr. and Mrs. Sheldon, is that much of this trouble has come out of that part of the Federal Government that calls itself the Department of Justice.

Mr. SHELDEN. Injustice as far as I'm concerned.

Mr. CONYERS. The Department of Justice, the one place in this government where citizens are supposed to repair to for acts of unfairness that are visited upon them, the one place in this government where the constitution and the laws of this country are supposed to be upheld and enforced, the one place where fairness is supposed to be sacred, the one place that—

Mr. SHELDEN. That you can count on, that you think you can count on.

Mr. CONYERS [continuing]. Is where this is coming from.

Mr. SHELDEN. I know.

Mr. CONYERS. Well, you're doing an important service for everybody in this country.

Mr. SHELDEN. Well, I just hope that I don't have any more problems from them in the future.

Mr. CONYERS. Well, I'll bet you you've got about 100 million people watching with you now.

Mr. SHELDEN. I don't know how long it's going to take to get our family back in order.

Mr. CONYERS. Our last witness on this panel was a bank officer in San Antonio, TX. His name is Harlan Vander Zee.

We are grateful for your patience this morning and your steadfastness across the year in connection with the matter that brings you here today. We're pleased to hear you at this time, sir.

STATEMENT OF HARLAN VANDER ZEE, FORMER BANKER, SAN ANTONIO, TX

Mr. VANDER ZEE. Thank you, Mr. Chairman, members of the committee, ladies and gentlemen. I've got lots of patience. I've waited 3 years to tell this story, so 30 minutes or 1 hour or 3 hours certainly didn't affect that. I thank you for the opportunity.

My name is Harlan Vander Zee. I'm 62 years old. I've been married to my first wife for 39 years. I have two fine sons. I'm a college graduate. I've been in the banking business for 30 years, almost 30 years. I was twice indicted and once tried. I spent 3 years of my life and all of my assets in a battle with the U.S. Department of Justice, the Federal Bureau of Investigation, and the Internal Revenue Service. I won the battle, but I've lost almost everything in the process.

I lost my job, my home, my savings, my security. I lost my health insurance program. You may say that's not a very big thing, but when you are diagnosed with lung cancer and received the full treatment and now no longer have coverage for cancer, it becomes quite a big item. I've also lost my reputation. I've lost my right to continue in my profession. Yes, I've lost more than just a little bit of faith in my government.

Mario Alberto Salinas Trevino was my customer. On March 16, 1989, Mario Salinas was arrested in San Antonio in his home before daylight. He was accused of being the kingpin of an international drug organization operating between the United States and Mexico. He was alleged to have imported hundreds of tons of cocaine and marijuana into this country.

One year later, on Easter Sunday morning, 1990, Mario Salinas and two cellmates, with the help of a pistol, walked out of a minimum security facility in San Antonio, TX. Today Mario Salinas is still at large. He remains a fugitive from justice. Today I am unemployed. I remain a hostage of Justice, the U.S. Department of Justice.

I was indicted the first time on May 10, 1990, arrested the next day. I was charged with three counts of money laundering, \$700,000, alleged to be drug proceeds. My resignation was requested and immediately submitted. More than 1 year later, Federal Judge "Hippo" Garcia agreed to hear pretrial motions. One of the motions was a motion to dismiss the indictment. On May 29, 1991, Judge Garcia did dismiss the indictment.

In his judgment he said, "The motion to dismiss is well taken, due to the unique reporting requirements imposed on bankers." The prosecutor's comment immediately following the dismissal, "Well, if the judge didn't like the wording, we'll go back and reword

it and we will indict him again," both me and Herb Pounds, the president and CEO of the bank at the time.

Five months later, the government did reindict, on October 16, 1991, the same three counts of money laundering plus the charge of conspiracy, a big charge. They charged that I had knowledge that those funds were the proceeds of an illegal activity, the sale of illegal drugs. They charged that I conspired with Salinas to launder that money.

My trial was set for February 24, 1992. It was before Judge Lucius Bunton III, the chief Federal judge of the western district of Texas. There were some 40 government witnesses paraded by in 3½ days of testimony. Most all of the evidence was directed totally against Mario Salinas.

At one point, Judge Bunton asked, "When are we going to start this trial?" There were only four witnesses that offered damaging testimony against me. Two were government employees; one right here in Washington in the Treasury Department, the other a special agent for the Federal Bureau of Investigation, the San Antonio office. Nice guys maybe, but their testimony was certainly in error, grossly in error. I have it.

Then there were two drug traffickers. Their testimony was completely manufactured, absolute and total perjury, orchestrated by the assistant U.S. attorney Mr. Jack C. Frels. Please ask me about that testimony, please.

On the fourth day of the trial, the prosecution rested. They rested the case for the government. My attorney entered a motion, a motion for judgment of acquittal. After a brief recess, the judge called back the jury. He explained that he was taking the case out of their hands. He said it was his duty as a judge. His statement, "I think they did what any prudent, responsible, lawful banker and banking corporation would have done."

As far as the knowledge that the funds represented drug proceeds, he said, "I think the proof went the other way." Their witnesses, the government's witnesses, and their testimony went my way. Judgment of acquittal is granted, and the defense, we never even had to take the stand. The judge stopped the trial—almost unheard of I'm told.

You have my personal background in the written portion of the testimony. In addition to what I mentioned awhile ago, I did spend 2 years in Japan in the U.S. Air Force. I was honorably discharged as a first lieutenant. I did spend 4 years teaching in public schools and as an athletic coach. I spent 3 years in an agricultural-related business operation. I did receive my degree from a college in North Texas in 1953.

I entered banking in 1962 and was almost continuous up until the day of my indictment. Since that time, I haven't worked a lick. I worked at working but nobody wants to hire me. "You've got a stink factor," they say. "You smell like a drug dealer, a money launderer." I know I'm not, but they don't know I'm not. Their customers don't know I'm not. In fact, one bank told me his competition would love for him to hire me. That's all he wanted, and he would spread the word around town. So no, I haven't worked, not for a bank.

The first contact we had with Mr. Salinas came through a director of our bank. He was a home builder in San Antonio. He had sold Mr. Salinas a home in 1986. In March 1987, he called me at the bank and said, "Harlan, this guy is wanting to buy the home next door, he and his brother."

I said, "James, you sit on the board, we don't want to make any house loans." He said, "Well, this is different." He said, "This guy is going to put \$100,000 down, and he wants to borrow the balance, \$115,000. They want to take that loan to their bank. Why wouldn't that be a good loan for our bank?" He said, "If it goes bad, I'll take it out."

Also, they wanted to move their jet airplane loan from a downtown San Antonio bank out to our bank, \$280,000 loan. We'd had some of those smooth-mouthed airplane loans. I told him, "No, sir. Maybe on the house, absolutely no on the airplane."

Well, I imagine in anticipation of this, Salinas had already told our director that they had business associates in Mexico who were anxious to move money out of Mexico. It was flight money then. The peso was going totally to pot, from 25 or 30 to \$1 up to 3,500 pesos to \$1.

They had these people in Mexico, business associates, that wanted to move their money out of their country into the United States, put it in U.S. banks, buy certificates of deposit and they would allow those CDs to be pledged back against Mr. Salinas' loans.

I talked it over with the bank president. We couldn't see any way the bank could lose any money, no exposure to the bank. So I called the director back and said OK. Two weeks later, the president of the bank got a call from our director. The Mexican business associates were back in San Antonio. They were ready to come out to the bank, purchase the CDs, pledge them to Mr. Salinas. But, the director also said the money is in U.S. currency, \$300,000.

Well, that got our attention. It also prompted some telephone calls. This was the first time ever that cash had been mentioned in the entire conversation. The first call we made was to the chairman of the board of the bank. He wasn't real excited, but he said, "If you all check it out with the proper authorities, go ahead."

The next call we made—in fact, we made two calls to the U.S. Treasury Department, Washington, DC. We asked them what do we do. They said, "No problem. Take the money. All you've got to do is fill out the form." But we wanted to talk to somebody closer to home, too. So we made some calls in San Antonio.

We called the Internal Revenue Service, Criminal Investigation Division, charged with this responsibility. We called the Federal Reserve Bank. We called the Federal Bureau of Investigation. We called the U.S. Secret Service. We called the Office of the Comptroller of Currency. We were seeking information, both as having to do with the possibility of counterfeit bills and proper reporting requirements.

The agencies that responded—I think some of them didn't know what to respond, but those that did respond said, "Just fill out the CTRs," that's "cash transaction reports," the prescribed government form for reporting currency transactions. They said, "You're not policemen; we are. Banks are not responsible for determining the

source of the funds. Their only responsibility is to report those funds."

So the bank director, his realtor, the two Salinas brothers, two Mexican business associates, along with \$300,000 in United States currency came to our bank door. The funds were counted, verified that they were not counterfeit. The CDs were purchased, the notes made. All other documentation was completed. I filled in the CTRs myself. I signed the CTRs myself. I had never seen a CTR in my entire life, but I followed the instructions item by item.

The president of the bank signed the form with me as approving officer. If you're looking for an approval, you don't go downstream, you go upstream. He was the only guy ahead of me, so I went up to him. The Justice Department thinks that's why we were in this together. I asked him to approve it; he was the president of the bank.

I made copies of their Mexican driver's licenses and their border crossing cards. Ironically, these border crossing cards were issued by none other than our U.S. Department of Justice. If they didn't want them in the country, why did they give them a card?

Those were people the U.S. Department of Justice, that I would get to know much better and dislike a whole lot more in the months and years to come. We mailed the forms to Detroit, as instructed. I made two more calls to their attorney in Houston, TX. Their attorney was the president of the corporation that was going to be making the note on the jet airplane. I wanted copies of the articles of incorporation and the corporate borrowing resolution. He sent them to me in overnight mail.

The following Monday morning, Pounds placed one more call, Pounds being the president of the bank. He wanted to be sure before we funded that loan that everything was done right. But you know, this time he taped the call. He taped the call. He called Mr. Peter Caputo with the U.S. Treasury Department, financial enforcement. Pounds told him the story. You've got it. You've got it there in your package, the transcript of the taped call.

The response of the Treasury official "that is marvelous, you are covered as far as the Bank Secrecy Act is concerned. Complete the forms and mail them in. That is your only responsibility." But he had one more specific request. He did ask, "Due to the urgency of this type transaction, would we please send him a copy of the CTR directly here to Washington?" We did it that day.

Our CTRs were received in his office, and they found their way to the desk of Mr. Gerald L. Hilsher, then the Deputy Assistant Secretary of Treasury, Division of Law Enforcement. He transmitted the forms to Mr. Anthony V. Langone, the Assistant Commissioner Criminal Investigation, Internal Revenue Service, Washington, DC, down the street somewhere.

Mr. Hilsher's memo read, "The attached copies of Form 4789 were received from the Stone Oak National Bank. Apparently the bank is alerting us to what they consider unusual currency transactions. I would appreciate it if you would have your staff review this information to determine whether any possible criminal investigation action is appropriate."

From Washington, DC, they were sent to the Austin Internal Revenue Service office and then on to the office in San Antonio and

assigned to a special agent to be investigated. Never ever in 2 years time did we ever have any contact with any agent, any agency, ever, not even so much as a telephone call.

Mr. SHAYS [presiding]. I'm sorry to hold you up. I'm just going to take the floor so we don't have to discontinue. My chairman is going to go and vote and then he'll come back and I'll go and vote. So, if you would continue, thank you.

Mr. VANDER ZEE. There were two more large cash deposits that were received by the bank. Both were from different Mexican business associates. Both were used to purchase certificates of deposit. Both had been previously discussed with Mario Salinas and his brother. Both were reported to the U.S. Government on CTRs by me. I filled them out. I signed them. Mr. Pounds signed them. They were mailed to the government.

Both were pledged back against loans to Mario Salinas, each for a legitimate purpose. Why not? We had reported 2 or 3 months earlier to the government. Never heard anything from them. No response. We felt the government had no concern. We felt everything must be OK. That boosted our opinion to Mr. Salinas. We thought he was for real. Apparently the government thought he was for real.

Before my second indictment, both the bank and I made appeals to Washington, DC, for a review and conference with the Department of Justice, a top level conference with top people. They were both denied, both the bank and me. Their response was, "Let them settle it in the courthouse in San Antonio, District Court."

The government didn't want to know the truth. They wanted to rely on what they heard from the local office in San Antonio, which was figments of somebody's imagination. If he had had proof, why in 3½ days didn't the man put it in front of the judge?

Yes, I was offered numerous times, I guess half a dozen, well, it was open to me any day of the week, I imagine, any hour of the day. I was offered the possibility of a misdemeanor charge as opposed to my criminal charge if I'd perjure myself.

The prosecutor told my lawyer, "I can do something for Harlan." All I've got to say is that I thought that money belonged to Salinas and not to the Mexican businessmen that represented themselves to be the owners. It was all I had to say.

I didn't think it, I didn't know it, and damn well wasn't going to tell that little guy that I did. He could put me in the biggest jail that he's got, as far back in it as he wants to put me, and I wasn't going to tell him that. But I was offered.

All right, what happened to the bank? Well, it crushed it. A little \$20 million bank out in the northern part of San Antonio, it crushed the bank. But finally, here just the other day, August 14, 1992—my trial was way back in February—they just now settled with the bank.

There was a stipulation and settlement agreement and the hold harmless agreement signed between the United States of America and the Stone Oak National Bank. Among other items in the agreement, it was demanded by the Justice Department that due to my poor judgment in the handling of the Salinas account, I can no longer ever work in that bank. That's a death sentence that I can't work in any bank.

It was also forbidden that the bank would be able to pay for my defense. They haven't. It's not paid for. I still owe it, probably \$60,000 more than I don't have. The bank was forced to state that they had no knowledge of, and gave no approval to, the alleged money laundering activities conducted by me.

Folks, think back. The director brought him in the bank. The first phone call we made was to the chairman of the board. Every loan that was made was approved and signed off by the loan committee. Every member of that board of directors reviewed, I know three times, every line of credit that had been extended to the Salinas group. And now the bank signs an agreement that they had no knowledge of, and gave no approval to, my alleged money laundering activities.

They didn't want to do that. They were forced to do that by my government because my government lost. They lost twice. They couldn't take it. They wanted blood money. They wanted a piece of flesh, and they got it, because without that agreement there would be no bank. The bank had to sign it, knowing that they were lying every step of the way.

So here we have an insolvent bank—and it was—forced to sign a hold harmless agreement for claims made by third parties, me. This indemnification was for the benefit of the United States of America, the U.S. Department of Justice, the Federal Bureau of Investigation, the U.S. Department of Treasury, the U.S. marshals service, and their employees and agents. That's about half the government, I guess.

Mr. SHAYS. You don't have the Congress in there.

Mr. VANDER ZEE. Well, maybe they'll add them. Don't give up.

It makes you wonder what was the government afraid of? If they had to have all these people held harmless for them having done the right thing, why name all these people? Why go through all that stuff? Maybe it's standard. I don't know.

No, I think they were scared then. I think they're scared now, because the government knew they did wrong. How can the U.S. Department of Justice, which has no control, no supervision over the banking industry of this Nation, how can the Department of Justice continue these sanctions against me even after I was acquitted?

What is the meaning of judgment of acquittal? Does that mean, "Well, you're a nice old boy, married a local girl, maybe you didn't do a whole lot of what they accused you of doing?" No, sir, it means that you are not guilty. And that is what the judge ruled in my case.

What gives the Justice Department the authority to make these stipulations? I suggest they have no authority. And Justice should not have that authority. If anybody, the Office of the Comptroller of the Currency, in the case of a national bank; the State banking commission in the case of a State bank.

Money laundering statutes must be made more clear. They must be more focused. They must be more focused so as to tell the banking industry just exactly what in the hell is it that you want bankers to do and what protection do they have for doing it. And that ain't been said yet, to my knowledge.

They must be focused so as to give the very maximum in assistance to law enforcement officers in the apprehension of drug traffickers. The brave men and women of our law enforcement agencies at all levels—bless their heart, they risk their lives every day whether they're going to come home to mom and the children that night—they need all the help and support that this Nation can give them. They deserve every protection possible.

But so does our banking community. They are on the front line also. They need protection also. The bankers are risking their necks and the banks are risking their charters. These laws were never intended to be used as a tool of overzealous prosecutors in their attempts to entrap and convict reporting banks and bankers. For those that don't report, that's fine. Go get them. Close them up. Arrest them. They deserve it.

Mr. SHAYS. Excuse me, Mr. Vander Zee, I am going to have to go and vote. I have 4 minutes to get back. I have never missed a vote, but my chairman will be back in 2 or 3 minutes. So if you don't mind staying there and I will be back, too.

Mr. VANDER ZEE. All right. I know right where I stopped, sir, and I can start again.

Mr. SHAYS. I just want to say to you this is unusual for us to have a hearing just before we adjourn. We think this hearing is very, very important, and we're happy that we're having it, but I really apologize for all the interruptions.

Mr. VANDER ZEE. Thank you very much.

[Recess taken.]

Mr. CONYERS [presiding]. Thank you, Mr. Vander Zee, for your patience. We will continue now.

Mr. VANDER ZEE. Thank you. I had left off where I was about to make the statement that there must be established by Congress, as part of the law, the so-called "safe harbor provision." Banks have got to know, banks have got to have a guarantee that both the bank and the bankers who do report timely and accurately, will not find themselves as targets of the prosecution.

Without this provision and without this guarantee, one of the most productive sources of information on drug people will flat go away; it will be gone. Banks will be afraid to report. They will just send the people back out of the door. And I think because of my experience I feel that many banks have maybe already been doing that.

The power of a prosecutor, or certainly the one I ran up against, is virtually unlimited. Supervisory control over those prosecutors also seems to be quite limited, even sometimes it appears to be nonexistent. Apparently there is no penalty assessed to those few who might be guilty of gross misconduct. I would suggest that this also needs looking into. A detached review by supervisory personnel might well eliminate some of the misjudgment and unjust abuse that was so evident in my own case.

The forfeiture laws allow, or at least the government policies now in practice allow, for the sharing of forfeited proceeds by local law enforcement agencies that participate in drug-related investigations. Certainly, I want to see them have all of the equipment, whatever it takes to be the best protected as they possibly can.

But I suggest that this reward might well impair or distort the detached judgment that is so necessary of the government agencies and individuals who are charged with the responsibility of administration and enforcement of these forfeiture laws. It might well turn some into the likes of a bounty hunter of the late 1800's.

The alleged conspiracy was not hatched within the walls of the Stone Oak National Bank. The real conspiracy was hatched and nurtured within the halls of justice, the U.S. Department of Justice. And I continue to remain their hostage. My life, my reputation, my job, my security, they've all been destroyed by the unconscionable acts of an unscrupulous few. This is my reward for cooperating with my government.

I am anxious to answer any questions that any member might have on this committee. And I do pledge my time and cooperation to the committee and its staff, should you desire to make any further inquiry into my case. I thank you very much, Mr. Chairman, members. I appreciate the opportunity.

Mr. CONYERS. Thank you, Mr. Vander Zee. How could you have lost your job if the judge decided that the case against you had no merit?

Mr. VANDER ZEE. I have no idea, sir. Unless it's just that the Justice Department assumes, and I repeat "assumes," that they have the responsibility to dictate that. In my way of thinking, they're overruling the Federal judge. They're saying, "Judge, you've got the right to say the guy's not guilty, but you don't have the right for us not to nail him to the wall." And that's what they've done.

I wish the judge would come back and correct that. I wish he would tell them who has the authority. He has that authority. But that settlement agreement with the bank, it was approved all the way up here by the people down the street. They wrote it. They wrote those sanctions against the bank and against me.

Mr. CONYERS. Why would the Department of Justice do this to you?

Mr. VANDER ZEE. I don't know, Mr. Chairman. I think they got whipped twice. They're not used to getting whipped twice. They were going to come out here and get a little \$15, \$18, \$20 million bank. They were going to indict me. They knew the old man needed the job. He would belly up. He would roll over. He would tell them whatever they wanted him to say.

I didn't do that. They weren't used to that, I guess. I said, "I don't care what you do. I'm not going to make the statement you're asking me to make." So I think they just finally said, "Well, we can't get the guy in the courthouse. We'll get him anyway. We'll get him economically. We'll get him emotionally. We'll get him physically. We're going to hurt him." And by golly, they have. They've hurt a lot.

But as to what their reason is, it's not—I don't know.

Mr. CONYERS. Who is Mario Salinas?

Mr. VANDER ZEE. Mario Alberto Salinas Trevino. Trevino is his mother's maiden name, that's a custom of the Spanish. He's probably now 37 or 38 years old. He probably was the kingpin of that organization. I'm sure there were bosses further up, higher in the

chain, all the way to Columbia, wherever it starts. But he was certainly the kingpin in the south Texas area.

He was a personable guy. He appeared to be a successful guy. He had several San Antonio businesses. I saw two or three of them. He was big in race horses. When he was arrested he had 80, 90 fine race horses, all auctioned off by the Federal marshals. So the story goes, Mr. Salinas bought them back. He shipped them back to Mexico where he's at. And I think that probably may be where they are.

He had businesses in Colorado. He had a little air strip there. I guess now I know why he used the air strip. But he also had a service station for aircraft there. He did a lot of work with the government, he said.

He did a lot of minority work in San Antonio because he was a minority contractor, did a lot of work for the county, the city. He got his information out of the Dodge report which is a legitimate place to find it; that's where they all go.

He was heir to a lot of stuff in Mexico from his grandfather, he told me. Thousands of acres of ranch land, timberland, saw mills above Monterey, he was going to come in to all that. He wanted to build a luxury hotel. He wanted to buy a bank in Texas. They bought the Ford-Lincoln-Mercury House in California. They owned a feed lot out there. They would fill it up with 8,000 or 10,000 head of cattle. His brother told me they ginned about 5,000 bails of cotton in California every year.

They had all the business cards. They had all the legitimate identification that I had asked them for, never reluctant to hand me their billfold and say, "Here it is." The same thing with the other people, the business associates from Mexico, no reluctance on their part. It was like; Sure, this is me. Fill out that form. It doesn't matter to me, that's great. I'm glad to give you the information. I didn't expect him to be anything other than what he told me he was.

Mr. CONYERS. Did he have a section 8(a) minority business set-aside certificate?

Mr. VANDER ZEE. Not that I know of, sir. He could have; I don't know that.

Mr. CONYERS. Is it correct or does it comport with your information that he has been suspected of being involved in the drug traffic going back to 1983?

Mr. VANDER ZEE. According to the information that I've seen from the Justice Department, they first had leads on him back as far as 1983. At that time, he went from a migrant farm worker, according to the Justice Department, to a multi-millionaire. Maybe that's true. I don't know when they started looking at him.

I've seen documents that they did call his name back as early as 1986. And he didn't come to us until March 1987. So, yes, I feel sure that they had leads on him that went quite a way back.

Mr. CONYERS. Then that raises the question of who he was laundering money with and what happened to the millions of dollars that would be there or involved?

Mr. VANDER ZEE. Sir, I've laid awake at night, a lot of nights, wondering that same answer. They said he imported hundreds of tons of cocaine and marijuana. Now, how much is in a ton of co-

caine? I guess 2,000 pounds. How much is it worth a pound? I don't know, a bunch, I guess.

I would guess that hundreds of tons would generate hundreds of millions of dollars. Where did those dollars go? Seven hundred thousand dollars came to Stone Oak Bank. Where is the other \$99 million plus? I don't know.

There was never another bank—pardon me, I'll take that back. The little bank at Roma, TX on the Mexican border, a small bank; I think they were fined \$15,000, \$16,000. They had received deposits from Salinas. They had filled out CTRs, not near as good as I did. They loaned him back money, the same deal. The U.S. marshal down there said they did a good job. They did what any bank would do in normal banking relations. Anyway, they were fined \$16,000 or \$17,000.

No one was ever arrested, indicted, fined, only Herb Pounds, the president of our bank, and me, and our little bank, as far as I know, were the only ones ever charged in this total scam. And do you know why? We told them the guys were there. We sent them the forms. We sent them their pictures. We sent them their border-crossing cards. I wonder, did those other banks report them? I don't know. If they didn't, why don't they go arrest them? If they did, why don't they go arrest them? They did us.

Mr. CONYERS. Do you know if Mr. Mario Salinas had any assistants?

Mr. VANDER ZEE. Assistants, you bet, I guess he had a bunch. They indicted 34 of them there in one wack. They captured all but 8 or 10 of them, I guess, that first morning. He had a very close secretary that handled all his business. I knew her well, Gabriella Gonzalez DeLeon. She knew his whole operation. Her husband was an unloader of barrels out in the yard, of marijuana, cocaine, or however they move it around.

She got mad at Mario in the fall of 1988, before he was arrested in March 1989. She and her husband moved to Georgia and they went into a little mom-and-pop business. They set up a cocaine business, their own. I had reported that woman on CTRs. I had signed the CTRs. Our bank had made numerous telephone calls to the Internal Revenue Service reporting her. They knew about her. They knew about her because of us, probably, maybe another lead too.

But anyway, in January 1989 an FBI agent from San Antonio, Mr. Montoya, Robert Montoya, went to Georgia. He set up a buy, a sting. And he did, he bought cocaine. He arrested her, her husband, two other guys. They were indicted, put in jail, out on bond.

The assistant U.S. attorney in San Antonio—and I've got the letter to her lawyer in San Antonio—he goes to Georgia, makes her a deal, "If you'll come back home, we'll have the case transferred from the district in Georgia back to the western district of Texas. You're charged with one count of narcotics violation. If you'll testify against all these 38"—by then 38 or 39 defendants—"we're going to drop that one charge. You'll never be tried for your drug violation. We're also going to keep you in protective custody. We're also going to pay you."

Through October 1991—I have an FBI letter in my file that shows she was paid in excess, tax-free, in excess of \$115,000 to tes-

tify against Salinas, including me, and his other people. Her last testimony was some time in August 1992, so there's another \$40,000 or \$50,000 she's collected. And I don't know, I guess she's still in protective custody somewhere. I don't know where she is, really don't care.

But do you know what her testimony was against me? She said she picked up Mr. Jorge Cano and Angel Gonzalez at the airport, the two Mexican business associates that were going to deposit the money in March 1987. She went to the airport and got them, took them to the motel that night, put them up, bought them supper. The next morning she brought them to the bank. Mr. Salinas had already been there. He had brought the money and left. All that they had to do was sign a signature card I slide out in front of them.

The judge, the jury had already heard that the bank director, his realtor, the two Salinas brothers, and the two Mexican nationals came to the bank together. That was her testimony; that's a lie. It's a lie. She didn't just think that story up. She was told that story by that prosecutor or somebody working with the prosecutor.

But, do you know, that kind of takes away from what I think about the intelligence of that prosecutor; because you know there was another guy, another guy that had been arrested. He was a drug aviator. He flew the airplane in Mexico that hauled drugs. He flew it into the United States hauling drugs and money. He testified, too.

He was arrested. They made him a deal. He said he was a double agent. He worked with the customs people and he also worked with the bad guys and they both paid him. They both paid him a lot of money.

Now he is under protective custody; they wouldn't say where. He's supposed to be teaching in some high school in south Texas, teaching, by the way, math, business math, and bookkeeping. In cross examination he couldn't even multiply \$100 a pound times a 1,000 pounds of drugs and come within \$90,000 of what it was worth to fly it. And he is a teacher of bookkeeping and business math.

Anyway his testimony was exactly following that of Gabriella Gonzalez. He said he flew those depositors up from Mexico and he brought them to the Stone Oak National Bank. He came into the bank, not with two—he brought three this time—he came into the bank, met me, met Pounds; we went back out to the car; he opened the trunk. There were two grapefruit boxes in the trunk of his car.

I took one of those grapefruit boxes and put it in my secretary's car. We carried the other grapefruit box in the bank and it was full of money, and everybody bought them a big, old CD. That was his testimony directly after the testimony of Salinas' secretary. How come a guy can't get his witnesses to get any closer than that? They both described events that didn't occur and they certainly weren't there—the director, his realtor, the two Salinas; they were there.

The one funny thing that I've got tell you about this, I said they were grapefruit boxes. He was overheard the afternoon before that testimony that morning, he was overheard to tell—the U.S. prosecutor was—he was overheard to tell his assistants to get that son-

of-a-gun in my office at 6:30 a.m. They were talking about Mr. Martinez, the aviator, the drug pilot.

I'm sure he got in there at 6:30 a.m. All during the trial, Mr. Frels had been relating to these containers that carried all of this money as being boot boxes, b-o-o-t boxes. Well at 6:30 a.m., the guy, I guess, didn't hear too well; he thought he said fruit boxes.

So when he got to his testimony, that's what he said. He said it was a fruit box, fruit box. The lawyer said, "How do you know that? What kind of fruit?" "Well, it was grapefruit." "How do you know?" "Big pictures of grapefruit." And that's what we carried into my secretary's car.

But you know, he wasn't through yet. He came back a year later, brought those same three guys, said he came to the same bank. A month after he was there the first time, supposedly, we had moved the bank 3 or 4 miles down the road. He also said that the same little bilingual secretary was in there interpreting for us. She had quit 5 months earlier. She wasn't there. He wasn't there. They weren't there. Totally fabricated, perjured testimony. But he, Salinas, had some other assistants too, Congressman.

Mr. CONYERS. And Mr. Mario Salinas, where might he be?

Mr. VANDER ZEE. According to the officials that have speculated—and that was basically the U.S. marshals and the Justice Department people—they feel like he may be on one of his ranches in the Monterey Mexico area. One report said that he was likely there and guarded by Mexican government troops. Maybe. That's hard to believe. Another report said that he was guarded by high-paid personal body guards. I don't know where he's at.

The government would love to get him back, and I would love for them to get him back. He needs to stand trial. I'm not for these guys; I'm against them, very much against them. But I'm also for the government doing it the right way. Maybe they will get him back; they're trying.

I guess now that the Supreme Court has passed the ruling that it's legal for us to go kidnap somebody, maybe they'll go get him, I don't know. Maybe they'll go get him.

[The prepared statement of Mr. Vander Zee follows:]

**STATEMENT
OF
HARLAN VANDER ZEE
ON
THE DEPARTMENT OF JUSTICE'S
ASSET FORFEITURE PROGRAM

BEFORE THE
COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 30, 1992**

Mr. Chairman, members of the Committee, Ladies and Gentlemen, my name is Harlan Vander Zee. I am one of the two bank officers who were indicted in the Stone Oak National Bank case in San Antonio, Texas. In fact, I was indicted twice and I spent almost three years of my life fighting with the Department of Justice over its allegations that I intentionally laundered money for an international drug dealer, Mario Alberto Salinas.

I stood trial on those charges, a trial in which the Government offered the testimony of some forty witnesses and hundreds of exhibits. At the conclusion of the presentation of the Government's case, Judge Lucius D. Bunton, III, Chief Judge of the Federal District Courts for the Western District of Texas, granted my motion for judgement of acquittal. In granting that motion, Judge Bunton stated that the Government had not proved any agreement between myself and Mario Alberto Salinas or anybody else to launder money. He stated that, to the contrary, the Government's evidence had established that I had acted, in my dealings with Mario Alberto Salinas, in a manner that "any prudent, responsible, lawful banker or banking corporation would have done." (Attachment No. 1, pp. 1-4).

My testimony today concerns the questions of how and why a prudent, responsible and law abiding banker could be indicted, forced from his life-time employment and required to fight a long, expensive and emotionally devastating battle against the Internal Revenue Service, the Federal Bureau of Investigation and the Department of Justice, respecting allegations which were clearly unfounded.

First let me give you a brief history of my life and a description in general of the charges and the legal proceedings that I faced. I am age 62, I have been married to the same woman for 39 years. My precious wife, Donna and I are proud of our two grown sons, Dan and Dirk.

I graduated from North Texas State College with a degree in Physical Education in 1953, I taught school and coached for one year before entering the Air Force in 1954. I was honorably discharged as a First Lieutenant in 1956 and since that time I have been employed primarily in banking. I served as President of the Hereford State Bank in Hereford, Texas for 12 years from 1967 through 1979. I left banking briefly in 1979 to enter business and reentered banking in 1984 with my employment at the Stone Oak National Bank. I served as an officer of the Stone Oak National Bank from December 1984 until shortly after May 10, 1990. It was on that date that I was first indicted for three counts of money laundering. That indictment alleged that on March 31, June 5 and October 19, 1987 I had intentionally laundered the proceeds of an unlawful activity with the intent to promote the unlawful activity and conceal the true ownership of the funds. My attorneys, in motions filed with the courts, brought to the judge's attention that the Treasury Department had published formal instructions to bankers, advising them to receive, but report cash deposits, even if they suspect or believe those deposits might be the proceeds of illegal activity. (Attachment No. 2). The indictment was dismissed by Judge Hipolito Garcia on May 29, 1991, because of the "unique reporting requirements imposed on bankers."

Not satisfied with this finding, some five months later, the Department of Justice sought and obtained from a grand jury a second indictment charging essentially the same three violations plus an additional charge of conspiracy. It was these allegations which, after a full presentation of the Government's evidence, resulted in the judgment of acquittal on February 27, 1992.

Let me briefly describe to you how I got into this situation. In mid-March of 1987 a Stone Oak National Bank director referred Mario Alberto Salinas to me as a possible new bank customer. Mr. Salinas wanted to borrow funds for the purchase of a second home in San Antonio and to refinance an airplane. I was told by the director that Mr. Salinas was a wealthy Mexican who owned substantial property in the United States and Mexico. He was said to own several farms, ranches and businesses. About two weeks subsequent to this conversation we received a second call from the same bank director indicating that Mr. Salinas and his brother and two Mexican Businessmen were in San Antonio to deposit a substantial amount of cash. I was told that the Mexican businessmen, Jorge Cano and Angel Gonzalez, wished to purchase certificates of deposit which would be pledged to secure loans to businesses owned by Mario Salinas. I was told that these funds were from legitimate business sources in Mexico. I in fact believed that the funds were "flight money" which was common during this period of depreciating value in the Mexican currency.

The first thing Herb Pounds, the President of the Bank, did upon learning of the proposed deposits was to call the Chairman of the Board of the Bank to ask whether or not the Bank could receive deposits of such a large amount of currency. The Chairman

of the Board was not particularly excited about the transactions, but he did authorize acceptance of the funds, provided that everything was handled correctly. In response to that instruction, three officers of the Bank, the president, the cashier and the security officer, made telephone calls to numerous governmental agencies to inquire about the proper handling of the deposits. Instructions received from each agency, including the Internal Revenue Service and the Office of Financial Enforcement in Treasury was that we, as bankers, had no duty to investigate the source of the funds. We were specifically told that our only duty was to properly report the deposits.

I personally obtained the identification of Jorge Cano and Angel Gonzalez, the persons said to be the owners of the deposited funds. I filled out the Currency Transaction Reports, the reports on cash transactions required to be filed with the IRS, signed them with my name and promptly mailed them as instructed. On April 4th, Herb Pounds, President of the Bank, made an additional call to the Treasury Department's Office of Financial Enforcement. He did this before disbursing the loan proceeds and to be absolutely certain we had received the correct authorization for the deposits. That conversation occurred between Mr. Pounds and a Treasury official, Mr. Pete Caputo. Fortunately, Mr. Pounds recorded that conversation. (Attachment #3). In that conversation, Mr. Caputo reiterated the instructions we had previously received. In addition, he requested that additional copies of the Currency Transaction Reports be mailed directly to his office in Washington. We did this, and we subsequently learned that, because of our expressed concerns about the deposits, those reports were transmitted by the Assistant Secretary of the Treasury, Mr. Gerald Hilsher, to the IRS for further investigation. (Attachment No. 4, Exhibit B). However, no investigation was

conducted by the Internal Revenue Service. They just dropped the ball. We received no contact and as far as we knew, as bankers, we had handled the deposits properly. This also confirmed our belief that Mr. Salinas was, in fact, a legitimate Mexican Businessman.

This is why we continued to receive other deposits from Mario Salinas and his business associates. During a period of some two years we made additional reports to IRS and still had no contact or follow-up by the IRS or any other agency. We accurately and timely reported every transaction for which a report was required. I believe our reporting was the basis for Judge Bunton's comment that we had done all that was required of any prudent banker. You should note that Judge Bunton's comments are also in accord with published Treasury rulings and with the testimony of Mr. Pete Caputo, the Treasury official who received the telephone call from Herbert Pounds. Mr. Caputo testified at trial that under Treasury Ruling 89-5, I had completed the forms correctly reflecting the identified owners of the funds as Jorge Cano and Angel Gonzalez. He testified that as a banker I had no duty to investigate claims whether Mr. Cano and Mr. Gonzalez actually owned the funds and that I could properly rely upon their statements that they were the owners. Mr. Gerald Hilscher, who at the time of the deposits, was Assistant Secretary of the Treasury, has written a letter to Treasury respecting my case. (Attachment No. 5). In that letter, Mr. Hilscher states that it is unfair to charge bankers with money laundering where those same bankers have done simply as they were instructed by the Government.

In short, Mr. Chairman and members of this Committee, it is unfair for Treasury to tell bankers that they have no duty to investigate, that their only duty is to report the

deposits as presented to them and then permit the Department of Justice to prosecute those bankers for money laundering. If there was something wrong with the reports, or some violation respecting the way I filled out the forms, then certainly prosecution for incomplete or inaccurate reporting would be appropriate. There was no such prosecution because the forms I filled out were in fact completed correctly.

I also want to comment briefly upon the handling of this case by the Department of Justice. You should note that the Department of Justice has continued to impose improper and unwarranted sanctions on me even after my acquittal. In order to resolve its dispute with the Department of Justice and to save its bank charter, the Stone Oak National Bank was forced by the Department of Justice to stipulate that it would not rehire me and that it would not pay me legal expenses to defend against the charges, despite the fact that they have been held to be unwarranted. It is interesting to note that the Department of Justice officials also required this small and essentially insolvent bank to agree to indemnify the Government with respect to any claims that I might have with respect to these inappropriate conditions of settlement. It is also significant to note that the Office of the Comptroller of Currency has refused to agree to enforce that coerced agreement. At a bare minimum, the handling of my case by the Department of Justice has been fraught with problems of misjudgment and lack of detached review. I believe that these problems are caused by two fundamental defects in the criminal justice system as it presently exists. First, the money laundering statute is overly broad. It grants discretion to prosecutors to bring charges against bankers and other persons who must report cash transactions, even though the transactions are accurately and timely reported. Furthermore, in my view, the sharing of forfeited funds by local investigative agencies

impairs the detached judgment necessary to administer such broad and potentially abusive grants of power. Members, I would respectfully request that you consider narrowing the scope of the money laundering statute to provide a "safe harbor" so that persons who are charged with reporting financial transactions are protected from prosecution under that statute. If there is some defect in the reporting, then of course, the persons should be fully subject to prosecution under the appropriate statutes that deal with the timeliness or accuracy of the reports. I would further suggest that the local sharing of forfeited funds impairs the judgment of the very governmental officials and investigators who must carefully administer these laws. Unfortunately, the sharing of seized funds by local enforcement agencies has turned the important responsibility of proper criminal enforcement into a game of hunt and chase, for bounty. The consequences of an inappropriate exercise of these governmental powers are just too great, and do impair and diminish the detached judgment that must be exercised by the local governmental officials.

I would be glad to answer any questions of the Committee and I would be most willing, at any time, to cooperate with this Committee and its staff should you wish to make further inquiry into my case.

Mr. CONYERS. The Chair is pleased to recognize the gentleman from Connecticut, Mr. Chris Shays.

Mr. SHAYS. Thank you, Mr. Chairman. I appreciate the patience of our witnesses who have spent a long time here today.

Let me say from the outset that I do believe in the fundamental sense of this forfeiture law. I also want to say to you as a basic premise that I do believe that in the instances we've described with you, Mr. Jones, and you, Mr. Vander Zee, that the government feels you're guilty. I start with that premise; it could be wrong. I also start with the premise that you're innocent.

But I don't disagree with the fact that the government feels that you've done something wrong. And you can understand, from my standpoint, we haven't heard the government make their arguments to us; we haven't heard the person who arrested you, Mr. Jones; we haven't heard the people that have caused your problem as well. I'm going to just ask some general questions.

Now, let me say this to you: I also start with the premise that I fear communism less than I fear our downfall with drugs. I think it's destroying the Nation, and I feel that your government has to take extraordinary means to deal with it. I don't want to hear stories like this. I don't find these stories acceptable.

But the bottom line is, we act like somehow there is this vacuum here. Our country is being destroyed by drugs. And just as in certain cases of war, we suspended certain protections to the American citizens, in some cases that may happen. And we have to decide in our government how far that should happen.

Let me ask you this, Mr. Vander Zee, did you believe that Mr. Salinas could have, in fact, been a drug lord or drug dealer?

Mr. VANDER ZEE. No, sir, I did not.

Mr. SHAYS. Not at all?

Mr. VANDER ZEE. No, sir.

Mr. SHAYS. Why were you so interested in checking to make sure you covered yourself?

Mr. VANDER ZEE. We didn't know what to do. We had never, ever filled out a cash transaction report, to my knowledge in our bank. I had never filled out one. We needed to know. We knew it was a suspicious currency transaction, it being suspicious in that you don't get \$300,000 very often.

Mr. SHAYS. So you were suspicious, you just didn't know he was a drug lord. You were suspicious that they—

Mr. VANDER ZEE. Absolutely, I didn't know he was a drug lord.

Mr. SHAYS. But you knew that there was some reason to feel suspicious?

Mr. VANDER ZEE. \$300,000 kind of gets your attention, Congressman.

Mr. SHAYS. Well, it would get my attention. I have a hard time with Mr. Jones' story because I do believe that if a white man carried \$9,000 on him, it's less likely that someone would have thought something about it. I'm having a hard time wrestling with that.

But I have no difficulty at all thinking that if someone brought me \$300,000—just explain something to me, \$700,000 or \$300,000?

Mr. VANDER ZEE. There was three charges against me. There was \$300,000, March 31; \$300,000, June 5; and \$100,000 in October 1987; total is \$700,000.

Mr. SHAYS. Where did you think this money came from?

Mr. VANDER ZEE. Exactly what they told me, from their business associates that were wanting to move money out of Mexico because of the devaluation, because of the extreme—

Mr. SHAYS. So that's illegal in Mexico but not illegal in the United States for someone to do that?

Mr. VANDER ZEE. Oh, no, Mexico doesn't like for their capital to go out of the country.

Mr. SHAYS. It's illegal to do that in Mexico; it's not illegal for them to do it, as far as our laws are?

Mr. VANDER ZEE. No, sir, not at all.

Mr. SHAYS. So your general sense was that they were doing something illegal in their own country but it was certainly not illegal in this country?

Mr. VANDER ZEE. There is estimates that between \$40 and \$60 billion have come in the United States—

Mr. SHAYS. I just want you to answer the question.

The question is a very simple one: If it's illegal for them to do it in Mexico but your statement is it is not illegal for them to bring Mexican money to the United States?

Mr. VANDER ZEE. Absolutely not.

Mr. SHAYS. So you knew that you were dealing with some kind of shady transactions in terms of their ethics about their own country?

Mr. VANDER ZEE. No, sir.

Mr. SHAYS. No, it's—

Mr. VANDER ZEE. I don't know whether the Mexican law, Mexico discouraged the flight of capital from their country—whether there was a Mexican law that made that illegal, I have no idea. There was no law that made it illegal for American banks to take American currency.

Mr. SHAYS. Right.

Mr. VANDER ZEE. That's what they're chartered for.

Mr. SHAYS. I understand that. I understand that. I'm just trying to understand the people you're dealing with. The people you're dealing with were breaking Mexican law?

Mr. VANDER ZEE. I don't know that. I told you I did not know that.

Mr. SHAYS. That's what I want to know. You don't know what the Mexican law was, so as far as you're concerned, they were doing nothing wrong even in their own country?

Mr. VANDER ZEE. As far as I know.

Mr. SHAYS. Now, when they brought you this money, how did they bring it to you?

Mr. VANDER ZEE. It was in not necessarily a boot box or fruit box. It was in a cardboard box, yes, sir.

Mr. SHAYS. I just have to tell you when I see people bringing—

Mr. VANDER ZEE. It was a box about so large, so deep, mostly hundred dollar bills.

Mr. SHAYS. Why would you be so willing to accept the fact that they were, as they said, just bringing it out of Mexico. Why

wouldn't you have thought that maybe they were involved in drugs?

Mr. VANDER ZEE. Why would I have thought—

Mr. SHAYS. Yeah. I think everyone in this room, if they were brought something in a box with \$300,000 three times, they might wonder if maybe this money was a little tainted and maybe was involved in drugs.

Mr. VANDER ZEE. They might have.

Mr. SHAYS. Yeah, why didn't you?

Mr. VANDER ZEE. Maybe we did. Why did we call the government and say, "What do we do? Here's the report."

Mr. SHAYS. Don't change your story because you told me you weren't suspicious at all that they were involved in drugs. That's your testimony under oath.

Mr. VANDER ZEE. That's right.

Mr. SHAYS. OK, so you're talking two sides here.

Mr. VANDER ZEE. No, I'm not talking two sides here. I didn't think it was drug money. I thought it was flight money.

Mr. SHAYS. Let me start over again. Why didn't you even wonder maybe this was drug money? If we're going to lick this war on drugs and someone brings in \$300,000 in a box and says, "Here, this is honest, good money," why wouldn't you just maybe wonder if it wasn't?

How are we going to win this war on drugs if you accept \$700,000 coming in a cardboard box?

Mr. VANDER ZEE. How are we going to win it?

Mr. SHAYS. Yeah.

Mr. VANDER ZEE. You're not going to win it by a bank sending them back out of the door and say, "I'm not going to accept it." The law says take it and report it.

Mr. SHAYS. Well, we're sure not going to win it—

Mr. VANDER ZEE. You're going to have to accept it. You're going to have to report them because the government says you're going to report them. They demand that you report them. We do report them. They come out to your bank. They try to get the money and put your people in handcuffs and take you to jail. That's not the way to stop it.

Mr. SHAYS. But how are we going to win this war against drugs?

Mr. VANDER ZEE. I don't know.

Mr. SHAYS. Well, I haven't finished my question.

Mr. VANDER ZEE. I don't know how we're going to.

Mr. SHAYS. I haven't finished asking my question.

Mr. VANDER ZEE. Pardon me, sir.

Mr. SHAYS. And I've listened to you very patiently.

Mr. VANDER ZEE. I'm sorry. I've spent a long time with this.

Mr. SHAYS. I know you have, sir.

Mr. VANDER ZEE. It hurts a lot, and I hate to be questioned as to my honesty and as to my intentions.

Mr. SHAYS. But you know what? Well, you know, the only way you're going to make your case is if you just answer honestly to questions and give me the chance to ask my questions.

Mr. VANDER ZEE. I'm sorry.

Mr. SHAYS. My question to you is that your testimony to us is that in spite of the fact that you had someone bring \$300,000 twice

in a box and \$100,000, all in cash—were they packaged neatly or were they all loose?

Mr. VANDER ZEE. No, they were bound.

Mr. SHAYS. They were bound?

Mr. VANDER ZEE. Yes, they were bound in paper strips.

Mr. SHAYS. Brand new? Old money?

Mr. VANDER ZEE. Oh, no, virtually all old.

Mr. SHAYS. I guess the question I'm asking is, if you didn't even wonder if it was drug money, how are we going to wake up this country to maybe putting an end to the kind of thing that happened in your experience?

Mr. VANDER ZEE. Well, put yourself in my place. Should I have said, "Salinas, are you sure this is not drug money? Are you guys bringing drug money into this bank?"

The law says you will determine whose money it is by asking one simple question—"Whose money is this?"—and they answer it. That is what the law says. You take the word of the depositor as to whose money it is. That's what they told us. That's what they told me. That's the identification that I got. Those are the names that I filled in on the reporting forms.

If the government thought it was suspicious, Congressman, why in 2 years didn't they even give us a telephone call and say, "Listen, you guys are doing business with a bunch of drug dealers. We've known about them since 1983. Why don't you stop it?" The government is to investigate the bank's report.

Mr. SHAYS. I think that's a very fair question. I haven't talked to the chairman about this, but I have a feeling this will not be the first hearing and the last hearing that we have on this issue because those are very valid questions. There's no doubt in my mind that we have some fixing to do with this law.

But, still, there's no doubt in my mind that when someone brings hundreds of thousands of dollars in a cardboard box that real warning signals should kind of go in one's mind, yours and the government's.

Mr. JONES, when I watched the 60 Minutes segment I was outraged. But I realize I don't have all the facts and this may seem really kind of a strange thing to ask you, but we're going to have someone who is going to come in and testify that says there are things that were not on the 60 Minutes program that would lead them to believe that they had probable cause to suspect you. Now, probable cause isn't conviction, and I understand that.

But the first thing I would ask you is when you were carrying this money, how were you carrying this money?

Mr. JONES. I was carrying the money in a pouch in my waistband.

Mr. SHAYS. Was it behind you in your back, behind a coat or something? I don't know what \$9,000 looks like in cash. I know what a \$9,000 check looks like, but was it about this amount of money, maybe 1 inch or 2 thick?

Mr. JONES. It was basically a pouch about so wide, about so long.

Mr. SHAYS. About 4 or 5 inches wide. And you were carrying this. Now, would you agree that that's a large amount of cash to be carrying on your person? I mean just on the face of it, would you agree that that's kind of a large amount?

Mr. JONES. I guess that depends on which side of town you came from.

Mr. SHAYS. No, I have seen wealthy people carrying money, but I haven't seen them carry it like this in small denominations, \$10's and \$20's. I've seen wealthy people carry them in \$100's and greater amounts, but would you agree that that's a significant amount of money to be carrying on your person?

Mr. JONES. It was a lot of money to me.

Mr. SHAYS. Did you in any way display any nervousness or evasiveness during the whole time that they asked you about this?

Mr. JONES. They said I did.

Mr. SHAYS. OK. I'm just going to go down this list, if you don't mind.

