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Crime and Forfeiture: In Short

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Summary

Modern forfeiture is a creature of statute that calls for the confiscation of certain property related to a criminal offense. Forfeiture has long been a tool of law enforcement in the United States. Congress and state legislatures have authorized its use for over 200 years. Every year, it redirects millions of dollars' worth of property connected to criminal activity to lawful uses. Forfeiture law has always been somewhat unique. By the close of the 20th century, however, legislative bodies, commentators, and the courts had begun to examine its eccentricities in greater detail because under some circumstances it could be not only harsh but unfair. The Civil Asset Forfeiture Reform Act (CAFRA), P.L. 106-185, 114 Stat. 202 (2000), was a product of that reexamination.

Modern forfeiture follows one of two procedural routes. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of the procedure which ends in confiscation. Civil forfeiture is an *in rem* proceeding. The property is the defendant in the case. Unless the statute provides otherwise, the innocence of the owner is irrelevant—it is enough that the property was involved in a violation to which forfeiture attaches. As a matter of expedience and judicial economy, Congress often allows administrative forfeiture in uncontested civil confiscation cases. Criminal forfeiture is an *in personam* proceeding, and confiscation is possible only upon the conviction of the owner of the property.

The Supreme Court has held that authorities may seize moveable property without prior notice or an opportunity for a hearing but that real property owners are entitled as a matter of due process to pre-seizure notice and a hearing. As a matter of due process, innocence may be irrelevant in the case of an individual who entrusts his or her property to someone who uses the property for criminal purposes. Although some civil forfeitures may be considered punitive for purposes of the Eighth Amendment's excessive fines clause, civil forfeitures do not implicate the Fifth Amendment's double jeopardy clause unless they are so utterly punitive as to belie remedial classification.

The statutes governing the disposal of forfeited property may authorize its destruction, its transfer for governmental purposes, or deposit of the property or of the proceeds from its sale in a special fund. Intra- and intergovernmental transfers and the use of special funds are hallmarks of federal forfeiture. Every year, federal agencies share among themselves the proceeds of jointly conducted forfeitures. They also transfer hundreds of millions of dollars and property to state, local, and foreign law enforcement officials as compensation for their contribution to joint enforcement efforts.

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This is an overview of federal forfeiture law.¹ It sketches the origins and general attributes of forfeiture, describes the distribution of the hundreds of millions of dollars it generates annually, and identifies some of the constitutional issues it raises. Congress and state legislatures have authorized the use of forfeiture for more than 200 years.

Property and Trigger Crimes

Modern forfeiture is a creature of statute that calls for the confiscation of property related to a criminal offense. While there are some common themes and general patterns concerning the crimes that trigger forfeiture, the property subject to confiscation, and the procedures associated with forfeiture are matters of legislative choice and can vary greatly. Virtually every kind of property, real or personal, tangible or intangible, may be subject to confiscation under the appropriate circumstances.

Federal confiscation ordinarily begins with a crime, usually a federal crime, but occasionally a state or foreign offense. Statutes that outlaw conduct often house related forfeiture provisions. Confiscation is also accomplished by cross reference, sometimes multiple cross references. The Civil Asset Forfeiture Reform Act (CAFRA) supplies perhaps the most common example of forfeiture by multiple cross references. Section 981, its initial civil forfeiture provision, declares, among other provisions, that “[t]he following property is subject to forfeiture to the United States: . . . (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title).” “Specified unlawful activity,” means, among other things, “with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving” various kinds of offenses of violence or official corruption, for example. The term also includes “any act or activity constituting an offense listed in section 1961(1) of this title” [relating to Racketeer Influenced and Corrupt Organizations (RICO) which proscribes the use of predicate offenses to acquire or conduct the activities of a commercial enterprise] . . .” In addition to the federal crimes identified by citation, the RICO predicate offense list of Section 1961(1) mentions a category of state felonies. And Section 1961(1) specifies “any offense involving fraud connected with a case under title 11 [relating to bankruptcy].” Finally, it cross references as a RICO predicate offense “any act that is indictable under any provision listed in section 2332b(g)(5)(B) [defining federal crimes of terrorism].” Additionally, by virtue of 28 U.S.C. § 2461(c), property forfeitable under civil forfeiture provisions, such as those of 18 U.S.C. § 981, may be confiscated as part of a criminal prosecution.

