

HB

52

Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
Phone: (907) 465-2995
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Interim:
716 W 4th Avenue, Suite 300
Anchorage, AK 99501-2133
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Representative Lesil McGuire

Chair, Judiciary Committee

House Bill 52

“An Act relating to the forfeiture of property used to possess or distribute child pornography”

Sponsor Statement and Sectional Analysis

While providing instant access to useful and valuable information for business and academic research, the expansion of the Internet and corresponding development of computer technology have also created an environment in which new types of criminal enterprise are flourishing. Perhaps the most pernicious and predatory are the ever-increasing crimes against children.

It is becoming far more common for pedophiles to seek new victims through on-line chatrooms and email and for child pornography profiteers to use these technologies as a means to distribute their materials. HB 52 will provide the state courts and law enforcement agencies another tool to combat these sexual predators by giving the courts additional punitive sentencing options and, in turn, awarding forfeited computer technology back to law enforcement agencies for ongoing monitoring operations.

HB 52 will make it possible for law enforcement to stay on top of this rapidly changing industry without spending more government dollars. Advances in technology seem to happen on an almost daily basis, and new technology can frequently outperform previous models. This creates greater restrictions for police detection and monitoring operations thus leaving them at a disadvantage. In order for law enforcement to effectively combat computer crime, they must have access to the necessary hardware.

There are forfeiture laws in place across the country and at the federal level. Several other states already have similar laws on the books relating to the forfeiture of computers used in sex crimes. The use of computers in the commission of sex crimes is a national problem, and Alaska can look toward other states' laws in this area to draw realistic conclusions about the likely impact here in our own state.

HB 52 will amend AS 11.41 and AS 11.61, respectively, by adding the necessary statutory language for the forfeiture of hardware used either in a sexual offense or in indecent viewing or photography or child pornography.

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HB 52 – Sectional Analysis

Section 1. Provides legislative intent that in cases where the owner of the forfeited property is innocent of the crime, their property is returned to them following existing procedure and as the courts deem reasonable.

Section 2. Adds a new section that authorizes forfeiture of property, specifically electronic equipment as defined in the section, used to aid in the commission of a sexual offense under AS 11.41.410 – 11.41.470 including inchoate forms of those sexual offenses.

Section 3. Adds a new section that authorizes forfeiture of property, specifically electronic equipment as defined in the section, used to aid in the commission of indecent photography or child pornography under AS 11.61.123 – 11.61.127 including inchoate forms of those offenses.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 52
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An Act related to forfeiture of property BRU Legal and Advocacy Services
used in sexual offense Component Public Defender Agency
 Sponsor Rep. McGuire
 Requester (H) STA Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would have some effect on Agency operations, simply because if the state requests forfeiture, it will make the sentencing more complicated in some cases. However we do not anticipate much of an impact.

Prepared by: Linda K. Wilson, Deputy Director Phone (907)-334-4416
 Division Public Defender Agency Date/Time 2/11/03 7:07 AM
 Approved by: Mike Miller, Commissioner Date 2/11/2003
 Agency Department of Administration

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 52
 () Publish Date: _____

Revision Date/Time (Note if correction): N/A Dept. Affected: Public Safety
 Title An act relating to the forfeiture of property used BRU AST Detachment
to possess or distribute child pornography.... Component AST Detachment
 Sponsor Representative McGuire
 Requester House State Affairs Component No. 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact to the department.

Prepared by: Lieutenant Matthew Leveque Phone 907 269-0390
 Division Alaska State Troopers Date/Time 2/11/03 8:09 AM
 Approved by: William Tandeske, Commissioner Date 2/11/2003
 Agency Department of Public Safety



George P. Wuerch,
Mayor

Municipality of Anchorage

Anchorage Police Department

Walt Monegan, Chief



February 6, 2003

Representative Lesil McGuire, Chair
House Judiciary Committee
716 W. 4th Avenue, Suite 300
Anchorage, AK 99501-2133

Dear Representative McGuire:

This letter is written in support of HB 52, An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense.

Law enforcement agencies are often required to return equipment used in these crimes to the perpetrator or to another person whom the perpetrator has designated. Many of these items have been specially designed or adapted for no other purpose than to commit specific criminal acts. This equipment is generally costly and sometimes hard to obtain.