Mr. JONES. I don't mind.

Mr. SHAYS. The tickets were purchased by cash?

Mr. JONES. By cash.

Mr. SHAYS. Now, in terms of your travel arrangements, it's very unclear to me. We may have someone who testifies that says you really intended to be at the airport just for a very short period of time.

You were going from Nashville to Houston?

Mr. JONES. That's correct.

Mr. SHAYS. I have a hard time understanding why anyone goes to Houston to buy shrubs. What were you going to buy?

Mr. JONES. I was going to look at buying shrubs.

Mr. SHAYS. Why Houston?

Mr. JONES. Because we had had a seminar just a few weeks prior of this time, and at that seminar we had been told that you could buy shrubbery in the Houston area much cheaper than what we had been buying it from.

Mr. SHAYS. OK. Who were you going to go see?

Mr. JONES. I had a list of nurseries that I was going to visit while we were there in the Houston area, plus the fact I had a lady friend that lived in Houston also.

Mr. SHAYS. You had a what? I'm sorry.

Mr. JONES. A lady friend that lived in the Houston area also that I was going to see.

Mr. SHAYS. OK. So you were planning to stay there for a few days?

Mr. JONES. Not so much a few days, but at least overnight.

Mr. SHAYS. Just let me get back to this one point in time. You went to Houston. Of all the places in the country you could go to, Houston you had been told it's the best place to buy shrubs?

Mr. JONES. I had been told that we could buy shrubs much cheaper in the Houston area than we could—

Mr. SHAYS. And you have your own business that you own?

Mr. JONES. That's correct.

Mr. SHAYS. And so when you bought shrubs you would have ordered them, and they would have been trucked up to Nashville?

Mr. JONES. They would have been eventually trucked up. They had to be processed. A lot of time when you buy shrubbery they're still in the ground.

Mr. SHAYS. Why would you have carried cash to have these transactions? Why wouldn't you have just, you know, written out a check?

Mr. JONES. That's a good question. I'm glad you asked me that.

Mr. SHAYS. Well, I'm going to ask you a few more.

Mr. JONES. Let me answer that one for you, if you will. A lot of times in the nursery business it's kind of like a stockyard business, I imagine. You can go and buy shrubbery, for a good example. We call blocks where a guy has got a block that he's asking \$12.50 per shrub.

Well, you can make an offer on the spot, say, for \$10 a round, and what we consider a round is per shrub, and a lot of times they will take the offer by paying cash. You're out of town. Nobody knows me in the Houston area so giving them a check would have been—

Mr. SHAYS. These were pretty much in small denominations, \$10's and \$20's, the money you were carrying?

Mr. JONES. No, it was mostly \$20's, \$50's, and \$100's, plus the fact I did have a check with me. I had my checkbook with me.

Mr. SHAYS. Where did you get this money?

Mr. JONES. We had did some work for the State of Tennessee, the Department of Transportation, where we had made the majority of the money.

Mr. SHAYS. And that's how they paid you in dollars?

Mr. JONES. No.

Mr. SHAYS. So I don't understand how you went from you were paid in check, and you just transferred it all to \$20's and \$50's?

Mr. JONES. No, we was paid in check and we got the check cashed and I had a friend of mine that we do business together. A portion of the money was his, also.

Mr. SHAYS. I'm just trying to understand how you went from check to a whole ream of cash.

Mr. JONES. Well, I originally had some of the money, and I was able to cash the check that I had gotten and with the friend giving me the balance of the money, that's how we managed to come up with that amount of money.

Mr. SHAYS. Do you deposit your sales and receipts into an account at a bank?

Mr. JONES. Sometimes we do.

Mr. SHAYS. And, really, I don't mean to press this, but I just am unclear as to how much you were paid to have gotten \$9,000 that you would have decided to put into dollar bills and \$20's and \$50's and so on? Just explain to me again how you did that.

Mr. JONES. Repeat that question, if you would.

Mr. SHAYS. The bottom line is, you're going down to Houston with cash. I'm assuming it was bundled?

Mr. JONES. That's correct.

Mr. SHAYS. How did you bundle it—in \$50's, \$100's, \$1,000's? How did you bundle it?

Mr. JONES. It was bundled in \$1,000 bundles.

Mr. SHAYS. So you had nine bundles?

Mr. JONES. That's correct.

Mr. SHAYS. OK. I want to know where you got those nine bundles of cash.

Mr. JONES. Where did I get them? Just like I stated to you, I had just—

Mr. SHAYS. I know you stated it. I just don't understand it, so I'm just asking for your patience to explain to me. I know you were paid by a check for the government. The government paid you how much?

Mr. JONES. We had \$3,500. We got an additional \$2,700. The balance of the money was mine.

Mr. SHAYS. OK. Now, was that money that was paid in check or cash? Was the \$2,700 given to you in cash? Was it the \$3,500 given to you in cash? Was the \$5,000 given to you in cash?

Mr. JONES. \$3,500 was given to me in a check.

Mr. SHAYS. OK. Then what did you do with that check?

Mr. JONES. I cashed the check for cash.

Mr. SHAYS. And you went to a bank? What bank did you go to?

Mr. JONES. I went to the bank at that particular time it was a Sovran Bank that was located on Clarkesville Highway.

Mr. SHAYS. And you took that check and you asked them to convert it into cash for you?

Mr. JONES. That is correct.

Mr. SHAYS. And the \$2,700?

Mr. JONES. The \$2,700 was one that I got from a business associate of mine and was also in cash.

Mr. SHAYS. So he gave that in cash. And the \$5,000?

Mr. JONES. Was money that I had, my own.

Mr. SHAYS. And you don't keep it in a bank account?

Mr. JONES. I did not have it in a bank account.

Mr. SHAYS. You just kept it at home, \$5,000 just leave it at home?

Mr. JONES. I had \$5,000 at that time, right.

Mr. SHAYS. Do you think that's unusual for someone to keep a lot of cash at home and not keep it in an account to earn interest? I mean you're a smart man. I would think you'd want to earn interest on it.

Mr. JONES. I guess I just kind of inherited it from my father. My father has always carried cash money, and he's in the nursery business also, and he has carried cash and did business. That's kind of where I learned it from.

Mr. SHAYS. In the testimony we're going to hear, we're going to hear that the dog sniffed this cash as if they were detecting drugs of some kind, but your testimony is that this money came from the banks and you had \$5,000 of your own, all earned legitimately?

Mr. JONES. That is correct.

Mr. SHAYS. I'll end there. Thank you very much. And I would say to—if I may just ask one more question?

Mr. CONYERS. Yes.

Mr. SHAYS. Thank you. Mr. and Mrs. Shelden, I'm trying to understand. I don't think there's anyone up here who has heard your testimony and doesn't feel that you really have been screwed.

I'm trying to understand what happens, though, when you end up with a mortgage to someone else. Let's just say the person declares bankruptcy or something else happens to him. In other words, you took a risk giving what was a second mortgage to this individual.

Let me back up a second. I'm sorry. I know you gave lengthy testimony. Did you transfer the house over to this individual, the owner?

Mr. SHELDEN. Let me answer him, Mary. We sold the house in 1979 and we carried a second mortgage at \$160,000.

Mr. SHAYS. OK. I just—

Mr. SHELDEN. Let me finish.

Mr. SHAYS. Oh, no, no. I just want to make sure you are answering my question because I don't want you to feel you have to go on and on. The bottom line—

Mr. SHELDEN. Well, I would like to finish the answer.

Mr. SHAYS. Well, let me ask the question. The question is: Did you own the house or did someone else own the house?

Mr. SHELDEN. When we sold it?

Mr. SHAYS. Yes.

Mr. SHELDEN. I don't understand that question.

Mr. SHAYS. When you sold the house you gave up total ownership of the house?

Mr. SHELDEN. When we sold the house through a realtor, the buyer qualified for the—

Mr. SHAYS. Why is it important that it was through a realtor? You're giving me things I don't care to know. I just have a few questions I want to ask you.

Mr. SHELDEN. Because I've been talking about this for 10 damn years like this. You're asking a question. I will deliver it the way I understand it, not the way you want to hear it.

Mr. SHAYS. No, no. Let me just say this to you—no, don't applaud. Sir, you've gone through a lot, but I want to understand the issue. You may find it helpful that you understand the issue, but I have to ask the questions so I can understand it and if you choose not to ask any questions, I won't ask you any questions.

Mr. SHELDEN. I'll be glad to answer any questions you want to ask.

Mr. SHAYS. OK. The question I'm asking you is: You sold the house and did you give up ownership of the house? Did someone buy the house?

Mr. SHELDEN. That's right. Someone bought the house.

Mr. SHAYS. And they paid for it?

Mr. SHELDEN. No, they didn't pay for it.

Mr. SHAYS. How did they buy the house?

Mr. SHELDEN. We carried a first—second mortgage on it. There was a first mortgage.

Mr. SHAYS. OK. You gave them a second mortgage on the house?

Mr. SHELDEN. That's correct.

Mr. SHAYS. Thank you. Now, whenever you give out a mortgage, particularly a second mortgage, you obviously are taking risk with whomever buys the house. Did you check to see how this person could make payment, what they did? What did you know about this person?

Mr. SHELDEN. Well, we had a realtor. We checked his credit, checked what he did for a living. He owned businesses, a clothing store, and he owned quite a bit of real estate.

Mr. SHAYS. So you had every reason to feel that he would be able to pay this mortgage?

Mr. SHELDEN. Let's back up for a few minutes.

Mr. SHAYS. No, no. I just asked the question.

Mr. SHELDEN. No, I'm going to ask—

Mr. SHAYS. Sir, no, you aren't going to. You are simply not going to. I asked the question—

Mr. SHELDEN. You don't want—

Mr. SHAYS. No, sir, you aren't. You are not in charge of this hearing. You are a guest of this committee, and I asked you a question.

You had every reason to think this individual would be able to pay the mortgage; is that correct?

Mr. SHELDEN. Well, if you carried a mortgage, I guess you would feel that way, wouldn't you?

Mr. SHAYS. Sir, I'm not asking what I feel. I want to know what you feel.

Mr. SHELDEN. That's right.

Mr. SHAYS. OK. I want to know how well you studied whether this person could pay. I want to know if you knew what this person did. I want to know if you had any recognition whatsoever that you were taking a risk, and I have a right to ask those questions, and I would appreciate you answering them.

Mr. SHELDEN. Whether I thought I was taking a risk in California real estate? No.

Mr. SHAYS. OK. The bottom line—

Mr. SHELDEN. I thought about—

Mr. SHAYS. Sir—

Mr. SHELDEN. You're asking me questions. I'm going to answer it, again, the way I feel is—

Mr. SHAYS. I haven't asked the question yet.

Mr. SHELDEN. If I didn't want to carry the mortgage—

Mr. SHAYS. I have not asked the question.

Mr. SHELDEN [continuing]. I would have—

Mr. SHAYS. Sir, I have not asked the question.

Mr. SHELDEN. I would have sold the property.

Mr. SHAYS. Just wait till I ask the question, sir. The question I am asking you is: Did you study to know how this individual would be able to pay this mortgage?

Mr. SHELDEN. I just got through answering that question. I told you he had businesses and he had real estate. I'm sorry, I'll give a better answer than that. We got a W-2 tax form showing that he was making about \$138,000 a year.

Mr. SHAYS. Now let me ask you this: Why did you give him a second mortgage?

Mr. SHELDEN. Because I fell 20 feet and broke my back. I needed the income.

Mr. SHAYS. OK. In other words, if he had the money, why didn't he just—you received some payment for the house?

Mr. SHELDEN. That payment went through escrow. I think it was about 20 percent down.

Mr. SHAYS. I'm not going to take much more of your time. Let me just ask you this just so I can put it into some perspective. How much did the house sell for?

Mr. SHELDEN. \$289,000.

Mr. SHAYS. \$289,000. Of that, how much cash did you receive?

Mr. SHELDEN. \$75,000. Well, wait a minute. \$50,000 down and it was not cash—it was a check through escrow—and then another \$25,000 a few months later because he didn't have the total down.

Mr. SHAYS. And—I'm sorry. Are you finished?

Mr. SHELDEN. Yes.

Mr. SHAYS. And then what was the second mortgage that you gave this individual so he could buy the house?

Mr. SHELDEN. What does that mean?

Mr. SHAYS. In other words, you gave him a second mortgage. How much was the second mortgage for?

Mr. SHELDEN. \$160,000

Mr. SHAYS. OK. So, basically, you received \$75,000 in cash?

Mr. SHELDEN. Via check over 3 months through escrow. We gave him a second, he put down \$50,000, and then we gave him a third mortgage because he didn't have the other \$25,000, and then he came up with that a few months later.

Mr. SHAYS. OK. Do you have anything else you want to tell me that you want to add?

Mr. SHELDEN. Yes, I would.

Mr. SHAYS. Sure.

Mr. SHELDEN. Before we sold the house I tried selling the house myself for about 3 or 4 months. I didn't have any luck doing it, so I hired a realtor and she sold it for us.

Mr. SHAYS. If this individual had gone bankrupt, what would have resulted?

Mr. SHELDEN. I don't understand the question.

Mr. SHAYS. Well, in this case, the government screwed things up, but you were taking a risk as you basically invested in this individual. You invested in that he would pay you a certain amount.

My question to you is: If this person had gone bankrupt or some other personal problem had happened to him, how would you have dealt with that problem?

Mr. SHELDEN. I didn't take the risk with the individual. I took the risk with the California real estate market, and there is no risk in California real estate market, or there wasn't.

Mr. SHAYS. No, no, wait a second.

Mr. SHELDEN. You're asking a question that doesn't make any sense.

Mr. SHAYS. To you.

Mr. SHELDEN. That's right.

Mr. SHAYS. To you, but that's fine. I'm sorry it doesn't make any sense to you but it makes sense to me, and the reason it makes sense to me is there are other people who try to sell houses and don't give second mortgages because they don't want to take the risk—they're not sure the person can pay back—and they sure as hell don't give a third mortgage.

Mr. SHELDEN. I took the risk because I broke my back and needed the income.

Mr. SHAYS. I guess the point I'm making is that you really invested in this individual, who turned out to be a real bum, bottom line.

Mr. SHELDEN. No, I don't agree on that. I don't see it that way.

Mr. SHAYS. You don't think he was a bum.

Mr. SHELDEN. Well, obviously he is now, but at that time I didn't feel that, no. If I felt that then I would have cashed out and let the bank pay me off, and then they could have took the risk, if you feel that was a risk.

Mr. SHAYS. I think any time—and I'm concluding here. I think what the government did and what you went through with the government is wrong. What I also feel—and just as you are being honest, just as Mr. Vander Zee is being honest, just as Mr. Jones is being honest, I'm going to be honest too. And I think you took an extraordinary risk. If—

Mr. SHELDEN. I don't see it that way.

Mr. SHAYS. I haven't finished. I think you took an extraordinary risk giving a second mortgage and then a third mortgage, having so little down that you got yourself.

Mr. SHELDEN. Is \$50,000 little?

Mr. SHAYS. Yes, \$50,000 down on a \$300,000 house.

Mr. SHELDEN. That's your opinion, not mine.

Mr. SHAYS. It is my opinion and it's very strongly held, too.

Thank you, Mr. Chairman.

Mr. SHELDEN. A total of \$75,000 down is not a little money.

Mr. SHAYS. Sir, giving a mortgage of \$160,000 as a second mortgage is a lot of money to do.

Mr. SHELDEN. With \$75,000 down as a down payment?

Mr. SHAYS. Why couldn't he have gone to the bank and done that?

Mr. SHELDEN. Because I advertised in the brochure—and I have it if you would like to see it, not with me but I can get it—where I was going to take 27 percent down—this is for everybody to know, the general public—and I was going to charge 10½ percent commission—I mean not commission, interest on the money.

And this was done from day 1 and I didn't set it up with him when he came to buy the house. That was in the brochure and the realtor spent about \$1,000 or \$1,500 in advertising to get a buyer for the house.

Mr. SHAYS. Can I ask you another question since you went on?

Mr. SHELDEN. Sure, be glad to.

Mr. SHAYS. Do you feel that you received a fair price for the house?

Mr. SHELDEN. At the time I sold it?

Mr. SHAYS. Yes.

Mr. SHELDEN. That's obvious. I sold it.

Mr. SHAYS. Or do you think you received more than the fair market value?

Mr. SHELDEN. My loan was secured by the house. It was not—there was a secured second mortgage. Is that what your question is?

Mr. SHAYS. No, I know you had. What you had basically was the house that you could always get back through the legal process.

Mr. SHELDEN. I would have loved to have gotten the house back with the \$125,000 in equity above the first and the second mortgage, of course. I felt I was in a win/win situation when I sold it.

Mr. SHAYS. I hear you, sir.

Mr. SHELDEN. And I had to sell it because, again, I needed the income and I wanted to carry the mortgage. I didn't want the bank to carry it because I felt good about the property.

I've been out in California since 1965, and I know the real estate. I know the market. We needed the income off the interest on the loan to support my son, my wife, my daughter, and myself.

Mr. SHAYS. And thank you for your patience with me. I appreciate it, sir. The one thing that is very clear in the work that we're doing involving drug dealers is—and it relates to the situation you found yourself in, Mr. Vander Zee in as well—that the drug lords offer very tempting circumstances.

They come in and they've got the transaction, they've got money and, you know, banks are having trouble, you're having trouble selling your house, and someone comes in and he's got a solution to your problem, and they pay good money.

Mr. SHELDEN. What do you mean I'm having trouble selling my house?

Mr. SHAYS. You said you had trouble selling your house.

Mr. SHELDEN. I said I had trouble trying to sell it myself. I'm not a realtor.

Mr. SHAYS. No, that's what I mean.

Mr. SHELDEN. When I hired the realtor, she sold the house.

Mr. SHAYS. Right, OK.

Mr. SHELDEN. Now let me make this clear, too.

Mr. SHAYS. I hadn't finished, but I'm happy to have you interrupt me.

Mr. SHELDEN. Well, I think this is important so you know what's going on.

Mr. SHAYS. Sure.

Mr. SHELDEN. The property was not bought with drug proceeds.

Mr. SHAYS. No, I know that. I mean I don't know that.

Mr. SHELDEN. Well, I would like to finish that, also. He was prosecuted under prostitution and the illegal moneys were put into real estate and the property was never found, I guess, what they call guilty, or whatever it is. He never did anything wrong on the property.

Mr. SHAYS. What we have found periodically is that when we've—and it may not apply to any of your cases but the reason why I was asking the question was to have a sense if it did—is that we find that the drug lords have a lot of money to spend. They'll pay over the market price and they'll make arrangements like what they did.

They'll come into banks and bring hundreds of thousands of cash dollars in, and a lot of businesses are having problems. A lot of banks are vulnerable and they get tempted. Honest, good, and decent people get tempted to involve themselves and not ask questions, and we're finding that is not an uncommon circumstance and that was the purpose for my asking the question.

Mr. SHELDEN. Your problem—I don't—

[Witness confers with counsel.]

Mr. SHAYS. I think you should take her advice.

Mr. SHELDEN. Well, I would like to say this anyway.

Mr. SHAYS. Sure, sure.

Mr. SHELDEN. If I felt that a person couldn't pay the mortgage, I would have cashed out. I would have said, "Look, I'm not interested in carrying the mortgage." I would not have put it on the brochure. Like the realtor and I agreed, that's what we wanted because we needed the support for the family, and that's exactly what we did.

And, by the way, we have about a dozen of those brochures if you'd like to have one. It says right there 27 percent down, 20 years amortization, due in 7 years. And, of course, we didn't get what we bargained for.

Mr. CONYERS. Thank you very much.

Mr. Vander Zee, I never asked you how did Mr. Salinas do at his own trial?

Mr. VANDER ZEE. How did he what, sir?

Mr. CONYERS. How did he make out at his own trial?

Mr. VANDER ZEE. He never was tried.

Mr. CONYERS. Pardon?

Mr. VANDER ZEE. He never was tried. He walked out of the front door of the jailhouse and went to Mexico or went somewhere.

Mr. CONYERS. Well, they were giving all of the other drug dealers breaks in their testimony to testify against him.

Mr. VANDER ZEE. That's true. Yes, sir.

Mr. CONYERS. And now you tell me there was never any trial?

Mr. VANDER ZEE. He was never tried. He was put in jail and held there a little over 1 year. His trial was never set. He was never released on bond. No bond was set, and he was never tried. He escaped before his trial.

Mr. CONYERS. I see. Well, yet, you and others have a fair idea of where he is?

Mr. VANDER ZEE. No, I have no idea where he is.

Mr. CONYERS. You have no idea where he is?

Mr. VANDER ZEE. I read the San Antonio Express and San Antonio Light. The Federal marshal and the U.S. attorney's office think he's in Mexico. I have no idea, and I could care less where he's at. No, sir. Sir, if you think I've had contact with the guy, no, not at all.

Mr. CONYERS. No, I didn't think that at all. I remember you said you had an impression of where the chief secretary was or someone.

Mr. VANDER ZEE. She is under protective custody. I have no idea where she is, apparently, somewhere in the San Antonio area, as is the drug pilot. I have no idea where either one of them are.

Mr. CONYERS. Good. Thank you very much. Do any of the witnesses have any comments? It's been a very long day and a very difficult day, but if you choose to make any comments, you're welcome to do so at this point.

Mr. SHELDEN. Mr. Chairman, I would like to and I thank you very much for bringing this to the attention to the American people, and I feel that a lot of things have to be corrected, and I feel that the ones that are at the Justice Department and the U.S. attorney's office should be people that the American public can feel comfortable with at a level that they're going to do the right thing, not only by their government but by the people in the United States as well.

Thank you.

Mr. CONYERS. I thank you for your statement. I thank all of you for your cooperation, your perseverance, and your commitment to making sure that this, hopefully, doesn't happen to any more people. Believe me, this committee is going to stand behind you, and we're going to continue this investigation.

As you obviously know, there will probably be hundreds of other people coming forward now that they know that there is at least one place in the government that is interested in finding out what in God's name is going on in a program that's supposed to be combating the drug menace and why are so many crimes being committed in pursuance of this program. It's an absolute disgrace.

I thank you very much and you are excused from the witness table.

We now have Mr. Cary H. Copeland. Who is accompanying you, Mr. Copeland?

Mr. COPELAND. I have my Assistant Director, Art Leach, with me, Mr. Chairman.

Mr. LEACH. Mr. Art Leach, we welcome you both to the witness table.

[Witnesses sworn.]

Mr. CONYERS. Thank you very much. Please be seated. We have your prepared statement, which will be included, and we invite you to make any summary or disposition with it that you choose. Welcome to the hearing. Thank you for your patience today.

STATEMENT OF CARY H. COPELAND, DIRECTOR AND CHIEF COUNSEL, EXECUTIVE OFFICE FOR ASSET FORFEITURE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY ART LEACH, ASSISTANT DIRECTOR

Mr. COPELAND. Well, thank you for allowing us the opportunity, Mr. Chairman. I will file my statement and I would like to take a very few minutes—I know it's been a long day for the subcommittee—to try to put all of this in perspective.

The asset forfeiture program is one of our most promising and effective new weapons against crime and, particularly, drug trafficking and money laundering.

We're working with an ancient technology here. Forfeiture has been around even before the United States. The First Congress of the United States enacted the first forfeiture law in 1789. It was the same First Congress that enacted or passed the Bill of Rights.

So to the extent that there are people who say the forfeiture laws are unconstitutional, since they were written by the same people as the folks who wrote the Constitution, that's to suggest the Founding Fathers were schizophrenic. We don't believe that's the case.

Asset forfeiture laws have been examined by the Supreme Court over the years, ranging from the time of Chief Justice John Marshall to the time of Chief Justice William Rehnquist. They have consistently been upheld and, again, I think that that speaks for the basic process.

The basic concept of forfeiture is that criminals should not be allowed to benefit from their crimes. They should not be able to re-

tain the proceeds of their criminal activities, nor properties used to facilitate criminal activities. I think nearly all Americans agree with that. The Congress certainly agrees with that and has enacted over the years more than 200 different forfeiture statutes for items ranging from slaving ships in the 1800's to controlled substances and pelts of endangered species in this century.

There are three basic purposes of asset forfeiture. No. 1 is law enforcement. That's the predominant purpose of asset forfeiture. It is an effective law enforcement weapon.

The second purpose is to improve governmental relations, inter-governmental relations, through the equitable sharing program which fosters cooperation between Federal, State, and local law enforcement agencies.

And, of course, it does, as a byproduct of one and two, yield revenue which so far the Congress has been very good about letting us put back into law enforcement.

Why is asset forfeiture effective as a law enforcement weapon? Because, quite simply, wealth equals power, and to the extent that we can strip wealth from criminal syndicates we weaken them. You saw, for example, during the Persian Gulf war, every press conference began by a question to General Schwarzkopf, "What's the body count? How many of those Iraqis have we killed?"

His answers were always the same. "Don't know. Hard to say. We're not counting bodies. We are counting their aircraft, their artillery pieces, their command control centers. We are counting their military assets because if we can neutralize enough of those assets, we'll weaken them as a fighting force."

Of course, that proved to be true. That is the potential which asset forfeiture has. It's a potential we're only beginning to realize but we are getting there. It's very effective. It takes the profit out of crime and these criminal enterprises are not eleemosynary institutions. They are in business to make money, as you well know.

In terms of improving intergovernmental cooperation, we have—since we began this equitable sharing program in the fiscal year 1986—now shared in excess of \$1 billion in cash and property with more than 3,000 State and local law enforcement agencies, and that has helped those agencies equip their officers so that they are as well armed as the drug traffickers and other criminals that they're up against.

We're very proud of the equitable sharing program. It's brought about a sea-change in terms of relationships between Federal, State, and local law enforcement agencies. We're taking that concept international.

The Congress has authorized us now to share Federal forfeiture proceeds with cooperating foreign governments. We have done that in a number of cases, and the results are very dramatic. This weekend we announced the takedown of an international money-laundering case which resulted in the arrest of over 160 individuals worldwide, seizure of in excess of \$50 million, as well as over a half a ton of cocaine.

The intergovernmental cooperation, international cooperation, we had in that case was very dramatic and I think, in large part, is attributable to the forfeiture program.

Finally, in terms of revenue, and I know the chairman was interested in trying to get a capsule on what happens to the money, we have a chart here we will put up for you.

In a nutshell, what happens to the money is what the Congress appropriates it for, and over the years it's changed and so, as you see, it goes a number of different places.

The biggest chunk, as you see, is going back in purple there in the form of equitable sharing to the State and local law enforcement agencies that work with us. The little narrow yellow band reflects the international sharing that we have done.

The pink in the upper right pie there is the value of the tangible property, primarily forfeited cars. The rest of it is cash.

At the Federal level, the bulk of the money has gone back into prison construction. Again, this was something the Congress, I think, found very appealing, the poetic justice in using crime proceeds to build prison cells in which to incarcerate the criminals, so we've put about a half a billion back into Federal prison construction.

We've transferred \$281 million to the drug czar's special forfeiture fund. I know the chairman's interest in drug prevention and treatment. That fund is available for prevention and treatment, although very little has been appropriated by the Congress from that fund for prevention and treatment.

In summary, in trying to put this in perspective, what we're doing in the asset forfeiture area is unique. We are building a new law enforcement sanction. If you asked someone in law enforcement 8 years ago, "What do you do to criminals," they would have said three things: Incarceration; supervised release, parole or probation; or, criminal fines. That's it. That's what we've had for decades.

If you ask that question today, obviously—

Mr. CONYERS. What about the death penalty?

Mr. COPELAND. That's a good one. That's an ultimate deprivation of liberty.

Mr. CONYERS. No, but you didn't mention it.

Mr. COPELAND. No, I didn't mention it.

Mr. CONYERS. Well, you didn't mention—

Mr. COPELAND. Well, I stand corrected. There were four and now there are five.

Mr. CONYERS. OK, let's go over them again then.

Mr. COPELAND. All right. We'll start with death penalty, then we'll go to incarceration, supervised release, fines, and now I would suggest asset forfeiture and, moreover, asset forfeiture is now—and no one would disagree with this, Mr. Chairman—far more effective and far more powerful than criminal fines as a deterrent to crime.

So we are building a new sanction. We're 8 years into this. We really, although the sanction has been there since 1789, its application to drug trafficking generally goes back to 1984; to money laundering, to 1986.

We are obviously learning as we go. We are refining and perfecting this tool, and we're putting a lot of effort into making sure that we are exercising it in a prudent and responsible manner.

If I could just take a moment to comment very briefly on the witnesses that were here, first, we would note that since we began

keeping records in the modern forfeiture program that started with the 1984 Comprehensive Crime Control Act, we have made 164,485 seizures, and I think the fact that with that many seizures we have relatively few complaints reflects the quality of the program; moreover, I think the complaints need to be examined more carefully.

With respect to Mr. Jones, for example, I agree with Mr. Shays it would be good to have before this subcommittee the officers who made the seizure and hear their side, to hear the Federal attorney who handled the case in court that Mr. Jones alluded to.

We don't have them. We are depending entirely on Mr. Jones' testimony. It is a matter of public record that Mr. Jones is a convicted felon, food stamp fraud. His credibility, therefore, I would respectfully suggest is subject to some question. We will be glad to get into details of the Jones case.

With respect to the Sheldens, let me say you indicated, Mr. Chairman, you haven't heard expressions of sympathy. Let me assure you that I sympathize with their situation. They've obviously had a situation that has altered their lives for the worse.

I would suggest that this case is a good testament for what the Congress did in 1984. The 1984 Comprehensive Crime Control Act, I think, effectively prevented any repetitions of this, and I think you can rest assured that with the 1984 Comprehensive Crime Control Act and the procedures we've implemented since that time, there will be no repetitions of the Shelden case.

With respect to Mr. Vander Zee, that's really not a forfeiture case. We're talking about a money-laundering prosecution. No property belonging to Mr. Vander Zee was seized or forfeited, so I'm really not the right person. I know something about the case, but it is not one that comes within my province so it's not really a forfeiture matter.

That concludes my opening remarks. I'll be glad to respond to any questions you may have.

[The prepared statement of Mr. Copeland follows:]



Department of Justice

STATEMENT OF

CARY H. COPELAND
DIRECTOR AND CHIEF COUNSEL
EXECUTIVE OFFICE FOR ASSET FORFEITURE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

CONCERNING ASSET FORFEITURE

BEFORE THE
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

September 30, 1992

Mr. Chairman and Members of the Committee --

I welcome the opportunity to appear before this distinguished Committee on behalf of the Department of Justice to discuss the asset forfeiture program. I believe we have demonstrated in the past eight years that asset forfeiture is one of the most effective new law enforcement weapons against drug trafficking and organized crime. It can dismantle drug rings and organized crime groups by stripping them of their assets, turning powerful crime syndicates into empty financial shells.

Remarkable results have been achieved in a short time. Since 1985, almost \$2.6 billion in illicit cash and proceeds from the sale of seized property have been deposited in the Justice Department's Forfeiture Fund. Funds obtained through the Asset Forfeiture Program are put back into the fight against crime at the federal, state and local levels. This re-investment of forfeiture proceeds in law enforcement has made possible the remarkable growth in federal forfeitures. In sum, it requires massive expenditures of time and effort to support a national Asset Forfeiture Program and we could not sustain this effort without these resources. The Justice Department is also the custodian of over \$1.5 billion in assets that have been seized in the course of its investigations and are in the forfeiture process. This inventory of seized property, of course, is not

- 2 -

owned by the United States; rather, we have seized it for purposes of forfeiture. Only upon the execution of a final order or declaration of forfeiture does title to seized property vest in the United States. Complete information on the Department of Justice Asset Forfeiture Program is set out in our annual report which has been made available to the Committee. We have also supplied the Committee staff with current financial data as well as copies of policy directives governing the forfeiture program.

The Effectiveness of Asset Forfeiture

Asset Forfeiture is particularly effective against the intricate financial structures developed by drug traffickers, money launderers, organized crime groups, and other complex criminal organizations. Money is power and depriving crime syndicates of their money and property not only takes the profit out of crime -- it attacks the strength of criminal enterprises.

Drug trafficking is particularly susceptible to forfeiture because it requires aircraft, vessels, cars, stash houses, business "fronts" and cash hoards -- all of which can be seized and forfeited. Moreover, every pound of cocaine brought into the U.S. generates three pounds of cash from street sales. Laundering this cash is a major problem for traffickers. Thanks to asset forfeiture, it now costs drug traffickers more to launder their ill-gotten gains than to purchase the drugs they

- 3 -

sell to our citizens.

Asset forfeiture can be to modern law enforcement what airpower is to modern warfare: it attacks and destroys the infrastructure of criminal enterprises.

The Department of Justice Forfeiture Program

Since 1989, the Department's Forfeiture Program has been directed and managed by the Office of the Deputy Attorney General through the Executive Office for Asset Forfeiture which I head. Other units of the Department with important roles in the Program include our 94 United States Attorneys' Offices, the Criminal Division's Asset Forfeiture Office, the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the U.S. Marshals Service. Non-Justice agencies participating in the program are the Postal Inspection Service, Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, U.S. Secret Service, and U.S. Park Police.

The successes of the Asset Forfeiture Program reflect the close cooperation fostered by the Department of Justice with all branches and levels of government.

Concept and Results

- 4 -

With the enactment of the Comprehensive Crime Control Act of 1984, asset forfeiture was brought into the 20th Century. One innovation was the Assets Forfeiture Fund which allows the proceeds of successful forfeiture cases to be re-invested directly into law enforcement efforts rather than being deposited in the general treasury. Another innovation, equitable sharing, permitted the federal government to begin sharing forfeited property with state and local law enforcement agencies that assisted in investigations resulting in federal forfeitures. Those agencies thus began to receive cash and equipment they needed to fight crime more effectively. By treating state and local law enforcement agencies as full partners in the distribution of proceeds, intergovernmental law enforcement cooperation has been dramatically enhanced. Over the past seven years, equitable sharing has brought about a sea-change in the willingness of state and local agencies to work with their federal counterparts. Sharing has been the most dramatic law enforcement success of recent decades.

Both the Assets Forfeiture Fund and equitable sharing provide barometers to measure the success of the forfeiture program since 1984. For example, in Fiscal 1985, \$27 million in forfeited cash and property sale proceeds were deposited in the Fund. Six years later, net deposits totalled \$643 million -- more than a 20-fold increase in assets taken from criminals and reinvested in law enforcement.

- 5 -

The Fund provides law enforcement at all levels with new resources to fight crime. Since 1986, over \$1 billion in forfeited cash and tangible property has been transferred to more than 3,000 state and local law enforcement agencies that have participated in federal forfeiture cases.¹ A record \$289 million in forfeited cash and property was disbursed to state and local agencies in 1991 to fund new law enforcement programs and finance capital expenditures. Another \$150 million was transferred in 1991 to the Special Forfeiture Fund of the Office of National Drug Control Policy to help finance the national anti-drug strategy. The Special Forfeiture Fund is available for drug abuse education, prevention, and treatment as well as for law enforcement. We have prepared a chart for the Committee to show the distribution of asset forfeiture proceeds.

The Process: Civil and Criminal Forfeiture

The Department's forfeiture program is based on two principles: (1) to confiscate wealth generated by or used to support criminal activity; and (2) to protect innocent owners from unfair application of forfeiture laws. Federal civil and criminal statutes provide for forfeiture of proceeds of drug trafficking and money laundering as well as the instrumentalities used to facilitate these activities.

¹ Data is for FY 1986 through July 1992.

- 6 -

The First Congress enacted the first civil forfeiture law in 1789. It was the same First Congress which drafted the Bill of Rights. Civil forfeiture, is an in rem action; the property itself is the "defendant" in the action. Upon forfeiture, all property rights are vested in the government. Anyone with an interest in the property can file a claim and answer to the government's forfeiture complaint forcing a civil trial before a U.S. District Court. Claimants have the full range of Due Process rights including the right to trial by jury.

The law includes protections for innocent owners and lienholders. Even after forfeiture, anyone with an interest in the property may petition the Attorney General for remission or mitigation of the forfeiture; this is a special "pardon" process which is available to ameliorate harshness in appropriate cases. The policy is to safeguard third parties from unfair loss of their property. As many citizens do not understand civil forfeiture, we have prepared a brief guide for laymen, a copy of which is attached to this statement.

Criminal forfeiture is relatively new dating back only to 1970. Criminal forfeiture is an in personam action and is undertaken as part of the prosecution of an individual: that is, the forfeiture of the property in question is contingent upon the conviction of its owner. Criminal forfeiture only divests the convicted defendant of his or her rights in the property in

- 7 -

question. To obtain clear title, the government must address (through a post-trial proceeding known as an ancillary hearing) the interests others may hold in the property. The procedures thus protect the rights of innocent owners and third-parties in criminal forfeiture proceedings.

The advantage of civil forfeiture -- more widely used than criminal forfeiture -- is that it provides for forfeiture regardless of the current status of the property's owner. Even if the owner is dead or has fled the United States, the property can be forfeited since the property itself, and not any individual, is the "defendant" in the suit. For example, the United States has been able to obtain civil forfeiture of millions of dollars left in Swiss and British bank accounts by deceased Colombian drug trafficker Jose Rodriguez Gacha. Without the civil forfeiture remedy, these assets might have gone back to his drug associates.

Criminal forfeiture is based upon the jurisdiction the court has over the defendant rather than his or her property. It has the advantage of casting a "wider net," capable of reaching, in one proceeding, all of a defendant's forfeitable assets, regardless of location and scope. In our training programs, we are encouraging our prosecutors to make greater use of criminal forfeitures.

- 8 -

Review Processes

Seizure activity is, of course, carried out by federal law enforcement agencies as part of their general law enforcement duties. Federal law enforcement agents are the most carefully selected, highly-educated, and well-trained in the world. In the seizure and forfeiture area, however, we have additional quality assurance standards in place. In addition to statutory and administrative safeguards, federal seizing agencies have specialized seizure and forfeiture teams located throughout the country. In addition, our United States Attorneys' Offices have Assistant United States Attorneys with specialized training in seizure and forfeiture. In recent years we have devoted about \$6 million per year of the total \$100 million in appropriated discretionary spending authority from the Fund to the training of these specialized asset seizure and forfeiture personnel. In no other law enforcement program is such a substantial proportion of funding dedicated to training. In sum, our asset forfeiture program is staffed with the most highly trained personnel in all of law enforcement.

The Future

On the legislative front, we have proposed that the scope of asset forfeiture should be expanded to include white-collar crimes, particularly the fourteen most commonly used federal fraud statutes. We also support expansion of forfeiture to

- 9 -

embrace proceeds derived from counterfeiting, explosives and firearms offenses, and smuggling of illegal aliens. There are a number of other amendments we seek, some of which are included in the banking legislation which has been approved by the Senate. We also support amendments to avoid unintended adverse effects of the program including amendments: (1) to give claimants in civil forfeiture cases the same protections accorded bona fide purchasers for value without notice under federal criminal forfeiture laws, and (2) to authorize the payment of state and local taxes on seized real property. As you know, we are also moving to enhance accounting and audit controls over property shared with state and local law enforcement agencies consistent with the recommendations of the General Accounting Office.

Conclusion

In sum, the Department of Justice believes in asset forfeiture and we appreciate the strong support which the Congress has given the forfeiture program over the years. We look forward to continuing to work with you to refine, improve, and strengthen the program. I will, of course, be pleased to respond to any questions you may have.

We in the forfeiture program are engaged in an exciting and challenging mission. We are building a new law enforcement sanction. Ten years ago we had only the three historic sanctions for crime: incarceration, supervised release (parole or

- 10 -

probation), and criminal fines. Today there is a fourth sanction -- asset forfeiture. And in less than eight years, asset forfeiture has far surpassed criminal fines in importance and effectiveness. The future of asset forfeiture is virtually unlimited and we are committed to ensuring that this powerful and promising new weapon is used prudently and responsibly.

Thank you.

Attachment

Spring 1992

Funded by
Bureau of Justice Assistance

ASSET FORFEITURE

CIVIL FORFEITURE FOR THE NON-LAWYER

Citizens frequently ask, "How can the Government forfeit a person's property without convicting him of a crime?" The answer, of course, is civil forfeiture. The basic rationale for civil forfeiture is simple: Federal law provides that the profits and proceeds of designated crimes, as well as property used to facilitate listed crimes, is subject to forfeiture to the Government. Most Americans agree that criminals should not be allowed to benefit financially from their illegal acts.

Anglo-American law has traditionally provided two basic forms of legal procedure: a criminal procedure for determining liberty rights and a civil procedure for determining property rights. Thus, before a person can be deprived of his liberty or stigmatized as a criminal, he is entitled to a criminal trial where the Government's burden of proof is "beyond a reasonable doubt." Criminal defendants also have a right to counsel and an attorney will be provided for defendants who cannot afford one.

Before a person can be deprived of his property, he is entitled to a civil trial where the burden of proof is "preponderance of the evidence," civil litigants may be represented by counsel, but generally must hire their own attorneys.

Civil forfeiture, of course, involves property rights and is, therefore, entirely consistent with centuries of Anglo-American legal practice.

HISTORY AND PURPOSE OF FORFEITURE

Governments long ago recognized the need to protect their citizens against persons outside their borders who smuggle contraband into their territory. For example, simply arresting the captain and crew of a foreign smuggling ship was ineffective if the ship was returned to its foreign owner. The owner would merely hire a new crew and send the ship back on another smuggling run. There is an obvious parallel between age-old smuggling and modern drug-trafficking; they require methods to protect our citizens from criminals both inside and outside our borders.

The legal theory of civil forfeiture is that property which violates the law can be "prosecuted" and forfeited to the Government. In the smuggling ship example, therefore, the forfeiture action might be styled "*The Government vs. One Sailing Ship, SMUGGLER'S DELIGHT*." If the Government can show in a civil trial that the ship was involved in a viola-

tion of American laws, it can be forfeited. Of course, the owner can always recover the vessel if he comes forward to show that the ship was not used in violation of the law.

Our civil forfeiture laws also provide an "innocent owner" defense whereby the owner of seized property can recover the property upon a showing that the criminal use of the property was not the result of any act or omission by the owner.

The First Congress of the United States authorized civil forfeiture for vessels violating U.S. customs laws. This was the same First Congress that drafted the Bill of Rights! Since then, more than 200 federal forfeiture statutes have been enacted for items ranging from contaminated food and drugs to pelts of endangered species to proceeds of drug trafficking.

PROTECTIONS AGAINST ABUSE OF THE FORFEITURE POWER

No property may even be seized or "arrested" for purposes of forfeiture unless the Government has probable cause to believe it is subject to forfeiture. Probable cause is the same level of proof which the U.S. Constitution requires for the arrest and jailing of a person pending trial, the search of a home, the indictment (formal charge of criminal conduct) of a person by a grand jury, or the seizure of evidence or contraband.

Although the law does not require it, U.S. Department of Justice (DOJ) policy requires that seizures should not be executed until a neutral and detached magistrate has made an independent finding of probable cause and issued a federal seizure warrant. Exceptions are allowed, of course, for exigent circumstances where the property might be removed, hidden, or destroyed before a warrant can be obtained. DOJ policy permits no exception to the warrant requirement for the seizure of any parcel of real estate.

The Government must mail written notices of the seizure to any owner or lessee of the property and must publish a notice of the seizure for three consecutive weeks in a newspaper of general distribution. Anyone with a legal interest in seized property may claim it upon the posting of a bond of \$5,000 or 10 percent of the value of the property, whichever is less.

(over, please)

The posting of a bond requires the Government to file a civil forfeiture complaint in a United States District Court to continue a forfeiture action. The civil judicial forfeiture process is like other civil trials (e.g., for breach of contract or a personal injury claim).

Procedures exist by which each side can discover the other side's case and compel attendance of needed witnesses. As noted above, the standard of proof is "preponderance of the evidence." Claimants may demand a trial by jury except where the property was seized on the high seas, in which case admiralty laws apply.

In addition to the "innocent owner defense," federal forfeiture statutes expressly authorize the Attorney General to "remit" or "mitigate" a forfeiture if it would be unduly harsh. DOJ policy is to liberally grant such petitions as a means of avoiding harsh results.

This exercise of administrative grace (similar to a "pardon") also affords innocent claimants a means of recovering property without the necessity of incurring attorney's fees.

OTHER INDICATIONS OF THE PROPRIETY OF CIVIL FORFEITURE

The Supreme Court of the United States has upheld civil forfeiture in numerous cases from the earliest days of our nation to the 1980's. To say that the Government should not be able to forfeit property without a criminal conviction equates to the parents of a child hit by a drunk driver not being able to sue for damages unless the driver is convicted of driving while intoxicated—American law has never imposed such a requirement.

Civil judicial proceedings determine the fate of billions of dollars each year. In one civil case, a corporation won a \$10 billion judgment against another corporation in a civil trial based on an anti-competition claim. The losing corporation had never been convicted of a criminal violation. Civil proceedings are the age-old method of determining property rights; civil forfeiture proceedings are an appropriate part of the overall civil law system.

Although any person may file a civil lawsuit against another person, only the Government may file a civil forfeiture action. This is another significant safeguard against abuse.

THE IMPORTANCE OF CIVIL FORFEITURE

Civil forfeiture is an absolutely vital weapon against drug trafficking, money laundering, and other forms of organized criminal activity, particularly international crime. While criminal forfeiture is an available sanction in many cases, it requires that the Government be able to take custody of the criminal whose property is being forfeited. Of course, many drug lords and other international criminals reside outside the jurisdiction of the U.S. Although many non-lawyers are more comfortable with the concept of criminal forfeiture than with civil forfeiture, it is criminal forfeiture that is new and novel (Federal criminal forfeiture statutes date back only to 1970).

Even when criminals are within our borders, they are often able to elude law enforcement and remain fugitives

from justice. Civil forfeiture is an invaluable weapon in stripping fugitives of their ill gotten gains.

In sum, without civil forfeiture, we would be virtually powerless to act when the criminal profits and other property of foreign criminals are found within our own borders and when criminal operatives are able to evade arrest. Without civil forfeiture, the ability of the United States to fight international crime would be pitifully weak.

CONCLUSION

Civil forfeiture is an ancient legal procedure which is proving to be dramatically effective in attacking modern crime. While convicted drug kingpins are quickly replaced by their subordinates, the seizure and forfeiture of their airplanes, vessels, automobiles, stash houses, and cash hoards can cripple a drug syndicate.

Moreover, prison costs limit incarceration as a remedy for crime. It now costs over \$60,000 to build prison space for a single federal prisoner and over \$18,000 a year to keep a prisoner incarcerated. The potential of asset forfeiture, however, is virtually unlimited. Additionally, forfeiture hurts criminals in the same place it helps taxpayers—in the pocket-book. Over the past seven years, more than \$2 billion in criminal assets have been forfeited by DOJ and reinvested in law enforcement at the Federal, State and local levels.

Law enforcement officials at all levels of government must help get the message out to our citizens: civil forfeiture is a procedure that has stood the test of time, its use in the war on crime is still in its infancy, it is proving highly effective in attacking crimes committed for profit, and it is one of our most promising alternatives to costly incarceration. Moreover, civil forfeiture is a tried and true legal process that affords citizens their full range of Due Process rights.

—Cary Copeland

Cary Copeland was appointed the first Director of the Executive Office for Asset Forfeiture by the Attorney General of the United States in 1989. He came to that position from the post of Deputy Associate Attorney General in the Department. Prior to that assignment, Cary served as the lead Department attorney on issues involving the Comprehensive Crime Control Act of 1984. He received B.S. and M.A. degrees from Stephen F. Austin State University in Nacogdoches, Texas, and a law degree from the Georgetown University Law Center in Washington, D.C.

Prepared under Cooperative Agreement Number 87-DD-CX-K090 (5-3), between the Bureau of Justice Assistance and the Police Executive Research Forum. Points of view and opinions expressed in this document are those of the author and do not necessarily represent the policy or opinion of the Bureau of Justice Assistance or the U.S. Department of Justice. This paper is based on federal civil forfeiture law which has been the model for state forfeiture statutes. Many state forfeiture laws are more restrictive than the federal law in their coverage, with some requiring a higher standard of proof.

BJA Asset Forfeiture Project
Police Executive Research Forum
2300 M St., N.W., Suite 910
Washington, D.C. 20037

Mr. CONYERS. Thank you very much, sir. I appreciate your comments. I also note that you were a former member of the Hill in a staff capacity and that you worked for one of the great gentlemen of Congress, Wright Patman.

Mr. COPELAND. Yes, sir.

Mr. CONYERS. I had the honor of serving with him for a short while, and he was a wonderful person.

Mr. COPELAND. He was a legendary figure and he started his career as a local prosecutor so I feel very much at home with the Justice Department.

Mr. CONYERS. Well, we never held against him his previous career and we thought he survived it rather well. I say that facetiously, of course. Many outstanding members of the Congress have been lawyers and prosecutors.

But I note that you have a very excellent background in both the legislative part of our Federal Government, as well as the Department of Justice.

Let me ask the gentleman from Connecticut, Mr. Shays, if he has any questions.

Mr. SHAYS. I would just like to make sure that I'm clear in regards to the Sheldon case. As to your comment about what we did in 1984, before my time—I was elected in 1987—I would like you to specifically tell me what you think happened to them that would not happen today, and I would also like to ask if there's any way that you can be helpful in their circumstance.

Mr. COPELAND. Let me say again I, like the chairman, will be glad to look into the details of that. We've been in litigation for some time.

My understanding is that in 1984 we realized that the property had sold for substantially more than its fair market value and that there was very little equity. All we had forfeited in the case was the equity of the racketeer who was convicted.

I believe in 1984 we, in essence, indicated we were willing to back off. You can reclaim the property and sort all this out. And I believe the reaction was that, no, we'll never get that much money for this again. We think that the government ought to, in essence, guarantee the price that had been paid for the property by the criminal, and we were unwilling to do that because, obviously, any money we expend is not coming from our pockets. It's coming from Federal taxpayers.