Civil Forfeiture

Forfeiture follows one of two procedural routes: criminal or civil. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of the procedure which ends in confiscation. Criminal forfeitures are part of the criminal proceedings against the property owner, and confiscation is possible only upon the conviction of the owner of the property and only to the extent of the defendant’s interest in the property.

Civil forfeitures are accomplished using civil procedure. Civil forfeiture is ordinarily the product of a civil, in rem proceeding in which the property is treated as the offender. The guilt or

¹ This report is an abridged version of CRS Rept. No. 97-139, entitled *Crime and Forfeiture*, without the citations, footnotes, or appendices, found in the longer version. In both reports the term “forfeiture” and “confiscation” are used interchangeably.

innocence of the property owner is irrelevant; it is enough that the property was involved in a crime to which forfeiture attaches in the manner in which statute demands. Some civil forfeitures are accomplished administratively; some are not. Administrative forfeitures are, in oversimplified terms, uncontested civil forfeitures.

As a general rule, since the proceedings are brought against the forfeitable property itself in rem, actual or constructive possession of the property by the court is a necessary first step in any confiscation proceeding. The arrest of the property may be accomplished either by warrant under the Federal Rules of Criminal Procedure; or, if judicial proceedings have been filed, by a warrant under the Supplemental Rules of Certain Admiralty and Maritime Claims; or without warrant, if there is probable cause and other grounds under which the Fourth Amendment permits a warrantless arrest; or pursuant to equivalent authority under state law. Because realty cannot ordinarily be seized until after the property owner has been given an opportunity for a hearing, the procedure differs slightly in the case of real property.

The rules vary somewhat when forfeitable property is located abroad. Section 1355(b) of Title 28 of the U.S. Code vests jurisdiction over such forfeiture proceedings in any federal district court in the district where the forfeiture-triggering offense occurred or in the United States District Court for the District of Columbia. In addition, Congress provides a mechanism in 18 U.S.C. § 981(k) which permits the confiscation of funds in interbank accounts of a foreign bank held in this country when the foreign bank holds forfeitable assets on account overseas.

For the government, the civil forfeiture begins with seizure of the property and the filing of a civil complaint against the property. The arresting agency must notify anyone with an interest in the property of its intent to confiscate and provide an opportunity to request judicial forfeiture proceedings. Anyone with an interest in the property may contest confiscation with a verified claim under the Supplemental Rules. The government may serve a claimant with interrogatories seeking to confirm the validity of the claim and may petition the court to dismiss a claim for failure to respond to interrogatories or for want of standing.

CAFRA contains a number of provisions designed to soften some of forfeiture's harsher features. For example, claimants may enjoy an "innocent owner" defense under CAFRA that varies depending upon whether their ownership arose before or after the forfeiture-triggering offense. When they owned the tainted property before the offense, owners must establish that they did not know of the tainting conduct or did all that could be reasonably expected to prevent the property's misuse. Owners that acquired the tainted property after the offense must prove that they were good faith purchasers who were unaware of the taint. In either case, claimants bear the burden of proof by a preponderance of the evidence. CAFRA also authorizes legal representation of indigent property owners under some circumstances. In addition, it allows a court to reduce a forfeiture that would otherwise be unconstitutionally excessive. Moreover, when the seizure of the property causes an undue hardship, CAFRA affords an owner the opportunity to petition the court for release of the property pending the completion of forfeiture proceedings. Conversely, the government may be entitled to a restraining or protective order to preserve the property pending the completion of forfeiture proceedings.

