



Written Statement of

**E.E. Edwards, III
David B. Smith
Richard J. Troberman**

Co-Chairs

**National Association of Criminal Defense Lawyers
Asset Forfeiture Abuse Task Force**

on behalf of the

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Before the

United States House Committee on the Judiciary

Regarding

**H.R. 1916 ("Civil Asset Forfeiture Reform Act")
and the
Current Federal Asset Seizure and Forfeiture Program**

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E.E. Edwards, III of Nashville, Tennessee, is a graduate of the University of North Carolina and Vanderbilt University Law School. He is the senior partner in the firm of E.E. Edwards and Associates, a litigation-oriented firm with a heavy concentration on criminal defense in both state and federal courts.

He began his career as an Assistant District Attorney General in Nashville. He has also served as President of the Tennessee Association of Criminal Defense Lawyers, and has as a member of the Tennessee State Bar Association's House of Delegates. In addition to his service as a Co-Chair of the NACDL Asset Forfeiture Abuse Task Force, Mr. Edwards is a member of the Tennessee Supreme Court's Commission on Rules of Criminal Procedure, and a guest lecturer at Vanderbilt Law School and numerous legal seminars across the country.

David B. Smith of Alexandria, Virginia, is a graduate of the University of Pennsylvania and Yale Law School. Mr. Smith is a senior partner in the firm of English & Smith, which specializes in state and federal criminal practice.

He has served as trial attorney in the Appellate Section of the Narcotics and Dangerous Drug Section of the Department of Justice; Associate Director of the Asset Forfeiture Office of the Criminal Division, DOJ; and as a Special Assistant United States Attorney in the Eastern District of Virginia. In addition to serving as a Co-Chair of the NACDL Asset Forfeiture Abuse Task Force, Mr. Smith is a frequent guest lecturer at legal seminars across the country. He is a member of the board of editors of the Criminal Law Advocacy Reporter. He is also the author of the treatise, **Prosecution and Defense of Forfeiture Cases** (Matthew Bender 1996); and the co-author of **Civil RICO** (Matthew Bender 1996).

Richard J. Troberman of Seattle, Washington, is a graduate of the University of Denver and the University of Southern California School of Law. Mr. Troberman is the senior partner in the firm of Richard J. Troberman, P.S., which specializes in criminal defense and related civil matters in state and federal courts.

He has served as President of the Washington State Association of Criminal Defense Lawyers. Presently, in addition to serving as a Co-Chair of the NACDL Asset Forfeiture Abuse Task Force, Mr. Troberman serves on the NACDL Board of Directors. He also lectures frequently at legal seminars across the country.

I. Background

A. Summary of NACDL's Position on H.R. 1916 and the DOJ's Latest "Reform" Proposal(s)

For several years now, the Department of Justice's (DOJ) asset forfeiture program and similar state and local programs, utilizing a broad array of new and expanded federal and state forfeiture statutes¹, have provided federal, state and local law enforcement agencies with an unduly powerful weapon with which to fight the War on Drugs. And too often, the weaponry has been deployed to abuse law-abiding Americans.

The unchecked use of over-broad civil forfeiture statutes has run amok. Law enforcement agencies, in their zeal, have turned the War on Drugs into a War on the Constitution. NACDL has long had several concerns with the federal asset forfeiture program, and the resulting denigration of constitutional protections. We thus support Chairman Hyde's much-needed bill, H.R. 1916, although we think it does not go far enough to reign in over-zealous law enforcement in this area. We also think the Department of Justice's latest "reform" proposal still fails to rise to the level of a meaningful set of corrections. Attached to this statement is our analysis of the latest DOJ proposal(s) (1994 and 1996), which we regard as taking away at least as much as they would give in terms of reform. Still, there is some common ground between DOJ and NACDL on this subject, and any provisions of their proposal left un-critiqued in the attachment are unobjectionable to us.

See Attachments A and B.

¹ There are over two hundred federal civil forfeiture statutes, encompassing crimes from gambling and narcotics violations to child pornography profiteering.