So we do try to defend the public fisc and then, of course, after that a series of unnatural events occurred over which no one had any control, including the house sliding down the hill and being structurally damaged.

Mr. SHAYS. I regret I should have interrupted you sooner before we get into their specific case, I just don't understand why what happened to them earlier could not happen to them now based on the law of 1984.

Mr. COPELAND. OK. Well, the 1984 statute provided detailed procedures for both civil and criminal forfeitures and clarified, for example, that upon the conclusion of a criminal forfeiture action, there is an ancillary proceeding at which all claimants to the property have an opportunity to come forward and state their claims and have those sorted out by a U.S. district judge.

It clarified our ability to pay off innocent lienholders to the extent of their—any loan that they have outstanding the interest they're entitled to and, most importantly, it created the asset forfeiture fund which gives us the means of satisfying those very expenses.

Mr. SHAYS. In other words, you did not have a fund in which to draw on? Once you had a forfeiture you couldn't undo it and you had no funds to make someone whole who had been—

Mr. COPELAND. If there were no proceeds from that case to pay it out of, right, we would have had to, in essence, go against the judgment fund.

Let me refer that to my assistant, Mr. Leach, who is a much better practitioner than I am.

Mr. SHAYS. I'm not asking about the specific case now. I just want to know in general terms.

Mr. LEACH. Yes, sir. And let me outline for you not only the statute but the policies that have come into effect that would make this sort of problem not occur in the future.

The Department of Justice has—

Mr. SHAYS. Let me just say something. You speak in positives less likely to occur in the future. I just don't know if you could ever make a promise that it would never happen.

Mr. LEACH. Well, let me explain to you what the government tries to do to avoid this.

Mr. SHAYS. OK.

Mr. LEACH. No. 1 is training. I would suggest that one of the biggest problems that we probably had in the Sheldens case is we had a criminal prosecutor at that time we had no trained asset forfeiture attorneys until 1989 when Congress specifically authorized a number of asset forfeiture attorneys, and we've got at least one in every U.S. attorney's office around the country. And I think that made a big difference because now you've got trained practitioners both in criminal—

Mr. SHAYS. I understand that.

Mr. LEACH. OK. The second point that I would make to you is we have a policy known as expedited settlement which is an effort to resolve people such as the Sheldens very early on in both criminal and civil litigation, and the practice out in the field is that even though people like the Sheldens are limited by what's known as the bar on intervention—they can not join the lawsuit until there is a conviction—assistant U.S. attorneys affirmatively go out and attempt to resolve that lien at the very earliest stages of the litigation, which means I essentially say, "Present your documentation to me. Let me look at your loan, and I will tell you whether or not I will grant your lien at the conviction."

What that does for us, once I grant expedited settlement, which is completely a Department of Justice policy, as soon as that judge enters a preliminary order of forfeiture and the time runs for claimants to come in, I can recognize their lien, No. 1, and I can pay it so you can stop the pain right there. They're paid, they're gone, and now the government assumes the risk.

And part of expedited settlement is that I have to do an equity assessment. I have to be satisfied that there is sufficient equity to

cover this loan, but once I make the decision to go forward and pay it, the asset forfeiture fund assumes the risk.

And that's the beauty of expedited settlement, both in civil and in criminal because, you know, with the market going down in real estate there is usually a considerable lag from the order of forfeiture to disposition of the property, actual sale. We get the property sold, we cut their exposure, and we, the government, take the risk that this property is not going to sell for what we think it will.

Mr. SHAYS. In regards to this case—and I realize I don't know how close you are—what kind of knowledge you have in this case? I just want to be clear on one thing. If they sold the property in 1983, is it your statement that they got a price above and beyond the market? I mean do you have documentation that says that they received more than they should have for the house?

Mr. COPELAND. We'd be glad to supply what we have. My recollection of the case, Congressman, is it really relates to Congressional correspondence that we probably had in 1989 or 1990.

Mr. SHAYS. Let me just say this to you: If you don't know the answer to my question, I don't want you to speculate.

Mr. COPELAND. OK. I'm not certain. I'm surmising from the fact that we had a \$50,000 first.

Mr. SHAYS. Well, I don't want you to surmise anything.

Mr. COPELAND. OK.

Mr. SHAYS. I was asking those questions but if you have documentation—I would like to think that you have researched this and know the answer to the question. If you don't or they're not at your fingertips, I don't want you to answer it.

Mr. COPELAND. Very good.

Mr. SHAYS. So the answer is that you do not know?

Mr. COPELAND. I do not know, sir.

Mr. SHAYS. OK. I would then hope that you would take a second or third or fourth look at this whole issue and make some determination. It seems to me though the issue is not what it's worth today; it's what it was worth when they sold it.

Did they pay too much—excuse me. Did they get more than they were entitled to because they were getting someone who was eager to have this property or because they gave very special arrangements to be able to buy it and, therefore, took a risk in the process?

Mr. COPELAND. Let me say when I first became aware of the case it was in litigation. I know the U.S. attorney's office felt very strongly that the government was not liable. I have never really had the case before me because it's, in essence, been in litigation ever since but we'd be glad to take a look at it.

Mr. SHAYS. In the case of Mr. Jones, he lost his money and he suffers a reputation question of whether he was involved in dealing with drugs; in the case of Mr. Vander Zee, he lost his job and his reputation and; in the case of the Sheldens, they're having a very serious problem financially because of what they've gone through but let me just ask you with the sale of their house and so on, with Mr. Jones it does strike me pretty astounding.

I mean I can't quite believe that we can go in and take someone's money, not give him a true accounting for it right away and he's not been found guilty of anything, to my knowledge, so I don't understand why he doesn't get his money back.

Mr. COPELAND. Again, in the civil forfeiture area, the concept is that the property has violated the law and the property is being charged. When we're dealing with property rights, as opposed to liberty rights, the standard of proof is preponderance of the evidence.

Mr. SHAYS. Let me ask you this. Property rights, this is not a new concept since forfeiture; this is a concept that's existed for years and years and years?

Mr. COPELAND. Exactly, yes. That's Anglo-American thought.

Mr. SHAYS. No, I'm asking. I'm not an attorney. The implication was that somehow charging property versus charging an individual is a new concept. Is that a new concept?

Mr. COPELAND. No, sir. Like I say, the First Congress passed the first civil forfeiture statute, which provided for the forfeiture of vessels which smuggled goods into the country without payment of customs duties.

Mr. SHAYS. And they didn't charge the individual; they charged the vessel?

Mr. COPELAND. That's correct because in that context, the owner of the property is very often located outside the United States and beyond our jurisdiction.

Mr. SHAYS. OK, let me ask you this. You have nine bundles of \$1,000 each of \$20's and—well, let me ask you this. Was Mr. Jones accurate in describing that they were \$50's and \$100's in the bundles?

Mr. COPELAND. Well, my recollection of the case reports are that they were primarily \$10's, \$20's and \$50's.

Mr. SHAYS. But you've taken his money. It was his money. It was on his possession. It was his money.

Mr. COPELAND. That story changes. This morning he's saying it's not all his money. Maybe \$5,000 was his money and \$4,000 came from two other individuals.

Mr. SHAYS. The bottom line is he was under oath. Under oath that's what he said.

Mr. COPELAND. Well, then, under oath I'm telling you his story changes.

Mr. SHAYS. Under oath his story has been inconsistent?

Mr. COPELAND. At deposition—

Mr. SHAYS. Hold on, I just want to make sure we're clear on this. Has he under oath made statements here that disagree with what he said under oath somewhere else?

Mr. COPELAND. I think there were differences between the testimony he gave at deposition and the testimony at trial, which he explained as having forgotten, and I think the testimony he gave this morning is consistent with the testimony he gave at trial.

Mr. SHAYS. OK, so the last two times it's been consistent?

Mr. COPELAND. I think so.

Mr. SHAYS. OK. The only question I'm really asking you though is that—the question I want to get to is, he has his money taken; now, what is his recourse? If I had \$9,000, and your people, or the government, took \$9,000 of my money away from me, I'd go bananas. I would. I don't know what I'd do, but I'd go berserk. What are his options?

Mr. COPELAND. Well, his first option is to contest the administrative forfeiture. We begin by noticing the individual. You know, unless you file a claim and cost bond, your property is going to be forfeited administratively, which means without a court.

Mr. SHAYS. Did he do that?

Mr. COPELAND. No, he said, "I do not have the \$900." So we said, "Then you can file a motion to proceed in forma pauperis." He filed motions, maybe two.

Mr. SHAYS. An unfortunate term.

Mr. COPELAND. Well, a pauper's oath, in essence.

Mr. SHAYS. But it's an unfortunate term. OK, anyway.

Mr. COPELAND. Well, we take it from the civil rules of procedure.

Mr. SHAYS. But for someone who's not an attorney hearing that, that's not a very encouraging way to, you know—anyway, it's a small point.

Mr. COPELAND. I'm sorry. In essence, that he files a form that says I can not afford to pay that, in this case, \$900. In this instance, the information on the form was not enlightening. It was simply conclusory. I don't have any money. No indication of what he earned, what his obligations were, and so that petition was denied.

Mr. SHAYS. Before we get on, Mr. Chairman, I know we have other witnesses but may I just ask a few more questions?

Mr. CONYERS. Let me say to my colleague that because of the fact that we are going to have to vacate the room, we have worked out an arrangement for the other witnesses to come back.

Mr. SHAYS. Another time?

Mr. CONYERS. Yes.

Mr. SHAYS. Good. So I just have about 5 more minutes.

Mr. CONYERS. Take your time.

Mr. SHAYS. Thank you. Why would he have to pay anything to be able to argue administratively that he wants his money back?

Mr. COPELAND. It's not administratively; it would be judicially.

Mr. SHAYS. I don't care. You took \$9,000 of his and now you say you've got to spend more money to get your \$9,000. I mean, I don't know, if we're looking at something here, that just bothers me.

Mr. COPELAND. No, I understand that point. I understand your point, and I think it's—he's not paying that. He's putting that bond up. If he proceeds, he will have the bond returned to him if he prevails in the litigation.

Mr. SHAYS. I'm sorry. Say that last point again?

Mr. COPELAND. I said if he prevails in the litigation, he will have the bond returned to him.

Mr. SHAYS. OK, I understand that, but the burden is on him to prove it's his money?

Mr. COPELAND. The burden is on him to rebut the government's contention of probable cause. We always start off with the burden.

Mr. SHAYS. OK, the burden is on who?

Mr. COPELAND. The government, to show probable cause.

Mr. SHAYS. But you feel you've already showed probable cause by taking the money?

Mr. COPELAND. That's correct, but we've not done so in this case before a U.S. district court.

Mr. SHAYS. So you have to before—and this is an administrative hearing not a judicial hearing?

Mr. COPELAND. Well, in the Jones case there was no administrative or judicial—

Mr. SHAYS. No, I understand. Thank you for your patience. This is new to me. When he wants to petition for his money back, does he go before the courts?

Mr. COPELAND. Yes. If he files his claim and cost bond that gets him into a U.S. district court. Once in U.S. district court, the government has the original burden of establishing probable cause to the satisfaction of the judge.

Mr. SHAYS. He chose not to do it? He chose to petition so as not to have to pay the bond?

Mr. COPELAND. That's correct.

Mr. SHAYS. And you denied him the bond?

Mr. COPELAND. That's right.

Mr. SHAYS. OK. So then he gave up?

Mr. COPELAND. No, he filed a civil rights action against the officers who seized the currency, and that is the action that has just been tried in district court in Nashville with no decision yet announced.

Mr. SHAYS. Mr. Chairman, I am done, and I thank the gentleman. Thank you, both gentlemen.

Mr. CONYERS. Thank you very much.

Mr. Copeland and Mr. Leach, we have an unusual circumstance. At 3:45 I have committed this room to the former chairman of this committee, the Honorable Jack Brooks of Texas.

Were he to be advised that he could not have this room because this hearing has extended beyond 3:30, do you know what could happen to me and Mr. Shays?

Mr. COPELAND. Knowing Mr. Brooks, I have a rough idea. Yes, sir.

Mr. CONYERS. Yes, good. He is our friend. We love him dearly. His picture hangs on the wall and what we have agreed to do, and I have apologized to attorney Edwards and to Patrick Murphy and now to you, that we will have to adjourn these hearings at this point and reschedule them at your convenience, and I want to apologize for having to do this.

But it has been a long day on this subject alone, and I want to show my appreciation to you and Mr. Leach for doing something that witnesses rarely do. You have been here to hear all of the testimony of everyone that has preceded you, and I want to thank you on the record for doing that.

Mr. COPELAND. Well, thank you.

Mr. LEACH. Thank you, sir.

Mr. CONYERS. And I thank our other witnesses for their cooperation and, with that understanding, these hearings are adjourned.

[Whereupon, at 3:30 p.m., the hearing adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

WRITTEN TESTIMONY

SUBMITTED TO:

**THE HONORABLE JOHN CONYERS, CHAIRMAN
HOUSE GOVERNMENTAL OPERATIONAL COMMITTEE
ASSET FORFEITURE HEARINGS**

SUBMITTED BY:

**THE HONORABLE ELVIN L. MARTINEZ, CHAIRMAN
COMMITTEE ON CRIMINAL JUSTICE
FLORIDA HOUSE OF REPRESENTATIVE**

SEPTEMBER 30, 1992

As you are aware, forfeiture laws are designed to remove the profit motive from criminal activity. They are not intended to deprive citizens of their constitutional rights, or dispossess innocent owners of their property. Unfortunately, misapplication of these laws by a few bad actors, and loopholes in these laws have had that unintended result.

Somehow the intent of forfeiture laws, i.e., removing the profit motive from criminal activity, has taken on a new twist. We seem to be encouraging law enforcement agencies to supplement their budgets with questionable roadside stops of citizens. Increasingly, even when a criminal offense has occurred, we arrest the money and let the wrongdoer go free.

I have heard much testimony in my role as chairman of the committee that innocent citizens are being stopped on highways based upon a so-called "drug smuggler's profile". The vast majority of these citizens are either Hispanic or Black.

More often than not these individuals are being stopped on the pretext of having committed some minor traffic offense; the kind of offense which would ordinarily go unnoticed by the officer and for which motorists are rarely ticketed. Once stopped, these citizens are being stripped of their property based upon determinations of probable cause that frequently would not withstand judicial scrutiny. Please note that, because forfeiture is civil in nature, the standards for determining probable cause

are much lower than they would be in a criminal proceeding. These citizens are being denied the procedural safeguards that we have come to expect as citizens of a democracy, where innocence is still the presumption.

Because of the high cost of contesting seizures or because of the time constraints involved (a significant number of these persons reside in other states and do not have the resources to wait out these legal highwaymen), these citizens are being coerced into accepting lopsided settlements which result in financial windfalls to law enforcement agencies at the expense of persons whose only crime is traveling on the nation's highways. Moreover, the procedures for securing the return of seized property are unduly burdensome, and often result in waste to non-monetary assets.

In the 1992 legislative session, Florida forfeiture law was amended to require that any agency which acquires more than \$15,000.00 in proceeds within a fiscal year must expend or donate no less than 15% of such proceeds for the support of a drug treatment, drug education, crime prevention, safe neighborhood, or school resource officer program.

I am concerned that, through the asset sharing provisions of the federal forfeiture statute, state law enforcement agencies are allowing federal agencies to "adopt" their seizure cases to circumvent state laws which place restrictions on the use of seized proceeds (under this scheme the federal agency takes the case for

September 30, 1992

The Honorable John Conyers, Chairman
House Government Operations Committee
Washington, DC 20515

Re: Asset Forfeiture

Congressman:

My name is Elvin Martinez, I currently serve in the Florida House of Representatives. I began my legislative service in 1966 and served until 1974. I was elected again in 1978 and have been reelected subsequently. I served as chairman of the House Committee on Criminal Justice from 1982 to 1986, and presently hold the chairmanship of that committee. I have the distinction of being selected as the Florida Department of Law Enforcement's Honorary Special Agent in 1986, and was selected as the Florida Department of Law Enforcement's Crime Fighter of the Year 1988-1990. In addition to my responsibilities as a legislator, I am a practicing member of the Florida bar.

Thank you for the opportunity to share my concerns regarding asset forfeiture with you and the members of your committee. The appropriate use of forfeiture laws continues to be of great concern to me. As Chairman of the Committee on Criminal Justice, I have been integrally involved in the creation and subsequent reform of the Florida Contraband Forfeiture Act, and remain committed to insuring that forfeiture continues to be a viable law enforcement tool.

a small percentage of the seizure proceeds and the state agency is free to spend its portion as it chooses). I would request that your committee address this issue and fashion a remedy that would not allow local law enforcement agencies to thwart state law.

In 1991, in response to many complaints, the Florida House of Representatives empaneled an ad hoc task force which held statewide hearings on the application of the contraband forfeiture law. Typically, the testimony at the hearings raised questions about due process and the inordinate amount of time and expense involved in trying to secure the return of seized assets.

I would like to take just a moment to relate a situation that was brought to my attention in my law practice. Just this past month, I had a young man call my law office asking for assistance in securing the return of \$534.00 in tips he received as a sky cap at Tampa International Airport. He had the misfortune of being the roommate of a young man who was stopped by police officers and arrested for being in possession of a small amount of marijuana. The officers conducted a search of the house occupied by these young men.

They asked for and received permission to examine the contents of the safe where my client kept his tips. Although he was not implicated in any criminal wrongdoing and there appeared to be no connection between the arrest of the roommate and the search, the tips were taken. The expense involved in securing the return of

the tips would have exceeded their value. The end result is that the skycap lost his money.

The problems with application of forfeiture laws suggests the need for some kind of oversight. Currently, no readily accessible avenue exists for investigating or disposing of complaints of abuse of asset forfeiture laws.

The Florida Legislature amended the Contraband Forfeiture Act this past session. I have taken the liberty of enclosing a copy of Florida's Contraband Forfeiture Act, my staff's analysis of the legislation, and the most recent Florida Supreme Court case on contraband forfeiture. I trust that you will find this information useful. Again, I am fully committed to fighting and winning the drug war in Florida, and I view asset forfeiture as a powerful weapon in this war. This war cannot be won, however, at the expense of individual citizens.

Respectfully submitted,

Elvin L. Martinez
State Representative

ELM/wf



Florida House of Representatives

T. K. Wetherell, Speaker
Committee on Criminal Justice

Elvin L. Martinez
Chairman

Tracy Stafford
Vice Chairman

Steven A. Geller
Ronald C. "Ron" Glickman
Subcommittee Chairmen

Susan G. Bisbee
Staff Director

September 30, 1992

The Honorable John Conyers, Chairman
House Government Operations Committee
Room 2157
Rayburn House Office Building
Washington, DC 20515

Re: Asset Forfeiture

Congressman:

My name is Elvin L. Martinez, I currently serve in the Florida House of Representatives. I began my legislative service in 1966 and served until 1974. I was elected again in 1978 and have been reelected subsequently. I served as chairman of the House Committee on Criminal Justice from 1982 to 1986, and presently hold the chairmanship of that committee. I have the distinction of being selected as the Florida Department of Law Enforcement's Honorary Special Agent in 1986, and was selected as the Florida Department of Law Enforcement's Crime Fighter of the Year 1988-1990. In addition to my responsibilities as a legislator, I am a practicing member of the Florida bar.

Thank you for the opportunity to share my concerns regarding asset forfeiture with you and the members of your committee. The appropriate use of forfeiture laws continues to be of great concern to me. As Chairman of the Committee on Criminal Justice, I have been integrally involved in the creation and subsequent reform of the Florida Contraband Forfeiture Act, and remain committed to insuring that forfeiture continues to be a viable law enforcement tool.

As you are aware, forfeiture laws are designed to remove the profit motive from criminal activity. They are not intended to deprive citizens of their constitutional rights, or dispossess innocent owners of their property. Unfortunately, misapplication of these laws by a few bad actors, and loopholes in these laws have had that unintended result.

The Honorable John Conyers
September 30, 1992
Page Two

Somewhat the intent of forfeiture laws, i.e., removing the profit motive from criminal activity, has taken on a new twist. We seem to be encouraging law enforcement agencies to supplement their budgets with questionable roadside stops of citizens. Increasingly, even when a criminal offense has occurred, we arrest the money and let the wrongdoer go free.

I have heard much testimony in my role as chairman of the committee that innocent citizens are being stopped on highways based upon a so-called "drug smuggler's profile". The vast majority of these citizens are either Hispanic or Black.

More often than not these individuals are being stopped on the pretext of having committed some minor traffic offense; the kind of offense which would ordinarily go unnoticed by the officer and for which motorists are rarely ticketed. Once stopped, these citizens are being stripped of their property based upon determinations of probable cause that frequently would not withstand judicial scrutiny. Please note that, because forfeiture is civil in nature, the standards for determining probable cause are much lower than they would be in a criminal proceeding. These citizens are being denied the procedural safeguards that we have come to expect as citizens of a democracy, where innocence is still the presumption.

Because of the high cost of contesting seizures or because of the time constraints involved (a significant number of these persons reside in other states and do not have the resources to wait out these legal highwaymen), these citizens are being coerced into accepting lopsided settlements which result in financial windfalls to law enforcement agencies at the expense of persons whose only crime is traveling on the nation's highways. Moreover, the procedures for securing the return of seized property are unduly burdensome, and often result in waste to non-monetary assets.

In the 1992 legislative session, Florida forfeiture law was amended to require that any agency which acquires more than \$15,000.00 in proceeds within a fiscal year must expend or donate no less than 15 percent of such proceeds for the support of a drug treatment, drug education, crime prevention, safe neighborhood, or school resource officer program.

The Honorable John Conyers
September 30, 1992
Page Three

I am concerned that, through the asset sharing provisions of the federal forfeiture statute, state law enforcement agencies are allowing federal agencies to "adopt" their seizure cases to circumvent state laws which place restrictions on the use of seized proceeds (under this scheme the federal agency takes the case for a small percentage of the seizure proceeds and the state agency is free to spend its portion as it chooses). I would request that your committee address this issue and fashion a remedy that would not allow local law enforcement agencies to thwart state law.

In 1991, in response to many complaints, the Florida House of Representatives empaneled an ad hoc task force which held statewide hearings on the application of the contraband forfeiture law. Typically, the testimony at the hearings raised questions about due process and the inordinate amount of time and expense involved in trying to secure the return of seized assets.

I would like to take just a moment to relate a situation that was brought to my attention in my law practice. Just this past month, I had a young man call my law office asking for assistance in securing the return of \$534.00 in tips he received as a sky cap at Tampa International Airport. He had the misfortune of being the roommate of a young man who was stopped by police officers and arrested for being in possession of a small amount of marijuana. The officers conducted a search of the house occupied by these young men.

They asked for and received permission to examine the contents of the safe where my client kept his tips. Although he was not implicated in any criminal wrongdoing and there appeared to be no connection between the arrest of the roommate and the search, the tips were taken. The expense involved in securing the return of the tips would have exceeded their value. The end result is that the skycap lost his money.

The problems with application of forfeiture laws suggests the need for some kind of oversight. Currently, no readily accessible avenue exists for investigating or disposing of complaints of abuse of asset forfeiture laws.

The Florida Legislature amended the Contraband Forfeiture Act this past session. I have taken the liberty of enclosing a copy of Florida's Contraband Forfeiture Act, my staff's analysis of the legislation, and the most recent Florida Supreme Court case on

The Honorable John Conyers
September 30, 1992
Page Four

contraband forfeiture. I trust that you will find this information useful. Again, I am fully committed to fighting and winning the drug war in Florida, and I view asset forfeiture is a powerful weapon in this war. This war cannot be won, however, at the expense of individual citizens.

Respectfully submitted,

Elvin L. Martinez
State Representative

ELM/wf

ENROLLED 1992 Legislature CS/HB 397, 1st Engrossed

An act relating to contraband forfeiture; amending s. 932.701, F.S.; providing definitions; amending s. 932.703, F.S.; revising language with respect to the transportation, concealment, or possession of contraband articles; amending s. 932.703, F.S.; revising language with respect to forfeiture; prohibiting use of seized property until perfected; providing exceptions; providing for reasonable maintenance; providing for the seizure of real property; providing for notice of adversarial hearing; providing for least restrictive means; providing for forfeiture of other property; providing a burden of proof to protect interests; providing for the protection of husband and wife interests; amending s. 932.704, F.S.; providing a policy statement; providing exceptions for rented or leased vehicles; providing procedures; providing for jury trial; providing for notice to owners; providing for larceny; providing for responsive pleadings; providing for settlements; providing burden of proof for forfeiture; providing for forfeiture; providing for release of property; prohibiting assessment of costs; providing for approval; providing for court costs and attorney fees; creating s. 932.705; providing for disposition of liens and forfeited property; providing for sale of property; providing for disbursement of

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

proceeds; providing for local trust funds; providing expenditures from trust fund; limiting use of trust funds; requiring certain expenditures from trust fund; providing exceptions; providing for state agency trust funds; providing for issuance of titles; providing for reports; prohibiting anticipating forfeiture proceeds; creating s. 932.706, F.S.; providing for training; creating s. 932.707, F.S.; providing penalty for noncompliance with reporting; providing a civil fine; amending s. 935.09, F.S.; clarifying the formula for distributing funds obtained pursuant to forfeiture proceedings under the act; repealing s. 6, ch. 99-102, Laws of Florida; abrogating the repeal of s. 995.99(2), F.S., relating to such distribution formula; amending s. 932.07, F.S.; providing for hull identification numbers; providing exceptions; providing for documentation; providing prohibitions from forfeiture; providing for replacing hull numbers and plates; providing prohibitions from altering and replacing hull numbers; providing an effective date.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 932.701, Florida Statutes, is amended to read:

932.701 Short title; definitions

~~w~~entraband-article

CODING: Words stricken are deletions; words underlined are additions.

CODING: Words stricken are deletions; words underlined are additions.

(1) Sections 932.701-932.707 938:706 shall be known and may be cited as the "Florida Contraband Forfeiture Act."

(2) As used in the Florida Contraband Forfeiture Act:

4 ~~932.701-932.706;~~

5 (a) "Contraband article" means:

6 (1)(a) Any controlled substance as defined in chapter 7 893 or any substance, device, paraphernalia, or currency or 8 other means of exchange which ~~has~~ has been is being; 9 ~~used~~ has attempted or is intended to be used in violation of 10 any provision of chapter 893.

11 2.(b) Any gambling paraphernalia, lottery tickets, 12 money, and currency ~~or other means of exchange which has 13 used~~ has attempted, or intended to be used in the violation 14 of the gambling laws of the state.

15 2.(c) Any equipment, liquid or solid, which ~~has~~ is being 16 ~~used~~ intended to be used, or intended to 17 be used in violation of the beverage or tobacco laws of the 18 state.

19 4.(d) Any motor fuel upon which the motor fuel tax has 20 not been paid as required by law.

21 5.(e) Any personal property, including, but not 22 limited to, any ~~vehicle~~ item, object, tool, 23 substance, device, weapon, machine, vehicle or any kind, 24 money, securities, books, records, research, negotiable 25 instruments, or currency, which ~~has~~ used or has attempted to 26 ~~be used~~ has been or is actually employed as an instrumentality 27 in the commission of, or in aiding or abetting in the 28 commission of, any felony, whether ~~or not~~ contraband is 29 ~~element~~ obtained as a result of a violation of the Florida Contraband 30 Forfeiture Act.

31

CODING: WORDS STRICKEN ARE DELETIONS; WORDS UNDERLINED ARE ADDITIONS.

CODING: WORDS STRICKEN ARE DELETIONS; WORDS UNDERLINED ARE ADDITIONS.

Section 2. Section 932.702, Florida Statutes, is amended to read:

(1) To conceal or possess any contraband article in or upon any vessel, motor vehicle, aircraft, other personal property, or real property;

(2) To transport, carry, or convey any contraband article in, upon, or by means of any vessel, motor vehicle, or aircraft;

(3) To use any vessel, motor vehicle, aircraft, other personal property, or real property to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(4) To conceal, or possess, or use any contraband article as an instrumentality in the commission of any law violation or attempt in the commission of any felony or violation of the Florida Contraband Forfeiture Act;

(5) To acquire real or personal property by the use of proceeds obtained in violation of the Florida Contraband Forfeiture Act.

Section 3. Section 932.703, Florida Statutes, is amended to read:

932.703 Forfeiture of vessels, motor vehicles, aircraft, other personal property, real property, or contraband article; exceptions.

(1)(a) Any contraband article vessel, motor vehicle, or aircraft; any other personal property; and any real property which has been or is being used in violation of any provision of the Florida Contraband Forfeiture Act s. 932.702, or is, upon, or by means of which any violation of the Florida Contraband Forfeiture Act that section has taken or is taking place, as well as any contraband article involved in the violation may be seized and shall be forfeited subject to the provisions of the Florida Contraband Forfeiture Act this act.

(b) All rights to, and interest in, and title to contraband articles or contraband property used in violation of s. 932.702 shall immediately vest in the state the resulting law enforcement agency upon seizure.

(c) The state agency shall not use the seized property for any purpose until the rights to, interest in, and title to the seized property are consistent in accordance with the Florida Contraband Forfeiture Act. This section does not prohibit use or operation necessary for reasonable maintenance of seized property. Reasonable efforts shall be made to maintain seized property in such a manner as to minimize loss of value, by a law enforcement agency; subject only to perfection-of-title; rights; and interests in accordance with this act;

(d) Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to action is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act. Seizing

CODING: Words stricken are deletions; words underlined are additions.

CODING: Words stricken are deletions; words underlined are additions.

1 advertisies shall make a diligent effort to notify the person
2 entitled to notice of the seizure. Notice provided by
3 certified mail, must be mailed within 5 working days of the
4 seizure and shall state that a person entitled to notice may
5 request an adversarial preliminary hearing within 15 days of
6 receiving such notice. When a non-seizure adversary
7 preliminary hearing is provided hereinafter requested, it shall
8 be held within 10 days after the request or as soon as
9 practicable.
10 (b) Real property may not be seized or restrained,
11 other than by law demands, subsequent to a violation of the
12 Florida Contraband Forfeiture Act until the person entitled
13 to notice are afforded the opportunity to attend the
14 adversarial preliminary hearing. A law demand may
15 be obtained by any method authorized by law. Notice of the
16 adversarial preliminary hearing shall be by certified mail,
17 return receipt requested. The success of the adversarial
18 preliminary hearing to determine whether probable cause
19 exists to believe that such property has been used in
20 Violation of the Florida Contraband Forfeiture Act. The
21 adverse party shall make a diligent effort to notify any
22 person entitled to notice of the seizure. The forfeiture
23 adversarial preliminary hearing provided herein shall be held
24 within 30 days of the filing of the law demands or as soon as
25 practicable.
26 (c) When an adversarial preliminary hearing is held,
27 the court shall review the verified affidavit and any other
28 authentic documents and take any testimony to determine
29 whether there is probable cause to believe that the property
30 has been used, has attempted to be used or has
31 intended to be used in violation of the Florida Contraband

CODING: Words stricken are deletions; words underlined are additions.

1 Forfeiture Act. If probable cause is established, the court
2 shall authorize the seizure or continued seizure of the
3 subject contraband. A copy of the findings of the court shall
4 be provided to any person entitled to notice.
5 (d) If the court determines that probable cause exists
6 to believe that such property has been, is being, or has
7 attempted to be used in violation of the Florida Contraband
8 Forfeiture Act, the court shall order the property restrained
9 by the least restrictive means to protect against disposal,
10 waste, or continued illegal use of such property pending
11 disposition of the forfeiture proceeding.
12 (3) Neither replevin nor any other action to recover
13 any interest in such property shall be maintained in any
14 court, except as provided in this act; however, such action
15 may be maintained if forfeiture proceedings are not initiated
16 within 45 90 days after the date of seizure. However, if bond
17 seizure is shown, the court may extend the aforementioned
18 exhibition to 60 days.
19 (4) In any incident in which possession of any
20 contraband article defined in s. 932.701(2)(g) (a)-(d)
21 constitutes a felony, the vessel, motor vehicle, aircraft,
22 SLMR personal property, or real property in or on which such
23 contraband article is located at the time of seizure shall be
24 contraband subject to forfeiture. It shall be presumed in the
25 manner provided in s. 90.302(2) that the vessel, motor
26 vehicle, aircraft, other personal property, or real property
27 in which such contraband article is located at the
28 time of seizure is being used or was intended or intended to
29 be used in a manner to facilitate the transportation,
30 carriage, conveyance, concealment, receipt, possession,
31

CODING: Words stricken are deletions; words underlined are additions.

1 purchase, sale, barter, exchange, or giving away of a
2 contraband article defined in s. 932.70(12).
3 (5) The court shall order the forfeiture of any other
4 property of a defendant, exclusive licensee, up to the value
5 of any property subject to forfeiture under this section if
6 any of the property described in this section subsection:
7 (a) Cannot be located;
8 (b) Has been transferred to, sold to, or deposited
9 with, a third party;
10 (c) Has been placed beyond the jurisdiction of the
11 court;
12 (d) Has been substantially diminished in value by any
13 act or omission of the person in possession of the property
14 defendant; or
15 (e) Has been commingled with any property which cannot
16 be divided without difficulty.)
17 (b)(1) No property shall be forfeited under the
18 the court shall order the forfeiture of any other property of
19 the defendant up to the value of any property subject to
20 forfeiture under this section.
21 (b)(2) No property shall be forfeited under the
22 provisions of the Florida Contraband Forfeiture Act as
23 931:791-932.794 if the owner of such property establishes by a
24 preponderance of the evidence that he neither knew, nor should
25 have known after a reasonable inquiry, that such property was
26 being employed or was likely to be employed in criminal
27 activity. Property titled or registered jointly between
28 husband and wife, by use of the conjunctives "and", "and/or",
29 or "or", shall not be forfeited if the co-owner establishes that
30 he neither knew, nor should have known after a reasonable
31 have known, that the vehicle was being employed or was likely

1 inquiry; that such property was employed or was likely to be
2 employed in criminal activity:
3 (b)(3) No bona fide licensee's interest shall be
4 forfeited under the provisions of the Florida Contraband
5 Forfeiture Act as s. 931:791-932.794 if such licensee
6 establishes by a preponderance of the evidence that he neither
7 knew, nor should have known after a reasonable inquiry, that
8 such property was being used or was likely to be used in
9 criminal activity; that such use was without his knowledge or
10 willful consent, express or implied; and that the licensor had
11 been perfected in the manner prescribed by law prior to such
12 seizure. If it appears to the satisfaction of the court that
13 a licensee's interest satisfies the above requirements of
14 shall remain until for example; such licensee's interest
15 shall be preserved by the court by ordering the licensee's
16 interest to be paid into the Florida Contraband Forfeiture Fund, from such
17 proceeds of the sale as provided in s. 931:791-932.794(3)(a);
18 (c) No property titled or registered between husband
19 and wife, jointly by the use of the conjunctive "and,"
20 "(and/or," or "or") shall be forfeited under the provisions of
21 the Florida Contraband Forfeiture Act if the co-owner
22 establishes by a preponderance of the evidence that he neither
23 knew nor should have known after a reasonable inquiry, that
24 such property was employed or was likely to be employed in
25 criminal activity.
26 (d) No vehicle which is rented or leased from a
27 company owned in the business of renting or leasing vehicles
28 shall be forfeited under the provisions of the Florida
29 Contraband Forfeiture Act if the company establishes by
30 preponderance of the evidence that it neither knew, nor should
31 have known, that the vehicle was being employed or was likely

CODING: Words stricken are deletions; words underlined are additions.

ENROLLED CS/HB 397, 1st Engrossed
1992 Legislature

1 1. (1) It is the policy of this state that law
2 enforcement agencies shall utilize the provisions of the
3 Florida Contraband Forfeiture Act to deter and prevent the
4 continued use of contraband articles for criminal purposes
5 while protecting the proprietary interests of innocent owners
6 and lawholders and to authorize such law enforcement agencies
7 to use the proceeds collected under the Florida Contraband
8 Forfeiture Act as supplemental funding for authorized
9 purposes.
10 (2) The Florida Rules of Civil Procedure shall govern
11 forfeiture proceedings under the Florida Contraband Forfeiture
12 Act unless otherwise specified under the Florida Contraband
13 Forfeiture Act.
14 (3) Any trial on the ultimate issue of forfeiture
15 shall be decided by a jury, unless such right is waived by the
16 plaintiff through a written waiver or on the record before the
17 court conducting the forfeiture proceeding.
18 (4) The seizing agency shall promptly proceed against
19 the contraband article by filing a complaint in the circuit
20 court within the jurisdiction where the seizure or the offense
21 occurred.
22 (5)(a) The complaint shall be styled, "In RE:
23 FORFEITURE OF..." (followed by the name or description of the
24 property). The complaint shall contain a brief jurisdictional
25 statement, a description of the subject matter of the
26 proceeding, and a statement of the facts sufficient to state a
27 cause of action that would support a final judgment of
28 forfeiture. The complaint must be accompanied by a verified
29 affidavit affidavit.
30 (b) If no person entitled to notice requests an
31 adversary declaratory hearing, as provided in s.

CODING: Words stricken are deletions; words underlined are additions.

ENROLLED 1992 Legislature
CS/HB 397, 1st Engrossed
1992 Legislature

CS/HB 397, 1st Engrossed

1992 Legislature

1 232.703(2)(a), the court, upon receipt of the complaint, shall
2 review the complaint and the verified supporting affidavit to
3 determine whether there was probable cause for the seizure.
4 Upon a finding of probable cause, the court shall enter an
5 order, absent the probable cause finding,
6 (a) The court shall require any claimant who desires
7 to contest the forfeiture to file and serve upon the attorney
8 representing the seizing agency any reasonable deadlines and
9 affirmative defenses within 20 days after receipt of the
10 complaint and probable cause findings.
11 (b)(a) If the property is required by law to be titled
12 or registered, or if the owner of the property is known in
13 fact to be the seizing agency, or if the seized property is
14 subject to a perfected security interest in accordance with
15 the Uniform Commercial Code, chapter 679, the attorney for the
16 seizing agency shall serve notice of the forfeiture complaint
17 by certified mail, return receipt requested, to each person
18 having such security interest in the property. The seizing
19 agency shall issue published, in accordance with chapter 50,
20 notice of the forfeiture complaint, twice each week for 2
21 consecutive weeks in a newspaper of general circulation, as
22 defined in s. 165.031, in the county where the seizure
23 occurred.
24 (b) The notice shall, in addition to stating that
25 which is required by s. 232.703(2)(a) and (b), as appropriate,
26 describe the property, state the county, place, and date of
27 seizure; state the name of the law enforcement agency holding
28 the seized property, and state the name of the court in which
29 the complaint will be filed.
30 (c) The seizing agency shall be obligated to make a
31 diligent search and inquiry as to the owner of the subject

13
COSINE: Words stricken are deletions; words underlined are additions.

1 property, and if, after such diligent search and inquiry, the
2 seizing agency is unable to ascertain any person entitled to
3 notice, the actual notice requirements by mail shall not be
4 applicable.
5 (2) When the claimant and the seizing law enforcement
6 agency agree to settle the forfeiture action prior to the
7 conclusion of the forfeiture proceeding, the settlement
8 agreement shall be reviewed, unless such review is waived by
9 the claimant in writing, by the court or a mediator or
10 arbitrator agreed upon by the claimant and the seizing law
11 enforcement agency.
12 (g) Upon clear and convincing evidence that the
13 seized article was being used in violation of the Florida
14 Seized and Forfeiture Act, the court shall order the seized
15 property forfeited to the seizing law enforcement agency. The
16 final order of forfeiture by the court shall reflect in the
17 law enforcement agency right, title, and interest in and to
18 such property, subject only to the rights and interests of
19 bona fide持有人, and shall relate back to the date of
20 seizure.
21 (g)(a) Then the claimant prevails at the conclusion of
22 the forfeiture proceeding, if the seizing agency decides not
23 to appeal, the seized property shall be released immediately
24 to the person entitled to possession of the property as
25 determined by the court. Under such circumstances, the seizing
26 agency shall not assess any liquidated damages fees.
27 administrative costs, or maintenance costs against the
28 claimant with respect to the seized property or the forfeiture
29 proceeding.
30 (b) When the claimant prevails at the conclusion of
31 the forfeiture proceeding, any decision to appeal must be made

14

COSINE: Words stricken are deletions; words underlined are additions.

1 by the chief administrative official of the seizing agency.
2 The trial court may require the seizing agency to pay to the
3 claimant the reasonable costs of value of the seized property
4 when the claimant prevails at trial and prevails on appeal and
5 the seizing agency retained the seized property during the
6 appellate process. The trial court may also require the
7 seizing agency to pay to the claimant any loss of income
8 directly attributable to the continued seizure of income
9 producing property during the appellate process. If the
10 claimant prevails on appeal, the seizing agency shall
11 immediately release the seized property to the person entitled
12 to possession of the property as determined by the court. Pay
13 any cost or assessed by the court, and shall not assess any
14 locking charges, storage fees, administrative costs, or
15 maintenance costs against the claimant with respect to the
16 seized property or the forfeiture proceeding.
17 (10) When the claimant prevails, the court may, in its
18 discretion, award reasonable attorney's fees and costs to the
19 claimant at the close of forfeiture proceeding and any appeal
20 if the court finds that the seizing agency has not proceeded
21 in good faith or that the seizing agency's action which
22 precipitated the forfeiture proceeding or appeal was a gross
23 abuse of the agency's discretion. The court may order the
24 seizing agency to pay the awarded attorney's fees and costs
25 from the appropriate contract and forfeiture trust fund.

26 Section 5. Section 932.705, Florida Statutes, is
27 created to read:
28 932.705 Disposition of liens and forfeited property.—
29 (1) When a seizing agency obtains a final judgment
30 against forfeiture of real property or personal property, it
31 may elect to:

- 1 (a) Retain the property for the agency's use.
- 2 (b) Sell the property at public auction or by sealed
3 bid to the highest bidder, except for real property which
4 should be sold in a commercially reasonable manner after
5 appraised by listing on the market, or
6 (c) Salvage, trade, or transfer the property to any
7 public or nonprofit organization.
- 8 (2) If the forfeited property is subject to a lien
9 preserved by the court as provided in s. 932.703(6)(b), the
10 agency shall:
 - 11 (a) Sell the property with the proceeds being used
12 towards satisfaction of any liens, or
13 (b) Have the lien satisfied prior to taking any action
14 authorized by subsection (1).
 - 15 (3) The proceeds from the sale of forfeited property
16 shall be disbursed in the following priority:
 - 17 (a) Payment of the balance due on any lien preserved
18 by the court in the forfeiture proceeding.
 - 19 (b) Payment of the cost incurred by the seizing agency
20 in connection with the storage, maintenance, security, and
21 forfeiture of such property.
 - 22 (c) Payment of court costs incurred in the forfeiture
23 proceeding.
 - 24 (4)(a) If the seizing agency is a county or municipal
25 agency, the remaining proceeds shall be deposited in a special
26 law enforcement trust fund established by the board of county
27 commissioners or the governing body of the municipality. Such
28 proceeds and interest earned therefrom shall be used for
29 school resource officer, crime prevention, safe neighborhood,
30 drug abuse education and prevention programs, or for other law
31 enforcement purposes, which include defraying the cost of

CODING: Words stricken are deletions; words underlined are additions.

CODING: Words stricken are deletions; words underlined are additions.

1. PROVIDED, OR COMPLEX INVESTIGATIONS, PROVIDING ADDITIONAL
2. EQUIPMENT OR OPERATE AND PROVIDING MATCHING FUNDS TO OBTAIN
3. FEDERAL GRANTS.

4. (b) THESE FUNDS MAY BE EXPENDED UPON REQUEST BY THE
5. CHIEF OF THE BOARD OF COUNTY COMMISSIONERS OR BY THE CHIEF
6. OF POLICE TO THE GOVERNING BODY OF THE MUNICIPALITY.
7. REQUESTED BY A MUNICIPAL CERTIFICATION THAT THE REQUEST
8. PERTAINS WITH THE PROVISIONS OF THIS SUBSECTION, AND SOLV UPON
9. REQUESTATION TO THE MUNICIPAL POLICE OR POLICE DEPARTMENT BY
10. THE BOARD OF COUNTY COMMISSIONERS OR THE GOVERNING BODY OF THE
11. MUNICIPALITY.

12. (c) AN AGENCY OR ORGANIZATION, OTHER THAN THE STATE
13. AGENT, THAT WISHES TO RECEIVE FUNDS SHALL APPLY TO THE
14. DIRECTOR OR CHIEF OF POLICE FOR AN APPROVAL OR DENIAL
15. AND APPROVAL SHALL BE ACCOMPANIED BY A MUNICIPAL CERTIFICATION
16. THAT THE MONEY WILL BE USED FOR AN AUTHORIZED PURPOSE, SUCH
17. AS REQUEST FOR EXPENDITURES SHALL INCLUDE A STATEMENT DESCRIBING
18. THE ANTICIPATED EXPENSES FOR THE AGENCY OR ORGANIZATION
19. OR LOCAL VESTED. AN AGENCY OR ORGANIZATION THAT RECEIVES MONEY
20. PURSUANT TO THIS SUBSECTION SHALL PROVIDE AN ACCOUNTING FOR
21. SUCH FUNDS AND SHALL FURNISH THE SAME UPON REQUEST AS AN AGENCY OR
22. THE COUNTY OR MUNICIPALITY THAT RECEIVED PUBLIC FUNDS. EACH
23. FUND MAY BE EXPENDED IN ACCORDANCE WITH THE FOLLOWING
24. PROCEDURES.

25. 1. SUCH FUNDS MAY BE USED ONLY FOR SCHOOL RESOURCES
26. 2. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
27. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
28. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
29. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
30. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
31. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,

3. AFTER JULY 1, 1992, AND DURING EVERY FISCAL YEAR
2. THEREAFTER, ANY LOCAL LAW ENFORCEMENT AGENCY THAT SECURES AT
3. LEAST \$15,000 PURSUANT TO THE FLORIDA CONTRABAND FORFEITURE
4. ACT, WITHIN A FISCAL YEAR, MUST SPEND OR DONATE NO LESS THAN 15
5. PERCENT OF SUCH RECEIPTS FOR THE SUPPORT OR OPERATION OF ANY
6. DRUG TREATMENT, DRUG ABUSE EDUCATION, DRUG DIVERSION, DRUG
7. PREVENTION, CHILD WELFARE, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
8. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
9. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
10. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
11. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
12. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
13. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
14. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
15. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
16. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
17. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
18. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
19. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
20. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
21. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
22. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
23. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
24. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
25. CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN, CHILDREN,
26. (a) THE DEPARTMENT OF LAW ENFORCEMENT, THE PROCEEDS
27. ACCRUED PURSUANT TO THE EXCISES OF THE FLORIDA CONTRABAND
28. FORFEITURE ACT SHALL BE DONATED INTO THE FORFEITURE AND
29. INVESTIGATIVE SUPPORT TRUST FUND.
30. (b) THE DEPARTMENT OF NATURAL RESOURCES, THE PROCEEDS
31. ACCRUED PURSUANT TO THE EXCISES OF THE FLORIDA CONTRABAND

1 Forfeiture Act shall be deposited into the Motorpool Revolving
2 Trust fund to be used for law enforcement expenses.
3 (c) The Division of Alcoholic Beverages and Tobacco,
4 the proceeds accrued pursuant to the Florida Contraband
5 Forfeiture Act shall be deposited into the Alcoholic Beverages
6 Forfeiture and Investigative Support Trust Fund.
7 (d) The Department of Highway Safety and Motor
8 Vehicles, the proceeds accrued pursuant to the Florida
9 Contraband Forfeiture Act shall be deposited into the
10 Department of Highway Safety and Motor Vehicles Trust Fund.
11 (e) The Game and Fresh Water Fish Commission, the
12 proceeds accrued pursuant to the regulations of the Florida
13 Contraband Forfeiture Act shall be deposited into the Wildlife
14 Law Enforcement Trust Fund.
15 (f) A state attorney's office acting within its
16 judicial circuit, the proceeds accrued pursuant to the
17 provisions of the Florida Contraband Forfeiture Act shall be
18 deposited into the State Attorney's Forfeiture and
19 Investigative Support Trust Fund to be used for the
20 investigation of crime and prosecution of criminals within the
21 judicial circuit.
22 (g) A school board security agency employing law
23 enforcement officers, the proceeds accrued pursuant to the
24 provisions of the Florida Contraband Forfeiture Act shall be
25 deposited into the School Board Law Enforcement Trust Fund.
26 (h) One of the State University System police
27 departments acting within the jurisdiction of its employing
28 state university, the proceeds accrued pursuant to the
29 provisions of the Florida Contraband Forfeiture Act shall be
30 deposited into that state university's special law enforcement
31 trust fund.

CODING: Words stricken are deletions; words underlined are additions.

1 (e) If more than one law enforcement agency is acting
2 substantially to effect the forfeiture, the court having
3 jurisdiction over the forfeiture proceedings shall, upon
4 motion, equitably distribute all proceeds and other property
5 among the available agencies.
6 (f) Upon the sale of any motor vehicle, vessel,
7 aircraft, real property, or other property requiring a title,
8 the appropriate agency shall issue a title certificate to the
9 purchaser. Upon the request of any law enforcement agency
10 which elects to retain titled property after forfeiture, the
11 appropriate state agency shall issue a title certificate for
12 such property to said law enforcement agency.
13 (g) Every law enforcement agency shall submit
14 annual reports to the Department of Law Enforcement
15 indicating whether the agency has seized or forfeited property
16 under the Florida Contraband Act. Any law enforcement agency
17 receiving or expending forfeited property or proceeds from the
18 sale of forfeited property in accordance with the Florida
19 Contraband Forfeiture Act shall submit completed annual
20 reports by April 10, and October 10, documenting the receipts
21 and expenditures on forms formulated by the Department of
22 Law Enforcement, to the entity which has budgetary authority
23 over such agency and to the Department of Law Enforcement.
24 The annual report shall specify the type, approximate
25 value, any court case number, type of offense, disposition of
26 the property received, and the amount of any proceeds received
27 or expended.
28 (h) The Department of Law Enforcement shall submit an
29 annual report to the Criminal Justice Committee of the House
30 of Representatives and of the Senate compiling the information
31 and data related in the semiannual reports submitted by the

CODING: Words stricken are deletions; words underlined are additions.