We feel it is necessary and appropriate to deprive those convicted of sexual crimes of the means to commit them again or allow others to use them for the same purpose. We therefore offer our support for House Bill 52. Thank you for bringing this legislation forward.

Sincerely,

A handwritten signature in black ink, appearing to read "William Miller".

William Miller
Deputy Chief

Subject: HB 52

Date: Fri, 07 Feb 2003 17:35:27 -0500

From: Polarcop@netscape.net (Alaska FORCES Task Force)

To: heath_hilyard@legis.state.ak.us

Heath,

Sorry about the delay but I have been swamped and am pretty much alone using old equipment trying to keep up with the fastest changing landscape seen by man. I will basically refer to the comments made in my previous letters and follow this theme:

I run a task force representing the digital evidence recovery and computer crime interests of law enforcement agencies throughout the interior. Digital evidence in cases of sexual crimes has proven to be extremely valuable in obtaining convictions. The sentencing of convicted sex offenders should include the loss of the instruments of the crime. To return a computer to a sex offender who used it to stalk, harass, threaten and assault a person is not only morally reprehensible but is tantamount to encouraging it to happen again. We forfeit cars used by drunken drivers, weapons and almost every other instrumentality but computers and digital devices have been returned for unknown reasons.

The victims message should be that the state will do everything in it's power to prevent it from happening again. The public message should be that if you choose to be a sex offender, we choose to punish you by taking anything you use to be one. The offender message will be that you will have to go out and buy another camera, computer or other device to offend again. It won't get cheaper.

The forfeited equipment can be used by investigators to further process digital evidence, conduct investigations or aid in law enforcement efforts in some way. Even if they are donated to charity, they will not be used by the offender again.

It is for the children, victims of any gender, and the good people of the state.

Sincerely,

Alaska FORCES Task Force
Marc Poeschel, Coordinator
<http://www.akforces.uaf.edu/>

The NEW Netscape 7.0 browser is now available. Upgrade now!
<http://channels.netscape.com/ns/browsers/download.jsp>

Get your own FREE, personal Netscape Mail account today at
<http://webmail.netscape.com/>

Subject: [Fwd: Regarding House Bill 52]
Date: Mon, 10 Feb 2003 10:25:48 -0900
From: Representative Lesil McGuire <Representative_Lesil_McGuire@legis.state.ak.us>
Organization: Alaska State Legislature
To: Heath Hilyard <Heath_Hilyard@legis.state.ak.us>

Subject: Regarding House Bill 52
Date: Sun, 2 Feb 2003 18:14:07 -0900
From: "Ben Granade" <bgranade@customcpu.com>
To: <Representative_Bruce_Weyhrauch@legis.state.ak.us>,
<Representative_Lesil_McGuire@legis.state.ak.us>
CC: <Representative_Pete_Kott@legis.state.ak.us>

February 2, 2003

Hon. Bruce Weyhrauch
Chairman, House State Affairs Committee

Hon. Lesil McGuire
Chairwoman, House Judiciary Committee

regarding: House Bill 52

Dear Chairman Weyhrauch and Chairwoman McGuire:

The Naturist Action Committee (NAC) is the political arm of The Naturist Society (TNS), a membership organization that represents the interests of many thousands of naturists across North America, including many in the state of Alaska. The Naturist Action Committee is strongly opposed to House Bill 52, which will be considered by the Judiciary Committee and the House State Affairs Committee of the Alaska House of Representatives.

Naturists are skinny dippers and nude sunbathers who believe there is nothing shameful about the unclothed human body. Naturism is a non-sexual family oriented activity that includes children and adults. It is a formal name for an activity that has been an informal tradition in Alaska and elsewhere for years and years.

House Bill 52 represents itself as addressing sex criminals. However, in its present form it would clearly punish skinny dippers as well, allowing the forfeiture of "property used to aid" the commission of the non-sexual activity of skinny dipping and other instances of mere nudity that are absent sexual context. The Naturist Action Committee, on behalf of the membership of TNS, strongly opposes House Bill 52 in its present form on the simple grounds that by adding the forfeiture of property as a punishment for skinny dipping, the punishment no longer fits the crime.