It is civil forfeiture law, however, which concerns us the most, due to the utter lack of constitutional safeguards and the unfair procedural advantages it affords the government at the expense of law-abiding citizens.³

C. Civil Forfeiture in Particular

Civil forfeitures are *in rem* proceedings. The government is technically targeting the property, as, according to a “legal fiction,” the inanimate property is deemed to be guilty and condemned. Because the property itself is the defendant, the guilt or innocence of the property owner is said to be irrelevant. The “use” made of the property becomes the central issue. It is the legal fiction which allows many extremely harsh and unwarranted repercussions to flow from the use of civil forfeiture statutes.⁴

³ The abuse of the civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. *See e.g.*, Honorable Henry J. Hyde, **Forfeiting Our Property Rights: Is Your Property Safe From Seizure?** (Cato Inst. 1995); Leonard L. Levy, **A License to Steal, The Forfeiture of Property** (Univ. of N. Car. 1996); Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 Hastings L.J. 1325 (1991); George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 New York L.S.L.R. 121 (1994); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L. Rev. 369 (1994); Brazil & Berry, “Tainted Cash or Easy Money?,” Orlando Sentinel Tribune (June 14-15, 1992 expose); Schneider & Flaherty, “Presumed Guilty: The Law’s Victims in the War on Drugs,” Pittsburgh Press (Aug. 11-Sept. 6, 1991 expose).

⁴ In a 1993 decision, the United States Supreme Court in **Austin v. U.S.**, 509 U.S. 602, all but laid to rest the legal fiction that the guilt or innocence of the property owner is irrelevant because it is the property that is the “wrongdoer” in an *in rem* forfeiture. However, during its most recent Term, the Court breathed new flames into this fiction, in **Bennis v. Michigan**, -- U.S. --, 116 S.Ct. 994 (1996); and then completely retreated from logic and fundamental fairness in **United States v. Ursery**, and **United States v. \$405,089.23 U.S. Currency**, 516 U.S. --, 116 S.Ct. -- (1996).

The extent of the Government's financial stake in drug forfeiture is apparent from the 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

"We must significantly increase production to reach our budget target."

* * *

"... Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990."

Executive Office of the U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin 180 (Aug. 15, 1990).⁷

Likewise recognizing that the practical implications of this inherent conflict, a federal district court recently explained well the unintended consequences of the current civil forfeiture statutes so in need of congressional reform:

Failure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain to the government.⁸

Indeed, this inherent conflict of interest can and does lead to serious law enforcement problems. For example, assume that law enforcement agents receive information from an informant that a shipment of 20 kilos of cocaine, worth an estimated \$500,000, is to arrive at a stash house on Monday; that it is to be "fronted" to mid-level dealers once it arrives; and that those mid-level dealers are to deliver \$500,000 to the stash house on Friday. If the agents make the arrests on Monday, they can confiscate the cocaine. If, on the other hand, they wait until Friday to make arrests, they can seize the \$500,000, which they can forfeit for their use. Which do you think they

⁷ *Id.* at 502, n.2.

⁸ *United States v. Real Property Located at 6625 Zumeriz Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994).

must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle. As in Witness Willie Jones' case, authorities unbridled in their handling of the current, unrestrained civil forfeiture laws routinely seize large amounts of cash at airports and roadblocks without establishing any connections to drug dealing other than the money itself (and perhaps, even more perniciously, the racial "profile" of the money-holder).

The policy of allowing the seizures of large sums of cash simply because it is currency, must be re-evaluated for comportment with sound policy as well as constitutional protections. Studies have shown that between 80% and 90% of the currency available today will test positive for some kind of drug; therefore, the practice of having drug dogs "alert" on the money is meaningless.¹⁰ The frequent practice of targeting minorities in airports and along interstate highways for search and seizure¹¹ is based on nothing more than blatant racism. It is morally (and should be legally) bankrupt.

Statistics on seizures document the use of racially based "profiles" to determine law enforcement targets. Willie Jones' case is but one example. There is also the infamous, but not unique, case of Volusia County, Florida. Armed with "anything goes" asset forfeiture laws

¹⁰ See e.g., **United States v. \$639,558 U.S. Currency**, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992); **United States v. \$53,082.00 U.S. Currency**, 985 F.2d 245, 250-251 n.5 (6th Cir. 1993); **United States v. \$30,060.00**, 39 F.3d 1039, 1042 (9th Cir. 1994). See also David B. Smith, **Prosecution and Defense of Forfeiture Cases** (Matthew Bender) at para. 4.03, 4-79-84.