Administrative (Nonjudicial) Forfeitures

In the interests of expediency and judicial economy, Congress has sometimes authorized the use of administrative forfeiture as the first step after seizure in "uncontested" civil forfeiture cases. It may be somewhat misleading to characterize administrative forfeitures as uncontested forfeitures, given the limitations that the government and claimants must overcome before the government is put to its burden in a judicial proceeding. The most obvious limitation on the government is

restriction on the nature of property subject to administrative forfeiture: (1) cash, currency, travelers' checks or the like; (2) conveyances used to transport or store controlled substances or precursor chemicals; (3) items that cannot be imported (contraband); or (4) other property worth less than \$500,000.00.

Following the seizure of the property, the government must notify those known to have an interest in the property and the public at large of the government's intent to confiscate and of the procedures to file a claim under the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. If there are viable claims, the government proceeds with its civil judicial complaint against the property. If there are no viable claims, the property is summarily declared forfeited.

When administrative forfeiture is unavailable, when a claimant has successfully sought judicial proceedings, or when the government has elected not to proceed administratively, the government may begin civil judicial proceedings by filing either a complaint or a libel against the property. In civil forfeitures governed by CAFRA, the government must establish that the property is subject to confiscation by a preponderance of the evidence. For most civil forfeitures, CAFRA establishes two "innocent owner" defenses—one for claimants with an interest in the property at the time the forfeiture-triggering offense occurred and the other for claimants with an interest acquired after the forfeiture-triggering offense occurred. The first is available to claimants either who were unaware that their property was being criminally used or who did all that could be reasonably expected of them to prevent criminal use of their property. The second is for good faith purchasers who did not know of the taint on the property at the time they acquired their interest. Even when the government establishes that property is subject to civil forfeiture, CAFRA affords a claimant the right to a judicial reduction of the amount of the confiscation, if the court determines the extent of the forfeiture is excessive in view of the gravity of the offense and claimant's culpability. When the court determines that the property is not subject to forfeiture, it must be released to its owner, assuming the property can be lawfully possessed by its owner. Regardless of the statutory procedure initially invoked, prevailing claimants may be entitled to compensation for damages to the property incurred while in federal custody, attorneys' fees, post-judgment interest, and in some instances pre-judgment interest.

Criminal Forfeiture

A bridge statute, 28 U.S.C. § 2461(c), permits confiscation using criminal forfeiture procedures whenever civil forfeiture is authorized elsewhere. Like civil forfeiture, criminal forfeiture is a creature of statute. Unlike civil forfeiture, criminal forfeiture follows as a consequence of conviction. While civil forfeiture treats the property as the defendant, confiscating the interests of the innocent and guilty alike, criminal forfeiture traditionally consumes only the property interests of the convicted defendant, and only with respect to the crime for which he is convicted. When the property subject to confiscation is unavailable following the defendant's conviction, however, the court may order the confiscation of other property belonging to the defendant in its stead (substitute assets).

The indictment or information upon which the conviction is based must list the property which the government asserts is subject to confiscation. When the trial is conducted before a jury, either party may insist upon a jury determination of the forfeiture issue. Since the court's jurisdiction does not depend upon initial control of the property, it need not be seized before forfeiture is declared. Although the courts are authorized to issue pretrial restraining orders to prevent depletion or transfer of property which the government contends is subject to confiscation, the Sixth Amendment right to the assistance of counsel precludes pretrial restraint of untainted

substitute assets necessary to pay for reasonable attorneys' fees. After conviction of the defendant, the government may elect to seek either confiscation of forfeitable property or a money judgment in the amount of its value. If the government seeks confiscation, the court must determine whether the statutory nexus between the property and the crime of conviction exists. If the government instead seeks a money judgment, the court must determine the amount the defendant must pay. A co-defendant, however, may not be held jointly and severally liable for the judgment if he received none of the tainted property.

