

Crime—Asset Forfeiture

PHOTOCOPY
PRESERVATION

THE WHITE HOUSE
WASHINGTON*Eric -
Asset Forfeiture*

DOMESTIC POLICY COUNCIL

FACSIMILE FOR: Eric / AnnaDATE: 11-10FAX: 62878FACSIMILE FROM: **LEANNE SHIMABUKURO**
ASSOCIATE DIRECTOR
FOR DOMESTIC POLICY

TELEPHONE: (202) 456-5574

FAX: (202) 456-7028

NUMBER OF PAGES (INCLUDING COVER): 13COMMENTS: Eric - Please also share w/ Bruce
if you think he would want to see
this. I gave a copy to Michael Deide.Thanks,Leanne

Fr: DOJ

TALKING POINTS ON HATCH-LEAHY SUBSTITUTE

- The Hatch-Leahy bill is similar to the House-passed civil forfeiture bill, H.R. 1658. Federal, state, county and local law enforcement oppose this legislation and oppose it being attached to the FY 2000 Commerce, State, Justice appropriations.
- The Hatch-Leahy bill is so contentious that the Senate Judiciary Committee has been unable to mark it up. Members of Senate Judiciary have made it clear that the issue should be thoroughly vetted through the Committee process with ample time to debate amendments. This has not occurred.
- At a minimum, the Hatch-Leahy bill will cost state and local law enforcement \$100 million a year. Under the legislation, state laws that require forfeited funds to be used for non-law enforcement purposes, such as education or the environment, would take priority over Justice Department regulations limiting the use to law enforcement. In addition, it will decrease annual revenues to the Department of Justice Assets Forfeiture Fund. These lost revenues will require significant reductions in support to state and local law enforcement through the elimination of payments for state and local overtime and related expenses in joint law enforcement operations. It will cut critical funding for drug task forces, safe streets task forces, and Weed and Seed operations.
- The Hatch-Leahy bill will disproportionately impact rural areas of the country where there is simply not enough federal law enforcement officers to participate in joint investigations for most major cases. These small town police department will lose proceeds of equitable sharing in their cases, reducing their ability to protect their communities.
- The Hatch-Leahy bill will seriously impair the potential for the Assets Forfeiture Fund to contribute to other important federal law enforcement needs. In the past, end-of-year surplus funds have been used to equip additional border patrol agents, to finance removal of criminal aliens, to house federal prisoners, to finance the National Church Arson Task Force, to expand health care fraud investigations and prosecutions, to enhance counter-terrorist investigations and prosecutions, and numerous other important but unfunded federal law enforcement needs without resort to taxpayer funds. In FY 1999, \$90 million in AFF Super Surplus funds were used to support federal law enforcement. These funds would not be available under Hatch-Leahy.
- The Hatch-Leahy bill waives the cost bond. This provision will encourage the filing of frivolous claims, and consequently overburden the criminal justice system.
- The Hatch-Leahy bill allows prisoners to wait 11 years to complain that their property was forfeited without proper notice.

- The Hatch-Leahy bill forces the government to pay attorneys fees even when it wins a civil forfeiture case, if there is at least one party, such as an innocent lienholder, whose claim the government concedes is valid.
- The Hatch-Leahy bill forces the government to release seized property to a wrongdoer who does not even contest the forfeiture, if the forfeiture is contested by a lienholder or spouse, and the government misses the 90-day filing deadline.
- The Hatch-Leahy bill forces the government to file *civil* forfeiture actions, even if the government might prefer to file a *criminal* forfeiture action.
- This legislation is unanimously opposed by the Department of Justice, Treasury, and state, local, and county law enforcement.

For all of these reasons, law enforcement is strongly opposed to the Hatch-Leahy substitute and supports S. 1701. (Sessions - Schumer)

LEGISLATION COMPARISON

U.S. Department of Justice

11/8/99

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Innocent Owner Defense	Innocent owner provisions exist for some civil forfeiture statutes but not others	Protects innocent owners, bona fide purchasers, and heirs who inherit estates from claimants	Protects innocent owners and bona fide purchasers	Protects innocent owners and bona fide purchasers; person presumed innocent if he alerts law enforcement
Burden of Proof	Burden on claimant by a preponderance, 19 U.S.C. § 1615, incorporated by reference in 18 U.S.C. § 981(d) and other major civil forfeiture statutes	On the government, by "clear and convincing evidence"	On the government, by "a preponderance of the evidence"	On the government, by "a preponderance of the evidence"
Sending Notice	Statute says notice must be sent promptly; 19 U.S.C. § 1604, 1607; policy requires notice within 60 days absent good cause	Notice must be given within 60 days or forfeiture is barred; court may grant exception for good cause.	Notice must be sent within 60 days or govt must return property until notice is given; the AG, Secretary of Treasury or USPIS may waive requirement for good cause; waiver may be delegated to person of supervisory rank in hdqrs. office	Notice must be sent within 60 days (90 days for seizures by state or local agencies) or gov't must return property; court may grant 60 day extension if notice may have an adverse effect, including endangering a life, destruction of evidence, flight from prosecution, jeopardize an investigation or unduly delaying trial