1 law enforcement agencies. The annual report shall also
2 contain a list of law enforcement agencies which have failed
3 to meet the reporting requirements and a summary of any action
4 which has been taken against the noncomplying agency by the
5 Office of the Comptroller.

6 (c) Neither the law enforcement agency nor the entity
7 having budgetary control over the law enforcement agency shall
8 anticipate future forfeitures or proceed thereon in the
9 adoption and approval of the budget for the law enforcement
10 agency.

11 Section 6. Section 932.706, Florida Statutes, is
12 created to read:

13 932.706. Forfeiture training requirements.--The
14 Criminal Justice Standards and Training Commission shall
15 develop a standardized course of training for basic recruits
16 which shall be designed to develop proficiency in the seizure
17 and forfeiture of property under the Florida Contraband
18 Forfeiture Act. Such course of training shall be developed
19 and implemented by October 1, 1993.

20 Section 7. Section 932.707, Florida Statutes, is
21 created to read:

22 932.707. Penalty for noncompliance with reporting
23 requirements.--Any agency which fails to comply with
24 the reporting requirements as described in s. 932.705(g)(a),
25 is subject to a civil fine of \$5,000 payable to the General
26 Revenue Fund. However, such agency shall not be subject to the
27 fine if, within 60 days of receipt of written notification
28 from the Department of Law Enforcement of the noncompliance
29 with the reporting requirements of the Florida Contraband
30 Forfeiture Act, the agency substantially complies with said
31 requirements. The Department of Law Enforcement shall submit
21

1 ANY SUBSTANTIAL NONCOMPLIANCE TO THE OFFICE OF THE
2 COMPTROLLER, WHICH SHALL BE RESPONSIBLE FOR THE ENFORCEMENT OF
3 THIS SECTION.
4 Section 8. Subsection (2) of section 895.09, Florida
5 Statutes, is amended to read:
6 895.09 Disposition of funds obtained through
7 forfeiture proceedings.--
8 (2)(a) Following satisfaction of all valid claims
9 under subsection (1), 25 percent of the remainder of the funds
10 obtained in the forfeiture proceedings pursuant to s. 895.05
11 shall be deposited as provided in paragraph (b) into the
12 appropriate trust fund of the Department of Legal Affairs or
13 state attorney's office which filed the civil forfeiture
14 action; 25 percent shall be deposited as provided in paragraph
15 (c) into the law enforcement trust fund of the investigating
16 law enforcement agency conducting the investigation which
17 resulted in or significantly contributed to the forfeiture of
18 the property; 25 percent shall be deposited as provided in
19 paragraph (d) in the Drug Abuse Trust Fund of the Department
20 of Health and Rehabilitative Services, established under s.
21 397.19; and the remaining 25 percent shall be deposited in the
22 Forfeited Property Trust Fund of the Department of Natural
23 Resources. When a forfeiture action is filed by the
24 Department of Legal Affairs or a state attorney, the court
25 entering the judgement of forfeiture shall, taking into account
26 the overall effort and contribution to the investigation and
27 forfeiture action by the agencies that filed the action, make
28 a pro rata apportionment among such agencies of the funds
29 available for distribution to the agencies filing the action
30 as provided in this section. If multiple investigating law
31 enforcement agencies have contributed to the forfeiture of the
22

CODING: Words stricken are deletions; words underlined are additions.

CODING: Words stricken are deletions; words underlined are additions.

Property, the court which entered the judgment of forfeiture shall, taking into account the overall effort and contribution of the agencies to the investigation and forfeiture action, make a pro rata apportionment among such investigating law enforcement agencies of the funds available for distribution to the investigating agencies as provided in this section.

(b) If a forfeiture action is filed by the Attorney General, any funds obtained by the Department of Legal Affairs by reason of paragraph (a) shall be deposited in the Legal Affairs Revolving Trust Fund as established by s. 16-53 and may be expended for the purposes and in the manner authorized in that section. If a forfeiture action is filed by a state attorney, any funds obtained by the state attorney's office by reason or paragraph (a) shall be deposited in the State Attorney RICO Trust Fund as established by s. 27-345 and may be expended for the purposes and in the manner authorized in that section. In addition, any funds that are distributed pursuant to this section to an agency filing a forfeiture action may be used to pay the costs of investigations of violations of this chapter and the criminal prosecutions and civil actions related thereto. Such costs may include all taxable costs; costs of protecting, maintaining, and forfeiting the property; employees' base salaries and compensation for overtime; and such other costs directly attributable to the investigation, prosecution, or civil action.

(d) The Department of Health and Rehabilitative Services shall, in accordance with chapter 397, distribute funds obtained by it pursuant to paragraph (a) to public and private nonprofit organizations licensed by the department to provide drug abuse treatment and rehabilitation centers or drug prevention and youth orientation programs in the service district in which the final order of forfeiture is entered by the court.

(e) On a quarterly basis, any excess funds, including interest, over \$1 million \$1,000,000 deposited in the Forfeited Property Trust Fund of the Department of Natural Resources in accordance with paragraph (a) shall be deposited in the Drug Abuse Trust Fund of the Department of Health and Rehabilitative Services.

Section 9. Section 6 of chapter 82-102, laws of Florida, is hereby repealed.

Section 10. Section 328-07, Florida Statutes, is amended to read:

(c) Any funds distributed to an investigating law enforcement agency under paragraph (a) shall be deposited in the special law enforcement trust fund established for that agency pursuant to s. 932.704 and expended for the purposes and in the manner authorized in that section. In addition,

23

CODING: Words stricken are deletions; words underlined are additions.

24
CODING: Words stricken are deletions; words underlined are additions.

title or which is required by law to be registered, unless the vessel displays the assigned hull identification number affixed by the manufacturer as required by the United States Coast Guard issued by the United States Coast Guard for a manufactured vessel or by the department for a homemade vessel or other vessel for which a hull identification number is not required by the United States Coast Guard. The hull identification number must be carved, burned, stamped, embossed, or otherwise permanently affixed to the outboard side of the transom or, if there is no transom, to the outermost starboard side at the end of the hull that bears the rudder or other steering mechanism, above the waterline of the vessel in such a way that alteration, removal, or replacement would be obvious and evident. The characters of the hull identification number must be no less than 12 in number and no less than one-fourth inch in height.

(2) No person shall operate on the waters of this state a vessel the construction of which was completed before November 1, 1972, for which the department has issued a certificate of title or which is required by law to be registered, unless the vessel displays a hull identification number. The hull identification number shall be clearly imprinted in the transom or on the hull by stamping, impressing, or marking with pressure. In lieu of imprinting, the hull identification number may be displayed on a plate in a permanent manner. If the hull identification number is displayed in a location other than the transom, the department must be notified by the manufacturer as to each location. A vessel for which the manufacturer has provided no hull identification number or a homemade vessel shall be assigned a

hull identification number by the department which shall be affixed to the vessel pursuant to this section.

(3)(a) No person, firm, association, or corporation shall destroy, remove, alter, cover, or deface the hull identification number or hull serial number, or plate bearing such number, of any vessel, except to make necessary repairs which require the removal of the hull identification number and immediately thereafter shall cause the hull identification number to be rescribed in accordance with subsection 10 (2).

(b) If any of the hull identification numbers required by the United States Coast Guard for a vessel manufactured after October 31, 1972, subsection (1) do not exist or have been altered, removed, destroyed, covered, or defaced or the real identity of the vessel cannot be determined, the vessel may be seized as contraband property by a law enforcement agency or the division, and shall be subject to forfeiture pursuant to ss. 932.701-932.702794. Such vessel may not be sold or operated on the waters of the state unless the division receives a request from a law enforcement agency requiring documentation of its directed by written order of a court of competent jurisdiction to issue to the vessel a replacement hull identification number which shall thereafter be used for identification purposes. No vessel shall be forfeited under the Florida Contraband Forfeiture Act when the owner unconditionally, inadvertently, or negligently altered, removed, defaced, covered, or defaced the vessel hull identification number.

(4)(a) It is unlawful for any person to knowingly possess, manufacture, sell or exchange, offer to sell or exchange, supply in blank, or give away any counterfeit

CODING: Words stricken are deletions; words underlined are additions.
25
26

ENROLLED
1992 Legislature

CS/HB 397, 1st Engrossed

ENROLLED
1992 Legislature

CS/HB 397, 1st Engrossed

1 manufacturer's vessel hull identification number plate or
2 decal or any manufacturer's vessel hull identification plate or
3 decal which is assigned to another vessel to be used for the
4 purpose of identification of any vessel; to authorize, direct,
5 sell in exchange, or give away such counterfeit manufacturer's
6 vessel hull identification number plate or decal or any
7 manufacturer's vessel hull identification number plate or
8 decal which is assigned to another vessel; or to comprise to
9 do any of the foregoing. However, nothing in this subsection
10 shall be applicable to any second hull identification number
11 plate or decal issued as a replacement by the manufacturer,
12 the department, or another state; or to conspicuously do any of
13 the foregoing.

14 (b) It is unlawful for any person to knowingly buy,
15 sell, offer for sale, receive, dispose of, conceal, or have in
16 his possession any vessel or part thereof on which the
17 assigned identification number has been altered, removed,
18 destroyed, covered, or defaced or maintain such vessel in any
19 manner which conceals or misrepresents the true identity of
20 the vessel.

21 (c) Any person who violates any provision of this
22 subsection is guilty of a felony of the third degree,
23 punishable as provided in § 775.082, § 775.083, or §
24 775.084.

25 (5) The failure to have the hull identification number
26 clearly displayed in compliance with this section shall be
27 probable cause for any Division of Law Enforcement officer or
28 other authorized law enforcement officer to make further
29 inspection of the vessel in question to ascertain the true
30 identity thereof.

27

1 (6) Each vessel manufactured after the effective date
2 of this act for sale in the state shall have a hull
3 identification number displayed prior to sale or delivery for
4 sale in accordance with the regulations set forth in 33 C.F.R.
5 pt. 181. The hull identification number shall not be altered
6 or replaced by the manufacturer or manufacturer's
7 representative for the purpose of updating the model year of
8 a vessel after being offered for sale or delivered to any
9 dealer.

10 (7) No person or firm shall assign the same hull
11 identification number to more than one vessel.

12 Section 11. This act shall take effect July 1, 1992.

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

28

CODING: Words stricken are deletions; words underlined are additions.

CODING: Words stricken are deletions; words underlined are additions.

STORAGE NAME: h0397blz.cj
 DATE: April 16, 1992

AS PASSED BY THE LEGISLATURE
 CHAPTER #: 92-54, Laws of Florida

HOUSE OF REPRESENTATIVES
 COMMITTEE ON
 CRIMINAL JUSTICE
 FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 397

RELATING TO: Contraband Forfeiture

SPONSOR(S): Committee on Criminal Justice and Representatives Stafford,
 Martinez and others

STATUTE(S) AFFECTED: Sections 932.701-704, 895.09, 328.07, F.S.

COMPANION BILL(S): S 1908 (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIMINAL JUSTICE YEAS 10 NAYS 0
- (2)
- (3)
- (4)
- (5)

I. SUMMARY:

This committee substitute (CS) for HB 397 amends the Florida Contraband Forfeiture Act (the Act) which provides for the civil forfeiture of contraband articles. This bill modifies the definition of "contraband article" to include property which was attempted to be used in violation of the Act.

The bill also provides that any person who is entitled to notice in real or personal property forfeiture cases must be notified of the right to a preliminary adversarial hearing to determine whether there is probable cause to believe that the property was used in violation of the Act. When probable cause is found, the court shall order that any seized property should be restrained by the least restrictive means to prevent waste, disposal, or continued criminal use.

CS/HB 397, further, provides that no property individually held, no lienholder's interest, and no property titled or held jointly between husband and wife shall be forfeited if such owner, lienholder, or co-owner establishes by a preponderance of the evidence that he neither knew, nor should have known, that the property was employed or likely to be employed in violation of the Act.

Additionally, CS/HB 397 provides that an action under the Contraband Forfeiture Act must be initiated by a complaint and a verified supporting affidavit. The complaint must be filed in the civil division of the circuit court where the violation occurred or where the property was seized. Replies to the complaint must be filed within 20 days after the complaint is noticed. When the seizing agency proves by clear and convincing evidence that the contraband article was used in violation of the Act, the contraband shall be forfeited and all interests will be perfected in the seizing agency.

Every law enforcement agency must submit semi-annual reports to the Florida Department of Law Enforcement (FDLE) indicating any actions such agency has taken under the Act or face a \$5,000 civil fine.

STANDARD FORM 11/90

STORAGE NAME: h0397six.cj
DATE: April 16, 1992
PAGE 2

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Currently, "contraband article" is defined in s. 932.701, F.S. The definition includes any real or personal property which has been used, is being used, or is intended to be used in violation of the Contraband Forfeiture Act. No other definitions are provided in the Act.

Section 932.703, F.S., provides that any vessel, motor vehicle, aircraft, currency, other personal property, or contraband article which has been used or was intended to be used in violation of any of the provisions of this Act may be seized and shall be forfeited. All rights, interest, and title to the seized property shall immediately vest in the state upon seizure and is then subject only to perfection. Under this section, no action to recover seized property may be maintained if such action is initiated within 90 days of the seizure. Additionally, no property individually owned, no lienholder's interest, and no property jointly held or titled between husband and wife may be forfeited if such owner or lienholder establishes that he neither knew, nor should have known, that the property was likely to be employed in criminal activity.

Section 932.704, F.S., provides that the state attorney in the jurisdiction where the property was seized shall promptly proceed against the contraband article in the circuit court in the jurisdiction where the property was seized or where the offense occurred. Such contraband property may be forfeited to the seizing agency upon that agency producing due proof that such property was used in violation of this Act. If the property is required by law to have a title or registration, the attorney for the seizing agency must give notice of the forfeiture proceeding by registered mail and publish notice of the forfeiture proceeding at least once each week for 2 consecutive weeks in a newspaper of general circulation. The notice and first publishing must be done at least four weeks prior to the filing of the Rule to Show Cause.

Section 932.704, F.S., also provides for the disposition of liens and forfeited property. Proceeds, which remain after all liens and debts against the forfeited property are paid, are deposited in special law enforcement trust funds which may be used for school resource officer, crime prevention, and drug education programs, or for other law enforcement purposes. The Act does not mandate the expenditure of any portion of the trust fund for any specific programs or purposes. Any law enforcement agency receiving or expending forfeited property or proceeds from forfeited property under this Act must submit quarterly reports documenting the receipts and expenditures, on forms developed by FDLE, to both the entity with budgetary authority over such agency and to FDLE.

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 3

Any vessel which is operated upon the waters of this state is required to display a hull identification number. No person may destroy, remove, alter, cover, or deface the hull identification number of any vessel. If the hull identification number does not exist or is destroyed, removed, altered, covered, or defaced such vessel shall be subject to forfeiture pursuant to ss. 932.701-704, F.S.

Section 895.09, F.S., currently provides for the distribution of funds obtained through forfeiture proceedings under the Racketeer Influenced Corrupt Organizations Act (RICO) following the satisfaction of all valid claims. Under the Laws of Florida section 6, chapter 89-102, shall be repealed effective July 1, 1992, and is scheduled for review by the legislature.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 397 changes the definition of "contraband article" to personal or real property which was used, is being used, was intended to be used, or was attempted to be used in violation of any provision of the Contraband Forfeiture Act. Such contraband article is subject to forfeiture whether or not it is an element of the underlying felony offense. For instance, in a forfeiture case arising from the felony of vehicular homicide, the vehicle used to commit that offense, although it is an element of the crime, is subject to forfeiture under the Contraband Forfeiture Act. The bill defines the terms "bona fide lienholder", "promptly proceed", "complaint", "person entitled to notice", "adversarial preliminary hearing", "forfeiture proceeding", and "claimant."

Section 932.703, F.S., is amended to provide that personal property may be seized at the time of the violation or any time subsequent thereto, provided that the persons entitled to notice are informed of their right to an adversarial preliminary hearing to determine whether there was probable cause for the seizure. Real property may not be seized until persons entitled to notice are afforded the opportunity to attend the adversarial hearing which will be held to determine whether there is probable cause for a seizure. When probable cause is established, the court shall limit the restraint of seized property to the least restrictive means to protect such property from disposal, waste, or continued criminal use. The seizing agency is prohibited from using seized property for any purpose, other than for reasonable maintenance, until all rights to, interest in, and title to the property are perfected in the law enforcement agency.

No action to recover any interest in the seized property may be maintained in any court unless forfeiture proceedings are not initiated within 45 days of the seizure. This 45-day limitation may be extended to 60 days if the court determines that there is good cause to extend the time.

Additionally, no individually owned property, no lienholder's interest in property, no property jointly held or titled between husband and wife, and no rental or leasing company's interest in a

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 4

seized vehicle may be forfeited if such owner or lienholder establishes by a preponderance of the evidence that they neither knew, nor should have known, that the property was employed or likely to be employed in criminal activity. Any seized vehicle which is rented or leased from a company which is in the business of renting or leasing vehicles shall be made available for the company to take possession as soon as practicable after it is seized.

Any interest in, title to, or right to property which is held by a culpable co-owner, other than such interest held between husband and wife, may be forfeited if such co-owner cannot prove by a preponderance of the evidence that they neither knew, nor had reason to know that the property was used in violation of the Act. The seizing agency shall afford the remaining co-owner the opportunity to purchase the forfeited interest. If the forfeited interest is not purchased by the remaining co-owner, the seizing agency may either hold, sell, or dispose of such interest.

The policy amendment to section 932.704, F.S., states that the purpose of the Contraband Forfeiture Act is to prevent and deter the use of contraband articles for criminal purposes while protecting the rights of innocent owners and lienholders. The Rules of Civil Procedure shall govern forfeiture proceedings under the Florida Contraband Forfeiture Act, unless otherwise provided. Additionally, any trial on the ultimate issue of forfeiture shall be decided by a jury, unless such right is waived by the claimant.

Further, the seizing agency shall promptly proceed against the subject property by filing a complaint. The complaint shall be styled, "In RE: FORFEITURE OF...", followed by a jurisdictional statement, a description of the subject matter and a statement of facts, and a verified supporting affidavit. Any claimant contesting the forfeiture must file responsive pleadings and any affirmative defenses within 20 days after receiving the complaint.

If the seizing agency and claimant decide to settle the forfeiture action prior to the conclusion of the forfeiture proceeding, the settlement agreement must be reviewed by the court. When the forfeiture action has not been filed with a court, the agreement must be reviewed by a mediator or arbitrator.

If the forfeiture action proceeds to trial, the seizing agency has the burden of proving by clear and convincing evidence that the intended use, attempted use, or use of the property was in violation of the Contraband Forfeiture Act. The court's final order of forfeiture shall perfect all rights to, title in, and interest to the forfeited property in the seizing agency. These perfected rights shall be subject only to the interest of bona fide lienholders.

When the claimant prevails at trial and the seizing agency does not appeal, the seized property shall be released immediately to the person entitled to possession. No towing charges, storage fees, or maintenance costs may be assessed against the claimant.

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 5

The seizing agency's decision to appeal must be made by the chief administrative official of the agency.

When the seizing agency loses at trial and then retains the seized property during the appellate process, the agency may be required to pay for the reasonable loss of value to the seized property, if it loses on appeal. Additionally, when the seizing agency loses at trial and then continues to hold income producing property during the appellate process, if the seizing agency loses on appeal it may be required to pay for the loss of income resulting from the continued holding of the seized property. When the seizing agency loses on appeal, they shall immediately release the seized property to the person entitled to possession. No towing charges, storage fees, or maintenance costs may be assessed.

When the claimant prevails at the close of the forfeiture proceeding or of any appeal, the court may, in its discretion, order the seizing agency to pay attorney fees and costs to the claimant if the court finds that the seizing agency did not proceed in good faith or exercised a gross abuse of discretion.

Section 932.705, F.S., is created to provide for the disposition of liens and forfeited property. The disposition of liens and forfeited property is currently provided for under s. 932.704, F.S. Safe neighborhood programs were added to the list of approved uses of monies from the contraband forfeiture trust funds. Proceeds from any forfeiture conducted under the Contraband Forfeiture Act by one of the police departments of the State University System may be deposited into the university's special law enforcement trust fund. Currently, these proceeds are deposited in the General Revenue Fund.

After July 1, 1992, any local law enforcement agency which acquires more than \$15,000 of proceeds within a fiscal year under the Florida Contraband Forfeiture Act must expend or donate no less than 15 percent of such proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program. The law enforcement agency and local governing body may agree to expend or donate the prescribed allocation over a period of years if the minimum expenditure would exceed the reasonable needs of the county or municipality.

Additionally, every law enforcement agency shall submit semiannual reports, by April 10, and by October 10, to FDLE indicating whether that agency has received or forfeited property under the Contraband Forfeiture Act. The report, submitted on a form designed by FDLE, shall specify the type, approximate value, court case number, type of offense, disposition of the property, and the amount of proceeds received or expended.

FDLE shall be required to submit an annual report to the Criminal Justice Committees of the House of Representatives and the Senate. The annual report should consist of a compilation of the information and data submitted in the semiannual reports of the law enforcement agencies. The annual report by FDLE shall also

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 6

disclose all law enforcement agencies which have failed to comply with the reporting requirements.

Section 932.706, F.S., is created to provide that the Criminal Justice Standards and Training Commission shall by October 1, 1993, develop a course of standardized training for basic recruits on the seizure and forfeiture of contraband articles under the Contraband Forfeiture Act.

Section 932.707, F.S., is created to provide that a \$5,000 civil fine, payable to the General Revenue Fund, shall be assessed against any law enforcement agency which fails to substantially comply with the reporting requirements of the Contraband Forfeiture Act. FDLE shall report any noncomplying agency to the Office of the Comptroller, which is responsible for enforcing this section.

Section 895.09, F.S., provides for the distribution of funds obtained through forfeitures under the RICO Act. This bill repeals section 6 of chapter 89-102, Laws of Florida, which currently repeals the distribution provisions under the Florida RICO Act.

Section 328.07, F.S., is amended to provide that no vessel shall be forfeited pursuant to the Contraband Forfeiture Act when the owner unknowingly, inadvertently, or negligently destroyed, removed, altered, covered, or defaced the vessel's hull identification number. Any vessel which is operated upon the waters of this state is required to display a hull identification number. Currently, if the hull identification number of the vessel is destroyed, removed, altered, covered, or defaced, the vehicle is subject to forfeiture under the Contraband Forfeiture Act.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 932.701, F.S., to provide definitions for "contraband article", "bona fide lienholder", "promptly proceed", "complaint", "person entitled to notice", "adversarial preliminary hearing", "forfeiture proceeding", and "claimant."

Section 2 amends s. 932.702, F.S., relating to the unlawful use of contraband articles, to include "other personal property" among contraband articles which, if used unlawfully, may be forfeited under this Act.

Section 3 amends s. 932.703, F.S., relating to the forfeiture of contraband articles, to prohibit certain use of seized property, to provide for an adversarial preliminary hearing and the seizure of real and personal property, to shorten the time in which an action to recover may not be brought, to provide for notice to persons entitled to notice of the action, and to provide burdens of proof for owners, lienholders, and husbands and wives.

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 7

Section 4 amends s. 932.704, F.S., relating to forfeiture proceedings, to provide a policy statement, to require the use of the Florida Rules of Civil Procedure in proceedings under this Act, and to provide for a jury trial on the issue of forfeiture. Further, the section provides for the forfeiture complaint, settlement agreements and a burden of proof of clear and convincing evidence for a forfeiture. Additionally, section 4 provides for appeals, attorney fees and costs, and loss of income from income producing property.

Section 5 creates s. 932.705, F.S., to provide for the disposition of liens and forfeited property. With one exception, fifteen percent of the proceeds from forfeited property must be allocated for certain programs.

Section 6 creates s. 932.706, F.S., to require the Criminal Justice Standards and Training Commission to develop a standardized course of training on the Contraband Forfeiture Act.

Section 7 creates s. 932.707, F.S., to provide a civil fine for any law enforcement agency which fails to comply with the reporting requirements of the Contraband Forfeiture Act.

Section 8 amends and reenacts subsection (2) of section 895.09, F.S., to reenact the provisions for the distribution of funds under the Florida Racketeer Influenced Corrupt Organization Act.

Section 9 repeals section 6 of chapter 89-102, Laws of Florida.

Section 10 amends s. 328.07, F.S., to provide that vessels whose hull identification number have been unknowingly, inadvertently, or neglectfully altered, removed, destroyed, covered, or defaced shall not be forfeited under the Contraband Forfeiture Act.

Section 11 provides that this act shall take effect July 1, 1992.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate. Law enforcement agencies which fail to comply with the reporting requirements may be assessed a civil fine.

2. Recurring Effects:

Indeterminate. However, seizing agencies may incur expenses that result from the towing, storage, and maintenance of seized property. The seizing agency may be assessed attorney fees,

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 8

costs and loss of income if the court determines that such agency has not acted in good faith.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Indeterminate. Law enforcement agencies which fail to comply with the reporting requirements may be assessed a civil fine.

2. Recurring Effects:

Indeterminate. However, when a seizing agency loses it must absorb the towing, storage, and maintenance cost of returned property. The seizing agency may be assessed attorney fees, costs, and loss of income if the court determines that such agency has not acted in good faith.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

STORAGE NAME: h0397s1z.cj
DATE: April 16, 1992
PAGE 9

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Exempt as a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None.

V. COMMENTS:

On August 15, 1991, the Florida Supreme Court in Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla 1991), considered whether the Florida Contraband Forfeiture Act is constitutional on its face and as applied. The Court held that the Act is facially constitutional, provided that it is applied consistent with the minimal due process requirements of the Florida Constitution as set forth in the Court's opinion. The Court held that in forfeiture cases under the Contraband Forfeiture Act minimal due process requires the following:

- A. The agency seeking forfeiture may file its complaint by applying for the issuance of a rule to show cause in the circuit court. The complaint must be verified and supported by an affidavit.
- B. The rule to show cause shall require the filing of responsive pleadings and any affirmative defenses within twenty days (20) of service of the rule to show cause.
- C. When real or personal property is seized, the state should use the least restrictive means to preserve the availability of that property. Short of physically taking custody of seized property, the state should consider less restrictive seizures such as lis pendens, restraining orders, or property bonds.
- D. In real property forfeiture actions, the state must give notice of the adversarial preliminary hearing to interested persons. The Court anticipates that such hearing will take place within ten days of the filing of the petition. With the exception of a lis pendens, an adversarial preliminary hearing must be held prior to any other initial restraint on real property.
- E. In personal property forfeitures, the state must notify interested persons that they have the right to an adversarial hearing upon request. Such hearing should be held as soon as possible after the property is seized.

STORAGE NAME: h0397s1z.cj
 DATE: April 16, 1992
 PAGE 10

- F. The Florida Rules of Civil Procedure shall otherwise control the proceedings under the Contraband Forfeiture Act.
- G. The ultimate issue of forfeiture must be decided at a trial by jury, unless the claimants waive that right.
- H. "Due proof" under the Act means that the government may not take an individual's property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime.
- I. Forfeiture must be limited to the property or the portion thereof that was used in the crime.
- J. An owner's interest in property may not be forfeited if that owner establishes by a preponderance of the evidence that he had no knowledge that the property was being used in criminal activity.

Additionally, the Staff of the Committee on Criminal Justice submitted an interim report to the legislature entitled "Contraband Forfeiture in Florida: A Review of Current Law and Suggestions for Legislative Reform." The report included: data collected during hearings of the Ad Hoc Task Force on Contraband Forfeiture; the Florida Supreme Court's decision in Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla 1991), on the constitutionality of the Act; the finding of a survey completed by municipal and county budgetary authorities on deposits to and expenditures from contraband forfeiture trust funds; and the results of a contraband forfeiture questionnaire which was completed by more than 80 percent of the state's law enforcement agencies.

Representative Stafford, the primary sponsor of the bill and the Chairman of the Ad Hoc Task Force on Contraband Forfeiture, indicated that this bill addresses many of the concerns raised by the Florida Supreme Court as well as the concerns which were brought to the attention of the Ad Hoc Task Force during the public hearings. Additionally, Rep. Stafford asserted that this bill is the product of many hours of extensive discussion and negotiation with representatives of the law enforcement and legal communities.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The CS for HB 397 is substantially different from the original HB 397. The changes in the CS incorporate the recommendations and suggestions which were adopted during the November and December meeting of the Subcommittee on Prosecution and Punishment and the Criminal Justice Committee, as well as the amendments which were adopted on the House floor. Essentially, the CS includes the following changes: provides for the forfeiture of property which was attempted to be used in violation of the Act; clarifies the burdens of proof; provides notice requirements; provides for the use of the Rules of Civil Procedure; provides for jury trials; provides for the distribution of forfeiture proceeds; modifies the reporting requirements; and provides penalties for law enforcement agencies which fail to meet the reporting requirements.

STORAGE NAME: h0397slz.cj
DATE: April 16, 1992
PAGE 11

VII. SIGNATURES:

COMMITTEE ON CRIMINAL JUSTICE:
Prepared by:

Richard D. Davison

Staff Director:

Susan G. Bisbee

FINAL ANALYSIS PREPARED BY COMMITTEE ON CRIMINAL JUSTICE:
Prepared by:

Richard D. Davison

Staff Director:

Susan G. Bisbee

Supreme Court of Florida

Nos. 77,308, 77,309, 77,310, 77,311, 77,312

DEPARTMENT OF LAW ENFORCEMENT,
Appellant,

vs.

REAL PROPERTY, etc.,
Appellee.

[August 15, 1991]

BARKETT, J.

We have on appeal an order of the Eighth Judicial Circuit, in and for Levy County, Florida, in which the court declared unconstitutional the Florida Contraband Forfeiture Act, sections 932.701-.704 of the Florida Statutes (1989) (the Act). The order was appealed to the First District Court of Appeal where a split panel, without deciding the merits, certified the issue to this Court as a matter of great public importance requiring immediate

resolution.¹ Florida Dep't of Law Enforcement v. Real Property Including Any Building, Appurtenances, etc., No. 91-23 (Fla. 1st DCA Jan. 29, 1991). We hold that the Act is facially constitutional provided that it is applied consistent with the minimal due process requirements of the Florida Constitution as set forth in this opinion.

I. THE FACTS

Charles DeCarlo was arrested on drug trafficking charges on May 15, 1990, stemming from a reverse sting operation conducted by appellant Florida Department of Law Enforcement (FDLE) and the Levy County Sheriff's Department. On May 16, the state initiated forfeiture proceedings in circuit court against certain properties that were described by the court as follows:

- | | |
|------------|---|
| No. 77-308 | An entire 60-acre tract of land, part of which includes an extension of an airstrip. |
| No. 77-309 | An R/V mobile home subdivision of more than 40 acres, with numerous full R/V hookups, a bath house, a restaurant, and other improvements. |
| No. 77-310 | An entire 280-acre subdivision platted on to more than 200 separate lots. |
| No. 77-311 | An entire 100-acre platted subdivision of approximately 1-acre parcels, including an air strip and other improvements. |
| No. 77-312 | Personal residence and property, including garages, sheds and other improvements. |

¹ We have jurisdiction pursuant to article V, section 3(b)(5) of the Florida Constitution.

Based solely on an affidavit executed by an FDLE special agent, the circuit court on May 16 issued warrants to seize the aforementioned properties. The state that day also filed a notice of lis pendens against those properties and petitioned for a rule to show cause why the properties should not be forfeited.²

The petition for a rule to show cause was opposed by claimants Charles DeCarlo; Cedar Key Mobile Home Village, Inc.; Cedar Key Flying Club, Inc.; Cedarwood Estates, Inc.; Cedar Key Hunting and Game Preserve, Inc.; Walter G. Gifford; and Marlene M. Gifford. The claimants moved to dismiss the petitions on constitutional grounds. The circuit court consolidated the cases and granted the claimants' motions to dismiss,³ concluding that the Act, as amended in 1989, facially violates due process guarantees of the federal and state constitutions for the following reasons: (1) As a penal sanction, the Act fails to provide adequate substantive-due process required of penal statutes; (2) if not purely penal, the Act is quasi-criminal and fails to provide the requisite procedural guidelines; and (3) the Act is void for vagueness, requiring parties to guess the proper procedures and protections, and insufficiently requires notice as

² Although the Act required the state to file a petition for a rule to show cause, see section 932.704(1) of the Florida Statutes (1989), the Act did not expressly require the state to seek a seizure warrant or to file a notice of lis pendens.

³ In re Real Property Forfeiture Proceedings, Nos. 90-250-CA; 90-251-CA; 90-252-CA; 90-253-CA; 90-383-CA (Fla. 8th Cir. Ct. Dec. 21, 1990).

to what specific property is subject to forfeiture. The FDLE appealed the dismissal, and we accepted jurisdiction to resolve a matter of first impression before this Court.⁴

The parties here do not question the validity of forfeiture statutes per se, hence we do not explore the history and nature of the subject. Rather, the issue in this case concerns whether the Florida Contraband Forfeiture Act, as amended in 1989, comports with due process of law.

II. THE DUE PROCESS REQUIREMENT

The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's

⁴ In Griffis v. State, 356 So.2d 297 (Fla. 1978), receded from, Duckham v. State, 478 So.2d 347 (Fla. 1985), the Court expressly declined to rule on the facial constitutionality of the Florida Uniform Contraband Transportation Act, sections 943.41-.44 of the Florida Statutes (1975), the predecessor statutes to those in issue here. We also note that in In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So.2d 261 (Fla. 1990), we did not address the constitutionality of the forfeiture process itself when we held that the Florida Constitution required damages be paid to a party whose truck was confiscated in an unsuccessful forfeiture action where the state failed to comply with a court order to return the property for two years.

right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights. Substantive due process may implicate, among other things, the definition of an offense, see State v. Bussey, 463 So.2d 1141 (Fla. 1985); Baker v. State, 377 So.2d 17 (Fla. 1979); the burden and standard of proof of elements and defenses, see, e.g., State v. Cohen, 568 So.2d 49, 51 (Fla. 1990); the presumption of innocence, see State v. Rodriguez, 575 So.2d 1262 (Fla. 1991); State v. Harris, 356 So.2d 315, 317 (1978); vagueness, see, e.g., Perkins v. State, 576 So.2d 1310 (Fla. 1991); Bussey; State v. Barquet, 262 So.2d 431, 436 (Fla. 1972); the conduct of law enforcement officials, see Haliburton v. State, 514 So.2d 1088 (Fla. 1987); State v. Glosson, 462 So.2d 1082 (Fla. 1985); the right to a fair trial, see Kritzman v. State, 520 So.2d 568 (Fla. 1988); and the availability or harshness of remedies, see In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So.2d 261 (Fla. 1990); Roush v. State, 413 So.2d 15 (Fla. 1982).⁵

~~Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where~~

⁵ This is not intended to be a complete catalog of substantive due process. Rather, our discussion merely focuses on substantive due process as relevant to the issue at hand.

substantive rights are at issue. Procedural due process under the Florida Constitution

guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice[] and afforded a real opportunity to be heard and defend[] in an orderly procedure, before judgment is rendered against him.

State ex rel. Gore v. Chillingworth, 126 Fla. 645, 657-58, 171 So. 649, 654 (1936) (citations omitted); accord, e.g., Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (procedural due process under the fourteenth amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).. The manner in which due process protections apply vary with the character of the interests and the nature of the process involved. Hadley v. Department of Admin., 411 So.2d 184, 187 (Fla. 1982); accord Mathews v. Eldridge, 424 U.S. 319, 334 (1976). There is no single, inflexible test by which courts determine whether the requirements of procedural due process have been met. Hadley, 411 So.2d at 187.

While the doctrines of substantive and procedural due process play distinct roles in the judicial process, they frequently overlap. Hence, many cases do not expressly state the distinction between procedural and substantive due process. See, e.g., State v. Rodriguez, 575 So.2d 1262 (Fla. 1991) (in criminal cases the state must provide notice of each essential element and

proof beyond a reasonable doubt); accord, e.g., In re Winship, 397 U.S. 358 (1970).

III. CONSTRUING THE PROCESS EXPRESSLY PROVIDED IN THE ACT

The process provided in the Act⁶ enables the state to seize property--whether real or personal--"which has been or is being used" to commit one of the enumerated offenses, or "in, upon or by means of which" any enumerated violation "has taken or is taking place." § 932.703(1), Fla. Stat. (1989). The Act can be read to mean that seizure immediately ousts property owners or lienholders of any right or interest they have in the subject property. *Id.*⁷ After seizure, the state must "promptly proceed" against the property "by rule to show cause in the circuit court," and may have the property forfeited "upon producing due proof" that the property was being used in violation of the Act. *Id.* § 932.704(1). If the state does not initiate proceedings within ninety days after the seizure, the claimant may maintain an action to recover the property. *Id.* § 932.703(1). The state is required to give notice of forfeiture proceedings by

⁶ The Act, as amended in 1989, is published in the appendix to this opinion.

⁷

All rights and interest in and title to contraband articles or contraband property used in violation of s. 932.702 shall immediately vest in the state upon seizure by a law enforcement agency, subject only to perfection of title, rights, and interests in accordance with this act.

§ 932.703(1), Fla. Stat. (1989) (emphasis supplied).

registered mail and publication only if the seizing agency actually knows the identity of the owner, or if the property is required to be registered, or if it is subject to a perfected security interest; however the requirement for notice by mail is waived with respect to perfected security interests if the owner cannot be ascertained after diligent search and inquiry by the seizing agency. Id. § 932.704(2). If the property cannot be easily ascertained or reached, the court shall order the forfeiture of any other property of the "defendant" up to the value of any property subject to forfeiture. Id. § 932.703(1).⁸ Owners may raise a defense only after the property has been seized, and they must bear the burden in forfeiture proceedings of proving that they neither knew, nor should have known after a reasonable inquiry, that the property was being used or was likely to be used to commit an enumerated crime.

Id. § 932.703(2). Lienholders who can establish their perfected interests also may raise a defense only after seizure, and they bear the same burden as property owners plus an additional burden of proving that they did not consent to having the property used to commit a crime. Id. § 932.703(3). At some point, the court is to issue a "final order of forfeiture" perfecting title in the seizing agency relating back to the date of seizure.

⁸ We do not discuss the constitutionality or application of the provision authorizing forfeiture of substitute property because neither the facts in this case nor the arguments presented specifically raise this issue.

Id. § 932.704(1). Legal title to the property, or proceeds derived from the property after satisfaction of bona fide liens, are then transferred to an agency or fund as set forth in the Act. Id. § 932.704(3).

The Act raises numerous constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that * forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a policy that it ~~must seriously consider~~ ~~not seriously consider~~ forfeiture statutes. See, e.g., General Motors Acceptance Corp. v. State, 152 Fla. 297, 302, 11 So.2d 482, 484 (1943); City of Miami v. Miller, 148 Fla. 349, 350, 4 So.2d 369, 370 (1941). Strict construction, however, may clash with the traditional judicial policy that all doubts as to the validity of a statute are to be resolved in favor of constitutionality where reasonably possible. See, e.g., State v. Rodriguez, 365 So.2d 157 (Fla. 1978). While this Court is obliged to establish rules to enforce the provisions of the Florida and federal constitutions in the courts of this state, it may not transgress the proscription of article II, section 3 of the Florida Constitution, which forbids one of the branches of government from invading the province of another.⁹

⁹ Article II, section 3 of the Florida Constitution provides:

In light of these concerns, we must ascertain whether the Act can reasonably be construed to comport with minimal due process requirements. The process of forfeiture actions involves two major components: (1) the initial restraint on property, by seizure or otherwise, to ensure that the property will be available if it is found to be forfeitable; and (2) the forfeiture itself, whereby a court must determine if the property was in fact used to violate the law under the controlling statutes, and if so, who under the law is entitled to acquire legal title to the property.¹⁰

1. Initial restraint on property

The only action expressly authorized by the Act to initiate forfeiture is the actual seizure of the subject property, see section 932.704(1), an extreme measure because seizure effectively ousts an individual from all rights concerning the property,¹¹ producing particularly harsh consequences where a residence is at issue. The Act does not

SECTION 3. Branches of government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

¹⁰ Our decision does not address the portions of the Act dealing with the disposition of property once a court has decided to enter a final order of forfeiture.

¹¹ See supra note 7.

speak to any lesser forms of property restraint, such as a notice of lis pendens (which was used in the instant case), a restraining order, or a bond requirement. The Act does not distinguish between seizing interests in personal property from seizing interests in real property, which is substantially different in character and may be adequately restrained by less restrictive means. The Act does not provide for any preseizure notice to the property owner or lienholder with an opportunity to be heard; nor does it provide any procedures for the seizure itself, including the standard or burden of proof.

Some of these constitutional concerns have been addressed by recent federal due process decisions that we find highly persuasive and reflective of the principles embodied in the Florida Constitution.¹² Two opinions are particularly noteworthy: United States v. Premises & Real Property at 4492 South Livonia Rd., 889 F.2d 1258 (2d Cir. 1989) (Livonia Road); and United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) (en banc).

In Livonia Road, the government filed a notice of lis pendens and got an ex parte seizure warrant one day after it filed a forfeiture complaint against a parcel of real property, which contained a person's home. In reviewing the propriety of the seizure, the court held that the government may not seize

¹² Although we cite to some federal decisions, we explicitly decide this case on state constitutional grounds.

real property containing a person's home in a forfeiture through an ex parte seizure warrant without first giving the home owner notice or an opportunity to be heard in an adversarial proceeding. Accord United States v. Leasehold Interest in Property Located at 850 S. Maple, 743 F. Supp. 505 (E.D. Mich. 1990); United States v. Parcel I, Beginning at a Stake, 731 F. Supp. 1348 (S.D. Ill. 1990).¹³ The court focused on two substantial constitutional principles: (1) the general principle that due process forbids the government from taking any property without notice and an opportunity to be heard unless the facts pose an extraordinary situation to justify postponing notice and hearing until after the seizure, Livonia Road, 889 F.2d at 1263-64 (citing Fuentes v. Shevin, 407 U.S. 67, 92 (1972)); and (2) the special significance of a person's residential property, because "an individual's expectation of privacy and freedom from

¹³ In United States v. Single Family Residence & Real Property Located at 900 Rio Vista Blvd., 803 F.2d 625, 632 (11th Cir. 1986) (Rio Vista), the court found that no preseizure notice or hearing was required for the seizure of a residence and real property, relying on Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), which held that no preseizure notice or hearing was required to seize a yacht. The court in Rio Vista, however, failed to expressly consider the different interests implicated when residential property is seized, a critical distinction drawn by various federal courts in subsequent opinions. See United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) (en banc); United States v. Premises & Real Property at 4492 South Livonia Rd., 889 F.2d 1258 (2d Cir. 1989); United States v. Leasehold Interest in Property Located at 850 S. Maple, 743 F. Supp. 505 (E.D. Mich. 1990); United States v. Parcel I, Beginning at a Stake, 731 F. Supp. 1348 (S.D. Ill. 1990).

governmental intrusion in the home merits special constitutional protection." Id. at 1264. Balancing the interests under the principles of Mathews v. Eldridge, 424 U.S. 319 (1976), the court put great weight on an individual's property interests; found that preseizure notice and an opportunity to be heard would minimize the risk of erroneous deprivation at little or no additional burden to the state; and determined that exigent circumstances are unlikely where real property is at issue because it cannot be readily moved or dissipated. "Any exigency that might be posed by the threat of an encumbrance on, or transfer of, the property may be met by less restrictive means than seizure; for example, by the filing of a pendens, ~~which~~ done in this case, along with a restraining order or bond requirement." Livonia Road, 889 F.2d at 1265; cf. Connecticut v. Doehr, 111 S.Ct. 2105 (1991) (prejudgment attachment of real property without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond, violates due process).

Much of the same rationale was applied in Monsanto, where a federal grand jury indictment charged Monsanto with various offenses and alleged that his home, an apartment, and \$35,000 in cash were subject to forfeiture. Upon indictment and at the government's request, the court issued an ex parte restraining order prohibiting Monsanto from directly or indirectly transferring or encumbering the home or apartment. The circuit court approved the use of a restraining order, which, rather than

ousting the owner of all rights with regard to the property, merely "'operates to remove the assets from the control of the defendant on the claim of the government that it has a higher right to those assets.'" Monsanto, 924 F.2d at 1192 (quoting United States v. Moya-Gomez, 860 F.2d 706, 725 (7th Cir. 1988), cert. denied, 109 S.Ct. 3221 (1989)). A restraining order, like the notice of lis pendens in Livonia Road, preserves the availability of potentially forfeitable assets. Thus, the circuit court held that because probable cause had already been established through a grand jury indictment, the court was free to issue an ex parte restraining order on real property before the owners and lienholders had been given notice and an opportunity to be heard. However, the court said the right to have notice and a hearing weigh heavily when property interests are being taken under these circumstances. Therefore, it held that after a trial court issues an ex parte restraining order--which is even less restrictive than a seizure--the court must provide notice and an adversarial hearing to reexamine probable cause to determine ~~as to~~ whether or not the government is entitled to continue its restraint on the property throughout the pretrial process.

Turning to the Act under review, the state's argument as to the initial restraint on property focused on the fourth amendment of the United States Constitution. The state conceded at oral argument that the fourth amendment applies to the seizure of property in forfeiture actions, and argued that fourth

amendment protections adequately protect property owners. We fully agree that the fourth amendment applies when there has been a seizure;¹⁴ however, the state's reliance on fourth amendment principles misses the point. The issue of initial property restraint focuses on (1) whether due process requires the state to use means less restrictive than seizure, if possible, to protect the respective interests and safeguard the constitutional rights being impinged; and (2) whether seizure or other forms of property restraint are constitutionally permissible in the absence of notice and an opportunity to be heard in an adversarial forum. Even temporary or partial impairments to property rights are sufficient to merit due process protection. Connecticut v. Doehr, 111 S.Ct. 2105 (1991). As the Monsanto and Livonia Road opinions expressed, seizure may be a harsh, extreme, and unnecessary way to restrain an owner or lienholder from using or disposing of potentially forfeitable property when there are less restrictive means available, especially when no notice or hearing is provided.

¹⁴ Since article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution, the warrant requirement of article I, section 12 also applies to seizures in forfeiture actions under Florida law.

In evaluating the due process concerns,¹⁵ it is clear that individuals have compelling interests to be heard at the initiation of forfeiture proceedings against their property rights to assure that there is probable cause to believe that a person committed a crime using that property to justify a property restraint. Property rights are among the basic substantive rights expressly protected by the Florida Constitution. Art. I, § 2, Fla. Const.; see Shriners Hosps. for Crippled Children v. Zrillic, 563 So.2d 64, 68 (Fla. 1990) (article I, section 2 protects all incidents of property ownership from infringement by the state unless regulations are reasonably necessary to secure the health, safety, good order, and general welfare of the public). Those property rights are particularly sensitive where residential property is at stake, because individuals unquestionably have constitutional privacy rights to be free from governmental intrusion in the sanctity of their homes and the maintenance of their personal lives. Art. I, §§ 2, 12, 23, Fla. Const. Additionally, Floridians have substantive rights to be free from excessive punishments under article I, section 17 of the Florida Constitution, and to have

15 The parties argue that the manner in which due process applies to forfeiture is controlled by whether the forfeiture is "criminal," "quasi-criminal," or "civil." We reject the overly simplistic notion that a label should be dispositive in deciding constitutional cases. Disputes over rights guaranteed by the Florida Constitution must be decided by evaluating and, if necessary, balancing the interests as appropriate under the circumstances.

meaningful access to the courts pursuant to article I, section 21 of the Florida Constitution. All of these substantive rights necessarily must be protected by procedural safeguards including notice and an opportunity to be heard. Art. I, § 9, Fla. Const.; see Hadley v. Department of Admin., 411 So.2d 184 (Fla. 1982); State ex rel. Gore v. Chillingworth, 126 Fla. 645, 657-58, 171 So. 649, 654 (1936).

Just as we recognize the significance of the interests of property owners and lienholders, we also recognize that the state has substantial interests in restraining the use of potentially forfeitable property to punish criminal wrongdoers; to seek retribution for society; to deter continued use of the property for criminal activity; to remedy the wrongs done to society; and to compensate the state for its law enforcement services.

However, the means by which the state can protect its interests must be narrowly tailored to achieve its objective through the least restrictive alternative where such basic rights are at stake. Art. I, § 9, Fla. Const. Thus, due process under article I, section 9 requires the state to protect against the disposal of potentially forfeitable property pending final trial on the forfeiture by means less restrictive than seizure where feasible under the circumstances.¹⁶ For example, the state can

¹⁶ In Lamar v. Universal Supply Co., Inc., 479 So.2d 109 (Fla. 1985), the Court said that the seizure of property prior to notice and hearing under the 1983 version of the Florida Contraband Forfeiture Act was not a violation of due process.

use a notice of lis pendens, a property bond, a restraining order, or a combination thereof. Due process also requires notice and the opportunity for those claiming an interest in the property to be heard throughout the forfeiture process. Art. I, § 9, Fla. Const.

It is clear that real and personal property are substantially different both in the interests of the parties involved and in the ability of owners or lienholders to dispose of their interests. Therefore, the manner in which due process applies to the preliminary restraint, notice, and hearing requirements varies when distinguishing between the forfeiture of interests in real and personal property.