Following the conviction, the court issues a preliminary forfeiture order or order for a money judgment against the defendant in favor of the government. Upon the issuance of a preliminary forfeiture order, the government must proclaim its intent to dispose of the property and notify any third parties known to have an interest in the property. Third parties with a legal interest in the forfeited property, other than the defendant, are then entitled to a judicial hearing, provided they file a timely petition asserting their claims. Third party claims must be grounded either in an assertion that they possessed a superior interest in the property at the time confiscation-trigger misconduct occurred or that they are good faith purchasers. The courts will not recognize the unsecured claims of general creditors to the property, but will look to state law to determine whether a third party has the requisite superior interest in the property. Regardless of whether third parties assert a superior interest or the status of a good faith purchaser, they bear the burden of establishing their claim by a preponderance of the evidence, and they may not challenge the district court's preliminary determination of forfeitability.

Although Rule 32.2 presumes court authority to enter a personal money judgment against a defendant, the only statute that explicitly conveys such authority is the bulk cash smuggling provision of 31 U.S.C. § 5332. Some courts have also read such authority into the substitute asset provision of the Controlled Substances Act adopted by cross reference. When the government is awarded a money judgment, it is not limited to the forfeitable assets the defendant has on hand at the time but may enforce the judgment against future assets as well.

Disposition of Forfeited Assets

Disposal of forfeited property is ordinarily a matter of statute. The pertinent statute may require that the proceeds of a confiscation be devoted to a single purpose, such as the support of education or deposit in the general fund. Intergovernmental transfers and the use of special funds, however, are the hallmarks of the more prominent federal forfeiture statutes. The Attorney General and the Secretary of the Treasury enjoy wide latitude to transfer confiscated property to federal, state, local, and foreign law enforcement agencies to the extent of their participation in the case.

Equitable Sharing an Adoptive Forfeiture: Adoptive forfeiture occurs when property is forfeitable under federal law because of its relation to conduct, such as drug trafficking, which violates both federal and state law. The Department of Justice "adopts," for processing under federal law, a forfeiture case brought to it by state or local law enforcement and in which the United States is not otherwise involved. Federal adoption is sometimes attractive because of the speed afforded by federal administrative forfeiture. It may also be attractive because forfeiture would be impossible or more difficult under state law or because law enforcement agencies would not share as extensively in the bounty of a successful forfeiture under state law. The circumvention restriction is no longer in effect, but the Treasury and Justice Departments insist that state and local law enforcement agencies indicate the law enforcement purposes to which the transferred property is to be devoted and that the transfer will increase and not supplant law enforcement resources. Existing policy permits adoptive forfeiture where the conduct triggering the seizure constitutes a violation of federal law.

Federal Funds: The lion's share of confiscated cash or the proceeds from the sale of confiscated property, however, is now deposited in either the Department of Justice Asset Forfeiture Fund, or the Department of the Treasury Forfeiture Fund. The Treasury and Justice Department Funds together receive over \$1.5 billion per year. Congress subsequently established the United States Victims of State Sponsored Terrorism Fund, which has distributed periodic payments to certain victims of terrorism, the fourth round of which will total an estimated \$85 million.

Department of Justice Asset Forfeiture Fund: Congress created the Department of Justice Asset Forfeiture Fund as part of the Comprehensive Crime Control Act of 1984. The Department of Justice administers the Fund, which receives confiscated cash and the proceeds from forfeitures conducted under the laws enforced or administered by the Department of Justice and the Department of Justice's equitable share of forfeitures conducted by other state, federal, or foreign law enforcement agencies. Before confiscated cash or the proceeds from the sale of other confiscated property is paid into the Fund, the Attorney General may often authorize it to be transferred to or shared with other federal, state, local, or foreign law enforcement agencies who have participated in the investigation or proceedings that resulted in confiscation.

After money has been paid into the Fund, the Attorney General may use it to pay: [1] forfeiture related expenses, [2] rewards to informants in illicit drug cases, [3] rewards to informants in forfeiture cases, [4] liens and mortgages against forfeited property, [5] remission and mitigation in forfeiture cases, [6] to equip cars, boats and planes for law enforcement purposes, [7] to purchase evidence of money laundering or of federal drug crimes, [8] state and local real estate taxes on forfeited property, [9] overtime, travel, training and the like for assisting state and local law enforcement personnel, [10] federal correctional construction costs, [11] the Special Forfeiture Fund, and [12] for joint state, local and federal cooperative law enforcement operations.