¹¹ See "Tainted Cash or Easy Money", Orlando Sentinel Tribune (Jun.-Aug. 1992); "Presumed Guilty: The Law's Victims in the War on Drugs", The Pittsburgh Press (Aug. 11-16, 1991).

of “asset forfeiture” and for their own financial benefit. Moreover, many state civil asset forfeiture statutes are patterned on the federal scheme. Thus, congressional correction of the federal asset forfeiture will also provide the states with a better, more just model to follow.

D. Case Study

A prime example of forfeiture “justice” in America is the Volusia County, Florida case study. In the absence of any evidence of criminal complicity, and with the Sheriff’s knowledge that the currency would have to be returned, the law enforcement agency offers “settlement” to asset forfeiture victims who seek to (or who for economic reasons, must) avoid undue delay and unnecessary legal fees.¹⁴ Rather than go to court to defend seizures, the agency cuts “deals” with the drivers.

Motorists can get some of their money back if they agree not to sue the abusive agency. For example, Sheriff’s Deputies seized \$19,000 from a Massachusetts paint shop owner. They returned \$14,250 and kept \$4750. They seized \$38,923 from a Miami lawn care business owner; returned \$28,923 and kept \$10,000. They seized \$31,000 from a Virginia car salesman; returned \$27,250 and kept \$3750. None of these people were charged with a crime. All were offered out-of-court settlements with no judicial supervision of the process. Indeed, Volusia County judges expressed surprise at these settlements.¹⁵

¹⁴ Note that there is no “speedy trial” right to assist a citizen in getting back her wrongfully seized property, although we strongly encourage this as an amendment to H.R. 1916.

¹⁵ See authorities cited *supra* note 3.

the forfeiture proceeds. That kind of money can buy a lot of “tips.”

The DOJ’s internal documents read a little different from their public ones. A September 1992 DOJ newsletter noted: “Like children in a candy shop, the law enforcement community chose all manner and method of seizing and forfeiting property, gorging themselves in an effort which soon came to resemble one designed to raise revenues.”¹⁸ Nevertheless, Cary Copeland, Director of the DOJ’s Executive Office for Asset Forfeiture, declared at a June 1993 congressional hearing: “Asset forfeiture is still in its relative infancy as a law enforcement program.”¹⁹ The darling of a federal police state’s nursery? And the Federal Bureau of Investigation announced in 1992 that it anticipated its total seizures of private property would increase 25% each year for the following three years.²⁰

Most courts have recognized the problem is the law; that **any real relief from asset forfeiture abuse must come from Congress**, through meaningful legislative reform. For example, as the United States Court of Appeals for the Second Circuit recently put it:

We continue to be enormously troubled by the government’s increasing and virtually unchecked use of the civil forfeiture statutes **and the disregard for due process that is buried in those statutes.**²¹

¹⁸ U.S. Department of Justice, “Message From the Director: ‘Do the Right Thing,’” *Asset Forfeiture News* (Sept./Oct. 1992), at p. 2.

¹⁹ Statement of Cary H. Copeland before the Subcommittee on Legislation and National Security, United States House of Representatives Government Operations Committee (Jun. 22, 1993), at 4.

²⁰ U.S. Department of Justice, **Annual Report of the Department of Justice Asset Forfeiture Program 1991** (Washington, D.C.: Government Printing Office, 1992), at p. 27.

²¹ **United States v. All Assets of Statewide Auto Parts**, 971 F.2d 896, 905 (2nd Cir. 1992).

books, ready for abuse.

When the DEA or the FBI seizes property, a claimant is required to post a bond in the amount of 10% of the value of the property to preserve the right to contest in court the forfeiture (not less than \$250, up to a maximum of \$5,000). The claimant has up to 30 days to post the bond after receipt of the notice of forfeiture. Frequently, the government seizes several items, and requires that a separate bond be posted for each item. Many people lose their property at this stage because they are unable to post the cost bond within the time limit.