Regarding matters of real property, due process requires that the state must provide notice and schedule an adversarial hearing for interested parties on the question of probable cause prior to any initial restraint, other than lis pendens, on the real property being subjected to forfeiture. To comply with due process, a real property forfeiture action under the Act would

The 1983 version of the Act, however, addressed only the seizure and forfeiture of personal property, and did not address the seizure and forfeiture of real property, which was added to the Act by chapter 89-148, Laws of Florida. Compare §§ 932.701-.704, Fla. Stat. (1983) with §§ 932.701-.704, Fla. Stat. (1989). Our decision today is largely consistent with that discussion in Lamar because we again approve the seizure of personal property prior to notice and opportunity for a hearing. We reaffirm the holding in Lamar that due process requires reasonably prompt proceedings in forfeiture actions. To the extent that Lamar can be read to be inconsistent with today's decision, we recede therefrom.

begin with the state's filing of a petition for rule to show cause in the circuit court where the property is located or where the crime is alleged to have taken place. Simultaneously, the state would record a notice of its petition with the property records of the appropriate clerk of court's office, which will serve as a lis pendens.¹⁷ This recordation shall be deemed a constructive "seizure" for purposes of commencing a forfeiture action under the Act. The state would immediately schedule an adversarial preliminary hearing to determine if probable cause exists to maintain the forfeiture action, and to resolve all questions pertaining to the temporary restraints on the real property pending final disposition. Notice of the petition and the adversarial preliminary hearing must be served on all interested parties. If probable cause is found at the adversarial preliminary hearing, the court may, at its discretion, enter such orders as are necessary to protect the respective interests of the parties. This preliminary stage should, of course, be expeditiously completed to protect the rights of all the parties. We would anticipate that the adversarial hearing will take place within ten days of the filing of the petition.

Regarding matters of personal property, due process permits the state to seize personal property prior to notice or

¹⁷ See § 48.23, Fla. Stat. (1989).

an opportunity for a hearing, provided that notice is sent and the opportunity for an adversarial preliminary hearing is made available as soon as possible after seizure. We envision that this situation will arise in two types of circumstances: when the state has not yet taken possession of the property; and when the state already has lawfully taken possession of the property, such as evidence seized while making an arrest.

In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action. In those situations where a law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an ex parte seizure for the purposes of initiating a forfeiture action.

After the ex parte seizure of personal property, the state must immediately notify all interested parties that the state has taken their property in a forfeiture action; and that they have the right to request a postseizure adversarial preliminary hearing. If requested, the preliminary hearing shall be held as soon as is reasonably possible to make a de novo determination as to whether probable cause exists to maintain the forfeiture action; and to determine whether continued seizure of the property is the least restrictive means warranted by the

circumstances to protect against disposal of the property pending final disposition. Again, as with real property forfeitures, this initial stage should be expeditiously completed, and we anticipate that the adversarial preliminary hearing, if requested, will take place within ten days of the request.

In all forfeiture cases, due process under article I, section 9 of the Florida Constitution requires that notice shall be served on all persons whom the agency knows, or with reasonable investigation should know, have a legal interest in the subject property. Notice shall advise those persons that a forfeiture action is pending against the particular property or properties. In real property forfeiture actions, notice must advise interested parties of the time and place for which the preliminary adversarial hearing has been scheduled. In personal property forfeiture actions, notice must advise interested parties that they have a right to an adversarial preliminary hearing upon request.

In this preliminary stage of real and personal property forfeitures, due process requires the state to establish probable cause to believe that the property was used in the commission of a crime pursuant to the terms of the Act. Art. I, § 9, Fla. Const. If the state establishes probable cause, the court shall order the property restrained throughout the pendency of the forfeiture action by the least restrictive means necessary under the circumstances. Under no circumstances may the state continue its restraint on the property pending final disposition

unless notice and an opportunity to be heard in an adversarial proceeding are provided to all potential claimants. Art. I, § 9, Fla. Const.

2. Litigation of forfeiture action

The Act provides that after the property is first seized, the state must file a petition for a rule to show cause in the circuit court, and upon producing due proof that the property was used in violation of the Act, the court shall issue a final order of forfeiture vesting legal title in the appropriate agency under the Act. However, that is the sum total of direction given by the Act. The Act does not set out any procedures for filing the petition or issuing the rule to show cause, except that a rule shall issue upon the showing of "due proof." § 932.704(1), Fla. Stat. (1989). The Act does not address any requirements for filing the petition; which procedural rules should apply to control the litigation; what standard and burden of proof is "due" for issuance of the rule; whether a trial--with or without a jury--is required to decide the merits of the action once the rule has been issued; what standard and burden of proof apply in deciding the ultimate issue, including defenses; and whether and how property is to be divided or partitioned to ensure that only the "guilty" property is forfeited. As the Fourth District Court appropriately characterized the Act, forfeiture proceedings are "procedural quagmires on account of the failure of the statute to provide measures to be followed other than to say . . . by rule to show cause in the circuit court." In re Forfeiture of United

States Currency in the Amount of Five Thousand Three Hundred Dollars (\$5,300.00), 429 So.2d 800, 801-02 (Fla. 4th DCA 1983); see also One 1978 Green Datsun Pickup Truck v. State ex rel. Manatee County, 457 So.2d 1060, 1061 (Fla. 2d DCA 1984) (describing forfeiture proceedings as "murky"); In re Forfeiture of 1975 Mercedes Benz 450 SL, 455 So.2d 498, 499 (Fla. 4th DCA 1984) (dismissal of complaint was premature "no doubt due to the absence of a clearly established procedure to be followed in forfeiture proceedings"); Famiglietti v. State ex rel. Broward County, 382 So.2d 767 (Fla. 4th DCA 1980) (Anstead, J., dissenting), dismissed, 386 So.2d 636 (Fla. 1980).

The forfeiture practice of courts in this state has been largely established by case law in the absence of formal direction. In re Forfeiture of Six Video Draw Poker Machines, 544 So.2d 1097 (Fla. 1st DCA 1989); see In re Approximately Forty-Eight Thousand Nine Hundred Dollars (\$48,900.00), 432 So.2d 1382 (Fla. 4th DCA 1983); In re Forfeiture of United States Currency in the amount of Five Thousand Three Hundred Dollars (\$5,300.00); see also, e.g., Willie v. Castro, 490 So.2d 250 (Fla. 4th DCA 1986). ~~We conclude that the following procedure does not violate the constitution and is in accord with statutory, administrative, and criminal requirements of the process, and thus shall be followed in the course of this action. The agency seeking forfeiture may file its complaint by applying for the issuance of a rule-to-show-cause in the circuit court of jurisdiction where the property was restrained or where the~~

alleged offense occurred. The petition must be verified and supported by affidavit. If the court determines that the petition on its face sufficiently states a cause of action for forfeiture, the court shall sign and issue the rule. A copy of the petition and the rule shall be served on all persons whom the agency knows, or with reasonable investigation should know, have a legal interest in the property. The rule to show cause also shall require that responsive pleadings and affirmative defenses be filed within twenty days of service of the rule to show cause. As stated above, in real property forfeiture actions the state shall give notice to interested parties as to the time and place for which the adversarial preliminary hearing has been scheduled; and in personal property forfeiture actions, the state must notify interested parties that they have a right to an adversarial preliminary hearing upon request. The Florida Rules of Civil Procedure shall otherwise control service of process, discovery, and other measures appropriate for the administration of forfeiture proceedings.

It is now well settled that the ~~substantive rights~~ of forfeiture must be decided by jury trial unless claimants waive that right. Art. I, § 22, Fla. Const.; see In re Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986). That substantive right is also subsumed within article I, section 9 of the Florida Constitution. However, the issue of standard and burden of proof has not been previously addressed by this Court. The state argues that the agency seeking forfeiture need establish its case

by at most a preponderance of the evidence, whereas the claimants argue that the constitution requires proof beyond a reasonable doubt, or alternatively, by clear and convincing evidence. Case law reflects no uniformity in this state as to the appropriate burden and standard of proof. See In re Approximately Forty-Eight Thousand Nine Hundred Dollars (\$48,900.00), 432 So.2d at 1382; In re Forfeiture of One 1976 Chevrolet Corvette, 442 So.2d 307 (Fla. 5th DCA 1983), review denied, 451 So.2d 849 (Fla. 1984); Marks v. State, 416 So.2d 872 (Fla. 5th DCA 1982).

We conclude that the state has the burden of proof at trial, which should be by no less than clear and convincing evidence. The state and the decisions on which it relies fail to recognize the significance of the constitutionally protected rights at issue and the impact forfeiture has on those rights. In forfeiture proceedings the state impinges on basic constitutional rights of individuals who may never have been formally charged with any civil or criminal wrongdoing. This Court has consistently held that the constitution requires substantial burdens of proof where state action may deprive individuals of basic rights. For example, when an individual is charged with a crime, the government cannot deprive that person of life, liberty, or property unless it carries the burden of proof beyond every reasonable doubt as to each essential element. E.g., State v. Cohen, 568 So.2d 49, 51 (Fla. 1990); accord In re Winship, 397 U.S. 358 (1970). In noncriminal contexts, this Court has held that constitutionally protected individual rights

may not be impinged with a showing of less than clear and convincing evidence. See Padgett v. Department of Health & Rehab. Servs., 577 So.2d 565 (Fla. 1991) (clear and convincing evidence required for termination of parental rights); In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990) (clear and convincing evidence required before a surrogate can exercise an incompetent patient's right to terminate life support); In re Bryan, 550 So.2d 447 (Fla. 1989) (clear and convincing evidence required to deprive an individual of basic property rights through a determination of incompetency); Nodar v. Galbreath, 462 So.2d 803, 806 (Fla. 1984) (public official or public figure must prove actual malice by clear and convincing evidence to impinge on first amendment rights in a defamation suit); accord Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); see also, e.g., Downing v. Bird, 100 So.2d 57, 64 (Fla. 1958) (in adverse possession cases, the claimant must show "by clear, definite and accurate proof" that the adverse possession of property continued for the full period required by Florida law).

Accordingly, "~~despoil~~ ~~confiscate~~ the Act constitutionally means that the government may not take an individual's property in forfeiture proceedings unless it proves by no less than clear and convincing evidence that the property being forfeited was used in the commission of a crime. Art. I, § 9, Fla. Const. ~~Establishing of the~~ ~~in the property~~ that the property was being employed in criminal activity is a defense to forfeiture, which, if established by preponderance

of the evidence, defeats the forfeiture action as to that property interest. Art. I, § 9, Fla. Const. Forfeiture must be limited to the property or the portion thereof that was used in the crime. Art. I, §§ 9, 17, Fla. Const. If a verdict favoring forfeiture satisfies the requirements of law, the court shall issue a final order of forfeiture, disposing of the property in accordance with law.

IV. CONCLUSION

This Court is obliged and authorized to establish rules to enforce the Florida Constitution and to administer the courts of this state. Although we are concerned with the multitude of procedural deficiencies in the Act, the procedures described above are required to satisfy due process and are not inconsistent with the language and intent of the Act. We conclude that the Act can be reasonably construed as constitutional provided that it is applied consistent with the due process requirements summarized in this opinion.

Turning to the facts of this case, it is clear that the state did not comply with due process: It seized real property, including residential property, prior to giving the claimants any notice or opportunity to be heard. Accordingly, we affirm the result reached by the circuit court in dismissing the forfeiture action. However, for the reasons stated above, we reverse the circuit court's conclusion that the Act is facially unconstitutional in violation of due process of law. This cause

is remanded to the circuit court for proceedings consistent with this opinion.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

APPENDIX

The Florida Contraband Forfeiture Act, sections 932.701-.704 of the Florida Statutes (1989), provides as follows:

932.701. Short title; definition of "contraband article".--

(1) Sections 932.701-932.704 shall be known and may be cited as the "Florida Contraband Forfeiture Act."

(2) As used in ss. 932.701-932.704, "contraband article" means:

(a) Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange which has been, is being, or is intended to be used in violation of any provision of chapter 893.

(b) Any gambling paraphernalia, lottery tickets, money, and currency used or intended to be used in the violation of the gambling laws of the state.

(c) Any equipment, liquid or solid, which is being used or intended to be used in violation of the beverage or tobacco laws of the state.

(d) Any motor fuel upon which the motor fuel tax has not been paid as required by law.

(e) Any personal property, including, but not limited to, any item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which has been or is actually employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

(f) Any real property or any interest in real property which has been or is being employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

932.702. Unlawful to transport, conceal, or possess contraband articles or to acquire real or personal property with contraband proceeds; use of vessel, motor vehicle, aircraft, or real property.--It is unlawful:

(1) To transport, carry, or convey any contraband article in, upon, or by means of any vessel, motor vehicle, or aircraft.

(2) To conceal or possess any contraband article in or upon any vessel, motor vehicle, aircraft, or real property.

(3) To use any vessel, motor vehicle, aircraft, or real property to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(4) To conceal or possess any contraband article.

(5) To acquire real or personal property by the use of proceeds obtained in violation of the Florida Contraband Forfeiture Act.

932.703. Forfeiture of vessel, motor vehicle, aircraft, other personal property, real property, or contraband article; exceptions.--

(1) Any vessel, motor vehicle, or aircraft; any other personal property; and any real property which has been or is being used in violation of any provision of s. 932.702, or in, upon, or by means of which any violation of that section has taken or is taking place, as well as any contraband article involved in the violation, may be seized and shall be forfeited subject to the provisions of this act. All rights and interest in and title to contraband articles or contraband property used in violation of s. 932.702 shall immediately vest in the state upon seizure by a law enforcement agency, subject only to perfection of title, rights, and interests in accordance with this act. Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided in this act; however, such action may be maintained if forfeiture proceedings are not initiated within 90 days after the date of seizure. In any incident in which possession of any contraband article defined in s. 932.701(2)(a)-(d) constitutes a felony, the vessel, motor vehicle, aircraft, personal property, or real property in or on which such contraband article is located at the time of seizure shall be contraband subject to forfeiture. It shall be presumed in the manner provided in s. 90.302(2) that the vessel, motor vehicle, aircraft,

personal property, or real property in or on which such contraband article is located at the time of seizure is being used or was intended to be used in a manner to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of a contraband article defined in s. 932.701(2). If any of the property described in this subsection:

- (a) Cannot be located;
- (b) Has been transferred to, sold to, or deposited with, a third party;
- (c) Has been placed beyond the jurisdiction of the court;
- (d) Has been substantially diminished in value by any act or omission of the defendant; or
- (e) Has been commingled with any property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property subject to forfeiture under this section.

(2) No property shall be forfeited under the provisions of ss. 932.701-932.704 if the owner of such property establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity. Property titled or registered jointly between husband and wife by use of the conjunctives "and," "and/or," or "or" shall not be forfeited if the coowner establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was employed or was likely to be employed in criminal activity.

(3) No bona fide lienholder's interest shall be forfeited under the provisions of ss. 932.701-932.704 if such lienholder establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was being used or was likely to be used in criminal activity; that such use was without his consent, express or implied; and that the lien had been perfected in the manner prescribed by law prior to such seizure. If it appears to the satisfaction of the court that a lienholder's interest satisfies the above requirements for

exemption, such lienholder's interest shall be preserved by the court by ordering the lienholder's interest to be paid from such proceeds of the sale as provided in s. 932.704(3)(a).

932.704. Forfeiture proceedings.--

(1) The state attorney within whose jurisdiction the contraband article, vessel, motor vehicle, aircraft, other personal property, or real property or interest in real property has been seized because of its use or attempted use in violation of any provisions of law dealing with contraband, or such attorney as may be employed by the seizing agency, shall promptly proceed against the contraband article, vessel, motor vehicle, aircraft, other personal property, or real property or interest in real property by rule to show cause in the circuit court within the jurisdiction in which the seizure or the offense occurred and may have such contraband article, vessel, motor vehicle, aircraft, other personal property, or real property or interest in real property forfeited to the use of, or to be sold by, the law enforcement agency making the seizure, upon producing due proof that the contraband article, vessel, motor vehicle, aircraft, other personal property, or real property or interest in real property was being used in violation of the provisions of this act. The final order of forfeiture by the court shall perfect in the law enforcement agency right, title, and interest in and to such property and shall relate back to the date of seizure.

(2) If the property is of a type for which title or registration is required by law, or if the owner of the property is known in fact to the seizing agency at the time of seizure, or if the seized property is subject to a perfected security interest in accordance with the Uniform Commercial Code, chapter 679, the state attorney, or such attorney as may be employed by the seizing agency, shall give notice of the forfeiture proceedings by registered mail, return receipt requested, to each person having such security interest in the property and shall publish, in accordance with chapter 50, notice of the forfeiture proceeding once each week for 2 consecutive weeks in a newspaper of general circulation, as defined in s. 165.031, in the

county where the seizure occurred. The notice shall be mailed and first published at least 4 weeks prior to filing the rule to show cause and shall describe the property; state the county, place, and date of seizure; state the name of the law enforcement agency holding the seized property; and state the name of the court in which the proceeding will be filed and the anticipated date for filing the rule to show cause. However, the seizing agency shall be obligated only to make diligent search and inquiry as to the owner of the subject property, and if, after such diligent search and inquiry, the seizing agency is unable to ascertain such owner, the above actual notice requirements by mail with respect to perfected security interests shall not be applicable.

(3)(a) Whenever the head of the law enforcement agency effecting the forfeiture deems it necessary or expedient to sell the property forfeited rather than to retain it for the use of the law enforcement agency, or if the property is subject to a lien which has been preserved by the court, he shall cause a notice of the sale to be made by publication as provided by law and thereafter shall dispose of the property at public auction to the highest bidder for cash without appraisal. In lieu of the sale of the property, the head of the law enforcement agency, whenever he deems it necessary or expedient, may salvage the property or transfer the property to any public or nonprofit organization, provided such property is not subject to a lien preserved by the court as provided in s. 932.703(3). The proceeds of sale shall be applied: first, to payment of the balance due on any lien preserved by the court in the forfeiture proceedings; second, to payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security, and forfeiture of such property; third, to payment of court costs incurred in the forfeiture proceeding. The ~~remaining~~ ~~proceeds~~ shall be deposited in a special law enforcement trust fund established by the board of county commissioners or the governing body of the municipality; and such proceeds and interest earned therefrom shall be used for school resource officer, crime prevention, or drug education programs or for other law enforcement purposes. These funds may

be expended only upon request by the sheriff to the board of county commissioners or by the chief of police to the governing body of the municipality, accompanied by a written certification that the request complies with the provisions of this subsection, and only upon appropriation to the sheriff's office or police department by the board of county commissioners or the governing body of the municipality. Such requests for expenditures shall include a statement describing anticipated recurring costs for the agency for subsequent fiscal years. Such funds may be expended only to defray the costs of protracted or complex investigations; to provide additional technical equipment or expertise, which may include automated fingerprint identification equipment and an automated uniform offense report and arrest report system; to provide matching funds to obtain federal grants; or for school resource officer, crime prevention, or drug abuse education programs or such other law enforcement purposes as the board of county commissioners or governing body of the municipality deems appropriate and shall not be a source of revenue to meet annual operating needs of the law enforcement agency. In the event that the seizing law enforcement agency is a state agency, all remaining proceeds shall be deposited into the state General Revenue Fund. However, in the event the seizing law enforcement agency is the Department of Law Enforcement, the proceeds accrued pursuant to the provisions of this chapter shall be deposited into the Forfeiture and Investigative Support Trust Fund; if the seizing law enforcement agency is the Department of Natural Resources, the proceeds accrued pursuant to the provisions of this chapter shall be deposited into the Motorboat Revolving Trust Fund to be used for law enforcement purposes; and, if the seizing law enforcement agency is a state attorney's office acting within its judicial circuit, the proceeds accrued pursuant to the provisions of this chapter shall be deposited into the State Attorney's Forfeiture and Investigative Support Trust Fund to be used for the investigation of crime and prosecution of criminals within the judicial circuit.

(b) If more than one law enforcement agency was substantially involved in effecting the

forfeiture, the court having jurisdiction over the forfeiture proceeding shall equitably distribute the property among the seizing agencies. Any forfeited money or currency, or any proceeds remaining after the sale of the property, shall be equitably distributed to the board of county commissioners or the governing body of the municipality having budgetary control over the seizing law enforcement agencies for deposit into the law enforcement trust fund established pursuant to paragraph (a). In the event that the seizing law enforcement agency is a state agency, the court shall direct that all forfeited money or currency and all proceeds be forwarded to the Treasurer for deposit into the state General Revenue Fund, unless the seizing agency is the Department of Natural Resources, in which case the court shall direct that the proceeds be deposited into the Motorboat Revolving Trust Fund to be used for law enforcement purposes. If the seizing agency is a state attorney's office acting within its judicial circuit, the court shall direct that the proceeds be deposited into the State Attorney's Forfeiture and Investigative Support Trust Fund. If the Department of Natural Resources together with a state attorney's office acting within its judicial circuit are substantially involved in effecting the forfeiture, the court having jurisdiction over the forfeiture proceeding shall equitably distribute the proceeds to the Motorboat Revolving Trust Fund and the State Attorney's Forfeiture and Investigative Support Trust Fund within the judicial circuit.

(4) Upon the sale of any vessel, motor vehicle, or aircraft, the state shall issue a title certificate to the purchaser. Upon the request of any law enforcement agency which elects to retain titled property after forfeiture, the state shall issue a title certificate for such property to the agency.

(5) Any law enforcement agency receiving or expending forfeited property, or proceeds from the sale of forfeited property in accordance with this act, shall submit a quarterly report documenting the receipts and expenditures, on forms promulgated by the Department of Law Enforcement, to the entity which has budgetary authority over such agency, which report shall specify, for such period, the type, approximate

value, and disposition of the property received and the amount of any proceeds received or expended. The entity which has budgetary authority over such agency shall forward to the Department of Law Enforcement such reports for collection. Neither the law enforcement agency nor the entity having budgetary control shall anticipate future forfeitures or proceeds therefrom in the adoption and approval of the budget for the law enforcement agency.

**Five Cases Consolidated - Direct Appeal of Judgment of Trial Court, in and for Levy County,
Benjamin M. Tench, Judge, Case Nos. 90-383-CA, 90-253-CA, 90-252-CA, 90-251-CA, and 90-250-CA - Certified by the District Court of Appeal,
First District, Case Nos. 90-3811, 90-3812, 90-3813, 90-3814, and 91-23**

**Robert A. Butterworth, Attorney General; Keith Vanden Dooren,
Diana K. Bock and Jeanne Clougher, Assistant Attorneys General,
Tallahassee, Florida; and Parker Thomson, Special Assistant Attorney General, Miami, Florida,**

for Appellant

Robert S. Griscti of Turner & Griscti, Gainesville, Florida, for Cedar Key Mobile Home Village, Inc.; Cedar Key Flying Club Sites, Inc.; Cedarwood Estates, Inc., Cedar Key Hunting & Game Preserve, Inc.; Cedar Key Campsites, Inc.; and Charles L. DeCarlo; and Albert C. Simmons and David G. White, Cedar Key, Florida, for Walter G. Gifford and Marlene M. Gifford,

Appellees

George N. Aylesworth, Senior Bureau Commander and Robert Knabe, Police Legal Advisor, Metro-Dade Police Department, Miami, Florida,

Amicus Curiae for Florida Sheriff's Association, Florida Police Chief's Association, Dade County Association of Chiefs of Police, and Florida Association of Police Attorneys

Arthur I. Jacobs, Fernandina Beach, Florida,

Amicus Curiae for Florida Prosecuting Attorneys Association, Inc.

October 8, 1992

Congressman John Conyers, Jr.
Congress of the United States
House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: Congressional Hearing - Asset Forfeiture
September 30, 1992
Carl and Mary Shelden Testimony
1065 Wickham Drive, Moraga, CA

Dear Congressman Conyers:

We both very much appreciated the opportunity you gave us to tell our story and express our concerns regarding innocent victims of asset forfeiture.

We are very concerned with Justice Department's statements that it is acceptable to suspend the constitutional rights of innocent third parties in the "war against crime". We do not believe that there is any justification for suspending the Constitutional rights of innocent parties.

We apologize for the delay in getting the additional information you requested to you. We hope this will answer your questions and please feel free to call us if you need additional information or if we can help out in any way in the future.

1. Order of Forfeiture - 1/31/84

This document shows how the defendants properties were to be disposed of after forfeiture.

2. Court Transcripts - 4/9/84 and 5/10/84

These transcripts were from the hearings before Judge Schnacke in the U.S. District Court in San Francisco. We were brought before the defendant's judge in order to restrain us from completing our foreclosure. At the time we did not realize that we could not foreclose against the property since it was forfeited to the United States.

Page 2 & 3 (4/9/84) shows that the United States felt that the property had between \$100-150,000 in equity at that time.

Congressman Shays made a statement that the house was overpriced when we sold it in 1979, but as you can see this was not the case.

Page 13 indicates they were afraid we would get a windfall if we got the property back. So the property was not overpriced and in fact increased in equity by 1984.

3. Opinions on our case

1/20/90 - Judge Loren Smith (U.S. Claims Court, Washington, D.C.) agreed there was a taking under the Fifth Amendment and that we were entitled to just compensation.

6/24/92 - Judge Smith reversed his opinion - because the United States was given 30 additional days to bring our loan current in 1984, he felt we had waived all of our rights as mortgagees.

4. Plea bargain of defendant - 1988 1988 Sep 26

See page 3

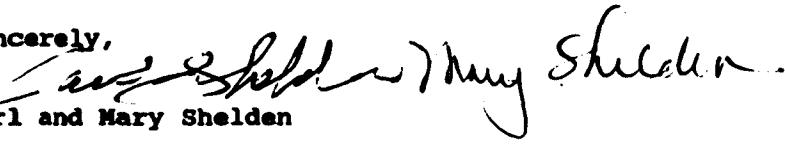
5. History of the Wickham Drive property showing the various courts and legal processes we had to go through to protect our Second Mortgage.
6. Although we had physical possession of the property in 1987, the United States did not remove the lis pendens on the property and transfer title to us until 10/9/90.
7. News article regarding the attempt to involve our Datsun car in a local crime.
8. Various letters from Congressman and Senators over the years who attempted to assist us.

12/15/87 letter to Joseph Russoniello from Senator Pete Wilson indicating that the U.S. Marshall's service was willing to get some relief for us. The U.S. Attorney's office in San Francisco in all cases refused to cooperate to resolve this issue.

We are hopeful that the gesture the Justice Department made to our attorney, Brenda Grantland, at the hearings was sincere. Mr. Leech agreed to review our file and contact Brenda this week to discuss this matter. We sincerely wish for an equitable resolution to this case. We will keep you posted on this matter.

Again, we very much appreciate your efforts to investigate the claims of innocent third parties who have been damaged.

Sincerely,


Carl and Mary Shelden

FILED

JAN 3 1 1981

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	NO. CR 83-0120 RHS
Plaintiff,)	ORDER RE FORFEITURE OF
v.)	PROPERTIES AND DISPOSITION
RALPH HUEY WASHINGTON,)	<u>THEREOF PENDING APPEAL</u>
Defendant.)	

The defendant RALPH HUEY WASHINGTON having been convicted under Title 18, United States Code, Section 1961(a) and 1963, and certain property having been declared forfeitable, and plaintiff United States of America and defendant Ralph Huey Washington having stipulated to the entry of the following order with respect to the property declared forfeitable, it is hereby ordered as follows:

1. This order applies to the following parcels of real property:

- (a) 1011-1013 Delaware Street, Berkeley, CA;
- (b) 775-777 6th Street, Richmond, CA;
- (c) 1611-1613 62nd Street, Berkeley, CA;
- (d) 1001 - 91st Avenue, Oakland, CA;

Law office of
BENSON, JACKEL, KARLSEN & STUCHIN
101 Grand Avenue, Suite 600
OAKLAND, CALIFORNIA 94603
(415) 444-4445

COPIES MAILED TO
PARTIES OF RECORD

1 (e) 1248 - 96th Avenue, Oakland, CA;
2 (f) 1904 - 11th Avenue, Oakland, CA;
3 (g) 2506 - 24th Avenue, Oakland, CA;
4 (h) 639 South Elmhurst, Oakland, CA;
5 (i) 766 - 6th Street, Richmond, CA;
6 (j) 1065 Wickham Drive, Moraga, CA.

7 2. This order does not involve the disposition of the
8 1974 Rolls Royce Silver Shadow automobile, which shall be
9 dealt with by separate order.

10 3. Any and all interest of the defendant Ralph Huey
11 Washington in and to the aforesaid real properties is hereby
12 deemed transferred to plaintiff United States of America
13 effective January 20, 1984, although for the convenience of
14 the parties and to put into effect the terms of this order
15 record title to the properties shall remain, (where
16 applicable) in the name of Ralph Huey Washington, and
17 plaintiff United States of America and defendant Ralph Huey
18 Washington shall have the following rights in and to the
19 subject real property pending outcome of the appeal of said
20 defendant from said judgment of conviction, as set forth in
21 the following paragraphs.

22 4. (A) The following parcels of real property shall
23 be sold as soon as reasonably practicable at such price and
24 on such terms as the market may permit:

25 (a) 1248 96th Avenue, Oakland, CA;
26 (b) 1011-1013 Delaware Street, Berkeley, CA;
27 (c) 2506 24th Avenue, Oakland, CA;
28 (d) 639 South Elmhurst, Oakland, CA;

LAW OFFICES OF
DELESKY, JACK, KARSKEN & HULCHIN
CITICORP SAVINGS PLAZA
190 GRAND AVENUE, SUITE 800
OAKLAND, CALIFORNIA 94612
(415) 444-0600

1 (e) 1904 12th Avenue, Oakland, CA;

2 (f) 766 6th Street, Richmond, CA.

3 (B) The defendant (or his designated representative)
4 is authorized to list said properties for sale with a
5 licensed real estate broker; however, all such sales shall
6 be subject to confirmation by plaintiff, who shall have
7 seven (7) days from receipt of written notice of the
8 execution of a contract between defendant and a prospective
9 buyer or buyers to confirm or refuse to confirm said
10 contract, which decision shall be in writing. All sales
11 shall be closed through a licensed escrow title company.

12 (C) The net proceeds from the sale of each such real
13 property (after payment of liens, encumbrances, real estate
14 broker's commissions, closing costs, real property taxes,
15 and other ordinary and necessary expenses of sale including,
16 if necessary, legal fees approved by plaintiff and
17 defendant) shall be deposited into an interest bearing
18 account maintained jointly by plaintiff United States of
19 America (or its designated representative) and defendant
20 Ralph Huey Washington, (or his designated representative)
21 and said defendant shall use said funds, or such portion as
22 may be necessary, to cure defaults on existing bona fide
23 liens and encumbrances against any and all of the subject
24 real properties identified in paragraph 4 above. All
25 disbursements from said account shall require the signature
26 of one representative of plaintiff and one representative of
27 defendant, which representatives shall promptly execute such
28 ///

Law offices of
WALKER, JACKIN, KATZMAN & SHULCINER
Circus Court Annex
1200 12th Avenue
Oakland, California 94612
(415) 467-4400

DELESEK, JACKL, KAPLEN & HOUCHERY
LAW OFFICES OF
CITICORP SAVINGS PLAZA
169 GRAND AVENUE, SUITE 600
OAKLAND, CALIFORNIA 94612
(415) 444-0400

1 checks as may be necessary or appropriate to carry out the
2 purposes of this order.

3 (D) Said defendant, or his designated representative,
4 shall manage said properties pending sale; provided,
5 however, that if said defendant is unable to do so, he may,
6 at his option, and on 30 days written notice to plaintiff,
7 relinquish possession to plaintiff for management and sale
8 purposes. All income from said properties, and expenses
9 thereof, shall be deposited in or withdrawn from said
10 jointly held account.

11 5. (A) Defendant Ralph Huey Washington, or his
12 designated representative, shall be entitled to remain in
13 physical possession of, and to have the management and
14 control of, the following parcels of real property:

- 15 (a) 1611-1613 62nd Street, Berkeley, CA;
16 (b) 1065 Wickham Drive, Moraga, CA;
17 (c) 775-777 6th Street, Richmond, CA;
18 (d) 1001 91st Avenue, Oakland, CA.

19 (B) Defendant, so long as he is not in custody, shall
20 be entitled to reside in the property known as 1065 Wickham
21 Drive, Moraga, CA; in the event that said defendant is in
22 custody, said real property shall be rented at a
23 commercially reasonable rental, on a month to month basis.

24 (C) Freddie Washington and/or members of her immediate
25 family, shall be entitled to reside in one unit located at
26 775-777 6th Street, Richmond, CA., until the pending appeal
27 of defendant Ralph Huey Washington shall become final.

28 ///

1 (D) Defendant Ralph Huey Washington, or Freddie
2 Washington, or such other person as Ralph Washington may
3 designate (which person shall be approved by the United
4 States Attorney) shall manage the foregoing properties, and
5 all rents obtained therefrom shall be deposited into an
6 account maintained jointly by plaintiff United States of
7 America and defendant Ralph Huey Washington, and the
8 proceeds thereof shall be used for the purpose of
9 maintaining mortgage payments, utilities, repairs, and other
10 such expenses which are ordinarily and customarily those of
11 a landlord of real property. Defendant, or his
12 representative, shall have the right to draw checks against
13 such account for such purposes not to exceed \$350; all
14 checks drawn against that account in excess of \$350 shall
15 require two signatures, one being that of a representative
16 of plaintiff and the other being that of defendant or his
17 representative.

18 (E) Defendant, or his representative, shall provide
19 monthly written accountings, on or before the tenth day of
20 the following calendar month, showing the unit number
21 rented, the rent received, and any itemized expenses in
22 connection with management of the properties. All expenses
23 shall be paid only by drawing checks against such account.

24 6. Defendant Ralph Huey Washington (or his designated
25 representative) will not encumber, mortgage, or pledge, any
26 of the subject real properties without the written consent
27 of the United States Attorney. Defendant (or his designated
28 representative) shall use his best efforts to obtain a

Law offices of J. JACKIE SCHAFFNER
1000 Avenue of the Americas, Suite 1000
New York, New York 10036
(212) 447-1400

LAW OFFICES OF
DUNLOP, JACK L. KAPLAN & HUTCHINS
CITICOP SAVINGS PLAZA
100 GRAND AVENUE, SUITE 200
OAKLAND, CALIFORNIA 94612
(415) 455-5400

1 commercially reasonable rental for the subject properties
2 (except as to the units occupies by Ralph Washington or
3 Freddie Washington).

4 7. Defendant, or his representative, shall maintain
5 reasonable fire and liability insurance as to the subject
6 real properties, premiums for which shall be paid from the
7 aforesaid accounts.

8 8. In the event of a failure of defendant, or his
9 representative to follow the terms and conditions set forth
10 above, plaintiff shall give to defendant, or his
11 representative, written notice to cure or rectify said
12 default, and defendant, or his representative, shall have
13 twenty (20) days within which to rectify said default. If
14 defendant, or his representative, refuses or fails to
15 rectify said default within said twenty (20) days,
16 plaintiff, at its option, can take over management of the
17 subject real properties, subject, however, to the right of
18 defendant, or his representative, to petition the federal
19 magistrate for relief, who shall have the power to enforce
20 the foregoing order in an equitable fashion (including the
21 right to restore defendant, or his representative, to the
22 possession of the properties) in such manner as to give
23 effect to the meaning and intent of this order. In the
24 event that plaintiff shall take over management of the
25 properties, plaintiff shall not have the power to deny
26 defendant or Freddie Washington their right to maintain
27 residence in the properties as aforesaid until final
28 disposition of defendant Ralph Huey Washington's appeal.

LAW OFFICES OF
JAMES R. KELLY & ASSOCIATES
100 SANTA ANA AVENUE, SUITE 600
IRVINE, CALIFORNIA 92614-4400

1 9. All references herein to plaintiff shall mean the
2 United States of America, or such representative to whom it
3 may delegate its rights and authority hereunder from time to
4 time, and all references to defendant Ralph Huey Washington
5 shall include defendant, or such representative to whom he
6 may delegate his rights and authority hereunder from time to
7 time.

8 10. Pending the outcome of the appeal of defendant
9 Ralph Huey Washington from the aforesaid judgment of
10 conviction, plaintiff United States of America shall not
11 levy or execute upon, the aforesaid real properties, or the
12 proceeds from the sale thereof, for taxes or other
13 liabilities claimed by plaintiff from defendant (other than
14 the rights of plaintiff resulting from the aforesaid
15 judgment of conviction). However, the plaintiff shall not
16 be prohibited from recording in the appropriate state or
17 county offices notices of liens as permitted by law.

18 11. Upon final disposition of defendant's appeal, the
19 property declared forfeitable shall forthwith be irrevocably
20 vested in plaintiff United States of America, or released to
21 defendant Ralph Huey Washington, as the result of said
22 appeal shall indicate.

23 12. This court retains continuing jurisdiction over the
24 subject real property to make such further supplementary
25 orders as may be necessary or appropriate to effectuate the
26 intent and purpose of this order and to determine, to the
27 ///
28 ///

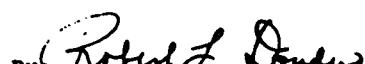
1 extent permitted by law, the claims, if any, of third
2 parties in and to the aforesaid property.

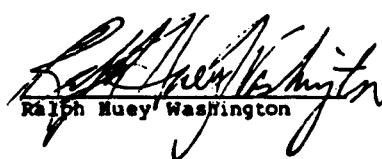
3 DATED: 31 JAN 1984


Judge Robert H. Schnacke

4
5 SO STIPULATED:

6 Joseph P. Russoniello
7 United States Attorney

8 By 
9 Robert L. Dondero
10 Assistant United States Attorney


Ralph Huey Washington

11 Law Office of
12 JACK L. KARSH & MULLIGAN
13 CIVIL & CRIMINAL ATTORNEYS
14 1000 Connecticut Avenue, N.W.
15 Washington, D.C. 20004
16 (202) 342-1440
17
18
19
20
21
22
23
24
25
26
27
28

SHELDEN
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE ROBERT H. SCHNACKE, SENIOR JUDGE

UNITED STATES OF AMERICA,

)

PLAINTIFF,

)

VS.

)

NO. CR-83-120-RHS

RALPH H. WASHINGTON, ET AL.,

)

DEFENDANTS.

)

1

REPORTER'S TRANSCRIPT

APRIL 9, 1984

APPEARANCES:

FOR THE PLAINTIFF:

JOSEPH P. RUSSONIELLO
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102
BY: ROBERT L. DONDERO
ASSISTANT U.S. ATTORNEY
GEORGE BEVAN
ASSISTANT U.S. ATTORNEY

FOR DEFENDANT:

JAMES JACKL, ESQUIRE
BELZER & JACKL
100 GRAND AVENUE, SUITE 960
OAKLAND, CALIFORNIA 94612

ALSO PRESENTS:

DAVID M. STERNBERG, ESQUIRE
1070 CONCORD AVENUE, SUITE 100
CONCORD, CALIFORNIA 94520

DAVID M. MC GRAW, ESQUIRE
1990 N. CALIFORNIA BOULEVARD
SUITE 555
WALNUT CREEK, CALIFORNIA 94596

1 APRIL 9, 1985

2 THE CLERK: CALLING CRIMINAL CR 83-120, UNITED STATES
3 VERSUS RALPH WASHINGTON, ET AL.

4 COUNSEL, STATE YOUR APPEARANCE FOR THE RECORD.

5 MR. DONDERO: ROBERT DONDERO REPRESENTING THE UNITED
6 STATES, ALONG WITH GEORGE BEVAN REPRESENTING THE UNITED STATES.

7 MR. JACKL: JAMES JACKL REPRESENTING RALPH WASHINGTON.

8 MR. STERNBERG: DAVID STERNBERG REPRESENTING MR. AND
9 MRS. SHELDON WHO ARE BENEFICIARIES UNDER A DEED OF TRUST ON THE
10 SUBJECT PROPERTY ON TODAY'S HEARING.

11 MR. MC GRAW: DAVE MC GRAW FOR TD SERVICE COMPANY.

12 THE COURT: WHICH IS WHAT?

13 MR. MC GRAW: WHICH IS THE -- WHICH IS ACTUALLY THE
14 SUBSTITUTED TRUSTEE UNDER THE NOTE AND DEED OF TRUST IN
15 QUESTION.

16 THE COURT: WHAT'S THE PROBLEM?

17 MR. DONDERO: YOUR HONOR, THE PROBLEM IS, IF I CAN
18 OUTLINE JUST BRIEFLY, THEN MR. WASHINGTON'S LAWYER CAN ADDRESS
19 THE COURT AS TO THE SITUATION.

20 THIS CONCERNS THE PROPERTY AT 1065 WICKHAM IN MORAGA.
21 THAT'S THE RESIDENTIAL HOME OF RALPH WASHINGTON WHICH WAS
22 DESCRIBED IN THE TESTIMONY. THAT PARTICULAR PIECE OF PROPERTY
23 APPARENTLY IS DELINQUENT IN THE SUM OF APPROXIMATELY 23 OR 25
24 THOUSAND DOLLARS.

25 THE PROPERTY HAS AN EQUITY, I UNDERSTAND, TO BE BETWEEN

1 A HUNDRED TO A HUNDRED AND 50 THOUSAND DOLLARS. THE DEFENDANT,
2 WASHINGTON, IS IN THE PROCESS OF SELLING AND WILL SELL WITHIN
3 THE NEXT 30 DAYS AND HAVE THE MONEY FROM THE BANK.

4 1611, 1613 62ND STREET, WHICH IS A TENANT BUILDING THAT
5 HE OWNED WHICH WAS DESCRIBED IN THE TESTIMONY, THAT SALE WILL
6 CREATE A RESIDUE OR AN EQUITY OF \$50,000 WHICH SHOULD BE ENOUGH
7 TO CLEAR THE DEFECTS IN PAYMENTS ON THE WICKHAM PROPERTY.

8 THE GOVERNMENT'S CONCERN IS THAT THE PROPERTY ON
9 WICKHAM APPARENTLY -- THREE MONTHS WILL HAVE PASSED TOMORROW
10 MORNING OR TOMORROW, AND WITH THAT OCCURRING —

11 THE COURT: WHAT'S THE SIGNIFICANCE OF THREE MONTHS?

12 MR. DONDERO: THE FORECLOSURE PROCEEDING — THERE WAS A
13 NOTICE FILED AND THE THREE MONTHS HAVE PASSED. AND IF AFTER
14 THREE MONTHS, RATHER THAN ONE WHAT'S DELINQUENT, HE OWES THE
15 FULL AMOUNT ON THE LOAN, WHICH IS A HUNDRED AND 60 THOUSAND
16 DOLLARS. THE NOTE BECOMES DUE -- AM I CORRECT, MR. JACKL?

17 MR. JACKL: THAT'S CORRECT.

18 MR. DONDERO: THE WASHINGTON PROPERTY WILL BE ABLE TO
19 COME UP WITH THE 20 SOMETHING THOUSAND DOLLARS DUE -- \$23,000
20 DUE BY THE END OF THE MONTH, BUT THEY WILL NOT BE ABLE TO COME
21 UP WITH A HUNDRED AND 60 THOUSAND DOLLARS THAT WILL BE DUE IF
22 THE THREE MONTH TIME FOR FORECLOSURE PASSES, WHICH WILL WIPE OUT
23 THE GOVERNMENT'S INTEREST IN THE HUNDRED TO THE HUNDRED AND
24 FIFTY THOUSAND DOLLARS.

25 THE COURT: WHAT CAN I DO ABOUT IT?

1 MR. DONDERO: THE GOVERNMENT FEELS, YOUR HONOR, THAT
2 YOU HAVE RETAINED JURISDICTION UNDER THE ORDER WHICH YOU SIGNED
3 CONCERNING THE INTEREST ON THOSE PROPERTIES.

4 THE COURT: I HAVE JURISDICTION OVER MR. WASHINGTON AND
5 OVER THE GOVERNMENT. WHAT JURISDICTION DO I HAVE TO AMEND
6 ANYONE ELSE'S RIGHTS?

7 MR. DONDERO: I THINK UNDER THE EQUITY UNDER 1963(B),
8 YOUR HONOR, OF TITLE 18 —

9 THE COURT: I CAN DEAL WITH THE EQUITY OF WASHINGTON —
10 WELL, DO YOU HAVE ANYTHING TO ADD?

11 MR. JACKL: AS TO THE AUTHORITY, YOUR HONOR, NO, I
12 DON'T. JUST UNDER 1963 OF TITLE 18, YOUR HONOR, SUBSECTION B.

13 THE COURT: WHAT SECTION?

14 MR. DONDERO: SUBSECTION B, 1963, YOUR HONOR.

15 THE COURT: SUBSECTION B.

16 MR. DONDERO: AND ALSO C, WHICH GIVES YOU POWER OF THE
17 ATTORNEY GENERAL TO SEIZE THE PROPERTY.

18 THE COURT: ALL RIGHT.

19 MR. DONDERO: AND UNDER PARAGRAPH 12 OF THE COURT
20 ORDER, WHICH WAS FILED ON JANUARY THE 31ST, 1984, YOUR HONOR,
21 WHICH GIVES YOU CONTINUING JURISDICTION TO HANDLE — EFFECTUATE
22 PURPOSES OF THE ORDER.

23 THE COURT: ALL RIGHT. LET ME SEE IT. ALL RIGHT. DO
24 YOU WANT TO BE HEARD?

25 MR. STERNBERG: YOUR HONOR, I REPRESENT THE SHELDONS.

1 MR. SHELDON HAS BEEN RELYING ON THE INCOME FROM THE NOTE FOR HIS
2 SUPPORT SINCE 1978. HE HAS A BACK INJURY, WHICH MAKES IT UNABLE
3 FOR HIM TO WORK. HE IS IN COURT TODAY.

4 THE NOTE IS EIGHT MONTHS OVERDUE. THE SHELDONS HAVE
5 BEEN PAYING THE PAYMENTS ON THE FIRST MORTGAGE TO THE SANTA
6 BARBARA SAVINGS IN THIS MATTER, AND THEREFORE, THE EQUITY IN
7 THIS MATTER OVERWHELMINGLY LIES WITH THE SHELDONS.

8 THE COURT: WHY DID THEY WAIT SO LONG, IF IT'S EIGHT
9 MONTHS OVERDUE?

10 MR. STERNBERG: THEY RECORDED THEIR NOTICE OF DEFAULT
11 AFTER THE SECOND MONTH. TD SERVICES, WHO IS REPRESENTED HERE
12 TODAY, ALLEGEDLY FILED — RECORDED AN IMPROPER NOTICE OF
13 DEFAULT. MR. JACKL COMPLAINED AND THEN THEY RE-RECORDED A NEW
14 NOTICE OF DEFAULT AFTER THE FULL THREE MONTHS RAN.

15 SO NOW, WE ARE INTO THE SECOND THREE MONTHS, AND IT
16 RUNS — THE THREE MONTH PERIOD RUNS TOMORROW. AND MY CLIENTS
17 WOULD ALSO LIKE TO OBJECT TO YOUR JURISDICTION HERE TODAY,
18 BECAUSE BY MY READING OF THE ORDER, IT SEEMED THAT THE UNITED
19 STATES GOVERNMENT AND THE INTEREST OF MR. WASHINGTON WERE
20 COVERED IN THAT ORDER AND NOWHERE DID IT MENTION MY CLIENTS OR
21 ANY OF THEIR INTERESTS.

22 I ALSO READ THE —

23 THE COURT: WELL, I DO PURPORT IN THAT ORDER TO RETAIN
24 CONTINUING JURISDICTION OVER THE REAL PROPERTY, WHICH I WOULD
25 ASSUME CONTEMPLATES ALL INTEREST IN THE REAL PROPERTY INSOFAR AS

1 NECESSARY TO EFFECTUATE ORDERS OF THIS COURT.

2 I DO NOTE SOMEBODY ADDED FOR ME IN THE ORDER THAT I
3 DIDN'T WRITE "TO THE EXTENT PERMITTED BY LAW." AND YOU TELL ME
4 TO WHAT EXTENT THAT IS.

5 MR. STERNBERG: I DON'T REALLY KNOW, YOUR HONOR. I
6 READ THE C.F.R. REGULATIONS IN TITLE 28 ABOUT THE ADMISSION AND
7 MITIGATION OF CIVIL FORFEITURES. AND I LOOKED FOR SOME CLEAR
8 DEFINITION OF WHAT RIGHTS THE COURT WOULD STILL RETAIN, AND I
9 JUST HAVE BEEN UNABLE TO SEE THAT. IT SEEMS TO ME THAT THE
10 PROPER JURISDICTION WOULD BE IN THE STATE COURT.

11 AND AS TO THE FORECLOSURE PROCEEDINGS IN THIS ACTION —
12 AND EVEN IF YOUR HONOR HAS JURISDICTION, I STILL THINK THAT
13 UNDER STATE LAW, THERE WOULD BE NO — YOU HAVE NO AUTHORITY TO
14 ORDER THE CHANGES OF THE RIGHTS OF MY CLIENTS, THEIR CONTRACT
15 RIGHTS IN THIS PROPERTY, ABSENT SOME EQUITABLE ORDER THAT YOU
16 MIGHT MAKE.

17 AND I DON'T SEE HOW YOU COULD MAKE AN EQUITABLE ORDER
18 BY PROTECTING MR. WASHINGTON'S RIGHTS -- I MEAN, JUST FOR THE
19 FACT OF HIS NONPAYMENT FOR NINE MONTHS UNDER THIS NOTE. AND
20 THEN TO COME IN THE LAST -- THE 11TH HOUR, 59TH MINUTE AND
21 CHANGE THE CONTRACT RIGHTS THAT MY CLIENTS HAVE I BELIEVE WOULD
22 BE IMPROPER.

23 THE COURT: HOW MUCH IS THE DEFAULT?

24 MR. STERNBERG: APPROXIMATELY \$30,000. AND THE
25 UNDERLYING NOTE IS ABOUT —

1 THE COURT: IT'S ACCUMULATING, WHAT, ABOUT 2,500 A
2 MONTH?

3 MR. STERNBERG: APPROXIMATELY, YOUR HONOR.

4 MR. STERNBERG: THE EXACT AMOUNT WOULD BE MORE LIKE
5 \$433 TO THE FIRST PLUS LATE CHARGES OF 17.32. AND THE SECOND
6 PAYMENTS ARE \$1,602 AND THEN A LATE CHARGE OF \$96 A MONTH, PLUS
7 I MIGHT ADD THAT TAXES ARE IN ARREARS OF \$2,509.