In the past, Congress has occasionally directed that the Fund be made available during a particular year and for a specific law enforcement purpose in anticipation of a surplus in the Fund after the statutory purposes had been served. At other times, however, it has authorized the Attorney General to tap this "super surplus" for any law enforcement or Justice Department purpose.

Department of the Treasury Forfeiture Fund: The Department of the Treasury Forfeiture Fund is administered by the Secretary of the Treasury and receives deposits of currency and proceeds from forfeitures under laws enforced or administered by the Department of the Treasury or the Coast Guard or law enforcement components of the Department of Homeland Security previously housed in the Treasury Department. Before confiscated cash or the proceeds from the sale of other confiscated property are paid into the Fund, the Secretary of the Treasury may also authorize transfer of the property to other federal, state, local, or foreign law enforcement agencies who assisted in its forfeiture. After money has been paid into the Fund, the Secretary of the Treasury makes one portion available to the Coast Guard in an amount reflecting its contributions. The moneys available for the Coast Guard may be used to equip cars, boats and planes for law enforcement purposes, to pay overtime and similar expenses for state and local law enforcement officers in a joint operation, and to satisfy environmental requirements before sinking hazards to navigation.

The Fund is otherwise available to the Secretary of the Treasury for a number of purposes, including paying: [1] expenses associated with the forfeiture, [2] claims against the property, [3] liens and mortgages against forfeited property, [4] remission and mitigation, [5] rewards for information concerning violations of the customs laws, [6] rewards for information or assistance resulting in a Department of Treasury forfeiture, [7] to equip cars, boats and planes for law enforcement purposes, [8] to purchase evidence of various crimes traditionally within the

jurisdiction of the Department, [9] to reimburse the expenses of private individuals associated with Department law enforcement activities, [10] for equitable sharing, if not accomplished prior to deposit in the Fund, [11] for “overtime salaries, travel, fuel, training, equipment, and other similar costs of State and local law enforcement officers that are incurred in joint law enforcement operations,” and [12] to train foreign law enforcement personnel in Department forfeiture related matters.

Victims of State Sponsored Terrorism Fund: A Special Master administers the Fund that receives revenues from the penalties imposed for violations of the International Economic Emergencies Act (IEEPA) and the Trading with the Enemy Act, among other sources. The Special Master authorized distributions from the Fund in 2017, 2019, and 2020.

Crime Victims Fund: Forfeitures provide a limited source of revenue for the Crime Victims Fund. The Justice Department’s Office for Victims of Crime in the Office of Justice Programs administers the Crime Victims Fund created by the Crime Control Act. The Fund receives revenues collected as fines for violations of federal criminal law, as special assessments against misdemeanor offenders, as a consequence of jumping bail, and from the operation of the espionage and “Son of Sam” forfeiture provisions. The Fund is available for grants to the States for crime victim compensation and assistance programs, for HHS child-abuse prevention and treatment grants, and to reimburse the courts for administrative costs.

Constitutional Considerations

In 1993, the Supreme Court handed down a series of decisions that seemed to signal its uneasiness with the trends in forfeiture law. Yet thereafter, it seemed to deny any inclination to totally repudiate the government’s broad forfeiture authority, although it incrementally began to define the constitutional borders of that authority.

Eighth Amendment: The Eighth Amendment states in its entirety that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In 1993, the Supreme Court announced that the Eighth Amendment’s Excessive Fines Clause applies not only to criminal forfeitures but to some civil forfeitures as well. The full impact remained uncertain initially, because the Court declined to articulate a test by which to measure particular forfeitures against the Clause’s proscriptions. Then in *United States v. Bajakajian* it selected the standard used as the measure under the parallel Cruel and Unusual Punishment Clause of the Eighth Amendment: “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant’s offense.” A few circuits also suggest that the Excessive Fines Clause may preclude a forfeiture that permanently impoverishes the property owner. CAFRA permits the court to reduce or eliminate a forfeiture that would otherwise be unconstitutionally excessive.