This administrative forfeiture proceeding was designed to resolve **uncontested** forfeitures. Under this process, a post-seizure probable cause determination is waived. The property is forfeited without benefit of court intervention. The cost bond is the antiquated, perfunctory mechanism through which contested seizures are supposed to be able to proceed to judicial resolution.

However, the requirement of posting a cost bond eliminates through attrition many claims which would otherwise be contested. Adding insult to injury, the cost bond is used to pay the *government's* costs of litigating the forfeiture. This is an absurdly unjust arrangement -- letting the government take property away from someone without having to prove anything, then making the owner pay in advance the government's costs of trying to take it away from him permanently. Furthermore, unlike criminal cases, the bond is imposed without any independent determination of probable cause.

The cost bond would be abolished by H.R. 1916, as it should be.

B. Court-Appointed Counsel for Indigents

Another extremely important reform that would be accomplished by H.R. 1916 is allowance for appointment of counsel in cases in which the claimant satisfactorily demonstrates to the court

C. Burdens and Standards of Proof

H.R. 1916 puts the burden of proof, and sets the standard of proof, where they should be according to fundamental principles of due process. Current statutory law gives the government many unfair procedural advantages over citizens, especially as regards the burden and the standard of proof.

Who Should Bear the Burden of Proof?

H.R. 1916 rightly places the burden of proof with the government so that the government must prove its case before it can permanently deprive a citizen of his or her property.

One of the gravest problems with the current statutory framework is the burden of proof provision, at 19 U.S.C. 1615. The statute places the burden of proof on the claimant to show that the property is not subject to forfeiture. This is fundamentally unfair and constitutionally anomalous in view of the quasi-criminal character of the proceedings and the important interest at stake. It is extremely difficult to prove a negative.

For example, when the government offers testimony that an unidentified informant claims to have participated in, or witnessed, a drug transaction at a claimant's residence, the claimant bears the burden of proof that it did not occur. This turns the criminal presumption of innocence on its ear. The reversal of the normal burden of proof is unique to civil forfeiture. In all other cases, the party trying to change the *status quo* has the burden of proof, by at least "a preponderance of the evidence."

What Should the Burden Be?

In addition to placing the burden of proof with the government, H.R. 1916 also rightly ensures that the government can deprive one of property only upon proof by "clear and convincing"

the criminal defendant is entitled to many criminal procedure safeguards.²³ Innocent third parties in civil forfeiture proceedings should receive at least the same, and probably more rights. Instead, they are required to bear the burden of proof and overcome the government's routine use of otherwise inadmissible hearsay.

In his Annual Report of the Department of Justice Asset Forfeiture Program (1990), the Attorney General claimed:

The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, primarily to innocent lienholders and innocent family members. It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Although this statement sounds good, it is not accurate. Experienced defense attorneys rarely file such petitions, because far from being "routinely grant[ed]," they are routinely denied.

For two centuries, 19 U.S.C. 1618, the statute governing remission, has provided for the grant of remission to petitioners who establish that they acted "without willful negligence." Historically, DOJ had granted remission based upon a showing that the petitioner was not negligent in the care and use of the property. But on August 31, 1987, DOJ issued new regulations abandoning the statutory negligence standard and requiring petitioners to meet a more stringent standard of care.²⁴

To get relief through the remission process, a petitioner now must prove that forfeiture of his

²³ However, most circuits have misinterpreted Section 853 (d)'s rebuttable presumption to mean that any property of a person convicted of a Title 21 drug felony is subject to forfeiture under section 853 if the government establishes its case by a preponderance of the evidence. Congress should clarify its intent that the standard under Section 853 is **beyond a reasonable doubt**.

²⁴ See 28 C.F.R. Section 9.5(b)(5)

lack of knowledge or lack of consent.²⁶ However, a minority of circuits have held that congressional use of the word “or” really means “and.” They have held that in order to prevail, an owner must establish both lack of knowledge and lack of consent.²⁷ Although these decisions have been heavily criticized, they unfortunately persist as binding authority in their respective circuits.²⁸

The requirement of establishing both lack of knowledge and lack of consent presents a particularly harsh problem for innocent spouses. The innocent spouse may have knowledge that the other spouse is engaging in unlawful activity in the home, but does not consent to it and is indeed powerless to do anything to stop it. Battered spouses are especially hurt by the predicament. The no-win situation presented is either: (1) leave the family home; or (2) report the activity to law enforcement, perhaps risking physical danger, and at least, the arrest and prosecution of the spouse (whose financial support may well be essential to the family’s survival).²⁹

H.R. 1916 would clarify this statute, to confirm the existence of a defense when the innocent owner can establish *either* lack of knowledge *or* lack of consent.

