ORIGINAL #4829

TRANSCRIPT OF PROCEEDINGS

JUDICIAL CONFERENCE OF THE UNITED STATES

ADVISORY COMMITTEE ON CRIMINAL RULES

HEARING ON

PROPOSED CHANGES TO RULE 11

AND RULE 32.2

Pages 1 Thru 211

Washington, D.C.
April 27, 1998

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Washington, D.C. 20002
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Monday, April 27, 1998

8:30 a.m.

One Columbus Circle, N.E.
Washington, D.C. 20544

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P A R T I C I P A N T S

ADVISORY COMMITTEE ON CRIMINAL RULES

MEMBERS PRESENT:

Honorable W. Eugene Davis, Chair

Honorable Edward E. Carnes
Honorable George M. Marovich
Honorable David D. Dowd, Jr.
Honorable John M. Roll
Honorable Tommy E. Miller
Honorable Daniel E. Wathen
Professor Kate Stith
Robert C. Josefsberg, Esq.
Darryl W. Jackson, Esq.
Henry A. Martin, Esq.
Roger A. Pauley, Esq.

ALSO PRESENT:

Professor David A. Schlueter, Reporter
Honorable William R. Wilson, Jr., Liaison Member
Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

James B. Eaglin, Federal Judicial Center
Joseph F. Spaniol, Jr.
John K. Rabiej, Chief, Rules Committee Support Office
Hon. Alicemarie H. Stotler
Mary Harkenrider, Esq.
Professor Daniel R. Coquillette

C O N T E N T S

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P R O C E E D I N G S

CHAIRMAN DAVIS: We're going to go directly into the hearing which is our first order of business. We have four witnesses to hear this morning, two on our proposed rule changes to Rule 11 and two witnesses on our new Rule 32.2. Our first witness is Judge Paul Borman, who is a United States District Judge in Detroit, Michigan. Is Judge Borman here?

Judge Borman, we appreciate very much your having an interest in our rules to take the time to come out today and talk to us about Rule 11. We've all read your written submission, and we'd be delighted to hear a brief statement from you and we hope you'll answer any questions the committee has after that.

JUDGE BORMAN: Thank you, Judge Davis. I'm looking more to the questions than really the statement because the rule, it seems to me, and I know that every court of appeals that has dealt with the issue has said, well, it's okay, but a couple of them say, but, of course, if this were a

really bad case where a person was sentenced based on their race or ethnicity or something like that, why, of course, we wouldn't impose the waiver, and I think that the government's Keeney memorandum, which was passed around in support of the memo a year or two ago, also said, well, you know, we shouldn't support the waiver in the horrific cases because that's not fair. The basic problem is if you tell the defendant when they're pleading that they have no right to appeal, then the horrible cases, the bad cases, will never get to the court of appeals. And I know it's a difficult problem because we're looking right now just at Rule 11, an amendment there, but after you do Rule 11, then the judge is still faced with Rule 32(c)(5) which says notification of right to appeal after imposing sentence. In any case, the court must advise the defendant of any right to appeal the sentence.

Now, does this mean that if an individual believes that he was coerced to plead guilty, if he had ineffective assistance of counsel, which resulted in an improper sentence, the judge when

they follow Rule 32 says, you know, I know you had a waiver and I know you signed that and the government signed that, but I still have to tell you that if your right to counsel was not proper, if your sentence was based on unconstitutional reasons, then, sir, or ma'am, you still have a right to appeal.

So I think the committee can't deal with one without dealing with Rule 32, but going back to the one you're dealing with today, the sentencing guidelines, and I know Mary Harkenrider from working with the commission, I know Roger Pauley even longer, because back when the commission was set up and operating early on in '87 and '88, the whole basis for its being there and setting up guidelines was to stop disparate sentencing, and the reason why Congress--those of you on the courts of appeals know that there didn't use to be any appeals from sentences before the guidelines because the judge had total discretion.

We set up a guideline system. We wanted sentencing under law and we wanted it to be proper

and we set up appeals to the courts of appeals. What you're going to be doing now if you pass this is telling the district judges to inform people that there aren't going to be appeals and, therefore, if the district judge errs in sentencing, and the parties agree to the error, then you're going to have erroneous, illegal sentences.

And should the Advisory Committee of Criminal Rules, a part of the Judiciary which has the Sentencing Commission as well, which is supposed to look out for the guidelines and enforce what Congress passed, which is a guideline system and a system of appeals to prevent illegal sentencing, undermine the integrity of the guidelines by allowing lawless sentencing by preventing the sunshine from seeing what happens in the district courts in sentencing?

Now, in February, I was fortunate that Judge Martin called me and I sat a week at the sixth circuit as a court of appeals judge, and I took home with me some sentencing cases to write,

and they're going to be, well, I don't know if any --none of the people here were litigating, but there could well be findings of illegality based on the district court's interpretation of the guidelines.

Now, do we want each district judge to be able to interpret their guidelines their own way? Or do we want uniform legal sentencing? Congress said they want uniform legal sentencing and this, I believe, by telling someone that you have no right to appeal your sentence at all at the time of the plea--and it's not ambiguous; you're giving up your right to appeal the sentence; you're giving up your right in many cases to collaterally attack--is going to create lawless sentencing and undermine the integrity of the guidelines.