Double Jeopardy: The Supreme Court’s conclusion in *Austin v. United States* that certain civil forfeitures might be considered punitive for purposes of the Eighth Amendment’s Excessive Fines Clause seemed to have obvious double jeopardy implications. Yet, the Court in *United States v. Ursery* reaffirmed its faith in the traditional tests. Forfeitures that Congress has designated as remedial civil sanctions do not implicate double jeopardy concerns unless “the statutory scheme [is] so punitive either in purpose or effect as to negate Congress’ intention to establish a civil remedial mechanism.”

Sixth Amendment: The Sixth Amendment assures the accused in criminal proceedings the right to a jury trial, to the assistance of counsel, and to confrontation of accusers. The Supreme Court long ago held that the right to confrontation does not apply in civil forfeiture cases and has not revisited the issue. The right to the assistance of counsel in criminal cases does not prevent the

government from confiscating tainted fees paid to counsel or, upon a probable cause showing, from obtaining a restraining order to freeze assets preventing the payment of attorneys' fees. Nor, according to one court, does it entitle an otherwise indigent property owner to the appointment of counsel for substitute asset forfeiture proceedings. It does, however, preclude the pretrial restraint of untainted "substitute assets" intended to retain counsel. The Amendment is by its terms only applicable "in all criminal prosecutions," and consequently there is no constitutionally required right to assistance of counsel in civil forfeiture cases.

The Court's opinion in *Libretti v. United States*, to the effect that there is no right to a jury trial on disputed factual issues in criminal forfeiture, rests on a somewhat battered foundation. "Any fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court declared in *Apprendi v. New Jersey*, "must be submitted to a jury, and proved beyond a reasonable doubt." The fact that criminal forfeiture is a penalty *within* "the prescribed statutory maximum" and that Rule 32.2 of the Federal Rules of Criminal Procedure affords an expanded jury determination right would seem to shield federal criminal forfeiture procedures from *Apprendi*-based attacks. Although *Apprendi*'s implications for the preponderance standard might appear slightly more ominous, the federal appellate courts have either explicitly or implicitly declined to apply *Apprendi* to criminal forfeitures.

Due Process: Fairness is the hallmark of due process. Due process objections can come in such a multitude of variations that general statements are hazardous. That said, the courts have acknowledged that due process demands that those with an interest in property which the government seeks to confiscate be given notice and opportunity for a hearing to contest. Actual notice is not required but the government's efforts must be "reasonably calculated, under all the circumstances, to apprise" of the opportunity to contest. In some instances, due process permits the initiation of forfeiture proceedings by seizing the personal property in question without first giving the property owner either notice or the prior opportunity of a hearing to contest the seizure and confiscation. But absent exigent circumstances, the owner is entitled to the opportunity for a pre-seizure hearing in the case of real property where there is no real danger that the property will be spirited away in order to frustrate efforts to secure *in rem* jurisdiction over it.

Several provisions authorize pretrial restraining orders to preserve the availability of forfeitable property. Due process, however, requires a probable cause determination of the forfeitability of property made subject to a post-seizure, pretrial restraining order designed to prevent dissipation. Due process does not require an adversarial determination of the existence of probable cause; a grand jury indictment will do. While due process clearly limits the circumstances under which the property of an innocent owner may be confiscated, the Court has declined the opportunity to broadly assert that due process uniformly precludes confiscation of the property of an innocent owner. Any delay between seizure and hearing offends due process only when it fails to meet the test applied in speedy trial cases: Is the delay unreasonable given the length of delay, the reasons for the delay, the claimant's assertion of his or her rights, and prejudice to the claimant?

In other challenges, the lower federal courts have found that due process permits: postponement of the determination of third-party interests in criminal forfeiture cases until after trial in the main; an 11-year delay between issuance of a criminal forfeiture order and amendment of the original order to reach overseas assets; and fugitive disentitlement under 28 U.S.C. § 2466.