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Remedy for Sending Defective Notice	No statute; case law allows case to be re-opened if statute of limitations has not expired	Return of property to the claimant; forfeiture barred	Send claimant proper notice; re-open forfeiture proceeding, if statute of limitations has not expired	Re-open forfeiture proceeding within 60 days even if statute of limitations has expired
Limitations period for challenges to completed forfeiture	No statute; case law gives claimant 11 years; <u>Polanco v. U.S. Drug Enforcement Administration</u> , 158 F.3d 647 (2d Cir.1998)	No provision; courts allow claimant 11 years to re-open cases where Congress has not set a limit	Limits claimant to 2-years to challenge completed forfeitures	Claimants have up to 11 years to challenge completed forfeitures, codifying <u>Polanco</u>
Time to File Claim	Claimant has 20 days from first publication of notice to file a claim; 19 U.S.C. § 1608	Claimant has 30 days from last publication of notice or when notice is received to file a claim	Claimant has 30 days from first publication of notice or the deadline indicated in the notice letter to file a claim	Claimant has 30 days from last publication of notice or when notice is received to file a claim
Equitable Sharing of forfeiture proceeds	Attorney General may equitably share forfeiture proceeds with state and local law enforcement agencies which participated in the forfeiture; shared monies and assets must be used for law enforcement purposes	No provision	No provision	State laws directing forfeited funds to non-law enforcement programs take priority over Justice Department regulations requiring that forfeited funds be applied to law enforcement purposes

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Time for filing complaint	No provision in current law	gov't must file complaint within 90 days	gov't must file complaint, or commence criminal forfeiture, within 90 days	gov't must file civil complaint within 90 days; both civil and criminal forfeiture barred if gov't misses deadline
Appointment of Counsel/Attorney Fees	Successful claimant can recover attys fees under the Equal Access to Justice Act; <u>United States v. \$16,500 in U.S. Currency</u> , __ F.Supp2d __, 1999 WL 328867 (D. Or. May 8, 1999)	Allows any claimant to seek appointment of free counsel	Award of costs and reasonable fees where claimant is not charged in offense related to property and court enters judgment for claimant	The court may appoint counsel to represent an indigent claimant if the property subject to forfeiture is real property used by the claimant as a primary residence or if the claimant is represented by court-appointed counsel in a related criminal case. If the claimant substantially prevails in the forfeiture action, the Government is liable for the claimant's attorney fees and costs

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Release of property pending trial	No statute; case law allows claimant to file Rule 41(e) motion for release of the property if no forfeiture action is pending; <u>In the Matter of Seizure of One White Jeep Cherokee</u> , 991 F.Supp. 1077 (S.D. Iowa 1998)	Claimant entitled to release of property pending trial upon showing of "hardship";	Claimant entitled to release of property other than contraband, cash, evidence, property suited for illegal activity or likely to be used in additional crimes, pending trial upon showing of "hardship"; claimant entitled to probable cause hearing	The claimant is entitled to release of property other than contraband, cash, evidence, property suited for illegal activity or likely to be used in additional crimes, pending trial upon a showing of "hardship"; gov't must respond within 10 days upon receiving request for release of property.
Seizure Warrants	Gov't may seize property based on probable cause, without a warrant; 21 U.S.C. § 881(b)(4); Fourth amendment applies; <u>Florida v. White</u> , __ S.Ct __, 1999 WL 303726 (U.S. May 17, 1999)	No provision	Requires seizure warrant for all seizures of forfeitable property, unless Fourth Amendment exception applies	Requires seizure warrant for all seizures of forfeitable property, unless Fourth Amendment exception applies

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Cost bond	Cost bond required; 19 U.S.C. § 1608	Cost bond abolished	Cost bond or pledge of real or personal property required; <i>In Forma Pauperis</i> provision in lieu of cost bond	Cost bond abolished
Pre-judgment Interest	Circuits are split on whether gov't is liable for pre-judgment interest.	Makes gov't liable for pre-judgment interest	Makes gov't liable for pre-judgment interest	Gov't required to pay imputed interest when claimant successful
Compensation for Damage to Seized Property	Gov't liability is limited under the Tort Claims Act	Expands Tort Claims Act to cover damage caused following seizure for forfeiture	Expands Tort Claims Act to cover negligent damage caused following seizure for forfeiture	Expands Tort Claims Act to cover negligent damage caused following seizure for forfeiture
Use of Criminal Forfeiture as Alternative to Civil Forfeiture	Statutes authorize only civil forfeiture for numerous crimes	No provision	Makes criminal forfeiture available whenever civil forfeiture is available; clarifies criminal forfeiture procedures	No provision