Please consider the following table, which summarizes the sections addressed by HR 52 in Chapter 11.41 of the Alaska Statutes:

11.41.410 unclassified	Sexual assault in the first degree	felony,
11.41.420 class B	Sexual assault in the second degree	felony,
11.41.425 class C	Sexual assault in the third degree	felony,
11.41.427	Sexual assault in the fourth degree	misdemeanor,

class A
11.41.434 Sexual abuse of a minor, first degree felony, unclassified
11.41.436 Sexual abuse of a minor, second degree felony, class B
11.41.438 Sexual abuse of a minor, third degree felony, class C
11.41.440 Sexual abuse of a minor, fourth degree misdemeanor, class A
11.41.445 Incest
felony, class C
11.41.455 Unlawful exploitation of a minor
felony, class B
11.41.458 Indecent exposure, first degree
felony, class C
11.41.460 Indecent exposure, second degree misdemeanor,
class B *

* class A only if in the presence of a person under 16 years of age

Of the dozen sections of Chapter 11.41 identified by HB 52 as candidates for forfeitures, only 11.41.460 does not describe activity with sexual content. In a list dominated by felonies, the base offense of section 11.41.460 is a class B misdemeanor, described by the term "reckless", but not by the term "sexual."

Tossing skinny dipping, nude sunbathing and other non-sexual nudity into the mix with the genuine sexual offenses for which property forfeiture would be allowed would surely make very bad law for the State of Alaska. If HB 52 were to be passed into law, naturists would have no choice other than to challenge it in court. We ask you to report HB 52 unfavorably from the committee.


As an alternative, we suggest that the bill be amended to exclude section 11.41.460, Indecent exposure in the second degree. Such a revision could be accomplished by a simple committee amendment affecting only two lines of the bill, as follows:

07 * Section 1. AS 11.41 is amended by adding a new section to read:
08 Sec. 11.41.468. Forfeiture of property used in sexual offense.
Property
09 used to aid a violation of AS 11.41.410 - 11.41.470 11.41.458 or to
aid the solicitation of,
10 attempt to commit, or conspiracy to commit a violation of AS
11.41.410 - 11.41.470 11.41.458
11 may be forfeited to the state upon the conviction of the offender.

The effect of such an amendment would be to place the emphasis of HB 52 where it was originally intended to be, while avoiding a disproportionate penalty on a clearly non-sexual activity. On behalf of naturists throughout Alaska and elsewhere, I thank you in advance for your thoughtful consideration.

Respectfully,

Ben T Granade
Area Representative, Alaska
Naturist Action Committee
18335 McCrary Rd.
Eagle River, AK 99577
(907) 696-5831

 winmail.dat	Name: winmail.dat Type: application/ms-tnef Encoding: base64
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FORFEITURE IS REASONABLE, AND IT WORKS

Stefan D. Cassella*

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations -- from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal criminal code.

Why do forfeiture?

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. Like the statutes the First Congress enacted in 1789, the modern laws allow the government to seize contraband -- property that is simply unlawful to possess, like illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. For example, if drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its use time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has the right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits -- and any property traceable to it -- thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims -- like carjacking or fraud -- we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and as a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence. In fact, in many cases, prosecution and incarceration are not needed to achieve the ends of justice. Not every criminal act must be answered with the slam of the jail cell door. Sometimes, return of the property to the victim and forfeiture of the means by which the crime was committed will suffice to ensure that the community is compensated and protected and the criminal is punished.

The parade of horrors

The expansion of forfeiture into all of these areas has, of course, been controversial. When laws that were designed to seize pirate ships from privateers are applied, over the course of a decade, to the seizure of homes, cars, businesses and bank accounts, there are a lot of issues to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far, in violation of the Excessive Fines Clause of the Eighth Amendment? The ten forfeiture cases that the Supreme Court has had on its docket in the past five terms are part of this sorting out process. There are certain to be more; and Congress will need to pass legislation to fill in many of the loopholes.

An informed debate on these issues is welcome. The debate is not informed, however, if it is muddled by the misconceptions and plain old-fashioned misstatements that seem to pop up in every article critical of asset forfeiture. Roger Pilon's article, containing the usual parade of horrors, is a good example.

Once again we are told that forfeiture is based on an absurd legal "fiction" that the property is guilty of the crime, which implies that property can be forfeited without proof that a crime was committed by a real live person. We're told that the government can seize property "almost at will," i.e. without due process, and that innocent people find the process so unfair that they walk away from their property without filing claims. And we're told that even when they do file claims, innocent owners just don't have any rights. Let's see if we can't inject a little truth and understanding into the debate on these points.