CAFRA established a timetable within which the government must restart forfeiture proceedings following a claimant's successful motion setting aside an earlier confiscation declaration.

Finally, counsel in *United States v. Monsanto* and *Caplin & Drysdale v. United States*, challenged on both Sixth Amendment right to counsel and Fifth Amendment due process grounds the

confiscation of property that paid for, and that was destined to pay for, the services of defense counsel. The Supreme Court rejected both assertions.

Article III - Forfeiture of estate: Article III of the United States Constitution implicates two forfeiture issues: forfeiture of estate and standing. The Constitution mentions forfeiture explicitly only in Section 3 of Article III: “[N]o attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.” Forfeiture of estate is the confiscation of all of an attainted defendant’s property without any necessary connection to the crime of conviction. The section on its face seems to restrict forfeiture of estate only in treason cases, although at least one court has suggested a broader scope. Substantive due process concerns may explain why from 1790 to 1984, Congress barred forfeiture of estate as a punishment for non-treason crimes as well. Even if Article III when read in conjunction with the Due Process Clause reaches not only treason but all crimes—lest forfeiture, the more severe penalty, be precluded for the most serious offense, but permitted for lesser crimes—Article III speaks of no other forfeiture than forfeiture of estate.

Standing: Article III declares that the judicial power of the United States extends to certain cases and controversies. If a litigant has no judicially recognized interest in the outcome of such a case or controversy, he is said to lack standing and the court lacks jurisdiction to proceed. In some instances, a statute or rule imposes additional, more demanding standing requirements. So it is with civil forfeiture, where claimants face a statutory standing prerequisite. In order to meet Article III’s case-or-controversy requirement, a plaintiff (including a civil forfeiture claimant) must establish the three elements of standing: namely, that the plaintiff suffered an injury in fact, that there is a causal connection between the injury and conduct complained of, and that it is likely the injury will be redressed by a favorable decision. Claimants in civil forfeiture actions under CAFRA or the Controlled Substances Act, which recognize an innocent owner defense, initially satisfy this test by alleging that they have a colorable interest in the property (including an ownership interest or a possessory interest).

Fourth Amendment: The Fourth Amendment condemns unreasonable search and seizures. The hallmark of a seizure which is not unreasonable is the presence of a warrant issued upon probable cause. Nevertheless, warrantless seizures or those grounded in less than probable cause are not unreasonable under all circumstances. For example, authorities may seize property without a warrant based on exceptions recognized for searches incident to arrest or for the search of vehicles. Moreover, several of the older civil forfeiture statutes, particularly those arising in a customs or maritime context, reflected the traditional view that contraband and other forfeitable property may be seized without observing the normal demands of the Amendment’s requirements. Some question may persist over whether warrantless seizures or seizures with less than probable cause are generally permissible in forfeiture cases, regardless of the want of any customs or maritime connection. In any event, unlawfully seized evidence may not be used in the forfeiture proceedings, but unlawful seizure of the res does not doom the proceedings as long as there is sufficient untainted evidence to support the confiscation.

Ex Post Facto: Neither the states nor the federal government may enact ex post facto laws. The prohibition applies both to laws which make criminal conduct which was innocent when committed and laws which increase the penalties for a crime over those which attached when a crime was committed. The ex post facto bar, however, poses no impediment to the application of a new sanction such as forfeiture to a continuing crime which straddles the date of enactment.

First Amendment: When confiscation involves material entitled to First Amendment protection, more demanding standards must be met. In *Fort Wayne Books, Inc. v. Indiana*, the Court held that while a single book or film might be seized upon an ex parte probable cause showing, books or films could not be taken completely out of circulation until after an adversary hearing on their

obscenity. Yet, the First Amendment stands as no bar to the use of criminal forfeiture to punish those convicted of engaging in the commercial exploitation of obscenity, nor to the use of civil forfeiture to confiscate equipment used by an unlicensed radio station.

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