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Fugitive Disentitlement	Fugitives may challenge forfeiture without having to surrender on criminal charges; <u>Degen v. United States</u> , 517 U.S. 820 (1996)	No provision	Bars claims filed by fugitives	No provision
Destruction of Property to Prevent Seizure	Crime to conceal property being seized for evidence; no provision relating to property being seized for forfeiture	No provision	Makes it a crime to remove property to prevent seizure for forfeiture	No provision
Retroactive Application	Not applicable	Change of burden of proof applies retrospectively	All changes apply prospectively	All changes apply prospectively; no grace period
Real Property	DOJ policy that all forfeitures of real property proceed as judicial forfeitures	No provision	Codifies current DOJ policy that all forfeiture of real property shall proceed as judicial forfeitures	Codifies current DOJ policy that all forfeiture of real property shall proceed as judicial forfeitures

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Civil Restraining Orders	No provision; Rule 65, F.R. Civ.P., may apply	No provision	Court may enter restraining orders or take other action to preserve availability of property for forfeiture	No provision
Civil Investigative Demands	Currently no provision in civil enforcement actions analogous to grand jury subpoena allowing gov't to gather evidence before filing complaint	No provision	Attorney General or Treasury Secretary may issue subpoenas for evidence for civil forfeiture action	No provision
Access to Records in Bank Secrecy Jurisdiction	Claimant filing claim to property in federal court may refuse to produce or allow gov't access to foreign financial records material to the claim.	No provision	Claim will be dismissed where claimant refuses to waive secrecy or produce material records; claimant may refuse production on the basis of statutory or Constitutional privilege	No provision
Fungible Property in Bank Accounts	18 U.S.C. § 984 authorizes forfeiture of fungible property in civil cases when no property traceable to the underlying offense is available; forfeiture action must be commenced within one year of the underlying offense	No provision	Authorizes forfeiture of fungible property when no property traceable to the underlying offense is available in all civil forfeiture cases; forfeiture action must be commenced within 2 years of the offense	No provision

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Statute of Limitations for Civil Forfeiture Actions	Within 5 years of the discovery of offense giving rise to the forfeiture	No provision	Within 5 years after the existence of property and its involvement in the crime were discovered	No provision
Currency Seized from Drug Couriers	Current anti-drug statutes provide no guidance for determining if seized currency is drug proceeds, resulting in widely inconsistent judicial decisions	No provision	Enumerates factors that the finder of fact shall use to determine nexus between currency and alleged drug activity	No provision
Restitution to crime victims	Attorney General has limited authority to use forfeited property for restitution to victims of crimes	No provision	Permits the Attorney General to use forfeited property to pay restitution to victims; makes proceeds of consumer fraud subject to forfeiture	Permits the Attorney General to use forfeited property to pay restitution to victims; <i>does not</i> make proceeds of consumer fraud subject to forfeiture
Enforcement of Foreign Judgment	No provisions for freezing assets of foreign criminals or enforcement of foreign judgments	No provision	Permits freezing of assets of persons arrested abroad; creates procedure for enforcing foreign judgments	No provision

Issue	Current Law	HLR. 1658	S. 1701	Hatch-Leahy Bill
Application of Civil Forfeiture Changes	Current law has over 200 civil forfeiture provisions	Applies to all civil forfeitures except titles 19 and 26	Applies to title 18, Controlled Substances Act, and Immigration and Naturalization Act	Applies to all civil forfeitures except titles 19 and 26; attorneys fees and compensation for damage to seized property provisions apply to <u>all</u> civil forfeitures
Excessive fines	Most courts have held that 8 th Amendment issues should be resolved by court, not jury, after the return of a forfeiture verdict	No provision	After forfeiture verdict, court determines if forfeiture is "grossly disproportional to the gravity of the offence"; may adjust forfeiture	After forfeiture verdict, court determines if forfeiture is "grossly disproportional to the gravity of the offence"; may reduce or eliminate forfeiture
Stay of Civil Forfeiture	After filing of criminal indictment, gov't can move for stay of civil forfeiture proceeding upon showing of "good cause"	No provision	Court shall stay civil proceeding if civil trial or discovery could adversely affect gov't ability to conduct related criminal investigation or prosecution; or infringe on claimant's right vs. self-incrimination	No provision

Issue	Current Law	H.R. 1658	S. 1701	Hatch-Leahy Bill
Access to Other Records	Disclosure of tax returns and information to U.S. law enforcement officials is permitted at the investigative stage of criminal cases, but not civil forfeiture cases; 26 U.S.C. § 6103(i)(4)	No provision	Allows disclosure in investigations leading to civil forfeiture actions, with same restrictions as currently apply to use of such information in criminal investigations	No provision
Cooperation Among Federal Prosecutors	Only grand jury material concerning banking law violation may be disclosed to federal prosecutors for use in civil forfeiture action; 18 U.S.C. § 3322(a)	No provision	Allows disclosure of grand jury material to federal prosecutors for use in any civil forfeiture action	No provision