The legal "fiction"

There are three types of forfeiture under federal law: administrative forfeiture, civil judicial forfeiture, and criminal forfeiture. An administrative forfeiture is essentially a default proceeding. It occurs when property is seized and no one files a claim contesting the forfeiture. By definition, all administrative forfeitures are uncontested. Between 80 (eighty) and 85 (eighty-five) percent of all forfeitures handled by the Department of Justice fall into this category.

If someone does file a claim to the property, the government has a choice (assuming Congress has provided both options by statute). It can file a civil complaint against the property in district court, thus commencing a civil judicial forfeiture; or it can include a forfeiture count in the indictment in a criminal case, which sets the stage for a criminal forfeiture. In 1995, the Justice Department began aggressively training criminal prosecutors in the use of the forfeiture laws, so that now more than half of all contested forfeitures are criminal forfeitures.

Just because a forfeiture is handled administratively or civilly, of course, doesn't mean that there isn't a related criminal case. In all forfeiture cases there must be proof that a crime was committed by someone. In fact, in more than eighty percent of all forfeitures, including administrative and civil forfeitures, there is a parallel arrest and/or criminal prosecution. There wouldn't have been such a wail and cry about forfeiture constituting a violation of the Double Jeopardy Clause a few years ago if that weren't so. (Between the Ninth Circuit's decision in *United States v. \$405,089.23* in 1994 and the Supreme Court's decision putting the double jeopardy issue to rest in *United States v. Ursery*, thousands of federal prisoners filed post-conviction actions alleging that their criminal conviction and the civil forfeiture of their property constituted double jeopardy.)

The legal "fiction" that the property is "guilty" of the crime is simply a shorthand for the way a civil forfeiture case is styled: *United States v. \$405,089.23*, *United States v. 92 Buena Vista Ave.*, and so forth. In legal parlance, the property in such a case is the "defendant." But property doesn't commit crimes; people do. If there isn't proof that a person committed a crime, there is no forfeiture. If our normally verbose legal system styled its civil forfeiture cases to set forth the full legal theory, this would be obvious. The above cases, for example, might have been called *United States v. \$405,089.23 in Proceeds Earned by Charles Arlt From Selling Methamphetamine*; or *United States v. A Residence at 92 Buena Vista Ave. Purchased with Drug Proceeds that Joseph Brenna, a Drug Dealer, Gave to His Girlfriend*.

In short, forfeiture is a way of reaching the property involved in a crime, but the focus is on the crime, without which there can be no forfeiture.

Why do civil forfeiture?

If all forfeitures involve the commission of a crime, and the vast majority involve an arrest or prosecution, why does the government use civil forfeiture at all? It is not, as many contend, because it is necessarily easier. To the contrary, the easiest way to forfeit a criminal defendant's property in many cases is not to file a separate civil action, but to present the forfeiture issue to the same jury that just convicted the defendant in the criminal case. But sometimes, criminal forfeiture isn't available or doesn't make sense.

Take the administrative forfeiture cases for example. There is no point in including a criminal forfeiture count in an indictment and presenting the issue to a jury if the defendant is not going to contest the forfeiture. If a defendant facing criminal conviction for drug trafficking thinks it pointless to contest the forfeiture of the cash seized from him as drug proceeds at the time of his arrest, it is equally pointless to clutter the indictment with a forfeiture count when administrative forfeiture will answer.

What about the contested forfeitures that are done civilly? The reasons for this are many. First, while there are over 100 civil forfeiture statutes, there are relatively few criminal forfeiture statutes. Drug proceeds can be forfeited either civilly or criminally, for example, but firearms, gambling proceeds, vehicles used to smuggle illegal aliens, and counterfeiting paraphernalia can only be forfeited civilly. See 28 U.S.C. §2461(a). This is a problem Congress needs to fix.

Second, criminal forfeiture requires a federal conviction for the crime giving rise to the forfeiture. If the defendant is dead or is a fugitive, there can be no prosecution and therefore no criminal forfeiture. If the defendant was prosecuted in a State case, the federal forfeiture has to be civil, because there is no federal prosecution for the criminal offense. And if the defendant is prosecuted for one crime, but the property was involved in a related but separate crime, the forfeiture has to be civil, because the criminal forfeiture is limited to the offense of conviction. For example, drug proceeds seized from a defendant at the time of his arrest must be forfeited civilly if the defendant is charged with possession of drugs with intent to distribute, because such money was necessarily the proceeds of an earlier drug deal, not the one for which the defendant is actually prosecuted.