8 THE SHELDONS ARE -- CAN'T DERIVE ANY INCOME FROM THE
9 PROPERTY. THEY HAVE TO PUT OUT THESE MONIES. AND THE
10 WASHINGTONS ARE USING THIS PROPERTY FOR THEIR USE AS THEY CAN
11 RENT IT, LIVE IN IT OR DO WHATEVER THEY SO DESIRE. ALSO,
12 INSURANCE HASN'T BEEN PAID, PLUS MY CLIENTS ARE HAVING TO PAY
13 FOR ATTORNEY'S FEES AND OTHER —

14 THE COURT: WAS THE SALE NOTICED?

15 MR. STERNBERG: NO, IT HASN'T BEEN. AND THAT'S WHAT WE
16 WOULD LIKE, YOUR HONOR, TO DO, IS AT LEAST ALLOW US TO NOTICE
17 THE SALE AND THEN WE COULD HAVE A FURTHER HEARING BEFORE THE
18 SALE ACTUALLY TAKES PLACE TO LET MR. WASHINGTON PAY OFF THE
19 AMOUNTS DUE.

20 MR. JACKL: MAY I ADDRESS MYSELF TO THE EQUITY, YOUR
21 HONOR? I DON'T THINK THE AMOUNT THAT'S DUE IS QUITE 30,000. I
22 THINK IT'S CLOSER TO 25,000. BUT THE EXACT AMOUNT ISN'T
23 TERRIBLY IMPORTANT. IN APPROXIMATELY 30 DAYS, WE WILL GENERATE
24 \$50,000 NET.

25 THE COURT: THAT'S APPROXIMATELY 30 DAYS?

BARBARA HORN STOCKFORD, CSR., U.S. DISTRICT COURT, SAN FRANCISCO

1 MR. JACKL: YES, YOUR HONOR. THE PROPERTY ON 62ND
2 STREET HAS BEEN SOLD. IT'S IN ESCROW. AND WE ARE WAITING NOW
3 FOR GREAT WESTERN SAVINGS TO APPROVE THE LOAN. THEY HAVE GIVEN
4 ME A VERBAL APPROVAL OF THE LOAN, BUT THEY HAVE TO GO THROUGH
5 THEIR PROCEDURES. THEY HAVE TO GO TO THE LOAN COMMITTEE. THEY
6 HAVE TO GO BY A CERTAIN BOOK.

7 AND SO IT WILL BE -- I WAS TOLD THAT THE APPROVAL
8 SHOULD BE 30 DAYS FROM LAST FRIDAY AND THEN THEY CAN CLOSE
9 IMMEDIATELY. AND WE CAN PUT ALL THE DOCUMENTS IN ESCROW BEFORE
10 THEM. ALL OF THE PROPERTIES ARE FOR SALE. EVERYTHING HAS BEEN
11 FORFEITED TO THE UNITED STATES. THE UNITED STATES IS THE OWNER
12 OF ALL OF THE PROPERTIES AND MR. WASHINGTON'S INTEREST IN THE
13 PROPERTY IS ONLY IF HE OBTAINS A REVERSAL ON APPEAL; THEN THE
14 PROCEEDS OF THESE SALES BELONG TO HIM. BUT OTHERWISE,
15 EVERYTHING BELONGS TO THE GOVERNMENT NOW.

16 THERE CERTAINLY IS SOME EQUITY FOR MR. AND MRS.
17 SHELDON. THEY HAVE HAD TO WAIT EIGHT MONTHS AND NOW WE ARE
18 ASKING THEM TO WAIT ANOTHER MONTH. THEY DID, FOR A PERIOD OF
19 TIME, MAKE PAYMENTS ON THE FIRST OF -- I THINK THEY'RE ABOUT
20 \$433 A MONTH. THEY DID NOT MAKE MARCH'S PAYMENT OR APRIL'S
21 PAYMENT. AND I HAVE THE MONEY TO MAKE THOSE PAYMENTS RIGHT NOW
22 FROM RENTS THAT WERE GENERATED FROM ANOTHER PROPERTY. AND I
23 HAVE A LETTER TRANSMITTING THAT TO SANTA BARBARA SAVINGS AND I
24 WILL BE ABLE TO KEEP THOSE PAYMENTS CURRENT.

25 THE OTHER SIDE OF THE EQUITY IS THAT IF THERE IS NOT

1 SOME SORT OF INJUNCTION, AND IF THE UNITED STATES AND MR.
2 WASHINGTON, TO THE EXTENT HE STILL HAS AN INTEREST, IS ALLOWED
3 TO REINSTATE THE LOAN, THE SHELDONS WILL ENJOY AN UNJUST
4 ENRICHMENT OF A HUNDRED TO A HUNDRED AND FIFTY THOUSAND DOLLARS
5 NEXT MONTH.

6 THE COURT: THAT ISN'T NECESSARILY SO. THEIR INTEREST
7 WILL BE SOLD AT AUCTION, WON'T IT?

8 MR. JACKL: THAT'S RIGHT, BUT AS PRACTICAL MATTER THESE
9 DAYS --

10 THE COURT: YOU CAN'T IMAGINE ANYONE ELSE BIDDING ON
11 IT?

12 MR. JACKL: WELL, NO ONE ELSE REALLY BIDS ON SALES.
13 IT'S NOT LIKE THE OLD DAYS.

14 THE COURT: IN A CASE LIKE THIS, IT'S EVEN LESS LIKELY.
15 WHEN DID YOU WANT TO NOTICE THE SALE?

16 MR. STERNBERG: WE WOULD LIKE TO NOTICE IT FORTHWITH,
17 YOUR HONOR, BECAUSE WHAT WE COULD DO IS AGREE TO NOTICE THE SALE
18 FOR 30 DAYS FROM NOW OR 35 DAYS AND THEN HAVE A STATUS REPORT TO
19 YOUR HONOR BEFORE WE ACTUALLY HOLD THE SALE. BUT I THINK THAT
20 THAT WOULD BE THE MOST APPROPRIATE. AND IF THEY, IN FACT, COME
21 THROUGH, THEN THEY WILL COME THROUGH.

22 ADDITIONALLY, COUNSEL INFORMED ME THAT MR. WASHINGTON
23 WOULD BE FILING FOR BANKRUPTCY. SO I WOULD REQUEST EVEN MORE
24 STRONGLY THAT YOU ALLOW US TO NOTICE THE SALE SO THAT IF, IN
25 FACT, HE DOES FILE HIS BANKRUPTCY PROCEEDING BEFORE THE

1 BANKRUPTCY COURT, THAT WE CAN AT LEAST START THOSE
2 PROCEEDINGS — START THE PROCEEDINGS ON REMOVING IT FROM THE
3 BANKRUPTCY COURT AS QUICKLY AS POSSIBLE.

4 THANK YOU.

5 THE COURT: HOW WOULD ANYONE BE HURT IF WE NOTICED THE
6 SALE FOR 35 DAYS FROM NOW?

7 MR. JACKL: WE WOULDN'T BE HURT AS LONG AS THERE WERE
8 SOME SORT OF ORDER THAT WOULD ALLOW US TO REINSTATE THE LOAN
9 DURING THOSE 35 DAYS, YOUR HONOR.

10 THE COURT: I THINK COUNSEL CONCEDES IF THE MATTER IS
11 BROUGHT UP TO DATE DURING THAT PERIOD OF TIME.

12 MR. JACKL: IF HE DOES, THEN I REST, YOUR HONOR.

13 THE COURT: IF HE DOES, THE SALE WILL BE SET ASIDE.
14 AND ON THE FURTHER CONDITION THAT THE FUNDS THAT YOU HAVE
15 AVAILABLE FOR THE PAYMENTS ON THE FIRST WILL BE DELIVERED OVER.

16 MR. JACKL: THEY WILL BE PAID TO SANTA BARBARA SAVINGS
17 TODAY, YOUR HONOR.

18 MR. STERNBERG: TWO POINTS. ONE IS IF THEY WANT TO BE
19 ABLE TO REINSTATE AND RENEGOTIATE THE TERMS OF OUR LOAN, I
20 BELIEVE THE LEASED EQUITY WOULD ALLOW THE LOAN TO BE BROUGHT UP
21 TO MARKET RATE INTEREST, WHICH IS NOT TEN AND A HALF PERCENT ON
22 A SECOND MORTGAGE THESE DAYS. IT'S MORE LIKE 14 OR 15 PERCENT.

23 THE COURT: THEY'RE NOT GOING TO RENEGOTIATE THE LOAN.
24 THEY'RE GOING TO BRING THEMSELVES UP TO DATE ON THE PRESENT
25 CONTRACT.

11

1 MR. STERNBERG: FOR THE RECORD, I WOULD OBJECT TO THAT
2 BECAUSE I WOULD NOT CONCEDE THAT MY CLIENT WOULD HAVE TO WAIVE
3 ANY RIGHTS THAT THEY HAVE. SO WITH THAT IN MIND, I MAKE MY
4 STATEMENT. AND ALSO, THE MERE PAYMENT OF THE \$433 A MONTH
5 DOESN'T ANSWER MY CLIENTS' NEED OF, WITHIN THE NEXT MONTH, AT
6 LEAST HAVING THE INTEREST THAT'S DUE ON THE SECOND BE PAID.

7 MR. MC GRAW: MAY I BE HEARD ON THAT ISSUE?

8 THE COURT: SURE.

9 MR. MC GRAW: YOUR HONOR, IF I UNDERSTAND COMPLETELY
10 WHAT WE'RE DOING HERE TODAY, THE GOVERNMENT AND MR. JACKL, ON
11 BEHALF OF THE TRUSTOR OF THE NOTE, MR. WASHINGTON, IS ASKING
12 THIS COURT TO GIVE THEM AN ECONOMIC ADVANTAGE OVER AND ABOVE THE
13 SHELDONS, OUTSIDE THE CONTRACT BETWEEN THE PARTIES. THEY ARE
14 ASKING THIS COURT TO TOLL THE REINSTATEMENT PERIOD AND EXTENDING
15 TIME FOR MR. WASHINGTON TO DO SO OVER AND ABOVE THE CONTRACT,
16 AND OVER AND ABOVE CIVIL CODE SECTION 2924.

17 I READ BRIEFLY 1963. I DON'T THINK THE CODE SECTION
18 CONTEMPLATES SUCH AN ADVANTAGE. NO ONE IS TRYING TO TAKE AWAY
19 MR. WASHINGTON'S OR THE GOVERNMENT'S OPPORTUNITY TO PAY OFF THIS
20 LIEN. NO ONE IS TRYING TO TAKE THE PROPERTY OUT FROM UNDER
21 THEM. THEY'RE SIMPLY SAYING THAT THE CONTRACT TERMS IN A STATE
22 LAW PROVIDE THAT THE REINSTATEMENT PERIOD BE THREE MONTHS FROM
23 THE DATE OF THE RECORDING OF THE NOTE IN DEFAULT.

24 THEY ARE ASKING THIS COURT TO GIVE THEM AN ECONOMIC
25 ADVANTAGE AND MAKE MR. AND MRS. SHELDON CARRY THE BALL FOR THE

1 NEW BUYER WHEN THEY FIND HIM. AND I DON'T THINK THAT'S THE
2 CONTEMPLATION OF 1963. NOR IS IT THE CONTEMPLATION OF THE ORDER
3 THAT THIS COURT SIGNED PREVIOUSLY, WHEN CLEARLY, IN THE ORDER,
4 IT STATES TO THE EXTENT OF THE LAW.

5 THE ONLY QUESTION BEFORE THIS COURT TODAY IS WHETHER OR
6 NOT MR. AND MRS. SHELDON SHOULD BE REQUIRED TO CARRY THE
7 FINANCING ON THIS PROPERTY WHILE THE GOVERNMENT AND MR.
8 WASHINGTON SORT OUT THEIR DIFFERENCES AND ATTEMPT TO SELL THE
9 PROPERTY. WE ARE NOT TRYING TO TAKE THE PROPERTY AWAY FROM
10 THEM.

11 I SHOULD ADD TO THE COURT, REPRESENTING AS I DO THE
12 LARGEST FORECLOSURE AGENT IN THIS STATE, I CAN TELL YOU THAT
13 THERE ARE A LOT OF BIDDERS AT TRUSTEE SALES ESPECIALLY IF THERE
14 ARE \$150,000 IN EQUITY IN THESE THINGS. AND MY REFLECTION, THEY
15 HAVE HAD AT LEAST TEN CALLS FROM OUTSIDE BIDDERS ON THIS
16 PROPERTY. THERE IS INTEREST IN THIS PROPERTY. I SUSPECT IT
17 WILL GO TO — IF IT EVER GETS TO THE AUCTION BLOCK, SOMEBODY IS
18 GOING TO BUY IT.

19 THE GOVERNMENT IS GOING TO GET ALL ITS DOLLARS OUT.
20 BUT CERTAINLY, MR. AND MRS. SHELDON SHOULDN'T BE REQUIRED TO DO
21 THE FINANCING FOR THE GOVERNMENT OR MR. WASHINGTON. AND THAT IS
22 THE ONLY ISSUE THAT'S BEFORE THIS COURT; WHETHER OR NOT THIS
23 COURT SHOULD GIVE MR. WASHINGTON AN ECONOMIC ADVANTAGE OVER THE
24 TERMS OF THE CONTRACT AND THE CIVIL CODE.

25 THE COURT: ON THE ONE HAND, AS COMPARED TO WHETHER THE

1 SHELDONS SHOULD HAVE A WINDFALL; ON THE OTHER, IF THERE IS NO
2 BETTERMENT. I APPRECIATE THOSE ARE THE EQUITIES TO CONSIDER.

3 ARE THERE ANY OTHER FUNDS AVAILABLE TO MAKE AT LEAST
4 ONE MONTH'S PAYMENT TO THE SHELDONS?

5 MR. JACKL: I WISH THERE WERE, YOUR HONOR. JUST
6 RECENTLY, I HAVE KIND OF TAKEN OVER MANAGEMENT OF THE PROPERTY
7 BY DEFAULT. EVERYONE ELSE IS IN PRISON. THANK GOD I'M NOT
8 THERE.

9 THE COURT: MR. OSTERHOUDT IS STILL OUT, ISN'T HE?

10 MR. JACKL: WHERE IS HE? I THINK I JUST READ IN THE
11 STATE BAR JOURNAL HE'S IN CONTEMPT SOMEWHERE.

12 I HAVE TO PAY UTILITIES -- THE FIRST THING ON THE
13 APARTMENT BUILDINGS THAT WE ARE MANAGING. EVERYTHING RUNS IN A
14 NEGATIVE CASH FLOW. THEY'RE REALLY VERY, VERY POOR PROPERTIES
15 EXCEPT FOR THE RESIDENCE, YOUR HONOR. I HAVE A TOTAL OF ABOUT
16 \$1,200. I NEED \$70 TO MAKE THE TWO PAYMENTS TO SANTA BARBARA
17 SAVINGS. I ONLY HAVE A FEW HUNDRED DOLLARS LEFT.

18 I DON'T KNOW WHERE I COULD GET ANOTHER THOUSAND DOLLARS
19 TO MAKE A PAYMENT, BUT I WOULD REPRESENT TO THE COURT THAT I
20 WOULD MAKE EVERY EFFORT TO DO IT. I'M NOT SURE WHERE I COULD
21 GET IT, BUT I CAN STILL CONTACT MR. WASHINGTON. HE'S IN SAN
22 FRANCISCO IN JAIL AND FREDDIE IS IN PLEASANTON IN JAIL. WE ARE
23 EXERCISING EVERY BIT OF GOOD FAITH TO TRY TO CURE THIS.

24 I DON'T FEEL THAT WE ARE -- WE WOULD BE RECEIVING ANY
25 KIND OF ECONOMIC ADVANTAGE OVER MR. SHELDON. MR. SHELDON

14

1 CONTRACTED FOR A LOAN TO RUN FOR CERTAIN NUMBER OF YEARS. IT'S
2 ABSOLUTELY FORTUITOUS TO HIM THAT RALPH AND FREDDIE WENT TO
3 JAIL, WHICH ACT HERE RESULTS IN TRIGGERING -- FROM THE LOAN.

4 THEY'RE CONTRACT WILL BE FULFILLED ACCORDING TO ITS
5 TERMS AS LONG AS THIS COURT, AS THE COURT OF EQUITY, WOULD GIVE
6 US ANOTHER MONTH TO RAISE THE EQUITY TO BRING HIM CURRENT. AND
7 AT THAT POINT, HIS TRUSTEE'S FEES, ALL THOSE THINGS ARE PAID BY
8 LAW AND HE SUFFERS NOTHING EXCEPT THE DEPRIVATION OF THOSE FUNDS
9 FOR THESE NUMBERS OF MONTHS, BUT HE WILL BE PAID THEM AND
10 INTEREST AND LATE CHARGES.

11 THE COURT: THE SHELDONS OR THEIR AGENTS AWARE OF WITH
12 WHOM THEY WERE DEALING IN THESE FINANCINGS?

13 MR. JACKL: YOU MEAN DID THEY KNOW THAT RALPH WAS A
14 CRIMINAL? I DON'T KNOW, YOUR HONOR.

15 MR. STERNBERG: I CAN REPRESENT TO THE COURT THAT IN MY
16 CONVERSATIONS WITH THE SHELDONS, THEY HAD NO KNOWLEDGE OF WHO
17 THEY WERE DEALING WITH.

18 THE COURT: THEY DIDN'T KNOW THE BORROWER AT ALL?

19 MR. STERNBERG: THEY DID NOT KNOW THEM AT ALL. THE
20 TRANSACTION, I UNDERSTAND, TOOK PLACE IN A ONE DAY PERIOD, IN
21 THE PURCHASE. THEY DID NOT KNOW.

22 THE COURT: WHO WAS THE BROKER ON IT?

23 MR. STERNBERG: I DO NOT KNOW. RED CARPET OUT OF
24 LAFAYETTE.

25 MR. MC GRAV: IT WAS A REAL ESTATE AGENT. IT WAS A

15

1 CARRY BACK SITUATION. MR. JACKL INFORMED US THAT IF HE WASN'T
2 SUCCESSFUL HERE, HE WAS GOING TO FILE A BANKRUPTCY PETITION. I
3 SUGGESTED TO HIM THAT WOULD CERTAINLY BE THE MOST ADVANTAGEOUS
4 FORUM FOR HIM.

5 IF THIS COURT DENIES THEIR MOTION AND DOES NOT EXTEND
6 THEIR TERMS TO REINSTATE THE LOAN, THEN THE FORUM THAT MR.
7 WASHINGTON WANTS TO BE IN IS ONE IN WHICH THE COURT HAS THE
8 JURISDICTION TO REALIGN THE CONTRACT TO THE BETTERMENT OF
9 CREDITORS, WHICH IS APPARENTLY WHAT WE ARE ARGUING ABOUT HERE.

10 IF THIS COURT DENIES THEIR MOTION TODAY, THEY WILL FILE
11 A BANKRUPTCY PETITION AS THEY HAVE ADMITTED, SEEK THROUGH
12 CHAPTER 11 PROCEEDINGS WHAT'S COMMONLY CALLED A CRAMDOWN, WHICH
13 WOULD ALLOW THEM TO REINSTATE THE LOAN. THAT IS THE FORUM IN
14 WHICH THIS TYPE OF THING SHOULD BE DONE.

15 THEY'RE HERE ARGUING ABOUT WHAT DAMAGES ARE GOING TO BE
16 SUFFERED BY OTHER CREDITORS, SPECIFICALLY THE GOVERNMENT. THAT
17 IS PROPERLY THE FORUM OF BANKRUPTCY COURT.

18 AND I WOULD SUBMIT TO THE COURT THAT THAT'S WHERE THEY
19 SHOULD BE. THAT'S WHERE THEY TOLD US THEY WANT TO BE. AND I
20 THINK THAT'S THE RIGHT PLACE FOR THEM.

21 THE COURTS: SHELDONS AREN'T GOING TO BE ANY BETTER OFF
22 WITH THAT, ARE THEY?

23 MR. MC GRAW: THEY'RE PROBABLY NOT, YOUR HONOR, EXCEPT
24 IN THAT CIRCUMSTANCE, WE WILL PROBABLY HAVE A CHAPTER 11 TRUSTEE
25 APPOINTED TO MONITOR THESE PROPERTIES, TO SEE THAT EVERYBODY IS

1 PAID AND THINGS WOULD ROLL SMOOTHLY.

2 THE COURT: IT WOULD BE A MONTH BEFORE THEY GET
3 ANYTHING?

4 MR. MC GRAN: PERHAPS YOUR HONOR, BUT THE ONLY
5 CIRCUMSTANCE --

6 THE COURT: IS THAT REALLY WHAT THE SHELDONS WANT?

7 MR. STERNBERG: NO. OBVIOUSLY, THEY DON'T. THEY DON'T
8 WANT TO BE IN THE BANKRUPTCY COURT. THEY WANT TO BE IN THIS
9 COURT. I THINK THE ONLY POINT IS THAT WE SHOULD NOT ALLOW THERE
10 TO BE ANOTHER DELAY — THIS COURT BE USED AS A DELAY TACTIC TO
11 BUY --

12 THE COURT: I DON'T INTEND FOR THERE TO BE ANY GREAT
13 DELAY, BUT IT SEEMS TO ME AFTER THE SHELDONS HAVE SURVIVED FOR,
14 WHAT, SEVEN OR NINE MONTHS, I GUESS ANOTHER 35 DAYS ISN'T GOING
15 TO PUT THEM IN THE POOR HOUSE. PARTICULAR IF WE CAN ASSURE THAT
16 THE PRIMARY OBLIGATION IS BEING BROUGHT AT LEAST CLOSE TO UP TO
17 DATE, AND IF WE CAN ASSURE THAT THEIR DELINQUENCY IS GOING TO BE
18 CURED WITHIN 35 DAYS.

19 MR. STERNBERG: THAT WOULD BE APPROPRIATE, EXCEPT
20 THAT --

21 THE COURT: WHAT HAPPENS AFTER THAT TIME, OF COURSE, I
22 HAVE NO IDEA. WHETHER WE ARE BACK AT THE SAME THING IN ANOTHER
23 FOUR MONTHS, I DON'T KNOW.

24 MR. STERNBERG: AS LONG AS THE SHELDONS ARREARAGES ARE
25 BEING BROUGHT UP -- THEY'RE TALKING ABOUT PAYING \$866 AGAINST A

1 \$32,000 -- AS MY NUMBERS SHOW -- ARREARAGE.

2 THE COURT: I TAKE IT THAT'S THE ONE PRESSING
3 OBLIGATION WITHOUT WHICH PAYMENT, THE WHOLE THING GOES DOWN THE
4 DRAIN.

5 MR. STERNBERG: THAT'S RIGHT. THERE HAS TO BE \$32,000
6 PAID TODAY IN ORDER TO PREVENT THE NOTE BEING CALLED. AND I
7 THINK IF YOU ARE GOING TO MAKE AN EQUITABLE ORDER —

8 THE COURT: THE FIRST NOTE?

9 MR. STERNBERG: NO, OUR NOTE. THE FIRST NOTE HAS BEEN
10 PAID BY THE SHELDONS. ALSO, THE SHELDONS DO NOT HAVE THE
11 ECONOMIC WHEREWITHAL TO SUSTAIN MORE THAN ANOTHER 35 DAYS, ONE
12 MONTH. AND AT THAT POINT, IF, IN FACT, THE BANKRUPTCY
13 PROCEEDING IS FILED, THEY REALLY WILL BE IN DIFFICULTY. THEY'RE
14 DEPENDING ON THIS FOR INCOME BECAUSE MR. SHELDON DOES NOT HAVE A
15 JOB.

16 AND I THINK THE IDEA THAT THE SHELDONS ARE GOING TO GET
17 A WINDFALL SHOULD NOT BE CONSIDERED BY THE COURT AT ALL, BECAUSE
18 THERE IS A PUBLIC BIDDING STATUTE. AND I THINK THE REALITIES
19 ARE IF THERE REALLY IS THAT MUCH EQUITY, THEY'RE NEVER GOING TO
20 GET THAT KIND OF -- THEY'RE NEVER GOING TO GET THE PROPERTY
21 BACK. AND ALL THAT'S GOING TO HAPPEN IS THAT THEY'RE NOT GOING
22 TO HAVE TO BE PAYING OUT THESE VAST SUMS OF MONEY AND THEY WILL
23 GET THE INCOME THAT THEY ORIGINALLY BARGAINED FOR. I STRONGLY
24 URGE THAT ANY ORDER THAT YOU MAKE TAKE THAT INTO CONSIDERATION.

25 THE COURT: WELL, I MUST CONFESS I WOULD LIKE AN

1 AGREEMENT OF THE PARTIES THAT THE SALE WOULD BE STAYED FOR 35
2 DAYS ON CONDITION THAT THE 800 AND SOME ODD DOLLARS BE PAID OVER
3 TO THE HOLDER OF THE FIRST OBLIGATION, AND THAT MR. WASHINGTON
4 BE PERMITTED, WITHIN THAT PERIOD OF TIME, TO BRING HIS
5 OBLIGATION UP TO DATE.

6 I GET THE IMPRESSION THERE IS NOT SUCH A STIPULATION.

7 MR. STERNBERG: YOUR HONOR, MY CLIENT'S HAVE -- THEY
8 ARE HERE. I WILL CONFER WITH THEM.

9 THE COURT: WHY DON'T YOU DO THAT?

10 MR. STERNBERG: THANK YOU.

11 MR. JACKL: I WOULD LIKE TO POINT OUT, YOUR HONOR, OF
12 ALL THE OTHER CREDITORS THAT HAVE ENTERED INTO SIMILAR
13 AGREEMENTS, THIS IS THE ONLY CREDITOR THAT INSISTS UPON
14 FORECLOSING.

15 THE COURT: WE WILL TAKE A FIVE-MINUTE RECESS WHILE YOU
16 ARE CONFERRING, COUNSEL.

17 (RECESS TAKEN)

18 IS THERE AN AGREEMENT, GENTLEMEN?

19 MR. STERNBERG: YES, YOUR HONOR. WE HAVE AGREED THAT,
20 NUMBER ONE, THE SHELDONS HAVE THE RIGHT TO PUBLISH THEIR SALE
21 FOR A DATE 35 DAYS FROM TODAY, WHICH WOULD BE MAY 16TH, 1984;
22 THAT THERE WOULD BE A PAYMENT OF \$866 TO SANTA BARBARA -- THAT
23 THIS ORDER WOULD BE CONDITIONED ON PAYMENTS OF \$866 TO SANTA
24 BARBARA SAVINGS BY THE WASHINGTONS, THAT THEY WOULD PAY --

25 THE COURT: BY WHEN?

1 MR. STERNBERG: FIVE DAYS?

2 MR. JACKL: SURE.

3 MR. STERNBERG: THAT THE FIRST MONIES RECEIVED BY THE
4 WASHINGTON ESTATE, EXCEPT FOR UTILITIES, WOULD BE PAID OVER TO
5 THE SHELDONS IN THE MEANTIME.

6 MR. JACKL: UNTIL I COLLECT \$1,600.

7 MR. STERNBERG: ANY MONIES OVER AND ABOVE THE UTILITIES
8 THAT COME IN ON A WEEKLY BASIS, SO WE CAN GET WHATEVER MONIES --
9 IS THAT AGREEABLE?

10 MR. JACKL: THAT'S OKAY.

11 MR. DONDERO: SURE.

12 MR. JACKL: EXCEPT FOR --

13 MR. STERNBERG: UTILITIES.

14 MR. JACKL: WE ALSO HAVE TO PAY THE PROPERTY MANAGEMENT
15 FEE OR ELSE WE DON'T HAVE ANYBODY TO COLLECT RESTS.

16 MR. STERNBERG: THE PROPERTY MANAGEMENT FEE IS
17 AGREEABLE. MY CLIENTS ARE DOING THIS, AND THERE IS AN AGREEMENT
18 THAT THIS -- THAT ANY MONIES ACCEPTED WILL BE WITHOUT PREJUDICE
19 TO MY CLIENT. SO IN OTHER WORDS, MY CLIENTS CAN ACCEPT THIS
20 MONEY AND STILL GO THROUGH WITH THEIR SALE. OF COURSE, THEY
21 WOULD HAVE TO APPLY ANY MONIES RECEIVED TO THE BALANCE DUE.

22 SO THAT THE SHELDONS -- IN OTHER WORDS, THE SHELDONS
23 CAN HOLD THEIR SALE AND THE WASHINGTONS WON'T COME IN AND CLAIM
24 THAT WE HAVE ACCEPTED MONEY AND THEREFORE, WAIVED OUR RIGHT TO
25 FORECLOSE UNDER THE STATE'S 2924 CODE SECTION.

20

1 IS THAT AGREEABLE?

2 MR. JACKL: SURE.

3 MR. STERNBERG: AND THAT IN ADDITION, THE WASHINGTONS
4 WILL HAVE UP TO AND INCLUDING 5:00 P.M. ON MAY 13TH, 1984, TO
5 PAY THE SUMS DUE WHICH ARE APPROXIMATELY \$32,000, BUT WHICH WE
6 WILL PROVIDE THEM WITH A DETAILED ACCOUNTING WITHIN --

7 MR. JACKL: FIVE DAYS.

8 THE COURT: THEY WILL BRING THEIR OBLIGATION --

9 MR. STERNBERG: -- CURRENT.

10 THE COURT: -- CURRENT AS OF THE DAY BEFORE THE SALE.

11 MR. JACKL: CAN WE MAKE IT MAY 15TH AND PAY IT BY MAY
12 16TH, BECAUSE IT IS A SUNDAY AND IT'S RIDICULOUS.

13 MR. STERNBERG: THEN LET'S MAKE IT BY 10:00 O'CLOCK IN
14 THE MORNING. THEY CAN PAY US ON MONDAY AND WE CAN HAVE THE SALE
15 THEREAFTER -- IN THE AFTERNOON.

16 THE COURT: ALL RIGHT. IS THAT OKAY?

17 MR. MC GRAW: NO. THAT'S GOING TO BE PRACTICALLY
18 IMPOSSIBLE. YOU ARE GOING TO EITHER HAVE TO TELL THE GENERAL
19 PUBLIC THERE IS GOING TO BE A SALE OR THERE ISN'T GOING TO BE A
20 SALE.

21 THE COURT: HOW LONG IN ADVANCE OF SALE SHOULD YOU
22 KNOW?

23 MR. MC GRAW: I WOULD SAY AT LEAST 24 HOURS. OTHERWISE
24 THERE WILL BE NO BIDDERS ON THE SALE.

25 MR. STERNBERG: LET THEM COME UP WITH THE MONEY.

1 MR. JACKL: LET'S SET THE SALE FOR MAY 15TH.

2 THE COURT: ONE EXTRA DAY ON THE SALE.

3 MR. STERNBERG: THEN WE WILL SET THE SALE FOR MAY 15TH
4 AND REINSTATEMENT WILL BE 5:00 P.M., THE 16TH.

5 THE COURT: LET'S MAKE REINSTATEMENT BY 11:30 A.M. ON
6 THE DAY BEFORE. THAT WILL GIVE YOU ENOUGH TIME.

7 MR. STERNBERG: THANK YOU, YOUR HONOR. AND AGAIN, I
8 JUST WANTED IT CLEAR THAT THIS IS WITHOUT PREJUDICE TO MY
9 CLIENTS, AS WE AGREE, AND ALSO THAT THIS WOULD -- THERE IS A
10 POTENTIAL CLAIM BETWEEN MY CLIENT AGAINST TD SERVICES. AND
11 COUNSEL AND I HAVE AGREED THAT THIS ORDER WOULD HAVE NO EFFECT
12 ON THAT CLAIM BETWEEN MY CLIENTS AND OUR CLAIM AGAINST TD
13 SERVICE; IS THAT CORRECT?

14 MR. MC GRAW: THAT'S AGREEABLE, YOUR HONOR.

15 THE COURT: DO YOU WANT TO REDUCE THAT TO WRITING AND
16 SUBMIT IT TO ME?

17 MR. JACKL: IN THE FORM OF AN ORDER?

18 THE COURT: THIS WILL BE THE ORDER OF THE COURT, BUT I
19 THINK IT WOULD BE MORE APPROPRIATE IF IT WERE REDUCED TO
20 WRITING.

21 MR. JACKL: I WILL DO THAT.

22 MR. STERNBERG: IF YOU WILL SEND ME A COPY.

23 THE COURT: ALL RIGHT. THANK YOU, GENTLEMEN.

24 (PROCEEDINGS ADJOURNED)

25 ---000---

REPORTER'S CERTIFICATE

I, THE UNDERSIGNED OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, APPOINTED PURSUANT TO THE PROVISIONS OF TITLE 28, UNITED STATES CODE, SECTION 753, DO HEREBY CERTIFY THAT THE FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT OF PROCEEDINGS HAD IN THE WITHIN-ENTITLED AND NUMBERED CAUSE ON THE DATE HEREINBEFORE SET FORTH; AND I DO FURTHER CERTIFY THAT THE FOREGOING TRANSCRIPT HAS BEEN PREPARED BY ME.



BARBARA H. STOCKFORD

SHELDEN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE ROBERT H. SCHNACKE, SENIOR JUDGE

UNITED STATES OF AMERICA,)
)
)
PLAINTIFF,)
)
VS.) NO. CR-83-120-RHS
)
RALPH H. WASHINGTON, ET AL.,)
)
DEFENDANTS.)

REPORTER'S TRANSCRIPT
MAY 10, 1984

APPEARANCES:

FOR THE PLAINTIFF:

JOSEPH P. RUSSONIELLO
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102
BY: ROBERT L. DONDERO
ASSISTANT U.S. ATTORNEY
GEORGE BEVAN
ASSISTANT U.S. ATTORNEY

FOR DEFENDANT:

JAMES JACKL, ESQUIRE
BELZER & JACKL
180 GRAND AVENUE, SUITE 960
OAKLAND, CALIFORNIA 94612

ALSO PRESENT:

DAVID M. STERNBERG, ESQUIRE
1070 CONCORD AVENUE, SUITE 100
CONCORD, CALIFORNIA 94520

1 MAY 10, 1984

2 THE CLERK: CALLING CRIMINAL CR 83-120, UNITED STATES
3 VERSUS RALPH WASHINGTON.

4 COUNSEL, PLEASE STATE YOUR APPEARANCE FOR THE RECORD.

5 MR. DONDERO: ROBERT DONDERO AND GEORGE BEVAN FOR THE
6 UNITED STATES.

7 MR. JACKL: GOOD AFTERNOON, YOUR HONOR. JAMES JACKL
8 FOR DEFENDANT RALPH WASHINGTON, YOUR HONOR.

9 MR. STERNBERG: DAVID STERNBERG FOR SHELDON, CARL
10 SHELDON.

11 THE COURT: WHO IS CHARLES SHELDON?

12 MR. STERNBERG: CHARLES SHELDON IS THE BENEFICIAL
13 HOLDER OF THE SECOND TRUST DEED ON THE PROPERTY THAT WAS
14 FORFEITED -- WASHINGTON'S, THAT WAS FORFEITED TO THE UNITED
15 STATES.

16 THE COURT: HOW DOES MR. SHELDON BECOME SUBJECT TO MY
17 JURISDICTION?

18 MR. STERNBERG: WE GOT A TELEPHONE CALL, AND I DON'T
19 UNDERSTAND HOW MR. SHELDON IS SUBJECT TO YOUR JURISDICTION, BUT
20 UPON COUNSEL'S PHONE CALL, WE ARE HERE.

21 MR. JACKL: YOUR HONOR, YOU MAY RECALL APPROXIMATELY
22 ONE MONTH AGO, WE WERE IN THIS COURTROOM, AND MR. SHELDON WAS
23 HERE AND HIS COUNSEL. AND THEY SUBMITTED TO THE JURISDICTION OF
24 THE COURT VOLUNTARILY, I THINK, AT THAT TIME.

25 WE ENTERED INTO AN AGREEMENT WHICH WAS INCORPORATED

1 INTO AN ORDER OF THIS COURT EXTENDING THE TIME FOR MR.
2 WASHINGTON AND/OR THE GOVERNMENT, WHO ARE THE OWNERS OF CERTAIN
3 PROPERTY FORFEITED, TO CURE A DEFAULT IN PAYMENT ON A NOTE WHICH
4 IS HELD BY MR. SHELDON.

5 DO YOU RECALL THAT, YOUR HONOR?

6 THE COURT: YES.

7 MR. JACKL: AT THAT TIME, WE REPRESENTED TO THE COURT
8 THAT WE HAD ONE OF THE WASHINGTON PROPERTIES FOR SALE AND IT WAS
9 IN ESCROW, AND WE BELIEVED WE WOULD HAVE FUNDS IN 30 DAYS TO
10 CURE THE DEFAULT. AND WE ASKED THE COURT TO EXTEND OUR TIME FOR
11 REINSTATING THAT DEFAULT TO PREVENT APPROXIMATELY A HUNDRED
12 THOUSAND TO A HUNDRED AND 50 THOUSAND DOLLARS WINDFALL TO MR.
13 SHELDON. UNDER THE COURT ORDER, THAT TIME RUNS OUT ON MONDAY AT
14 11:00 A.M.

15 THE — OUR ESTIMATE WAS AN APPROXIMATE 30 DAYS, AND AS
16 OF 15 MINUTES AGO, THE TITLE COMPANY TELLS ME IT'S NOW 99
17 PERCENT SURE THAT WE WILL CLOSE TOMORROW, WHICH MEANS WE WILL
18 HAVE THE FUNDS AVAILABLE FOR MR. SHELDON TOMORROW AFTERNOON, OR
19 ON MONDAY MORNING.

20 I SPOKE WITH —

21 THE COURT: WHEN DOES THE TIME RUN?

22 MR. JACKL: MONDAY MORNING AT 11:00 A.M.

23 THE COURT: TOMORROW AFTERNOON WOULD BE PLENTY OF TIME?

24 MR. JACKL: YES, IT WOULD, YOUR HONOR. THE PROBLEM
25 WITH ANY ESCROW IS IF ANY ONE OF THE SINGLE STEPS IN IT IS

1 DEFECTIVE --

2 THE COURT: BETTER SEE TO IT THAT NONE OF THEM IS
3 DEFECTIVE.

4 MR. JACKL: I HAVE SHEPHERDED THAT ESCROW THROUGH EVERY
5 SINGLE STAGE, YOUR HONOR, BECAUSE I KNOW THE URGENCY.

6 I SPOKE WITH MR. STERNBERG A WEEK AGO AND I OFFERED TO
7 LET HIM SPEAK WITH ALL THE PEOPLE INVOLVED, BECAUSE THERE WAS A
8 POTENTIAL THAT THE LENDER WOULD NOT BE ABLE TO GET THE DOCUMENTS
9 IN ESCROW UNTIL 24 HOURS AFTER THE TIME SET FOR CLOSING, WHICH
10 MEANS THAT WE WOULD FORFEIT EVERYTHING, AND ASKED FOR AN
11 EXTENSION OF TIME OF MAYBE A DAY.

12 MR. STERNBERG SAID, WELL, HE WOULD TALK TO HIS CLIENT
13 ABOUT IT. AFTERWARDS, HIS CLIENT SAID HE WOULD NOT CONSENT TO
14 EVEN AN HOUR. AS A PRECAUTIONARY MEASURE, I FELT WE HAD TO COME
15 BACK TO THE COURT TO ASK THE COURT FOR 24 HOURS OR 48 HOURS
16 LEeway THERE.

17 IN VIEW OF WHAT THE TITLE COMPANY JUST TOLD ME, MAYBE
18 THAT'S PREMATURE, BUT I DIDN'T WANT TO WALK IN ON THE LAST HOUR.

19 THE COURTS: LET'S HOPE IT IS, BECAUSE MR. STERNBERG AND
20 HIS CLIENT VERY GRACIOUSLY STIPULATED TO THE ORDER THAT I
21 ENTERED A MONTH AGO. I EXPRESSED MY DOUBTS ABOUT JURISDICTION
22 THEN AS I EXPRESS THEM NOW. AND IT WAS BY VIRTUE OF THE GOOD
23 GRACES OF MR. STERNBERG THAT YOU HAVE HAD THE EXTRA PERIOD.

24 OVER ANY OBJECTION FROM MR. STERNBERG AS TO MY
25 EXERCISING JURISDICTION OVER HIM, I CERTAINLY WOULD NOT PURPORT

1 TO DO SO.

2 MR. JACKL: ALL RIGHT.

3 THE COURT: I'M HAPPY THAT YOU HAVE REACHED A SOLUTION
4 THAT WILL RESOLVE THIS MATTER TOMORROW AFTERNOON AND IF ANYBODY
5 IS STANDING IN YOUR WAY, YOU BETTER SEE TO IT THAT HE IS
6 ACCOMMODATED IN WHATEVER FASHION IS NECESSARY. BECAUSE, THE
7 ORDER -- I HAVE NO POWER TO EXTEND THE ORDER OVER THE OBJECTION
8 OF MR. STERNBERG AND I WOULD NOT DO SO IF I HAD THE POWER.

9 MR. JACKL: ALL RIGHT. THANK YOU, YOUR HONOR.

10 THE COURT: DOES THAT CLARIFY IT FOR EVERYBODY?

11 MR. JACKL: PARDON.

12 THE COURT: THAT CLARIFIES IT FOR EVERYONE?

13 MR. JACKL: YES, IT DOES, YOUR HONOR. AND I APPRECIATE
14 THAT.

15 THERE IS ONE OTHER MATTER. AND THAT IS, UNDER
16 CALIFORNIA LAW, AND UNDER THE ORDER THAT WE STIPULATED TO, MR.
17 WASHINGTON AND/OR THE GOVERNMENT HAVE THE RIGHT TO REINSTATE
18 THIS LOAN BY PAYMENT OF ALL OF THE FUNDS DUE BY 11:00 O'CLOCK ON
19 MONDAY.

20 IT'S QUITE CLEAR UNDER CALIFORNIA LAW -- IT'S CALLED
21 2924(C) OF THE CIVIL CODE -- THAT THE AMOUNT THAT WE ARE
22 REQUIRED TO TENDER IS ALL OF THE BACK PAYMENTS, LATE CHARGES,
23 BACK TAXES, INSURANCE, AND EITHER TRUSTEE'S FEES, AS SET FORTH
24 PRECISELY IN THE STATUTE, OR ATTORNEY'S FEES AS SET FORTH IN THE
25 STATUTE, WHICH CANNOT EXCEED CERTAIN AMOUNTS. BUT ONE CANNOT

1 RECEIVE BOTH OF THOSE.

2 THE PERSON WHO WANTS TO FORECLOSE HAS A CHOICE OF
3 EITHER EMPLOYING AN ATTORNEY TO DO HIS FORECLOSURE OR HE CAN
4 EMPLOY A TRUSTEE TO DO HIS FORECLOSURE.

5 UNDER THE COURT'S ORDER AND UNDER OUR AGREEMENT, THEY
6 WERE TO PROVIDE US AN ACCOUNTING OF THE MONIES THAT THEY DEMAND
7 FOR US TO REINSTATE THE OBLIGATION. AND THEY SET FORTH ALL OF
8 THE PAYMENTS WHICH WE AGREE WITH AND WE AGREE TO PAY. AND THEN
9 THEY ADDED ON TO THAT \$3,000 ATTORNEYS FEES AND 232 DOLLARS FOR
10 PARKING FEES AND BRIDGE TOLLS, ET CETERA, ET CETERA.

11 I TRIED TO GET SOME ACCOUNTING AS TO WHAT THAT WAS;
12 ONE, SO WE COULD SEE IF IT WAS REASONABLE; TWO, TO SEE IF THERE
13 WAS ANY LEGAL BASIS FOR THEIR RECOVERING SAME. AND THEY HAVE
14 NEVER DONE SO.

15 I HAVE SPOKEN WITH MR. STERNBERG A COUPLE OF TIMES.
16 MR. STERNBERG HAS SAID THAT HE HAS REVIEWED THESE FEES INCURRED
17 BY MR. SHELDON WITH THREE OR FOUR DIFFERENT LAWYERS, AND HE
18 THINKS THAT \$3,000 IS A REASONABLE AMOUNT, NOT \$3,000.

19 SO HE HAS OFFERED TO REDUCE THE AMOUNT TO \$3,000. BUT
20 STILL NO ONE WILL SHOW US ANY BILLS OR ANY BASIS WHY THEY SHOULD
21 RECOVER ANYTHING. AND UNDER THE STATE STATUTE, THEY ARE NOT
22 ENTITLED TO RECOVER ANYTHING.

23 WE WILL BE PREPARED. IF WE ARE NOT PREPARED, THEN WE
24 LOSE EVERYTHING. BUT WE WILL BE PREPARED, I BELIEVE, TO TENDER
25 THE AMOUNT TOMORROW AFTERNOON OR MONDAY TO CURE THE DEFAULT, BUT

1 I AM LED TO BELIEVE THAT IF WE PAY ALL OF THE BACK PAYMENTS
2 WITHOUT PAYING THIS DEMAND FOR ATTORNEY'S FEES, WHICH IS
3 UNSUPPORTED, THAT WE WOULD NOT BE ENTITLED TO REINSTATEMENT.

4 MR. STERNBERG SUGGESTS THAT I JUST MAKE A TENDER AND
5 THEY WILL EITHER TAKE IT OR THEY WON'T AND WE CAN LITIGATE IT.
6 I DON'T THINK WE HAVE TO ROLL DICE ON WHETHER OR NOT MR.
7 STERNBERG IS GOING FEEL THIS IS REASONABLE. MR. STERNBERG, IF
8 HE FEELS HE HAS SOME RIGHT TO ATTORNEY'S FEES, HE SHOULD BE
9 REQUIRED TO.

10 THE COURT: HE'S MADE A STATEMENT OF WHAT HE THINKS
11 HE'S ENTITLED TO.

12 MR. JACKL: I KNOW THAT, BUT HE'S OFFERED NO EVIDENCE
13 AS TO WHAT THE FEES WERE INCURRED FOR.

14 THE COURT: WHAT DOES THE CODE SAY ABOUT THE EVIDENCE
15 THAT HE'S SUPPOSED TO OFFER?

16 MR. JACKL: THE CODE IS SILENT ON THAT.

17 THE COURT: WHEN THE CODE IS SILENT ON SOMETHING, AND
18 THERE IS A DISPUTE BETWEEN THE PARTIES, HOW DO YOU RESOLVE IT?

19 MR. JACKL: WELL, THE CODE IS SILENT ON ATTORNEY'S
20 FEES. THE CASE LAWS SAY ATTORNEY'S FEES MUST BE REASONABLE.
21 THEY MUST BE INCURRED TO PROTECT THE SECURITY OF THE DEED OF
22 TRUST OR IN LITIGATION ARISING OUT OF THE DEED OF TRUST, BUT
23 THAT DOESN'T ANSWER OF THE QUESTION OF WHETHER HE'S ENTITLED TO
24 BOTH ATTORNEY'S FEES AND TO TRUSTEE'S FEES, YOUR HONOR.

25 THE COURT: I CAN'T ANSWER THAT QUESTION FOR YOU. HOW

1 CAN IT? AS I SAY, THE MATTER OF THE PROPRIETY OF FORECLOSURE
2 UNDER STATE LAW IS SOMETHING I HAVE NO CONTROL OVER. AND ALL I
3 CAN IMAGINE IS THAT AT SOME POINT, SOME STATE COURT IS GOING TO
4 HAVE TO RESOLVE THE PROBLEMS BETWEEN YOU. HOW THE ISSUE IS
5 PRESENTED TO THEM DEPENDS ON WHAT CHOICE YOU MAKE, I WOULD
6 SUPPOSE.

7 MR. JACKL: ALL RIGHT, YOUR HONOR.

8 THE COURT: IF YOUR ONE CONCERN, OBVIOUSLY, IS TO SEE
9 TO IT THAT THE IMMEDIATE PROBLEM IS SOLVED, WHICH IS THAT NO
10 MATTER HOW THE MATTER IS RESOLVED, YOU GET YOUR ENTITLEMENT TO
11 THE PROPERTY, WHERE IT GOES FROM THERE, I THINK YOU HAVE TO WORK
12 OUT.

13 MR. JACKL: YOUR HONOR, I HAVE NO PROBLEM WITH
14 LITIGATING THIS IN STATE COURT. I FEEL VERY CONFIDENT OF OUR
15 POSITION. THE COURT DID SAY THIS COURT HAS EXCLUSIVE
16 JURISDICTION OVER THE PROPERTY. AND ONE OF THE PARTIES TO THE
17 ACTION IS THE UNITED STATES OF AMERICA. AND THE UNITED STATES
18 ATTORNEYS HAVE NOT FELT THAT IT'S PROPER FOR THE UNITED STATES
19 TO LITIGATE THIS IN STATE COURT.

20 ALSO, I BELIEVE UNDER THE ORDER FROM ONE MONTH AGO,
21 THAT THIS ISSUE WOULD PROPERLY BE BEFORE THIS COURT BECAUSE YOUR
22 HONOR'S ORDER SAID THAT WE ARE ENTITLED TO REINSTATE UNDER
23 2924(C) OF THE CIVIL CODE.

24 THE COURT: WHAT'S YOUR VIEW ON THAT? DO YOU WANT ME
25 TO RESOLVE THE MATTER OF WHAT THE PAYMENT OUGHT TO BE FOR EITHER

1 TRUSTEE OR ATTORNEY'S FEES?

2 MR. STERNBERG: YOUR HONOR, I THINK MR. WASHINGTON PUT
3 US IN THE POSITION OF HAVING THE PROPERTY FORFEITED, TO REQUIRE
4 US TO COME HERE AND FOR MR. SHELDON TO PROTECT HIS SECURITY. HE
5 HAS \$150,000 LOAN AND HE INCURRED, ACCORDING TO BILLINGS THAT I
6 SAW, \$5,800 IN ATTORNEY'S FEES. AND I HAD REVIEWED THESE BILLS.