²⁶ See e.g., **United States v. 6109 Grubb Road**, 886 F.2d 618, 625 (3d Cir. 1989); **United States v. 141st Street Corp.**, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, -- U.S. --, 111 S.Ct. 1017 (1991); **United States v. One Parcel of Real Estate at 1012 Germantown Road**, 963 F.2d 1496 (11th Cir. 1992).

²⁷ See e.g., **United States v. One Parcel of Land Known as Lot III-B**, 902 F.2d 1443 (9th Cir. 1990).

²⁸ And in its most recent Term, the Supreme Court expressly held that in the absence of an “innocent owner” statutory provision, due process is not offended by deployment of the “guilty property” fiction to the property of an actually innocent owner. **Bennis v. Michigan**, -- U.S. --, 116 S.Ct. 994 (1996). Clearly, Congress must act.

²⁹ Such a “choice” also arguably infringes upon the concept of spousal privilege.

negligent. This should certainly be the case when a court later determines that the seizure was illegal. Yet, under current law, it is unclear whether a claimant has a right of action against the government for losses occasioned by an illegal seizure and wrongful handling of property. H.R. 1916 would clarify the law.

Substantial Hardship Temporary Relief Provision

H.R. 1916 recognizes that often a seizure can deprive someone of their very home or livelihood before the property is returned to its rightful, private owner through the arduous asset forfeiture procedures. Accordingly, the bill provides for the temporary release of property where a claimant can demonstrate that a substantial hardship will result if property is not released during pendency of the action.

For example, where the government seizes a truck belonging to a trucker, the trucker is effectively out of business during the time it takes to resolve the forfeiture (which unfortunately, can take years, at least absent a “speedy trial”-type reform). Even if the claimant ultimately prevails, by the time he gets his truck back (even assuming it is in the same, undamaged shape it was in before the government took it), he could be out of business. H.R. 1916 would allow the trucker to continue using his truck, *under conditions imposed by the court (to safeguard the truck)*, while the action is pending and unless and until the government proves it is entitled to permanently deprive him of the truck. Meanwhile, the trucker, still employed, could continue contributing to the economy and the tax system. Other cases that come to mind in which this provision might prove essential are cases involving one’s only place of residence; or a business, which, if seized, might put not only the proprietor, but all of his or her employees, out of work.

issuance of search and arrest warrants from the scope of the Rules. Significantly, Rule 1101(e) provides that, absent statutory provisions to the contrary, the Rules apply to a list of enumerated proceedings, including “actions for fines, penalties, or forfeitures” under 19 U.S.C. 1581-1624.³¹

B. Need for Statutory Time Limits on the Government: Speedy Trial Act for Forfeiture Cases

H.R. 1916 should be strengthened to place time limits on the government’s ability to hold property without moving the process along for resolution of the contested possession.

Under the present forfeiture scheme, there are inadequate statutory deadlines placed on the government to keep the process moving. For example, except in the case of conveyances seized for violation of the drug laws, there is no time limit within which the seizing agency must give notice to the owner of the property, of the government’s intention to seek forfeiture of the property.

Notice

On January 15, 1993, Deputy Attorney General Cary Copeland, Director and Chief Counsel of the Executive Office for Asset Forfeiture, issued Directive 93-4, which recognizes that “a fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard.”

Directive 93-4 orders that written notice to owners and other interested parties (property stakeholders) known at the time of the seizure “shall occur not later than sixty (60) days from the date of the seizure.” It further provides that “where a reasonable effort of notice has not been made

³¹ Judge Beam of the Eighth Circuit has written persuasively that due process is offended by the permitting the government to forfeit a person’s property on the basis of the notoriously unreliable basis of hearsay. *See United States v. \$12,390.00*, 956 F.2d 801, 812 (8th Cir. 1992) (Beam, J., dissenting).

under the Rules of Criminal Procedure.³²

In the interests of justice, and in the interest of the economy, Congress should require the government to commence an action for forfeiture in district court within 60 days of receipt of the notice of claim. This time frame is already in effect in forfeitures involving seized conveyances under 21 U.S.C. 888.³³ This provision should simply be extended to all forfeitures. By giving the seizing agency 60 days to file a Notice of Intent to Forfeit, and another 60 days to file the action once a claim is received, the government would still have a total of at least 120 days from the date of seizure in which to initiate action in district court.