Third, and perhaps most important, criminal forfeiture is limited to the property of the defendant. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. For example, if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane. But suppose the only person arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third-party in South America, or by the pilot jointly with his spouse, criminal forfeiture is pointless.

The same is true if we want to forfeit a crack house. We can prosecute the tenants in the building until the cows come home, but we will never be able to forfeit the building criminally if the tenants don't own it. If the building belongs to a slumlord who allowed his property to be turned into a crack house, we need civil forfeiture to shut it down.

Due Process

Whatever the reasons why civil forfeiture is essential to federal law enforcement, it goes without saying that the process must be fair. All property owners -- whether they be criminal defendants or third parties -- are entitled to due process of law. Mr. Pilon contends that due process is lacking. He says that the government can seize property "almost at will," that officials can "seize property, real or personal, without notice or hearing," and that innocent parties find the system so daunting that they abandon their property without filing a claim. On all points, he is greatly mistaken.

Seizures of property for forfeiture are governed by the same rules that govern seizure of property for evidence — the search and seizure requirements of the Fourth Amendment. See *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992). If federal agents want to seize property for forfeiture, they have to get a warrant, unless one of the recognized exceptions to the Fourth Amendment applies, like when cash is found in plain view in a vehicle that can be driven away, and there is probable cause to believe it's drug proceeds, or when property is found during a search incident to a lawful arrest. In fact, in many instances, forfeiture seizures are more limited than their evidentiary counterparts. See 18 U.S.C. §981(b)(2) (in money laundering cases, warrantless seizures are authorized during searches incident to arrest, but not in other exigent circumstances).

In real property cases, the rules are still more restrictive. In *United States v. James Daniel Good Property*, 114 S. Ct. 492 (1993), the Supreme Court held that real property may not be seized at all, even with a warrant based on a showing of probable cause, until the property owner has been given notice and an opportunity to be heard. In short, in real property cases, the Due Process Clause of the Fifth Amendment requires the government to give property owners more "process" than is due under the Fourth Amendment.

Moreover, seizing the property isn't the end of the process; it's only the beginning. If someone wants to contest a forfeiture he has a right to file a claim, thereby forcing the government to file a civil or criminal forfeiture action in federal court. If the case is civil, the claimant has all the rights that attend normal civil litigation, including the right to discovery and the right to a trial by jury. Finally, the forfeiture verdict must be based on a preponderance of the admissible evidence, not the probable cause evidence that was sufficient for the seizure.

Of course, any system can be improved. The Justice Department has proposed legislation to make the government carry the burden of proof in civil forfeiture cases. We also have suggested making it easier for people to file claims in forfeiture cases by extending the filing deadlines, and we have proposed a remedy for those whose property is damaged in government custody. (The Justice Department's legislative proposal and supporting testimony are published in the record of the Hearing on the Civil Asset Forfeiture Reform Act, H.R. 1916, House Committee on the Judiciary, 104th Congress, 2d Sess., Serial No. 94, July 22, 1996.) But it is preposterous to say that property owners are denied due process under current law.

The Uncontested Forfeitures

What should we make of the fact that so many forfeitures are uncontested? The critics, of course, see this as evidence that innocent property owners are walking away from their property without filing a claim because the procedures are unfair. But the opposite is far more likely. Four out of five forfeitures are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless. A defendant charged with smuggling illegal aliens, for example, might see little advantage in contesting the forfeiture of the truck he was driving when he was arrested and the aliens were found. Remember, eighty percent of all forfeitures involve a parallel arrest or prosecution. Those are cases in which the defendant is in court anyway, has counsel, and yet most of the time does not object to the forfeiture.

Certainly, there are still due process issues to be worked out. One of the most nettlesome involves the current flood of post-conviction pleadings being filed by federal prisoners who contend that they didn't contest forfeiture actions because they didn't receive proper notice. See e.g. *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996). Most commonly, the prisoners complain that the government sent the notice to the wrong jail or to a home address when the government knew that the person was incarcerated. Criminals have due process rights just like everyone else, so the government must find a way to provide

notice of forfeiture actions to persons being held in jail. But these are hardly cases that involve innocent claimants not filing claims because the procedures are stacked against them.