7 THE COURT: FROM WHEN UNTIL WHEN CONCERNING WHAT?

8 MR. STERNBERG: WHAT WAS THE PURPOSE OF HIS MEETING?

9 THE COURT: WHAT WAS THE PURPOSE OF THE ATTORNEY'S
10 FEES?

11 MR. STERNBERG: THEY WERE TO DETERMINE THE EXTENT OF
12 VALIDITY OF HIS LIEN IN THE PROPERTY. HE WENT TO OTHER
13 ATTORNEYS BEFORE ME TO DETERMINE THIS MATTER.

14 THE COURT: WHAT DID THEY DO?

15 MR. STERNBERG: LEGAL RESEARCH AND PHONE CALLS AND
16 LETTERS.

17 THE COURT: HOW MUCH ARE YOUR FEES?

18 MR. STERNBERG: AT THIS POINT, THEY'RE APPROXIMATELY
19 \$2,000.

20 THE COURT: DID THE OTHER ATTORNEYS DO MORE THAN YOU
21 DID.

22 MR. STERNBERG: I DON'T KNOW.

23 THE COURT: YOU KNOW PERFECTLY WELL THAT THEY DIDN'T,
24 DON'T YOU? YOU ARE THE ONE THAT TOOK THE LABORING ORDER HERE
25 AND WERE INVOLVED IN THE CLOSING PROCEDURES. UP TO THAT POINT,

10

1 NOTHING REALLY HAD BEEN DONE EXCEPT FOR SOME SCURRING AROUND; IS
2 THAT FAIR TO SAY?

3 MR. STERNBERG: THAT'S HOW I ANALYZE THE ATTORNEY'S
4 FEES.

5 THE COURT: HAVE THE OTHER ATTORNEY'S FEES BEEN PAID?

6 MR. STERNBERG: MR. SHELDON INFORMED ME THAT HE HAD
7 PAID APPROXIMATELY 1,500, BUT THAT HE HAD BILLS FOR THE OTHER
8 ATTORNEY'S FEES. 2,500 IS WHAT HE'S TELLING ME, AND THERE WAS
9 SOME ADDITIONAL BILLS. BUT AGAIN, THAT'S WHY I RECOMMENDED
10 REDUCING THE ATTORNEY'S FEES TO MY CLIENT AND, IN FACT, I DID
11 CALL AND REDUCE OUR DEMAND TO \$3,000 AS OF AFTER THIS HEARING.
12 YESTERDAY MY DEMAND WAS \$2,700.

13 AND I REVIEWED THE CASE LAW AND CAME TO THE CONCLUSION
14 THAT WE WERE ENTITLED TO GET ATTORNEY'S FEES TO PROTECT OUR
15 SECURITY. AND I CITED A CASE TO COUNSEL, BUCK VERSUS BARG
16 (PHONETIC), 1983, 147 CA 3RD 920, AND EXPLAINED TO HIM THAT WE
17 WERE ENTITLED TO ANY REASONABLE ATTORNEY'S FEES. IN ANY EVENT,
18 I DON'T THINK THAT'S THE ISSUE AND I DON'T WANT YOU -- I REQUEST
19 THAT WE NOT DECIDE THIS HERE.

20 AS OF THE DATE OF THE ORDER, WE ORIGINALLY AGREED ON
21 TOMORROW TO BE THE DAY TO -- THAT'S WHAT I ORIGINALLY AGREED ON
22 ON BEHALF OF MY CLIENT. AND YOU SUGGESTED WHY DON'T WE MOVE IT
23 TO MONDAY. AND MR. JACKL SAID, "WHY DON'T WE GET ANOTHER DAY,
24 SO WE WILL HAVE PLENTY OF TIME TO GET THE MONEY AND TENDER WHAT
25 WE FEEL IS DUE." AND YOU CAME UP WITH 11:00 O'CLOCK ON MONDAY

1 MORNING. AND I BELIEVE THAT THAT'S THE TIME THAT PERFORMANCE
2 SHOULD BE TENDERED, BY THAT TIME.

3 AS OF THIS DATE, NO MONIES HAVE BEEN TENDERED. ALL WE
4 HAVE HEARD IS THAT THERE IS AN ESCROW AND THERE IS AN ESCROW AND
5 THERE IS AN ESCROW. AND IN ADDITION, ANOTHER PART OF OUR ORDER
6 OR AGREEMENT WAS THAT MR. JACKL WAS GOING TO SEND EXCESS MONIES
7 TO THE SHELDONS BECAUSE OF THEIR NEED FOR THEIR FINANCES,
8 BECAUSE THEY LIVE ON THE INTEREST ON THIS NOTE.

9 WE HAVE RECEIVED NO ACCOUNTING. NOR HAVE WE RECEIVED
10 ANY MONIES FROM MR. JACKL. IT WAS ADDITIONALLY TALKED ABOUT AND
11 DISCUSSED THAT THERE WOULD BE A BANKRUPTCY PROCEEDING FILED IF
12 THIS DID NOT WORK OUT. AND THAT OPTION, OBVIOUSLY, IS STILL
13 OPEN TO MR. WASHINGTON.

14 SO I REQUEST NO ORDER BE MADE TO EXTEND THE ORDER TO
15 TODAY AND THAT THE ISSUE OF ATTORNEY'S FEES SHOULD BE -- THAT
16 MR. JACKL SHOULD TENDER WHAT HE FEELS IS THE AMOUNT.

17 THE COURT: YOUR DEMAND PRESENTLY IS \$3,000?

18 MR. STERNBERG: YES, IT IS. THAT SUBTRACTS FROM THE
19 ORIGINAL ACCOUNTING THAT WAS SENT BY TD SERVICES TO MR. JACKL OF
20 THE TRAVELING AND MISCELLANEOUS EXPENSES AND THE SO --
21 APPROXIMATELY \$5,500 IN ATTORNEYS FEELS. SO OUR DEMAND AT THIS
22 TIME IS THAT AMOUNT.

23 AND I SPOKE WITH MR. JACKL MORE THAN TWICE, MAYBE TEN
24 TIMES IN THE LAST --

25 THE COURT: AND THE OTHER AMOUNTS -- THE PARTIES ARE IN

1 AGREEMENT ON THE REMAINING AMOUNTS?

2 MR. STERNBERG: YES.

3 MR. JACKL: YES, YOUR HONOR.

4 THE COURT: THAT AT LEAST MAKES CLEAR WHAT THE DEMAND
5 IS. AND AS I SAY, I FEEL I HAVE NO POWER TO MAKE ANY ORDER
6 BEYOND THE ORDER THAT'S ALREADY BEEN MADE PURSUANT TO THE
7 AGREEMENT OF THE PARTIES. ABSENT AGREEMENT, I CAN'T GO ANY
8 FURTHER WITH IT.

9 MR. STERNBERG: THANK YOU, YOUR HONOR.

10 MR. JACKL: DO I UNDERSTAND THEN THAT THE COURT IS NOT
11 RETAINING JURISDICTION OVER THIS PIECE OF PROPERTY SO THAT I
12 MIGHT GO INTO STATE COURT?

13 THE COURT: NO, I HAVE NO FURTHER — I HAVE NEVER HAD
14 ANY JURISDICTION OVER IT. I ENTERED THE ORDER ONLY BECAUSE THE
15 PARTIES WERE IN AGREEMENT THAT THAT WAS AN ORDER THAT SHOULD BE
16 ISSUED. SO THE PARTIES ARE FREE TO GO ANYWHERE. ALL RIGHT.

17 (PROCEEDINGS ADJOURNED)

18 ---000---

19

20

21

22

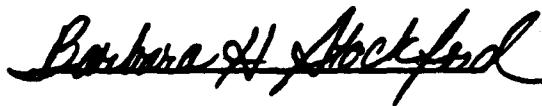
23

24

25

REPORTER'S CERTIFICATE

I, THE UNDERSIGNED OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, APPOINTED PURSUANT TO THE PROVISIONS OF TITLE 28, UNITED STATES CODE, SECTION 753, DO HEREBY CERTIFY THAT THE FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT OF PROCEEDINGS MADE IN THE WITHIN-ENTITLED AND NUMBERED CAUSE ON THE DATE HEREINBEFORE SET FORTH; AND I DO FURTHER CERTIFY THAT THE FOREGOING TRANSCRIPT HAS BEEN PREPARED BY ME.



BARBARA H. STOCKFORD

In the United States Claims Court

No. 164 - 88L

W.H.C. 11/11/89

Filed: January 12, 1990

JAN 12 1990

OFFICE OF THE CLERK
U.S. CLAIMS COURTCARL SHELDEN and
MARY SHELDEN,

- Eminent domain; Forfeiture;
- Racketeer Influenced and Corrupt Organizations Act; Property right or interest subject to taking;
- Summary judgment; Claims Court jurisdiction; Sovereign immunity; Tort; Exhaustion of administrative remedies.

Plaintiffs.

v.

THE UNITED STATES,

Defendant.

Landon Dowdley, Washington, D.C., for plaintiffs. *Brenda Granlund*, Washington, D.C., of counsel.

Celia I. Campbell - Mohn, Land and Natural Resources Division, United States Department of Justice, Washington, D.C., for defendant.

OPINION

SMITH, Chief Judge.

This case comes before the court on plaintiffs' motion for summary judgment as to liability, and defendant's cross-motion for summary judgment, or in the alternative, to dismiss. Plaintiffs were innocent mortgagees of real property under a deed of trust. This property was ordered forfeited when the mortgagor was convicted of violating federal anti-racketeering statutes. Although the order of forfeiture was eventually vacated, plaintiffs were prevented from foreclosing their lien for over two years, during which time the property sustained severe, preventable, and apparently permanent damage. Plaintiffs allege that the government's actions amounted to a taking of their property without just compensation, in violation of the fifth amendment to the United States Constitution. For the reasons set forth below, plaintiffs' motion for summary judgment as to liability is granted.

FACTS

The parties' proposed findings of uncontested fact accompanying their motions and the representations of counsel at oral argument reveal agreement on virtually all of the relevant facts.¹ The only dispute is whether, under the facts, plaintiffs have a remedy at law.

Plaintiffs Carl and Mary Shelden owned real property at 1065 Wickham Drive, Moraga, California (the Moraga property), as joint tenants. On May 23, 1979, they sold the property to Ralph and Freddie Jean Washington for \$289,000, taking back a promissory note in the amount of \$160,435.65, secured by a deed of trust.² Under the terms of the note, the Washingtons were to make monthly payments of \$1602.41 until June 1, 1986, at which time the balance on the note was to become due. The note also gave the signatories the option to renegotiate at the end of the initial seven-year period, continuing the note for an additional five years.

On February 15, 1983, the Washingtons were indicted for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. The indictment alleged that the Moraga property was subject to forfeiture under RICO. On March 7, 1983, the Washingtons conveyed the Moraga property to the Clerk of the United States District Court for the Northern District of California by deed of trust with power of sale, to secure payment of their bail bonds.

On October 7, 1983, the Sheldens' trustee filed a notice of default and election to sell the Moraga property. At that time, payments on the note held by the Sheldens were \$6264.88 in arrears. The United States attorney was notified that the Moraga property was to be sold at a foreclosure sale to be held in January, 1984, when the three-month redemption period required by California law would have expired.

Ralph Washington was found guilty on 12 counts of the indictment on December 1, 1983. The jury which rendered the verdict declared the Moraga property forfeited under 18 U.S.C. § 1963. On December 9, 1983, the United States filed a notice of *lis pendens* on the Moraga property, reciting the jury verdict and declaration of forfeiture.

On January 31, 1984, the United States District Court for the Northern District of California entered an "Order Re Forfeiture of Properties and Disposition Thereof Pending Appeal." The order effectively suspended the Sheldens' foreclosure rights. Although the order was signed by the district judge and entered by the clerk of the district court, it was for all intents and purposes a stipulation between the United States Attorney and Mr. Washington. Because the order of forfeiture is central to the dispute, it is necessary to set

¹ The parties disagree on the measure of plaintiffs' damages, but such a dispute is not relevant to the question at hand: whether the United States is liable to the Sheldens.

² The Sheldens held a second deed of trust; the first deed of trust was held by a California lending institution.

out pertinent portions at length here:

[P]laintiff United States of America and defendant Ralph Huey Washington having stipulated to the entry of the following order with respect to the property declared forfeitable, it is hereby ordered as follows:

1. This order applies to the following parcels of real property:

(j) 1065 Wickham Drive, Moraga, CA.³

3. Any and all interest of the defendant Ralph Huey Washington in and to the aforesaid real properties is hereby deemed transferred to plaintiff United States of America effective January 20, 1984, although for the convenience of the parties and to put into effect the terms of this order record title shall remain (where applicable) in the name of Ralph Huey Washington

5. (A) Defendant Ralph Huey Washington , or his designated representative, shall be entitled to remain in physical possession of, and to have management and control of [:]

(b) 1065 Wickham Drive, Moraga, CA;⁴

(B) Defendant, so long as he is not in custody, shall be entitled to reside in the property known as 1065 Wickham Drive, Moraga, CA;

(D) Defendant Ralph Huey Washington, or Freddie Washington, or such other person as Ralph Washington may designate . . . shall manage the foregoing properties, and all rents obtained therefrom shall be deposited into an account maintained jointly by plaintiff United States of America and defendant Ralph Huey Washington, and the proceeds thereof shall be used for the purpose of maintaining mortgage payments, utilities, repairs, and other such expenses which are ordinarily and customarily those of a landlord of real property.

10. . . . [P]laintiff (the United States) shall not be prohibited from recording in the appropriate state or county offices notices of liens as permitted by law.

11. Upon final disposition of [Ralph Huey Washington's] appeal [from his criminal conviction], the property declared forfeitable shall forthwith be irrevocably vested in plaintiff United States of America, or released to defendant Ralph Huey Washington, as the result of said appeal shall indicate.

³ The order listed nine other pieces of real property owned or controlled by Mr. Washington prior to his conviction.

⁴ The order listed three other properties.

12. This court retains continuing jurisdiction over the subject real property to make such further supplementary orders as may be necessary or appropriate to effectuate the intent and purpose of this order and to determine, to the extent permitted by law, the claims, if any, of third parties in and to the aforesaid property.

DATED: 31 JAN 1984

/s/ [Judge] Robert H. Schnacke

SO STIPULATED:

Joseph P. Russoielo

United States Attorney

By: /s/ Robert L. Dondero

Assistant United States Attorney

/s/ Ralph Huey Washington

While the Moraga property was under the control of the government and Mr. Washington, the hill upon which the house was built eroded severely. As a consequence, the market value of the property declined significantly.⁵

On August 20, 1986, the United States Court of Appeals for the Ninth Circuit reversed the conviction of Ralph Washington. *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986). The effect of this ruling was to vacate the forfeiture verdict. The trustee under the May 23, 1979 deed of trust held a foreclosure sale on February 23, 1987, at which sale the Sheldens bought the Moraga property for \$115,500.

DISCUSSION

Summary judgment is appropriate where the pleadings, motion papers, affidavits, and other documents properly before the court, reveal no genuine dispute of material fact, and as a matter of law, one party is entitled to judgment. RUSCC 56; *Celotex Corp. v. Catrett*, 477 U.S. 417 (1986) (construing Fed. R. Civ. P. 56). Here, the material facts are not in dispute, and they establish a taking. Thus, plaintiffs are entitled to summary judgment on the issue of liability.

I. Property interest cognizable under the fifth amendment.

The fifth amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." As a threshold matter, the court must address defendant's assertion that the Sheldens' interest in the Moraga property is not "property" within the meaning of the just compensation clause. If defendant is correct, then no further analysis is necessary, and the case must be dismissed.

⁵ The government estimated the value of the Moraga property for bail purposes at \$325,000. The Sheldens allege that as a result of the erosion, the value of the property dropped to approximately \$60,000. The erosion could have been avoided with the expenditure of approximately \$10,000 in preventive maintenance.

In *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987), *cert. denied*, 109 S.Ct. 1318 (1989), the court held that "[a] mortgagee's lien is a property interest within the meaning of the Fifth Amendment." (Citations omitted). *Murray* notwithstanding, defendant contends that the right to foreclose is not a property right cognizable under the fifth amendment's just compensation clause, citing *Oglethorpe Co. v. United States*, 214 Ct. Cl. 551 (1977), and *Sol-G Construction Corp. v. United States*, 231 Ct. Cl. 846 (1982), as support. Neither case is apposite. In both *Oglethorpe* and *Sol-G Construction*, the United States, through the Department of Housing and Urban Development, foreclosed on properties it held as mortgagee. The Court of Claims held in both cases that parties with inferior security interests in the properties, whose liens were extinguished by the foreclosure sales, could not recover on taking claims.

The grounds for distinguishing *Oglethorpe* and *Sol-G Construction* from the present case are numerous, but the key distinction lies in the character of the government action in those cases, as opposed to that in the case at bar. In *Oglethorpe* and *Sol-G Construction*, the United States was acting in its proprietary capacity; it acted just as a private party with a superior security interest would have acted. By contrast, in the instant case, the government acted in its sovereign capacity. The distinction was explained by the Court of Claims in *DSI Corp. v. United States*, 228 Ct. Cl. 299, 302-303 (1981):

When the government "takes" property, it exercises its right as sovereign to acquire property from the rightful owner for the public good. . . . Such an exercise is distinct from the right of ultimate ownership. . . . In the instant case, however, the government did not exercise its sovereignty and expropriate private property from the rightful owner. Instead, the government asserted a claim of right to the property, i.e., that it was entitled to be the rightful owner of the property as the only holder of a valid mortgage on the property and that DSI had no rights in the chattel because its mortgage was void. In essence, this case involved a contest between two parties over conflicting claims of ownership.

(Citations omitted.)

Here, the government never asserted a right of ownership as holder of a mortgage on the Moraga property. Rather, it exercised the power of the sovereign to impose penal sanctions, and declared the property forfeited under RICO. Thus, *Oglethorpe* and *Sol-G Construction* do not apply, and the Sheldens can maintain a taking claim.

II. The elements of a taking.

In determining whether a taking has occurred, the court must examine the character of the government action, as well as the impact of the government action on the rights of the property owner involved. See generally *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), *reh. denied*, 439 U.S. 883 (1978). However, it is

not necessary for the [government] to have actually taken physical possession

of plaintiff's property in order for there to have been a fifth amendment taking. A taking can occur simply when the Government by its action deprives the owner of all or most of his interest in his property. . . . Thus, it is the loss to the owner of the property and not the accretion to the Government which is controlling in fifth amendment cases.

Aris Gloves, Inc. v. United States, 190 Ct. Cl. 367, 374 (1970) (citations omitted).

Although the Supreme Court has endorsed a case by case approach to taking claims, e.g., *Agins v. Tiburon*, 447 U.S. 255 (1980), six elements recur in the case law.⁶ First, the government must have invaded or interfered with plaintiff's property. *Berenholz v. United States*, 1 Cl. Ct. 620, 626 (1982), *aff'd*, 723 F.2d 68 (Fed. Cir. 1983); *Florida East Coast Prop., Inc. v. Metropolitan Dade County*, 572 F.2d 1108, 1111 (5th Cir. 1978), *cert. denied*, 439 U.S. 894 (1978). Second, the government's invasion must have deprived plaintiff of a substantial right or interest in plaintiff's property. *Berenholz*, 1 Cl. Ct. at 626; *Florida East Coast Prop., Inc.*, 572 F.2d at 1111. Third, the government's invasion must have been a direct act. *Hartwig v. United States*, 202 Ct. Cl. 801 (1973); *Berenholz*, 1 Cl. Ct. at 630; *Florida East Coast Prop., Inc.*, 572 F.2d at 1111. Fourth, the government's invasion of plaintiff's property must be permanent or inevitably recurring. *Hartwig*, 202 Ct. Cl. at 809; *Benini v. United States*, 4 Cl. Ct. 755, 758 (1984); *Berenholz*, 1 Cl. Ct. at 626. Fifth, the government's invasion of plaintiff's property must be authorized by Congress. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922); *Sun Oil Co. v. United*

⁶ It has been argued that intent is one of the elements of a taking. Thus, it is argued that in order to effect a taking, the government must intend to effect a taking. See, e.g., *Foster v. United States*, 221 Ct. Cl. 412, 424 (1979); *Sun Oil Co., Inc. v. United States*, 215 Ct. Cl. 716, 770 (1978); *Columbia Basin Orchard v. United States*, 132 Ct. Cl. 445 (1955). Though a showing of government intent to take has been used in certain instances to show that the government's acts were direct and not consequential, see, e.g., *Berenholz v. United States*, 1 Cl. Ct. at 627, other cases hold that negligent or inadvertent destructive actions by the government can result in a taking. For example, the Supreme Court has held that the unintentional flooding of private land due to the government's adjusting the flow of waterways constitutes a taking. See *United States v. Cress*, 243 U.S. 316 (1917).

It has also held that the firing of artillery shells over private property might constitute a taking. See *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). Likewise, the Supreme Court found that the invasion of an individual's air space by government planes constitutes a taking. See *United States v. Causby*, 328 U.S. 256 (1946). It is implicit from these holdings that government intent to take property is not a necessary element of an inverse condemnation claim. It is enough that plaintiff's property has been invaded by the government's direct act and its value has been substantially impaired. Additionally, the Court of Claims has held that intent is not a necessary element of an inverse condemnation claim. See *Eyherabide v. United States*, 170 Ct. Cl. 598 (1965); *Richard v. United States*, 152 Ct. Cl. 225 (1960), modified on other grounds, 152 Ct. Cl. 266 (1961). Thus, the court need not address the question whether the officials involved in the forfeiture of the Moraga property intended to effect a taking.

States, 215 Ct. Cl. 716 (1978); *Bettini*, 4 Ct. Cl. at 758. Sixth, the government must have usurped plaintiff's property to benefit the public. *Baird v. United States*, 5 Ct. Cl. 324, 330 (1984); *Berenholz*, 1 Ct. Cl. at 631. Here, all of these elements have been met.

The government interfered with the Sheldens' interest in the Moraga property, when it filed a notice of *lis pendens* on the property on December 9, 1983. The notice announced to the world that the United States had a lien on the property, and it effectively destroyed the value of the Sheldens' security interest. See *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987) (temporary takings which deny landowners use of property are no different in kind from permanent takings). The interference continued while the Sheldens were prevented from foreclosing on the property pending Mr. Washington's appeal. The government argues that it never had title to, possession of, or control over, the Moraga property. Such a contention runs counter to the uncontested facts recounted above, and cannot be taken seriously.⁷ Defendant's argument asks the court to believe that while the United States asserted a lien on real property, and prevented innocent mortgagees from foreclosing on the property, it did not in any way control that property. The government's position is, as the late Chief Judge Marvin Jones once said, "[s]ingularly free from any suspicion of logic." *Belcher v. United States*, 94 Ct. Cl. 137, 140 (1941).

The government's interference deprived the Sheldens of a substantial interest in the property. The loss in value to the Moraga property while plaintiffs' foreclosure rights were suspended was significant. On December 9, 1983, when the government filed the notice of *lis pendens*, the Moraga property had a market value of \$325,000, according to the government's own estimate. Thus, had the Sheldens been allowed to foreclose in January 1984, the proceeds from the sale would have satisfied the balance due on the promissory note. The Sheldens allege that the property was worth only \$61,000 when they were finally allowed to foreclose in February, 1987. Thus, the loss of the Sheldens' right to foreclose can be valued at approximately \$99,000.⁸

The government's interference was direct. The notice of *lis pendens* was filed against

⁷ Defendant's argument is also internally inconsistent. It cites *DSI Corp. v. United States*, 228 Ct. Cl. 299, 303 (1981), for the proposition that "there is no taking where, pursuant to a court order, the government is in possession of property to which it asserts a claim of rightful ownership." Thus, the government appears to be arguing here that it *did* possess the Wickham Drive property.

⁸ The court employs these figures for illustrative purposes only, to demonstrate that the Sheldens' loss is significant and measurable. The case is before the court on plaintiff's motion for summary judgment on liability; the amount of damages due will be left for a later stage in the proceedings.

the Moraga property,⁹ the order of forfeiture specified the same property. The actions of the officials involved in the forfeiture proceeding were authorized; defendant has conceded as much. The government's actions caused permanent injury to the Sheldens; the decline in the value of the Moraga property is permanent. Finally, the order of forfeiture and filing of the *lis pendens* were actions taken to benefit the public. As explained more fully in section III below, *in personam* forfeitures serve the public's interests in enforcing penal sanctions.

III. Collateral attack on the district court's order.

The government argues, relying primarily on *Meincke v. United States*, 14 Cl. Ct. 383 (1988), that the Sheldens' claim amounts to an impermissible collateral attack on the district court's order. In *Meincke*, plaintiff sued for \$23,000, alleging an improper taking of private property for public use without just compensation. The subject of the claim, two vehicles in which Ms. Meincke alleged an interest, had been ordered forfeited by the United States District Court for the Eastern District of Michigan, after Ms. Meincke's husband was convicted of violating federal narcotics laws and operating a continuing criminal enterprise. Judge Futey ruled that the Claims Court could not consider plaintiff's challenge to the district court's order of forfeiture, explaining that Meincke's complaint was, "in essence, . . . a collateral attack on the district court's forfeiture ruling." 14 Cl. Ct. at 386. Judge Futey went on to say that "[t]he Claims Court's jurisdiction does not extend to the review of substantive actions taken by other federal courts." *Id.*

The court does not quarrel with the proposition that the Claims Court lacks jurisdiction to review district court orders. However, such a statement of the law does not control the outcome of this case. At the time Ms. Meincke's taking claim was brought, the order of forfeiture issued by the district court was in full force and effect. Had Judge Futey granted Ms. Meincke the relief she sought, he would have been, in effect, nullifying the district court's order. However, the court's task in a taking claim is to determine whether otherwise valid government action which adversely affects property owners, entitles the property owners to just compensation. See *Florida Rock Industries v. United States*, 791 F.2d 893, 900 (Fed. Cir. 1986) (taking can result from valid regulation). The court today does not purport to examine the validity of the district court's forfeiture order, nor would granting the Sheldens the relief they seek effectively nullify a court order. The court is simply fulfilling its mandate under the Tucker Act to award money damages to plaintiffs who can establish a violation of the Constitution.

The *Meincke* case is distinguishable on an additional ground. *Meincke* involved an

⁹ In *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984), the Supreme Court ruled that the mere filing of a *lis pendens* by the United States did not result in the taking of petitioner's property, where the filing did not prevent the petitioner from using the property as it wished, or from selling the land. In the present case, however, the government did prevent the Sheldens from using the property in the only way they could namely, selling it at a foreclosure sale. It prevented the sale from occurring for a period of over three years, during which time the property lost much of its value through waste.

in rem forfeiture under 21 U.S.C. § 848(a)(2), whereas the present case involves an *in personam* forfeiture. In an *in rem* forfeiture case, the property which prosecutors seize and subject to forfeiture is property which itself has been the situs of, or facilitated the commission of, criminal activities. In an *in personam* forfeiture, by contrast, prosecutors seek forfeiture as a penalty against the defendant, where the property itself was not involved in illicit activity. The government's interest in *in rem* forfeiture actions is "preventing continued illicit use of the property and in enforcing criminal sanctions." *United States v. One 1979 Cadillac Coupe de Ville*, 833 F.2d 994, 1000 (Fed. Cir. 1987) (quoting *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974)). In the instant case, the Moraga property was ordered forfeitable as a criminal penalty levied against Mr. Washington, and there is no allegation, nor has there ever been an allegation, that the property itself was the site of criminal activity.¹⁰ Thus, the government's interest in preventing the continued illicit use of the property is absent here.

Defendant argues that it is the rule of the Federal Circuit that there can be no recovery, under a taking theory, for loss in value while the United States holds property pending the outcome of a forfeiture proceeding, citing *United States v. One 1979 Cadillac Coupe de Ville*, 833 F.2d 994 (Fed. Cir. 1987). In *One 1979 Cadillac Coupe de Ville*, the court ruled that the owner of an automobile allegedly used to facilitate illegal drug sales could not recover for the loss of use of his vehicle while it was held by police pending the outcome of *in rem* forfeiture proceedings, where the government ultimately abandoned the forfeiture proceedings and returned the vehicle to the owner. As discussed above, the instant case involves *in personam*, not *in rem*, forfeiture. The Moraga property was ordered forfeitable as a criminal penalty levied against Mr. Washington, and as noted earlier, the concerns involved in *in rem* forfeitures do not come into play in this case.

Judge Futey's decision in *Meincke* was mindful of the important public interest in preventing illicit activity through *in rem* forfeiture. Prosecutors and judges involved in *in rem* forfeiture proceedings must be free to fulfill this public interest without having forfeiture orders subjected to second-guessing via a taking claim. However, the exigencies of preventing criminal activity are not present in an *in personam* forfeiture proceeding, where the property at issue is not even alleged to be involved in illicit activity. From a policy standpoint, the court sees little danger in entertaining a suit such as the present one.

IV. Diminution in value.

Defendant argues that mere diminution in the value of property is not compensable in an inverse condemnation claim. It is true that "the decisions of the Supreme Court uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." *Jenzen v. United States*, 228 Ct. Cl. 527, 532 (1981), *cert. denied*, 455

¹⁰ This is strongly buttressed by the fact that the officials involved agreed to allow Mr. Washington to continue to reside at the Wickham Drive property after his conviction. The irony in this case is that only the innocent third parties lost property as a result of the forfeiture; the alleged criminal retained possession of the forfeited property!

U.S. 1017 (1982) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978), *reh. denied*, 439 U.S. 883 (1978)). However, in this case, the Sheldens' allegations of diminution in the value of their property do not stand alone; the government suspended the Sheldens' foreclosure rights.

Furthermore, the cases rejecting takings claims based on the mere-diminution-in-value doctrine are virtually all challenges to land-use regulations, and are not apposite to the instant case. "In deciding whether a particular governmental action has effected a taking, [the court should focus on] both the character of the action and on the nature and extent of the interference with [property] rights." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978). If government regulation goes too far, it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The mere-diminution-in-value doctrine arose because courts recognized that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

The case at bar is not a regulatory taking case, and the concerns underlying the mere-diminution-in-value doctrine do not come into play. The character of the governmental action in this case was not a legislative act, general in nature, affecting property owners at large. Rather, the action was penal, directed specifically at the personal interest at issue here. There is no danger that government will be forced to compensate property owners for "every change in the general law;" the court today only requires that when prosecutors seek forfeiture under RICO, they be careful not to disturb the property rights of innocent lienholders. When such rights are disturbed, the government must be prepared to provide just compensation.

V. Plaintiffs' failure to exercise other remedies.

Defendant argues that plaintiffs had three remedies available to them under RICO, none of which they pursued: (1) the district court judge could have made equitable changes in the forfeiture order to protect third-party interests, under 18 U.S.C. § 1963(f); (2) plaintiffs could have petitioned the court for relief under 18 U.S.C. § 1963(l)(2); and (3) plaintiffs could have petitioned the Attorney General for remission of the forfeiture under 18 U.S.C. § 1963(g)(1).

The first two options outlined above are available only to persons who assert "a legal interest in property which has been ordered forfeited to the United States." 18 U.S.C. § 1963(l)(2). The Sheldens, as mortgagees, held an equitable interest, but no legal interest, in the Moraga property. Thus, the first two options were not available to them. Furthermore, sections 1963(f) and 1963(l) were added by the 1984 amendments to RICO, and did not become effective until October 12, 1984. Thus, even if options (1) and (2) were available to the Sheldens, the Sheldens could not have been expected to have pursued them, as the forfeiture of the Moraga property occurred in late 1983.

The Sheldens' failure to pursue the third option – petitioning the Attorney General for remission of the forfeiture – does not preclude them from bringing their taking claim in this court. The government never sent the Sheldens the statutorily required notice to

interested persons, informing them formally of the forfeiture and their right to petition for remission.¹¹ Without the required notice, there was nothing to trigger the Sheldens' filing of a petition, nor was there anything to trigger the running of the sixty-day statute of limitations for filing a petition for remission. Although the Sheldens had constructive notice of the forfeiture, the court sees no reason why the government should be excused from following its own rules, which afford procedural protections for innocent persons with interests in forfeited property. Even if the government were now to comply with its own rules regarding the giving of legal notice to persons adversely affected by a forfeiture order, the order of forfeiture has been vacated, and thus, the petition procedure is unavailable. The Sheldens' only remedy is the present taking claim.

Furthermore, the government's argument depends upon satisfying the court that the remission procedures are the exclusive remedy for persons asserting an interest in forfeited property. The fact that the Sheldens failed to petition the Attorney General for remission of the forfeiture, standing alone, does not explain why the Sheldens cannot pursue their taking claim. Relying on *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980), *cert. denied*, 449 U.S. 833 (1980), defendant maintains that petitioning the Attorney General for the remission of a forfeiture is indeed the exclusive remedy for innocent property owners claiming an interest in forfeited property. Defendant has seized on the Fifth Circuit's interpretation of 18 U.S.C. § 1963(c), which provides that "[t]he United States shall dispose of all [forfeited] property as soon as commercially feasible, making due provisions for the rights of innocent persons." From these words, the Fifth Circuit concluded that "[i]t would appear that Mrs. L'Hoste's remedy lies in petitioning the United States, through the Attorney General," in order to recover her property. 609 F.2d at 812. The legislative history to the 1984 amendments to RICO also state that "the remission . . . process . . . remain[s] the appropriate exclusive remedy for third parties" who claim an interest in forfeited property. See 1984 U.S. Code Cong. & Admin. News, p. 3391. Were the court to reach the question, it would be reluctant to conclude, based on the *L'Hoste* case and a few words from the Senate report on the 1984 RICO amendments, that the Sheldens' only route to relief is to petition the Attorney General. See *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1556 (Fed. Cir. 1985) (exchange provisions of the Surface Mining Control and Reclamation Act provided a remedy, but not the exclusive remedy, for owners of mining

¹¹ Prior to the October 12, 1984 amendments to RICO, 18 U.S.C. § 1963(c) incorporated by reference the United States Customs Service regulations governing petitions for remission and mitigation of forfeitures. 19 C.F.R. § 171.12(b) (1983), provided that "[p]etitions for relief shall be filed within 60 days from the date of mailing of the notice of fine, penalty, or forfeiture incurred. . . ."

19 C.F.R. § 162.31(a) (1983), provided that

[w]ritten notice of any fine or penalty incurred as well as any liability to [sic] forfeiture shall be given to each party that the facts of record indicate has an interest in the . . . seized property. The notice shall also inform each interested party of his right to apply for relief under . . . any . . . applicable statute authorizing mitigation of penalties or remission of forfeitures

property adversely affected by the Act; statutory supersession of the Tucker Act method of obtaining just compensation for property taken is not lightly to be implied). However, the court need not rule on the question whether the remission procedures are the exclusive remedy. As stated above, the government cannot expect to be excused from providing the Sheldens with proper legal notice of the forfeiture, and at the same time argue that the Sheldens are confined to the remission procedure as their sole remedy.

VI. Governmental immunity from suit in tort.

Defendant argues that plaintiffs' claim sounds in tort, and is therefore beyond the jurisdiction of this court. Defendant further urges that transfer of this case to a district court under 28 U.S.C. § 1631 would be improper, because Congress has not waived the defense of sovereign immunity in suits such as the instant one. This argument also fails.

The Claims Court's jurisdiction does not extend to claims against the United States sounding in tort. 28 U.S.C. § 1491(a)(1). Therefore, to the extent that plaintiffs allege negligent maintenance or waste of the Moraga property, the court is without jurisdiction. However, the Sheldens are before this court alleging a taking of their property for public use without just compensation. Both a taking claim and a tort claim can arise from the same set of events. *See, e.g., National Union Fire Insurance Co. v. United States*, No. 670-88L, slip op. (United States Claims Court December 22, 1989).

Defendant cites 28 U.S.C. § 2680(c) as being an exception to the government's waiver of sovereign immunity. That section states that the "provisions of the [Federal Tort Claims Act] shall not apply to . . . the detention of goods" by law enforcement officers. The instant case involves real property, not goods. Moreover, section 2680(c) is an exception to the Federal Tort Claims Act (FTCA); the Sheldens are suing under the Tucker Act and the fifth amendment, and not under the FTCA. *See also Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (provision of FTCA exempting liability for damages to goods detained by customs officials did not preclude owner of goods from suing based on an implied contract for bailment). 28 U.S.C. § 2680(h) excepts suits for "interference with contract rights" by law enforcement officers from the Federal Tort Claims Act, but again, plaintiffs are not suing under the FTCA, so this exception is also inapplicable.

CONCLUSION

Clearly the district court had the power to enter the order of forfeiture at issue in this case, and to have it enforced. However, under the Tucker Act, this court is given jurisdiction over claims against the United States based upon alleged violations of the Constitution. The court today does not purport to exercise a newly-found power to invalidate district court orders. Rather, it is simply carrying out its longstanding mandate to see that owners of private property which has been taken for public use receive just compensation. While the court recognizes the strong public interest in enforcing penal sanctions, there is no reason why innocent mortgagees should be forced to bear the expense of the government's attempts to enforce these sanctions. Accepting the government's position -- that a taking claim can never arise when the government acts pursuant to a court order -- would render the just compensation clause a dead letter. Innocent persons with

interests in property affected by court orders would be without remedy. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

The government's motion to dismiss, or in the alternative, for summary judgment, is DENIED; plaintiffs' motion for summary judgment on liability is GRANTED.



Loren A. Smith
LOREN A. SMITH
Chief Judge

In the United States Claims Court

No. 164-88L

Filed: June 24, 1992

* * * * *
CARL AND MARY SHELDEN,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* * * * *
Takings; RUSCC 60(b)(2)

Brenda Gransland, with whom was Mary C. Young, Washington, D.C., for plaintiffs.

David F. Shuey, United States Department of Justice, Washington, D.C., for defendant.

OPINION

SMITH, Chief Judge.

This case comes before the court on defendant's motion for relief from this court's opinion of January 12, 1990. *Shelden v. United States*, 19 Cl. Ct. 247 (1990). In that opinion, the court held that the government's action of filing a *lis pendens* on the subject property as a consequence of the indictment of the mortgagors under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (RICO), had resulted in a compensable taking because it prevented the innocent plaintiffs from foreclosing on the property when the mortgagors defaulted on their loan. Defendant's motion for relief attacks the underlying premise of this conclusion. Defendant contends that plaintiffs never perfected their right to foreclose and that, therefore, the government's action of filing the *lis pendens* did not result in a taking.

In order for the court to find a Fifth Amendment taking that would require just compensation, plaintiffs must have suffered actual damages. If plaintiffs did not have the right to foreclose on their property, they did not suffer actual damages as a result

of the government's actions. The court finds that the Sheldens were never prevented from foreclosing on their property by any action of the federal government. Therefore, the government's action, filing the *ts pendens*, did not prevent the foreclosure sale. Rather, the Sheldens' waiving of their right to foreclose in April 1984 and the mortgagors' timely curing of their default within the time allowed by the plaintiff's prevented the sale at the time in question. Later, the mortgagors' declaration of bankruptcy delayed by several months a foreclosure sale. Thus, the government's actions did not result in a taking.

In light of the facts raised in the government's motion, the court allowed plaintiffs to argue new theories of liability. Plaintiffs argued that the government violated the RICO Act by failing to promptly dispose of the property at issue and that their right to foreclose on the property was "taken" by the government when the property was declared forfeited under RICO. The court finds that a violation of a statute such as that alleged by plaintiffs would constitute a tort, over which this court does not possess jurisdiction. In addition, there is no evidence in light of the new facts that plaintiffs attempted to foreclose on their property and were prevented from doing so by the government. Therefore, there can be no showing that plaintiffs' property right to foreclose was taken or even affected by governmental action.

For the reasons set forth below, the court grants the government's motion for relief. The court's January 1990 opinion is vacated and the court must dismiss plaintiffs' claim. While this may be a sad result for the plaintiffs who have undoubtedly suffered, they have lost money through no fault of the federal government.

FACTS AND PROCEDURAL HISTORY¹

Plaintiffs Carl and Mary Sheldon owned real property, the Moraga property, which they sold to Ralph and Freddie Jean Washington. The Sheldens took back a promissory note for a portion of the purchase price. Under the note's terms, the Washingtons were to make monthly payments until June 1986, at which time the balance of the note was to become due. In the event of default or transfer of the property, or any interest therein, the Sheldens, as beneficiaries, had the option to declare all sums secured immediately due and payable.

On February 15, 1983, the Washingtons were indicted for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (RICO). The Moraga property was subject to forfeiture under RICO. On March 7, 1983, the property was conveyed to the district court by deed of trust with power of sale. Shortly thereafter, the Washingtons defaulted on their mortgage payments to the Sheldens. On October 7, 1983, the Sheldon's trustee filed a notice of default and election to sell the Moraga property. On November 29, 1983, the government and the court were notified that the Moraga property was to be sold at a foreclosure sale in January 1984.

Ralph Washington was found guilty on twelve counts of the indictment on December 1, 1983; the Moraga property was declared to be forfeited. On December 9, 1983, the United States filed a notice of *ts pendens* on the Moraga property. Prior

¹ For a complete statement of the facts of this case, see the court's opinion at 19 Cl. Ct. 247 (1990).

to the date of the January 1984 foreclosure sale, the Washingtons' attorney informed the Sheldens that their trustees had improperly recorded the notice of default. The notice of default was re-recorded and the foreclosure sale was postponed until April 10, 1984.¹

On January 31, 1984, the district court entered an order which provided that the Washingtons' interest in the Moraga property was forfeited to the United States pending appeal but that Ralph Washington was entitled to remain in physical possession of the house. The Washingtons continued to occupy the Moraga property. During this time, the hill upon which the house was located eroded severely, and, as a consequence, the market value of the house declined significantly. The erosion could have been halted with an expenditure of approximately \$10,000 in preventive maintenance.

In an attempt to prevent the Sheldens' scheduled foreclosure in April 1984, the United States and the Washingtons sought to intervene through the court which had presided over the RICO proceedings. On April 9, 1984, that court mediated a stipulated postponement of sale, with the caveat that the court did not have jurisdiction over the matter and could not prevent the Sheldens from foreclosing on the Moraga property. The parties agreed to postpone the sale until May 15, 1984. However, the May 1984 foreclosure was avoided because the Washingtons paid what was then currently due on their debt to the Sheldens. The United States did not dispose of the Moraga property and, through 1986, delegated ownership rights and management duties to the Washingtons. Sporadic mortgage payments to the Sheldens were made until March 1986. Subsequently, on April 17, 1986, the Sheldens filed a notice of default. The three-month reinstatement period required in California to allow the defaulting party to cure the default elapsed without the default being cured, and a foreclosure sale was noticed for August 20, 1986. Pursuant to the terms of the note, the note became due and payable on June 1, 1986.

August 20, 1986 was also the date on which the United States Court of Appeals for the Ninth Circuit reversed the conviction of Ralph Washington, *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986), (which effectively vacated the forfeiture verdict.) However, the notice of *lis pendens* was not removed at this time. The foreclosure sale on the property had been set for August 20, 1986; however, a few hours before the sale was to occur, Ralph Washington filed for protection under Chapter 11 of the Bankruptcy Code. The property was placed under the bankruptcy court's jurisdiction, and, as a consequence, the foreclosure sale did not occur at that time.

The Sheldens' trustee finally forced a foreclosure sale on February 23, 1987, and the Sheldens bought the Moraga property for \$115,500. On March 11, 1988, plaintiffs filed a complaint in this court alleging that the government's action of recording a *lis pendens* on the Moraga property in 1983 effected a taking by preventing them from foreclosing on their security interest.² Alternatively, plaintiffs alleged a breach of an

¹ The parties concede that the original foreclosure notice had been properly recorded and that the Sheldens could have legally foreclosed on the Moraga property in January 1984. However, this mistake is irrelevant to the proceedings at bar because the government was not a party to that mistake. No action by the government prevented the sale in January 1984.

² Plaintiffs concede that they did not ask the government to remove the *lis pendens* until 1990.

implied contract. On January 12, 1990, this court concluded that the government's actions amounted to a taking of the Sheldens' property without just compensation, in violation of the Fifth Amendment of the United States Constitution. The court, relying on *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984), concluded that the filing of the *lis pendens* prevented plaintiffs from selling their land and, thus, resulted in a taking of plaintiffs' property. No evidence was presented to the court that plaintiffs could have foreclosed on the property in spite of the *lis pendens*. The court granted plaintiffs' motion for summary judgment as to liability, with damages to be determined at a later date. The court did not address plaintiffs' breach of contract theory.⁴

On August 9, 1990, defendant filed a motion for relief from the court's opinion. Defendant contended for the first time that plaintiffs never perfected their right to foreclose on the property because the Washingtons had been able to cure their default prior to foreclosure, and that, when the Washingtons did not cure their default, the Moraga property came under the bankruptcy court's jurisdiction prior to the foreclosure sale. Therefore, defendant argues, since plaintiffs never possessed a right to sell their property, the government could not have prevented such a sale. Therefore, a taking could not have occurred. Plaintiffs alternatively argue that the government failed to promptly dispose of the property, which resulted in a compensable Fifth Amendment taking, and that plaintiffs' right to foreclose on the property was "taken" when the property was declared forfeited under RICO.

DISCUSSION

I. Jurisdiction

The government brings its motion for relief under RUSCC 60(b)(2). For jurisdiction to lie under that rule, defendant must show "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Defendant contends that information received during the deposition of Mary Sheldon on July 27, 1990 revealed that plaintiffs did not have a right to foreclose on the property until June of 1986, and that, when the plaintiffs were able to foreclose on the property in August 1986, the property was placed within the jurisdiction of the bankruptcy court. Defendant maintains that, although the information was within the knowledge of the plaintiffs, it was not revealed during the briefing of the cross-motions for summary judgment, and did not become known until pre-trial discovery on damages was underway.

Plaintiffs argue that the evidence had been revealed during the briefing of the cross-motions. However, the court noted at oral argument that, regardless of whether this motion would properly fall under RUSCC 60(b)(2), if the government's contentions contained in their motion for relief were true, then those facts would preclude any award of damages to the plaintiff. As the court stated:

[T]he very damages phase was premised on this taking date. So if, indeed, Defendant is right, it may not matter whether rule 60 would allow a reconsideration.

⁴ The court addresses plaintiffs' breach of contract theory in Section IV of this opinion.

Those same facts which would certainly be timely for the damages phase may not allow The Court to find any damages because the damages in this case were premised on when the government's exercise of its powers barred the Plaintiff from foreclosing. And when the Plaintiff was then permitted to foreclose. And if, in fact, those dates in fact do not exist, if there was never a point at which the *its* powers barred the Plaintiff from foreclosing, and there was never a point at which its removal allowed the Plaintiff to foreclose; then the damage premise of a taking cannot occur because there is no difference in the property value.

. . . [E]ven if relief was not granted under rule 60, it still may be mandated by the fact that the damage proceeding, the government could raise that lack of a differential [in the value of the property before and after the government's action].

Transcript at 6-7 (Sept. 7, 1990). The January 1990 opinion clearly was premised on the record before the court that plaintiffs were prevented from foreclosing by the federal government's actions. Regardless of whether the court hears the evidence at this stage, based on a Rule 60(b)(2) motion, or at trial, the result will be the same - the government's actions did not cause plaintiffs to suffer any loss of property and thus plaintiffs are not entitled to damages as a matter of law.

A Rule 60(b) motion must be made within a reasonable time, and, under RUSCC 60(b)(2), within one year after the judgment has been entered. Defendant filed its motion eight months after the January 1990 opinion was issued, and within one month after taking plaintiff's deposition that defendant contends revealed the new evidence. The court finds that defendant's motion is timely.

II. Plaintiffs' Right to Foreclose

In order for there to be a taking in this case, the plaintiffs must prove that they had a right to foreclose on the Moraga property and that the government prevented plaintiffs from exercising this right. In the January 1990 opinion, the court concluded that the plaintiffs would have been able to foreclose but for the government's filing of the notice of *its* powers. Defendant's motion for relief shows that the factual predicate for this conclusion is wrong.

Under applicable state law, to provide notice of a foreclosure sale, plaintiffs were required to record a notice of default and to allow the Washingtons to cure their default within three months from the date of that recording. California Civil Code § 2924. If the statutory period elapses without cure of the default, plaintiffs would then be able to give notice of a foreclosure sale. When the first three-month period came to an end, the Washingtons' attorney convinced plaintiffs that the notice of default they recorded was defective. Plaintiffs then recorded a second notice of default. Prior to the expiration of the second three-month period, plaintiffs agreed to extend the deadline for the Washingtons to cure the default.

The district court held a hearing with the attorney for the Washingtons, the attorney representing the Sheldens, the attorney representing the United States, and the attorney representing TD Service Company. At that hearing, the attorney for the Sheldens -- Mr. Steinberg -- indicated that the Washingtons' debt to the Sheldens was \$32,000 in default, and that payment of that amount was then currently due in order to

prevent the note being called. However, the Sheldons agreed to postpone the foreclosure sale to allow the Washingtons to cure their default. The attorney for the Sheldons stated:

Mr. Sternberg: We would like to notice [the foreclosure sale] forthwith, your honor, because what we could do is agree to notice the sale for 30 days from now or 35 days and then have a status report [addressing whether the Washingtons cured their default] to your honor before we actually hold the sale.

District Court Transcript at 9, April 9, 1984. The court indicated that, if the Washingtons paid what was due, the foreclosure sale would be set aside.

The Washingtons successfully cured the default within the time period, which effectively precluded the plaintiff's right to foreclose at that time. The filing of the notice of *lis pendens* by the government did not affect these actions. For nearly two years after they cured their default, the Washingtons made payments to the plaintiff under the mortgage agreement. Eventually, however, the Washingtons again defaulted and failed to cure within the statutory time period. Before plaintiffs could foreclose, however, the Washingtons declared bankruptcy and the property was seized by the bankruptcy court. The court concludes that, under these facts, the government never prevented the plaintiff from foreclosing on their property.