C. Need for a Substantial Nexus Requirement

Federal forfeiture statutes do not explicitly require that there be a substantial nexus between the alleged unlawful activity and the property seized. They should. Although the legislative history certainly suggests such a requirement, the courts are unfortunately split as to whether there need be such a substantial nexus and what it means.³⁴

³² See e.g., *Shaw v. United States*, 891 F.2d 602 (6th Cir. 1989); *United States v. Elais*, 921 F.2d 870 (9th Cir. 1990); *United States v. U.S. Currency*, 851 F.2d 1231 (9th Cir. 1988); *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989); *United States v. Price*, 914 F.2d 1507 (D.C. Cir. 1990).

³³ See 21 U.S.C. 888(c).

³⁴ The Senate Report accompanying the amendment adding subsection (a)(7) to 21 U.S.C. 881 noted that the proposed amendment adding real property to the categories of property that could be forfeited would lead to the seizure and forfeiture of property "indispensable to the commission of a crime." S. Rep. No. 225, 98th Cong. 1st Sess. 195, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3378. The Senate Report explained Congress' motivation in passing 21 U.S.C. 881 (a)(7) as follows:

Under current law, if a person uses a boat or a car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a **secluded barn to store tons of marijuana**, or uses his

We can no longer ignore the conflicts of interest and policy problems which arise when law enforcement and prosecutorial agencies reap financial bounty from the forfeiture decisions they make. Decisions regarding whose property to seize, and how to deal with citizens whose property has been seized is too often dictated by the **profit** the agencies stand to realize from the seizures.

State and local law enforcement agencies frequently work with federal agencies on forfeiture cases and share the proceeds of the forfeiture. This procedure thwarts state law, which may require forfeited assets to be deposited into the general treasury. It also allows states to take advantage of broader federal statutes. The types of cases the state and local agencies choose to pursue together are often influenced by the state's knowledge that the federal government will share the proceeds from the forfeited assets they acquire together. The federal government's participation in this preemption of state priorities should be eliminated by Congress.

In short, the inherent conflict of interest and unbridled discretion sanctioned by the current forfeiture law invites abuse. The opportunities for abuse are legion. For example, local police may cut deals with federal agencies to target individuals whose assets can best benefit both agencies. Joint forfeitures allow local police and federal agencies to avoid state statutory and constitutional law. Law enforcement officers and prosecutors have come to rely on forfeitures as sources of extra revenue. Congress should especially investigate the conflict of interest created when prosecutors and law enforcement agencies set quotas for forfeited assets and use the money to create additional positions and buy "informants" (to help generate still more forfeitures, for still more revenue).

so released during the pendency of the action.

➤ Forfeiture laws should recognize that innocent people often incur huge expenses in defending their property against wrongful seizure. Forfeiture laws should include an “early exit,” innocent owner provision. This would allow a case to be dismissed when an innocent party shows that he has an ownership interest in the property, and the government has no proof that the person was involvement in the alleged criminal conduct.

➤ Forfeiture of real property should always require that there be a substantial nexus between the alleged unlawful activity and the property seized.

➤ Congress must acknowledge that forfeiture is a quasi-criminal action. Most people do not realize that, under current laws, a citizen can be found not guilty (indeed, may not even be charged with a crime), and nevertheless have her property taken by the government.

➤ The United States government should be liable for the loss of use, and any deterioration of an asset in cases where the claimant prevails.

H.R. 1916 incorporates many of these essential safeguards, and NACDL supports the effort reflected in the bill.

V. Conclusion

We look forward to working with you, Chairman Hyde, and with the Committee, to achieve meaningful reform through H.R. 1916. We thank you again for affording us this opportunity to participate in this hearing on the need for civil asset forfeiture reform.