Innocent Owners

In his discussion of *Bennis v. Michigan*, Mr. Pilon makes a persuasive argument that the Constitution does not adequately protect innocent owners in civil forfeiture cases. It is an argument, however, that has little relevance to federal forfeiture law.

Bennis, it must be remembered, was a State case. Michigan, apparently, does not provide statutory protection for innocent owners, and the Supreme Court held that no such protection is required by the Due Process Clause. Fair enough. But the fact that the Constitution doesn't protect innocent owners doesn't mean that the legislature cannot do so. In fact, Congress has included an innocent owner defense in virtually all of the most widely used federal forfeiture statutes. For example, the drug statutes, 21 U.S.C. §881(a)(4) and (7), say that neither vehicles nor real property, respectively, may be forfeited if they were used to commit a crime without the knowledge or consent of the owner.

Mr. Pilon's claim that "hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them" is just plain wrong. Even a property owner who "knows" that his property is being used for an illegal purpose is protected from forfeiture if he shows that he took all reasonable steps to prevent the activity. See *United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), cert. denied, 111 S. Ct. 1017 (1991); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

For example, the owner of a residential hotel doesn't have to put a stop to drug transactions on his property; he just has to do what a reasonable owner would do to try to stop it, like call the police, evict tenants convicted of committing drug crimes on the premises, and install security devices like locks and adequate lighting. See *United States v. All Right, Title and Interest (Kenmore Hotel)*, 77 F.3d 648 (2d Cir. 1996).

What Congress Can Do

A key provision in the Justice Department's legislative proposal would codify this concept and thus extend the innocent owner defense to all federal forfeiture statutes. In addition to the other due process reforms discussed above, this would go a long way toward making sure that the forfeiture laws are up to date and protect the rights of all property owners. But there is more that Congress can do to enhance the forfeiture laws.

First, the criminal forfeiture statutes should be revised to make sure the government can use them in all cases where it's appropriate to do so. Criminal forfeiture should be available wherever civil forfeiture is authorized. The government also needs better tools to enforce criminal forfeiture judgments against convicted defendants, and needs to be able to restrain property subject to forfeiture, including substitute assets, pre-trial, to make sure that the assets are still around once the defendant is convicted.

Also, there is no rhyme or reason to the current forfeiture laws regarding the forfeiture of criminal proceeds. We can forfeit proceeds in drug cases, but not in fraud cases; we can forfeit the money paid to a "bag man" in a money laundering case, but not the money paid to a "hit man" in a murder-for-hire

case. All criminal proceeds should be subject to forfeiture, and the term "proceeds" should be defined to mean gross proceeds, not net profits. It is absurd that some courts have allowed heroin traffickers to deduct their overhead expenses from the amount of proceeds subject to forfeiture. See *United States v. McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996).

In these and many other ways, the forfeiture laws can be improved both to protect the rights of property owners and to allow the government to make full use of this dramatically successful law enforcement tool. Congress has that opportunity this year. If we can avoid the misstatements and misconceptions that serve only to polarize the debate, law enforcement, defense attorneys and legislators can work together to produce a genuinely comprehensive and effective body of laws to make forfeiture work for all of us.

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House Bill 52

Hello,

My name is Janet Brown. I'm co-founder of a group called P.O.P. I'm a mom whose life has been affected by a sexual predator. My daughter was raped by her father... my husband.

During the investigation there was a variety of electronic evidence...

- 1) Video tapes of children while they slept showing their private areas
- 2) Video tapes of an unconscious victim being sexually assaulted & raped
- 3) A voyeur type video taken in my home of a family member taking a shower
- 4) Audio cassettes of a sexual assault
- 5) Pictures of unknown females... no faces just body parts
- 6) Scanned pictures with enlarged body parts & reprinted over 160 times

This evidence was documented back 20 years.

The Computer & Video Camera
Along with a 35mm camera played
a big part in fulfilling this predators
fantasies. To return these items
to him upon ^{his} release from jail would
surely be a catastrophe. Being in
denial that he has a problem &
with access to these items will
definitely guarantee a new victim.
The return of any of these (condiscated)
items needs to be denied.

So I'm asking you for my
daughter and any future victims to
support HB#52. Give these
sexual predators one less avenue
to having access to our children
"Put ~~their~~ rights of our
children first... ^{no deep as well as thought} making their
lives safer & more secure
~~thereby by putting the needs~~
~~of our child~~

Thank you