Plaintiffs attempt to draw an analogy between this case and the Supreme Court's decision in *Armstrong v. United States*, 364 U.S. 40 (1960). In *Armstrong*, materialmen had liens on uncompleted boat hulls and building materials which had been conveyed to the United States by a contractor. The terms of the contract provided for the transfer of title and delivery of all completed and uncompleted work together with all manufacturing materials from the contractor to the United States in the event the contractor defaulted. The contractor defaulted, and the liens were transferred to the United States. In finding a taking, the Court stated that:

Before transfer these liens were enforceable by attachment against both the hulls and all materials. After transfer to the United States the liens were still valid, but they could not be enforced because of the sovereign immunity of the Government and its property from suit. *The result of this was destruction of all petitioners' property rights under their liens,* although, as we have pointed out, the liens were valid and had compensable value.

Id. at 46 (citation omitted and emphasis added). Plaintiffs assert that the government's filing of the *lis pendens* constituted a taking of their property similar to the taking in *Armstrong*. *Armstrong*, however, is very different from the facts of this case because in *Armstrong* the court found that plaintiffs' property rights were destroyed by the government's actions. The Court in *Armstrong* found that the petitioners were actually damaged by the government's actions.

The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure.

Id. at 48. In contrast to *Armstrong*, here the government's actions did not cause the plaintiffs' losses. Under state law, plaintiffs had the right to foreclose only if the Washingtons failed to cure. Even if the government's filing of the *lis pendens* could have prevented plaintiffs from foreclosing on their property, the fact that the Washingtons were able to cure their defaults prior to the foreclosure sale leads to the conclusion that the plaintiffs never had the right to foreclose. The one time that the Washingtons did fail to cure their default, the property was seized by the bankruptcy court prior to the actual foreclosure sale. Therefore, the court concludes that the government's action of placing a *lis pendens* on the property did not prevent plaintiffs from foreclosing. In fact, plaintiffs have not shown any evidence in the record which illustrates any damage to their property interest caused by the *lis pendens*. Plaintiffs have not suffered a taking compensable under the Fifth Amendment.

III. Violation of Procedure under RICO

Plaintiffs argue that the government violated RICO by failing to promptly dispose of the Moraga property. The 1970 RICO statute states that:

Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. . . . The United States shall dispose of all such property as soon as commercially feasible, making due provisions for the rights of innocent persons.

18 U.S.C. § 1963(q). According to plaintiffs, the government's failure to promptly sell the property violated this statute, and this violation would amount to a taking that would be compensable under the Fifth Amendment of the Constitution. Plaintiffs allege that RICO imposed a "duty of care" on the defendant with respect to innocent lienholders and that this duty was breached when the government did not dispose of the property "as soon as commercially feasible."

Assuming arguendo that there was a violation of the statute, and that the government breached its "duty of care" to innocent persons connected with the property, this court would not have jurisdiction over such a claim because the claim sounds in tort. This court does not possess jurisdiction over tort claims. 28 U.S.C. § 1491 (1982); *Golder v. United States*, 15 Cl. Ct. 513 (1988).

Plaintiffs also argue that their right to foreclose on the property was "taken" by the government when the property was declared forfeited under RICO. This argument does not withstand scrutiny under the facts of this case. There is no evidence that the Sheldens attempted to foreclose prior to August 1986 and that any action by the government prevented the Sheldens from foreclosing. Indeed, there is no evidence that the Sheldens desired to foreclose on their property, other than the current representations of counsel. The Sheldens were entitled to receive the mortgage payment under the contract, and they accepted the mortgage payments throughout the time the property was held by the Washingtons. While it cannot be said with certainty that the Sheldens could have foreclosed on their property, the fact that they did not attempt to foreclose on their property, and thus were not prevented from foreclosing by any governmental action, precludes this court from finding that a taking has occurred.

IV. Plaintiffs' Breach of Contract Claim

Plaintiffs, in their complaint and their motion for summary judgment, argue that the government breached an implied contract not to impair the plaintiffs' security interest and not to commit waste during the government's period of control.¹ The court finds that this argument lacks merit. The government never possessed title to or control of the Moraga property, and was not contractually bound to protect the Sheldens' security interest. At most, plaintiffs were entitled to receive the mortgage payments; they received their payments, or waived timely receipt, until mid-1986, at which time the Sheldens sought to foreclose on the property. The government was not contractually bound to any duty greater than that, and thus did not breach any implied contract with the plaintiffs to maintain the property in good repair.² Plaintiffs' breach of contract claim, if any, would lie against the Washingtons, who had physical possession and control over the property and with whom the plaintiffs had signed a contract for the property.

CONCLUSION

Plaintiffs have failed to show any actual damage suffered as a result of the government's action of placing a *lis pendens* on the property. Therefore, there has been no taking by the government that would be compensable under the Fifth Amendment, and just compensation is not due. In addition, the determination of whether a violation of a statutory duty under RICO has occurred is not within the jurisdiction of this court. Accordingly, defendant's motion for relief from this court's opinion of January 12, 1990 is GRANTED. Given that the court has granted the government's motion for relief, the court denies plaintiffs' motion for Rule 11 sanctions against the defendant. The court's January 12, 1990 decision is VACATED, and the government's motion for summary judgment or, in the alternative, to dismiss is GRANTED. The clerk is hereby directed to dismiss the case. The parties shall bear their own costs.

IT IS SO ORDERED.



LOREN A. SMITH
Chief Judge

¹ Plaintiffs argue that the forfeiture order entered by the district court was, in effect, a consent decree and that it should be enforced as a contract.

² The court notes that, at oral argument on February 19, 1991, counsel for plaintiffs sought the court's advice on the status of the original breach of contract claim. The court indicated that it had not yet re-examined the claim, but that, if plaintiffs wished to submit an additional brief on the subject, the brief would be considered. No such brief was filed.

AO 245 (Rev. 8-87) Judgment in a Criminal Case

FORFEITURE

United States District Court **FILED**
NORTHERN DISTRICT OF CALIFORNIA

SEP 26 1988

UNITED STATES OF AMERICA
 V.

WILLIAM L. WHITTAKER
 CLERK, U. S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CRIMINAL CASE

Ralph H. Washington

Case Number: CR-83-120-RHS
 Robert Dondero

(Name and Address of Defendant)
 Prior verdict and sentence set aside.

Hal Rosenthal
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

guilty nolo contendere as to count(s) 3 and 24 of the Indictment, and
 not guilty as to count(s) XXXXX

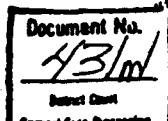
THERE WAS A:
 finding verdict of guilty as to count(s) 3 and 24 of the Indictment.

THERE WAS A:
 finding verdict of not guilty as to count(s) XXXXX
 judgment of acquittal as to count(s) XXXXX
 The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Mail Fraud in violation of Title 18, United States Code, Section 1341, and Willfully subscribing to a false tax return in violation of Title 26, United States Code, Section 7206(1).

IT IS THE JUDGMENT OF THIS COURT THAT: As to count 24, defendant is sentenced to the custody of the Attorney General to time already served. As to Count 3, imposition of sentence is suspended. The defendant is placed on probation for a term of five (5) years. The defendant is to pay a fine of Seven Thousand Five Hundred dollars (\$7,500). Along with the standard terms of probation, the defendant is also to provide financial reports as directed by the probation office.

Entered in CRIMINAL DOCKET 9-29-1988



In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION*

where probation has been ordered the defendant shall:

- (1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consent him prior to job changes);
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any changes in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 3 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of \$ XXXXX pursuant to Title 18, U.S.C. Section 3613 for count(s) XXXXX as follows:

IT IS FURTHER ORDERED THAT counts all remaining counts are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court an amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

The Court orders commitment to the custody of the Attorney General and recommends:

September 23, 1988

Date of Imposition of Sentence

R.H. Schnacke

Signature of Judicial Officer

Robert H. Schnacke, District Court Judge

Name and Title of Judicial Officer

September 23, 1988

Date

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
Date _____

the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

United States Marshal

By _____
Deputy Marshal

FILED

SEP 23 1988

WILLIAM L. WHITTAKER
CLERK, U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF CALIFORNIA

* * * * *

UNITED STATES OF AMERICA,)

Plaintiff,)

CR-83-120-RHS

vs.)

Ralph H. Washington)

APPLICATION FOR PERMISSION
TO ENTER PLEA OF GUILTY AND
ORDER ACCEPTING PLEA

Defendant.)

Under penalty of perjury, I declare that the following statements have been read and understood by me, and that each is true and correct:

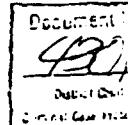
(1) My full name is: Ralph Washington.
I am 45 years of age. I have gone to school up to and including College. I request that all proceedings against me be in my true name.

(2) My lawyer is: Harold Rosenthal.

(3) I received a copy of the indictment* before being called upon to plead. I have read the indictment and discussed it with my lawyer. I fully understand every charge made against me.

(4) I have told my lawyer all the facts and circumstances known to me about the charges made against me in the indictment. I believe that my lawyer is fully informed on all such matters.

* "Indictment" also includes "Information".



(5) I know that the Court must be satisfied that there is a factual basis for a plea of "GUILTY" before my plea can be accepted. I represent to the Court that I did the following acts in connection with the charges made against me in Count or Counts Counts 1 + 24: Count 13 filed a complaint against another person in Court 24. I operated Night Club 13 with funds from a pattern of and racketeering activity.

(In the above space defendant must set out in detail in his/her own handwriting what he/she did. If more space is needed, add a separate page.)

(6) My lawyer has counselled and advised me on the nature of each charge, on all lesser included charges, and on all possible defenses that I might have in this case. My lawyer has given me all the time and attention needed to give my case full consideration. I have no complaint of any kind about the nature or quality of my lawyer's services to or representation of me.

(7) I know that I may plead "NOT GUILTY" to any offense charged against me, and that, if I plead "NOT GUILTY" I will have: (a) the right to a speedy and public trial by jury; (b) the right to see and hear all witnesses called to testify against me; (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor; (d) the right to have the assistance of a lawyer at all stages of the proceedings; (e) the right to take the witness stand at my sole option; and, if I do not take the witness stand, no inference of guilt may be drawn from such failure; and (f) the right to appeal from an adverse judgment.

(8) I know that if I plead "GUILTY", there will be no trial either before a court or jury, and the Court may impose the same punishment as if I had pleaded "NOT GUILTY", stood trial and been convicted by a jury.

(9) My lawyer informed me that the maximum punishment which the law provides for the offense charged in Count _____, is: 20 yrs.

a. 3 years imprisonment; and

b. a fine in the largest of:

(1) \$100,000

(2) double the gross pecuniary gain I derived from the offense;

(3) double the gross pecuniary loss caused by the offense to another person or persons; or

(4) \$250,000 if a felony or \$25,000 if a misdemeanor; and c. A special parole term of _____ years.

(Strike if inapplicable)

I understand that, if a special parole term is mentioned above, it refers to a term which may be for any period, but not less than the period stated; if the terms and conditions of a special parole term are violated, the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole; a person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment; and that a special parole term is in addition to, and not in lieu of, any other parole provided by law.

(10) I understand that I may be required to make restitution of any loss I have caused any victim of my offenses, and that I will be assessed \$50 for each felony and \$25 for each misdemeanor of which I shall be convicted.

(11) I understand that under provisions of certain criminal statutes, certain of my property may be forfeited to the United States. I have been advised by my attorney of whether, and to what extent, my property may be subject to forfeiture.

(12) If I am on probation or parole in this or any other Court, I know that by pleading guilty here my probation or parole may be revoked and I may be required to serve time in that case, which may be consecutive, that is, in addition, to any sentence imposed upon me in this case.

(13) I declare that no officer or agent of any branch of government (Federal, State or local) has promised or suggested that I will receive a lighter sentence, or probation, or any other form of leniency if I plead "GUILTY", except as follows:

~~According to Rule 11(c)(c)(C) - the government and defendant agree,~~

- ~~(1) Mr. Washington will plead guilty to counts 24 and 25 of the indictment and defendant agrees to bear the responsibility for any further collateral charges;~~
 - ~~(2) All property will be forfeited except for the 2 cars and adjacent land.~~
 - ~~(3) Mr. Washington will plead guilty to count 24 as modified in court re #6 of count 24.~~
 - ~~(4) The grand total of \$506 - forty four will be forfeited after a P.D. deed of trust for \$400 is executed by Mr. Jim Jackson.~~
 - ~~(5) The proceeds from the sale of the 1975 Royal will be applied to Mr. Washington's fine.~~
 - ~~(6) Mr. Washington will be sentenced to 5 years probation on the tax count.~~
 - ~~Commencing December 13, 1986, upon condition that he pay a \$7500 fine.~~
- (Here insert any promises or concessions made to the defendant or to defendant's attorney.)

If anyone else made such a promise or suggestion, except as noted in the previous sentence, I know that it was entirely without authority or effect.

(14) I know that the sentence I will receive is solely a matter within the control of the Judge. I hope to receive leniency, but I am prepared to accept any punishment permitted by law which the Court sees fit to impose. However, I respectfully request the Court to consider, in mitigation of punishment, that I have voluntarily entered a plea of "GUILTY".

*Mr. Washington will receive a sentence of credit for time served regarding the KICC count.

(15) I consent to an immediate presentence investigation by the probation officers of this Court, and I further consent to a review of my presentence report by the Judge.

(16) If, for any reason, my intended plea of "GUILTY" or "NOLO CONTENDERE" shall be set aside, a "NOT GUILTY" plea reentered, and the matter set for trial, I understand and agree that any subsequent trial, whether with or without a jury, may be conducted by any judge, even though such judge may have reviewed my presentence report, and I waive any right I may have to object thereto.

(17) I am satisfied that my lawyer has done all that a lawyer could do to counsel and assist me, and I am satisfied with the advice and help my lawyer has given me.

(18) I do not believe that I am innocent; I wish to plead "GUILTY" because I am guilty, and I know it.

(19) My mind is clear. I am not under the influence of alcohol or drugs and I am not under a doctor's care. The only drugs, medicines or pills that I have taken within the past seven days are: ① Capotex ② Appressolin ③ Dypatidamole ④ Insulin
⑤ Nitro-Bid ⑥ Aspirin ⑦ Nitroglycerin

(If none, so state.)

(20) My decision to plead "GUILTY" has not been forced or coerced by any threats or compulsion, direct or indirect, to or upon me or any other person.

(21) I OFFER MY PLEA OF "GUILTY" FREELY AND VOLUNTARILY AND OF MY OWN ACCORD AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET FORTH IN THE INDICTMENT AND IN THIS APPLICATION AND IN THE CERTIFICATE OF MY LAWYER WHICH IS ATTACHED TO THIS APPLICATION, AND I REQUEST THAT THE COURT ACCEPT MY PLEA OR PLEAS OF "GUILTY".

Signed and sworn to by me in open court in the presence of my attorney, this 13 day of October, 1988.

Ralph H Washington
Defendant

CERTIFICATE OF COUNSEL

I, the undersigned, as lawyer for the defendant Ralph Washington hereby certify that:

(1) I have read and fully explained to the defendant the allegations contained in the indictment in this case.

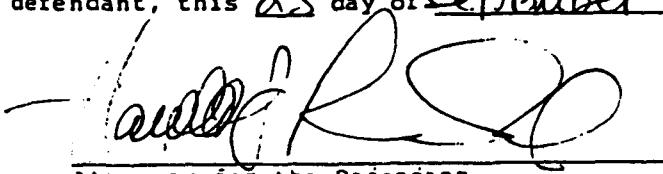
(2) To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing application are in all respects accurate and true.

(3) I have explained the maximum penalty for each count to the defendant, including the provisions of law relating to restitution, assessment, and forfeiture.

(4) The plea of "GUILTY" offered by the defendant accords with my understanding of the facts related to me and is consistent with my advice to the defendant.

(5) In my opinion the plea of "GUILTY" offered by the defendant is voluntarily and knowingly made. I recommend that the Court accept the plea of "GUILTY".

Signed by me in open court in the presence of the defendant above-named and after full discussion of the contents of this certificate with the defendant, this 23 day of September, 19XX.



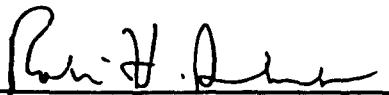
Attorney for the Defendant

ORDER

The defendant having sworn before me to the truth of the foregoing, I find: (1) that the plea of guilty was made by the defendant freely, knowingly, and voluntarily, and not out of ignorance, inadvertence, fear or coercion; (2) that the defendant has admitted the essential elements of the crime charged; and (3) that the defendant is aware of the consequences of the plea of guilty.

IT IS THEREFORE ORDERED that the defendant's plea of guilty be accepted and entered as prayed for in the application and as recommended in the certificate of defendant's lawyer.

Dated:



Robert H. Scznacke
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED

SEP 23 1988

CRIMINAL PRETRIAL MINUTES

Date 9/23/88
Ralph Washington
DEFENDANTRobert Dondero
AUSAWILLIAM L. WHITTAKER
CLERK, U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
RHSchnacke CR 88-122
JUDGE CASE NO.Vinian Pella Balloni Sharyn Moss/Lorena Fisher
REPORTER COURTROOM CLERK PROB. OFFICER
CUST PHal Rosenthal
ATTORNEY FOR DEFENDANT

INTERPRETER N

ADDRESS/PHONE
REASON FOR HEARING Disposition RETAINED/APPOINTED:

RESULT OF HEARING (Guilty plea entered as to counts 3 & 4 of indictment. Verdict and prior sentence set aside. Counsel to prepare agreement as to to

Case Continued to _____ for _____

Case Continued to _____ for _____

Case Continued to _____ for _____

JUDGMENT of _____ plea, waived sentencing indictment. As to Count #24 Sentenced to time previously served. As to count #3 Iss w/ probation for 5 yrs. NOTES Fine of \$7,500. A to provide financial reports & comply w/ terms of probation. Remaining counts dismissed.

- | | | |
|--|---------------------------------|---|
| 1. Arraignment | 12. Withdraw plea | 29. Judgment |
| 2. Plea | 13. Change of plea | 30. Dismissal |
| 3. Plea of not guilty | 14. Deft's mo. to dismiss | 31. Granted |
| 4. Plea of guilty | 15. Pltf's mo. to dismiss | 32. Denied |
| 5. Plea of nolo contendere | 16. Motion to suppress | 33. Granted in part |
| 6. Deft waived preparation of presentence report | 17. Mo. for bill of particulars | 34. Denied in part |
| 7. Deft consented to Court's inspection of presentence report prior to plea of guilty, nolo contendere, or finding of guilty | 18. Motion for discovery | 35. Submitted |
| 8. Filing of superceding indictment | 19. Motion for new trial | 36. Motion to sever |
| 9. Filing of superceding information | 20. Set for trial | 37. Motion to dismiss remaining coun: |
| 10. Waived indictment | 21. Set for pretrial | 38. Motions (speci: |
| 11. Waived jury | 22. Vacate trial date | 39. Bail hearing |
| | 23. Referred to Prob. Officer | 40. Remanded to custodian Document No. 2294 |
| | 24. Jury trial | 41. Other |
| | 25. Court trial | |
| | 26. Pretrial conference | |
| | 27. Motion to reduce bail | |
| | 28. Referred to Magistrate | |
| | for _____ | |

7/27/88
District Court
Criminal Case Processing

HISTORY OF SHELDEN SECOND MORTGAGE
1065 WICKHAM DRIVE, MORAGA, CA

May 23, 1979 Sold property through Red Carpet Realty. New buyer qualified for First Mortgage and Sheldens carried a Second Mortgage for income to support the family.

October 13, 1981 Foreclosure instituted and default cured.

February 15, 1983 New owner indicted under RICO.

March 7, 1983 Deed of Trust was conveyed to Clerk U.S. District Court - San Francisco.

March 10, 1983 Property was appraised at \$325,000 with an equity of over \$100,000 on the property.

October 14, 1983 Foreclosure instituted.

November 29, 1983 A Declaration of the pending foreclosure sale was entered into U.S. District Court in San Francisco.

December 1, 1983 Owner of property found guilty, jury verdict forfeited all of his properties including property we held a mortgage on.

December 9, 1983 Lis Pendens placed on the property.

January 9, 1984 On the last day of the reinstatement period for the October 14, 1983 foreclosure owner's attorney claimed notice of default was incorrect causing an additional 90 day reinstatement period. We did not realize at the time that after the property was forfeited we could not foreclose against the United States.

January 10, 1984 Original Notice of Default was rerecorded.

- January 20, 1984 Owner sentenced and forfeited all properties.
- January 31, 1984 Order of Forfeiture was filed for all of owner's properties.
- March 23, 1984 We requested the property be released to us through Congressman Bates office. The government refused this request.
- April 9, 1984 We were called before the Federal Judge who presided over RICO case and he was told by U.S. Attorney and defendant's attorney that he had jurisdiction over our mortgage. They wanted him to restrain our foreclosure so they could bring the loan current and not have to pay off the entire mortgage. The U.S. was intent on protecting their interest in the equity.
- 4-17-84**
- May 10, 1984 **Wm. Tyson Letter**
Another hearing to force us to extend the reinstatement period so our Second Mortgage would not become all due and payable.
- April 17, 1986 Another foreclosure initiated

Two years later and the property had not been sold.
- June 1, 1986 Second Mortgage became "All Due & Payable."
- August 20, 1986 A few hours before the Trustee Sale, Owner filed a Chapter 11 Bankruptcy.
- August 20, 1986 Property was listed for \$250,000 for Bankruptcy Court.
- September 22, 1986 Trustee Sale postponed. *\$196,000*
- September 26, 1986 We became suspicious of the low selling price and had an appraisal done and found extensive damage to the house and property. An engineer was called in and the cost for repairs at that time was close to \$125,000. In spite of the fact that there was no longer any equity in the property the Bankruptcy Judge did not release the property.
- 1st MTg #50,000 (Swings & Loan)*

October 6, 1986	Requested relief from the Stay - We were refused. The government was given additional time to sell property.
October 8, 1986	Trustee Sales postponed.
December 1, 1986	Trustee Sale postponed.
December 18, 1986	Presented the Engineer's report on the property. The cost of correcting the problems came close to \$125,000.
December 22, 1986	Trustee Sale postponed.
December 29, 1986	Trustee Sale postponed.
January 9, 1987	Bankruptcy Hearing
January 20, 1987	Trustee Sale postponed.
January 29, 1987	Trustee Sale was postponed.
February 3, 1987	Trustee Sale was postponed.
February 19, 1987	Trustee Sale was postponed.
February 23, 1987	Trustee Sale - physical property reverted to Sheldens.
March 11, 1988	Complaint was filed in U.S. Claims Court in Washington, D.C. - Case No. 164-88L
January 12, 1990	Sheldens won liability under a fifth amendment taking
October 9, 1990	Removal of lis pendens and transfer of U.S. interest in property to Sheldens.
June [redacted] 1992	Judge reversed his opinion and ruled in favor of United States.
August 12, 1992	Appeal filed in U.S. Claims Court, Washington D.C. history.hse



U.S. Department of Justice

Executive Office for United States Attorneys

APR 23 1984

Office of the Director

Washington, D.C. 20530

APR 17 1984

Honorable George Miller
House of Representatives
367 Civic Drive
Pleasant Hill, California 94523

Dear Congressman Miller:

This is in response to your letter dated March 23, 1984, requesting that the government issue a quitclaim on property purchased by Mr. Ralph Washington so that the property can be reassumed. You wrote on behalf of your constituent, Mr. Carl Shelden, who holds a second deed of trust on Mr. Washington's property.

The United States government is attempting to collect fines from Mr. Washington and therefore has placed liens on his property. Although we sympathize with Mr. Shelden's financial predicament, the United States Attorney's office for the Northern District of California is simply trying to protect the government's financial interest in this matter. Therefore, we recommend that Mr. Shelden retain private legal counsel in order to protect his interests.

Sincerely,

William P. Tyson
Director

**ADVO ASKS...
HAVE YOU SEEN US?**



SEARCHED	INDEXED
SERIALIZED	FILED
FEB 19 1992	
FBI - SAN FRANCISCO	
SEARCHED INDEXED SERIALIZED FILED FEB 19 1992 FBI - SAN FRANCISCO	

CALL 1-800-843-5878
1-800-843-5878 (TDD) for Hearing Impaired
National Center for Missing and Exploited Children
Over 85 children recovered.

KEEP

ADVO
ADVOsystem, Inc.
Union City, CA 94587

CAR #1807
Back Plate
US Postage
PAD
ADVOsystem, Inc.

1215250
RESIDENT
1065 WICKHAM DR
MORAGA CA
94556

xxWCCR10

94556

Town of Moraga

Police Department **6/19/92**

Sergeant Robert Priebe

7PM

CASE NO. **376-2515** Business
376-2515 Business
284-5010 - 24 Hr.

350 Rheem Blvd.
Moraga, CA 94556

HERALD
510 644-6790

OFF. STAFSTROM



A'S WIN; MONTE ROOTE SAYS - VIVA CI

Oakland Tribune

OAKLAND, CALIFORNIA

WEDNESDAY SEPTEMBER COUNTY EDITION

SEP 16 1997

WEDNF

RICHMOND SUSPECT IN CUSTODY AT BERKELEY POLICE HEADQUARTERS

BABY KERRI OK

Wary neighbor tips off officers to kidnapped girl

By William Brand
Tribune staff writer

BERKELEY — Baby Kerri came home alive and well to Berkeley yesterday, three months after she was kidnapped from the arms of her teenage mother in the Alta Bates maternity ward.

After calling the ecstatic parents in Gilroy, Berkeley police announced they were 99 percent certain the case was solved. The kidnapping suspect, Karen Lee Hughes, 41, of Richmond — the mother of children ages 20, 12, and 9 — was in custody at Berkeley police headquarters and would face charges, police said.

Kerri's tearful, delighted mother, Jessica Mammini, 16, of Gilroy arrived at a hospital back door at about 8:40 p.m., four hours after her baby. Hospital officials would not say immediately last night when the father, Kristian Ray Rosales, 19, would be reunited with his baby.

Later, in an interview in a sixth-floor hospital room as members of her family look on, Jessica held the baby quietly in her arms.

"I recognize her little face," the young mother said as she gently rubbed her baby's back. Jessica's mother, Catalina Orozco, said, "She looks like Jessica."

Jessica added, "I didn't want to cry when I heard she'd been found, but I ended up crying anyway. All I want to do is take her home."

Ironically, Hughes had been a suspect earlier in the investigation, said Capt. Phil Doran, Berkeley police spokesman. A neighbor called police to report the suspicious appearance of a new baby.

"We showed the mother the woman's California driver's license photo at that time, but she said she didn't think so," Doran said.

But Monday afternoon, another neighbor on Bayview Avenue in the Richmond Annex section of Richmond called, Doran said.

"The last three or four days,



Neighbors recognized the suspect from this sketch.

she (the neighbor) put it all together and called," said Berkeley police Inspector Dan Wolfe, adding that no other suspects were involved in the case.

It was hard to find 1,000 of a nationwide search that has included saturation coverage in the Bay Area, dramatization of the case twice on "America's Most Wanted," a nationally televised show. Several artist renderings of a possible suspect also were spread throughout the Bay Area.

Police sources said Hughes very precisely matched a suspect profile developed by police and the FBI.

Hughes lost a child through miscarriage not long before the kidnapping and had been at Alta Bates for a medical procedure about the time of the abduction, so she was familiar with the hospital layout, sources said.

And — neighbors told police — she appeared suddenly with a new baby, not long after the miscarriage.

Other elements predicted in the FBI profile such as emotional immaturity also matched,

See KERRI, Page A-11



Berkeley police Officer Diane Dolaney carries Baby Kerri into Alta Bates Hospital.

Community had some suspicions

By Cecily Bell
Tribune staff writer

RICHMOND — Most of Karen Hughes' neighbors knew she had been pregnant and lost her baby. They also knew she was caring for an infant.

What no one suspected was that their "friendly" neighbor is the mystery woman suspected of snatching Baby Kerri from its mother's arms at Alta Bates Hospital earlier this summer.

Berkeley police arrested Hughes, 41, yesterday afternoon after a suspicious neighbor phoned in a tip that she might just be the woman who abducted the 3-day-old infant from its

mother's hospital room June 12.

The kidnapper posed as an employee of Alameda County's Supplemental Food for Women, Infants and Children program. She told the young mother that she needed to take the baby to run some tests.

At the time, security personnel checked matching identification bracelets assigned to infants and mothers only when babies were taken from the nursery.

None of the neighbors in the small apartment building on Bayview Avenue would admit to calling police, but at least one began to wonder.

See NEIGHBORS, Page A-11

Kerri, mother reunited

Continued from Page A-1

sources said.

Yesterday morning, after a night of intensive background checks, Berkeley investigators got a search warrant signed and moved in.

The suspect was cooperative, Doran said.

The still tiny infant — taken from the hospital June 12 when she was just 2 days old — quickly got a clean bill of health from hospital pediatricians. A mark on her forehead present at birth has disappeared, and she had gained a set of tiny pearl earrings.

Baby Kerri arrived at Alta Bates at about 4 p.m. yesterday cuddled in the arms of Berkeley police Officer Diana Delaney. She was quickly checked by Dr. Ralph Berberich, head of pediatrics at Alta Bates.

Berberich said she was healthy, lively and of normal weight and height.

"We have a really lively baby girl here," he said.

The investigation was one of the most intense in the history of the Berkeley Police Department, an organization that regularly handles bizarre and difficult cases.

Doran praised Berkeley investigators and the FBI for their work on the case, month after month.

He had special praise for Inspector Dan Wolke of Berkeley police, who never gave up hope

that the case would be solved. The others who were instrumental in the case were Inspector Bob Maloney, Al Bierce, Larry Lindenau and Bill Judis, Doran said.

They worked long hours, nights and weekends, Doran said.

Carolyn Kemp of Alta Bates said the hospital's switchboard exploded with delighted callers when news of the baby's return reached the media.

"We've just had tons of calls," she said.

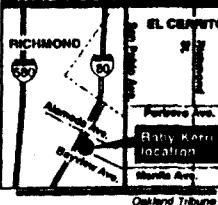
Hospital staff members said candidly last night that the procedures at the hospital have been overhauled dramatically since a light-brown-haired woman walked into Jessie's room June 12 and took the baby under a false pretext.

"There now are permanent guards on duty at the birth center, who must sign visitors in and out," Kemp said. In addition, the center now has only one entrance and exit.

"We now have what we call our baby team, and each member must wear a large, very readable identification tag. No one in the hospital can take a baby anywhere unless they are a team member and have that badge," Kemp said.

Each baby born at the hospital is footprinted and photographed within two hours. The hospital had stopped footprinting babies when the kidnapping occurred, because of fears about toxics in

WHERE BABY KERRI WAS FOUND



the footprinting ink. A new ink is being used.

No photograph had been taken when Kerri was stolen.

When a baby is born, four identifying wrist bands are supplied, Kemp said. One goes on the mother's wrist, and two go on the baby's wrist and leg. The mother's birth partner or another person designated by the mother gets the fourth band.

Baby clothes also have been clearly marked to identify their origin at Alta Bates and can no longer be taken from the hospital, Kemp said.

John Rayburn, a baby kidnapping specialist from the National Center for Missing and Exploited Children, has visited the hospital since security precautions were put in place.

"He said our system previously was very good, but now it is the best in the country," Kemp said.



A young man yells at photographers from the suspect's home.

Bandit robs cab driver, but gives him \$5 back

The Associated Press

HUNTINGTON, W.Va. — A taxi driver who was robbed at knifepoint told police the thief took all his money, then gave \$5 back.

Steven P. Simmons, 36, told police a passenger pulled a knife when they arrived at their destination Sunday and demanded all his money, according to a Huntington Police Department report.

Simmons gave the thief \$5, saying it was all he had. The robber handed him \$5 back and fled on foot, the report said.

Neighbors doubted woman was mother

Continued from Page A-1

der just who the baby really was.

"At first she said she was baby-sitting her godchild," said Barbara Zavala, who has lived in the apartment across from Hughes for six years. "Then later, she said the mother worked until 2 or 3 in the morning so it was easier to keep the baby overnight."

"Then just the other day, one of her other kids said that the baby was their brother. I thought that was kind of odd — I really didn't think anything was strange until that happened."

According to neighbors, Hughes had lived in the building for about a year. They said she mostly kept to herself, and they saw the baby

infrequently — sometimes in the carport, other times in its swing when Hughes had her front door open. They said they never heard the baby cry.

At the time of her arrest, she had three other children living with her, ages 20, 12 and 9.

They said she was obviously pregnant but lost the baby during the summer. She said she took a trip to Texas, and shortly after she got back, she had the baby.

Margarita Dominguez has lived in the apartment since May with her two young daughters. She said she asked the landlord if there were any other toddlers in the building, and he said "no." She said she found out he

was wrong.

"I've seen her a couple of times and she identified the baby as her daughter," Dominguez said. "I'm really really glad the baby's back, but I'm surprised the kidnapper lives here. People can act so normal — you would never suspect them."

It was apparent to all of Hughes' neighbors in the quiet neighborhood that they would never feel the same about their community.

"This is kind of scary," said Joe Montecino. "When I came home, I thought someone had won the lottery — there were so many people all over the place. Now that I know what happened, it makes me nervous."

Mail to:
 CARL SHELDEN
 P.O. Box 6214
 MORAGA, CA 94570

WILLIAM T. McGIVERN, JR.
 United States Attorney

ROBERT L. DONDERO
 Assistant United States Attorney

450 Golden Gate Avenue
 San Francisco, California 94102
 Telephone: (415) 556-4227

91 91047

MAY 16 1991

BOOK 16597 PG 919 4

RECORDED AT REQUEST OF
Plaintiff

MAY 16 1991
 AT 10 O'CLOCK A.M.
 CONTRA COSTA COUNTY RECORDS
 STEPHEN L. WEIR
 COUNTY RECORDER

FEE: 19.50 H-1cc
 C-1d

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
vs.) No. CR-83-0120 RHS
RALPH HUEY WASHINGTON, et al.) NOTICE OF WITHDRAWAL OF
) LIS PENDENS AND CONSENT
Defendants.) TO TRANSFER OF REAL PROPERTY

NOTICE IS HEREBY GIVEN that plaintiff UNITED STATES OF AMERICA withdraws the "NOTICE OF LIS PENDENS" recorded December 12, 1983 as Instrument No. 83-181883 in the Official Records of Contra Costa County, California insofar as they affect title to the real property situated in Contra Costa County, California, commonly known and described as:

1065 Wickham Drive, Moraga California
 County Assessors Parcel Number 250-391-000-4
 And more particularly described in Exhibit A
 to this document.

Said "NOTICE OF LIS PENDENS" hereinafter shall not constitute constructive or actual notice of any of the matters contained in it, or of any matters pertaining to this action, or create any duty of inquiry in any person dealing with the real property above-described.

Plaintiff UNITED STATES OF AMERICA hereby consents to the transfer of the aforesaid real property to CARL SHELDEN and MARY

16597M 920

SHELDEN, his wife, pursuant to the Trustee's Deed Upon Sale, recorded February 27, 1987 as Instrument 87-44569, and said transferees may take title to the aforesaid property free and clear of any claims whatsoever of the plaintiff UNITED STATES OF AMERICA pertaining to matters contained in or referred to in the aforesaid Notice.

~~OCTOBER 09~~
Dated: September ____ 1990.

WILLIAM T. McGIVERN, JR.

United States Attorney

Robert L. Dondero
ROBERT L. DONDERO
Assistant U.S. Attorney

State of California
County of San Francisco

On this the 9th day of
October _____, 1990,
before me, Betty vanTree,
the undersigned Notary
Public, personally
appeared Robert L. Dondero

personally known to me to
be the person whose name
is subscribed to the
within instrument, and
acknowledged that he
executed it.

WITNESS my hand and
official seal.



Betty VanTree
Notary's Signature

16547PG 921

Exhibit A

The land referred to herein is situated in the State of California, County of Contra Costa, unincorporated, described as follows:

Parcel 1:

Portion of Lot 4, Map of subdivision 3746, filed June 12, 1968, Book 121 of Maps, Page 12, Contra Costa County Records, described as follows:

Beginning on the Southern line of said lot 4, distant thereon south 88 degrees 22' 51" East, 115.45 feet from the southwestern corner thereof; thence from said point of beginning, along the exterior lines of said lot 4, North 88 degrees 55' 18" east, 239.29 feet and north 67 degrees 38' West, 98.07 feet, thence leaving said exterior line, south 62 degrees 40' 18" west, 163.99 feet to the point of beginning.

Parcel 2:

Portion of the 28.6 acre parcel of land as described in parcel fifteen in the deed from Utah Construction and Mining Co., to Russell J. Bruzzone, et ux, recorded March 19, 1967, Book 5322, Page 372, Official records, described as follows:

Beginning at the most eastern corner of lot 4 as said lot is shown on the map of "Subdivision 3746, Contra Costa County, California," filed June 12, 1968, Book 121, Maps, page 13; thence from said point of beginning running along the southern line of said lot 4, south 79 degrees 52' 55" west, 239.31 feet and north 67 degrees 25' 14" west, 115.46 feet to the southwestern corner thereof; thence southeasterly along the arc of a circle having a radius of 18 feet the center of which bears north 87 degrees 55' 45" east a distance of 11.79 feet to a point from which the center of a reverse circle to the right having a radius of 45 feet bears south 28 degrees 22' 32" west; thence southeasterly along the arc of said last mentioned circle through a central angle of 67 degrees 44' 8" a distance of 53.21 feet; thence south 82 degrees 10' 18" east, 38.34 feet; thence south 52 degrees 45' east, 117.58 feet; thence south 69 degrees 28' 36" east, 151 feet to the eastern line of said 28.6 acre parcel; thence along said last mentioned line north 2 degrees 04' 15" west, 200.02 feet to the point of beginning.

Excepting from parcels 1 and 2: Rights granted in the deed to Utah Construction and Mining Co., Recorded September 19, 1967, Book 5456, Page 484, Official Records, as follows:

"All oil, gas, petroleum and other hydrocarbon substances, minerals and water in, under or recoverable from the portion of subsurface of that certain real property described in the deed to Russell J. Bruzzone, et ux, recorded March 19, 1967, Book 5322, page 372, Official Records, and by this reference incorporated herein lying below a plane parallel to and 500 feet vertically below the surface of said property, together with the right to remove from, store and inject into said portion of the subsurface

16597AC 922

of said property, oil, gas, petroleum and other hydrocarbon substances, minerals and water; and rights of way, easements and servitudes in and through said property for the purpose of exercising the rights herein granted, including but not limited to the right from time to time to drill well holes, to cause same and otherwise to complete and maintain wells into and through said portion of the subsurface of said property from surface locations outside of said property; provided, however, that the rights herein granted do not and shall not include the right to enter upon the surface of the above-described property or any portion thereof lying above a plane parallel to and 500 feet vertically below the surface of said property and do not and shall not include the right to inject or store oil, gas, petroleum or other hydrocarbon substances, minerals or water into or in any portion of said property lying above a plane parallel to and 500 feet vertically below the surface of said property."

Parcel 3:

A non-exclusive easement for road and public utility purposes appurtenant to and for benefit of parcel 2 above described, over and along the following described parcel of land:

Beginning at the southwestern corner of lot 4 as said lot is shown on the map of subdivision 3746, Contra Costa County, California, filed June 12, 1968, Book 121, Maps, Page 13, thence from said point of beginning southeasterly along the arc of a circle having a radius of 10 feet the center of which bears north 87 degrees 55' 45" East, a distance of 11.79 feet to a point from which the center of a reverse circle to the right having a radius of 45 feet bears south 20 degrees 22' 32" west; thence southeasterly along the arc of said last mentioned circle through a central angle of 67 degrees 44' 58" a distance of 53.21 feet; thence north 62 degrees 32' 03" west, 103.43 feet to the southeastern corner of lot 5 as said lot is shown on said map of subdivision 3746, thence along the southern line of Wickham Drive as said Drive is shown on said map north 87 degrees 55' 45" east, 56 feet to the point of beginning.

County Assessor's Parcel Number 258-391-008-4.



U.S. Department of Justice
Executive Office for United States Attorneys

APR 23 1984

Office of the Director

Washington, D.C. 20530

APR 17 1984

Honorable George Miller
House of Representatives
367 Civic Drive
Pleasant Hill, California 94523

Dear Congressman Miller:

This is in response to your letter dated March 23, 1984, requesting that the government issue a quitclaim on property purchased by Mr. Ralph Washington so that the property can be reassumed. You wrote on behalf of your constituent, Mr. Carl Shelden, who holds a second deed of trust on Mr. Washington's property.

The United States government is attempting to collect fines from Mr. Washington and therefore has placed liens on his property. Although we sympathize with Mr. Shelden's financial predicament, the United States Attorney's office for the Northern District of California is simply trying to protect the government's financial interest in this matter. Therefore, we recommend that Mr. Shelden retain private legal counsel in order to protect his interests.

Sincerely,

William P. Tyson
Director

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building, Box 36035
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office:
675 N. First Street, Suite 508
San Jose, California 95112

April 18, 1984

Louise Bloomingfield
Office of Congressman Miller
367 Civic Drive
Pleasant Hill, CA 94523

Re: Question on Forfeiture of Ralph Washington
Property

Dear Ms. Bloomingfield:

This letter will confirm our conversation of April 17, 1984 regarding the manner in which the Government intends to proceed against the Ralph Washington property. I spoke to Assistant United States Attorney Robert Dondero, who informed me that it is correct that the Government intends to forfeit the given properties under the applicable Racketeering law.

My understanding is that the Government intends to foreclose on the given property. I also understand that any outstanding deeds of trust will take precedence over the Government's claim. Accordingly, if your constituent has a second deed of trust which was previously recorded ahead of the Government's claim, and if sale proceeds exceed the amount of the first and second deeds of trust, your constituent should be protected. Since the holders of deeds of trust of record apparently have a priority interest, the Government would be entitled to those proceeds which are left, if any, after paying off the priority deeds of trust. Of course, if the constituent's second deed of trust is such that market value of the property would not satisfy the amount of funds supporting the second deed of trust, the constituent would not be made whole. It all depends on what amount of money is bid on the property at the foreclosure sale.

I hope that the foregoing information has been helpful.

Very truly yours,

JOSEPH P. RUSSONIELLO

By:

PATRICK RAMIREZ S. SUPARA
Assistant United States Attorney
Civil Division

16
54
2308

PETE WILSON
CALIFORNIACOMMITTEES
ARMED SERVICES
AGRICULTURE, NUTRITION, AND RURAL
COMMERCIAL, SCIENCE, AND TRADES
SPECIAL COMMITTEE ON AGING
JOINT ECONOMIC COMMITTEE

United States Senate

WASHINGTON, DC 20510

November 23, 1987

The Honorable Edwin Meese III
 Attorney General
 Department of Justice
 Tenth Street & Constitution Avenue, NW
 Washington, D.C. 20530

Dear Mr. Attorney General:

Attached is a file regarding the claim of Mr. Carl Shelden of San Diego concerning property located at 1065 Wickham Drive, Moraga, California. This matter concerns both the U.S. Attorney's Office in San Francisco and the U.S. Marshal's Office.

Recently, members of my staff, on behalf of Mr. Shelden, inquired about the status of Mr. Shelden's claim to which there was supposed to have been an answer by November 10. My staff was told that a copy of the response was mailed out on November 12; neither Mr. Shelden nor any of my offices have received a response to date. This would seem to violate the Marshal's Office own deadline.

Apparently, however, Congressman Jim Bates, who has been interested in this case also, did receive a copy of a response which purports to deny the claim of Mr. Shelden. If this is so, I would be curious to know the basis for such a decision.

It seems to me, on the surface, that the government has spent substantial sums of money, not even counting the time of attorneys, to deal with a situation which, if settled, would have cost far less. In fact, it would appear that such is the case currently.

Mr. Shelden tells my staff that he is disabled and that he counts on income from this property (now substantially devalued through no fault of his own, he claims) to sustain his and his family's livelihood.

Is this not a situation where common sense should be included with considerations of the law?

Sincerely,

PETE WILSON

Enclosures
PW:da

PETE WILSON
CALIFORNIA

COMMITTEES
ARMED SERVICES
AGRICULTURE, NUTRITION AND FORESTRY
COMMERCIAL, SCIENCE AND TRANSPORTATION
SPECIAL COMMITTEE ON AGING
JOINT ECONOMIC COMMITTEE

United States Senate

WASHINGTON, DC 20510

December 15, 1987

The Honorable Joseph P. Russoniello
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

Dear Mr. Russoniello:

Please find enclosed a packet of material relating to the concerns of Mr. Carl Shelden of San Diego concerning property located at 1065 Wickham Drive, Moraga, California. Please note that the material includes a recent letter from me to Attorney General Meese.

The Director of the Congressional Affairs of the U.S. Marshals Service, Stephen T. Boyle, reported to my Legislative Director, Dixon Arnett, that the Marshals Service had reviewed the material and had concluded that the Service was bound by the order of the Court (paragraph 5(A) of the order dated January 31, 1984). Mr. Boyle indicated that, were you as U.S. Attorney, to seek a modification of the Court order of that date so that Mr. Shelden might have some relief, the Marshals Service would support such a modification.

From a review of the material attached it seems to me that, legal issues aside, Mr. Shelden is a victim of circumstances over which he has no control. The degree to which he is a victim is manifest in the degree to which he has suffered financial loss at a time when he needs income to support his family and the length of time it has taken to argue his case.

It would seem to me that the Government might pursue a reasonable request before the Court to grant relief on the basis of equity and humanitarian concern. Of course, legal battles can go on for years, but is that justice?

I would be grateful if you would review this matter and give me your judgement as soon as possible. If there is some consideration that I am missing, please inform me. Thank you, in advance, for your consideration.

Sincerely,

PETE WILSON

PW:da
enclosure

JOHN SEYMORE
CALIFORNIA

COMMITTEE
AGRICULTURE, NUTRITION, AND FORESTRY
ENERGY AND NATURAL RESOURCES
ENVIRONMENTAL AFFAIRS
SMALL BUSINESS

United States Senate

WASHINGTON, DC 20510-0503

December 10, 1991

The Honorable William Barr
Attorney General
Department of Justice
10th & Constitution Avenue
Washington, D.C. 20530

Dear Mr. Attorney General:

Attached is information sent to my office regarding the claim of Mr. Carl Sheldon, concerning federally seized property located at 1065 Wickham Drive, Moraga, California.

For nearly ten years and despite inquiries submitted by former Senator Pete Wilson, Congressman George Miller, and former Congressman Jim Bates to the Department of Justice, the U.S. Attorney's office in San Francisco, and the U.S. Marshal's office, Mr. Sheldon still awaits a fair and final resolution of his claim. Indeed, from a review of the materials attached, it seems that Mr. Sheldon has been for too long a victim of circumstances and a process beyond his control.

It seems to me that it would be in the interest of both the government and Mr. Sheldon to pursue an equitable resolution of this matter. The government has already expended substantial sums of money, and Mr. Sheldon has suffered significant financial loss while struggling to support his family. Therefore, if the claim is awaiting future action, I would appreciate knowing the status and the possibility of resolution. Similarly, if it is your understanding that this case has been settled, I would be interested to know the basis for this resolution.

I would appreciate it if your office would share their findings with me at the earliest possible date. If you have any questions, or information on this case, please contact my assistant, Robert Hoffman, at (202) 224-5422.

Given the hardship already suffered by Mr. Sheldon and his family, I am hopeful that this matter can be resolved expeditiously.

Thank you very much for your attention to this request.

Sincerely,

JOHN SEYMORE

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
 RICHARD M. HENRY, MASSACHUSETTS
 DENNIS DECONCINI, ARIZONA
 PATRICK J. LEAHY, VERMONT
 HOWELL HEPFNER, ALABAMA
 PAUL SIMON, ILLINOIS
 HERBERT KOLB, WISCONSIN
 STROM THURMOND, SOUTH CAROLINA
 ORIN G. HATCH, UTAH
 ALAN K. Simpson, WYOMING
 CHARLES E. GRASSLEY, IOWA
 ARLEN SPECTER, PENNSYLVANIA
 HARRY BROWN, COLORADO
 RONALD A. BLAIR, CHIEF CLERK
 CYRUS L. RABIN, STAFF DIRECTOR
 THOMAS L. COOPER, SENATE CLERK/COUNSELOR
 AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6276

May 13, 1992

Mr. Carl Shelden
 1065 Wickham Drive
 Moraga, California 94556

Dear Mr. Shelden:

Thank you for contacting me regarding asset forfeiture. I appreciate your sharing your thoughts with me on this important issue.

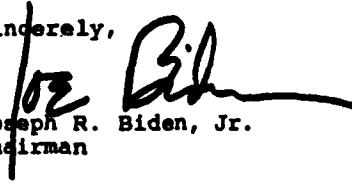
The forfeiture of illegal profits from the drug trade has proven to be an important tool for law enforcement in the fight against illegal drugs. For profit-motivated crime, such as drug trafficking, forfeiture is often the single most effective deterrent. Without civil forfeiture, the United States would be virtually powerless to act when drug traffickers are able to evade arrest.

Nevertheless, I understand your concerns about forfeiture policy. We must have safeguards to ensure that these laws are not used to take property that has not been involved in the drug trade. I am also concerned that the government adequately maintain property that has been seized and that the forfeiture proceeds be devoted to law enforcement.

In order to examine the issues surrounding forfeiture, the Judiciary Committee will be holding hearings concerning asset forfeiture in mid-May. I will certainly keep your views in mind as the committee considers this important topic.

Thank you again for taking the time to contact me.

Sincerely,


 Joseph R. Biden, Jr.
 Chairman

ISBN 0-16-041430-X

90000



3886 2486 81
 81
 51-23-82