Now, people say, well, what's the difference between that and when someone pleads guilty and gives up the right to trial, the right to subpoena witnesses, the right to testify? The difference is that the sentencing happens and the trial doesn't. When you're waiving a right to

trial, there is no trial. There is no possibility of an illegality or many illegalities occurring at the trial. When at the time you plead, you're giving up your right to appeal your sentencing, you're giving up in advance your right to appeal a proceeding that hasn't occurred and who knows what might take place at the proceeding with regard to illegalities. You're giving up your right to challenge a sentence which has not yet begun to take place in terms of the judiciary's involvement. The probation officer has not written the presentence report. You don't know what's correct, what's incorrect. The judge has not begun to determine at the sentencing what the sentence will be, and yet you're saying, well, you're giving up any possible illegality or unconstitutionality that may occur in the entire sentencing process up to the sentencing proceeding and in the entire sentencing proceeding itself.

In the statute, Congress provides for appeal and what the judiciary will be doing here is taking away the right to appeal in those cases, and

I would assume that there is more and more. Many of you are sitting on districts and circuits where the parties are agreeing and in some cases both parties. This is just defendant oriented. It's government oriented as well. The system loses its integrity as well when the government says we're not going to appeal any illegality or we're not at the guideline--I mean at the sentencing. And the defendant won't. Because some people say, well, it's not fair that the defendant has to give it up and the government doesn't. So some districts, the government says fine, we'll give it, too, as long as it's within this range. So both parties are making an agreement that shields the sentencing guidelines from their appropriate use and the sentencing itself from the purpose that Congress intended it to do.

One final thing. In the proposal by this committee, you take a walk out of a real question because I'm a district judge. What should I tell the person that they're waiving at the plea? Shall I say, well, just go read the contract because

that's the contract you agreed on and that's it and whatever the contract says is what you waived, and I don't have to get into that. Or do I say, well, you're waiving your right to appeal unless it's an illegal sentence or unconstitutional, and then going up to the sentencing, what am I supposed to say there? I'm supposed to notify of any right to appeal.

So I think that as the committee looks at this, even if you're going to do something, it has to be more complete than the proposal that you have here in order to give the district judges an idea of what they're supposed to do under the rule and obviously as well, I think, that you should stop, look and listen in terms of examining what this proposal will do to the integrity of the sentencing process in the country that the judiciary created through the guidelines and the Congress enacted through the guidelines.

So I'd really like some questions because, you know, I know it's a controversial issue, and I know that I'm not in the majority, and yet it's

something that I think this committee because of where it comes from, the judiciary, has to deal with.

CHAIRMAN DAVIS: All right. Thank you, Judge. Let me ask you one question. By my count at least seven circuits have held that these waivers of sentence are valid. So when we consider that that's the landscape that we're dealing with, do you think it's desirable for the judge to inform the defendant that his--and make sure that the defendant's waiver is knowing and voluntary?

JUDGE BORMAN: Well, when you say it's knowing, you have to really break down and not just say, well, you know, you're waiving your right to appeal. You have to say--

CHAIRMAN DAVIS: Is that a desirable objective to try to achieve, to try to find out if it's a knowing, voluntary waiver?

JUDGE BORMAN: Well, I think that you may want to say there's a provision in the guideline which speaks with regard to waiver. I'm going to talk to you more about that at the sentencing

because we've got a long way to go before you understand what's being waived. I can't see how you can waive something in two proceedings or I should say the probation writing up the sentence and the sentencing hearing itself in advance. That's a difficulty. It's not like a waiver of a trial where you're not getting a trial and you're waiving it and it's over, period. You're waiving an appeal from something that has yet to happen. I can't see how we as judges--in other words, the parties have agreed to something. You may want to say, you know, you and the government have agreed to waive the appeal from the sentencing down the line, but I'm going to talk to you further about that at the sentencing itself and explain to you what that means because right now the person won't understand what they're waiving, and it can't be knowing because they don't know what the guideline sentencing is. They have no idea at that time.

The agreement says, okay, you're going to be sentenced within this range, but the probation officer, and that happens many times, may say, you

know, the parties have agreed to an illegal sentence, judge, you shouldn't take the Rule 11. And the judge says, well, you know, I'm going to take the Rule 11, the parties agreed to it. Mr. U.S. Attorney or Madam U.S. Attorney, you're not going to appeal this; are you? No, we're happy with it. Okay. Then let's just go do the sentence.

Well, should the judges being taking part in an illegal sentencing? Is this really akin to a judge being involved in plea bargaining which we're not allowed to do under Rule 11 when we're doing something before proceedings that have yet to take place and upholding an agreement between the parties and putting the approval of the court on something that has yet to play itself out legally.

CHAIRMAN DAVIS: All right. Judge Dowd, you indicated you had a question.

JUDGE DOWD: If this rule were adopted, would you believe that you still have the power as a district judge to refuse to accept the plea agreement which included the waiver?

JUDGE BORMAN: That's a hard call. In our district, the bench spoke to the U.S. attorney, invited him over, and they took that out of the agreement for now. Other districts they haven't, and I don't know if South Florida did that. I guess the Justice Department people might well know better or maybe efficient defense lawyers--

PARTICIPANT: South Florida has not taken it out.

JUDGE BORMAN: They haven't taken it out.

JUDGE DOWD: Do you individually? Even if your district court adopted it and said, okay, it's okay to have these, don't you as a district judge still have the power to say, I'm sorry, I'm not going to approve this agreement with that provision in there?

JUDGE BORMAN: Yeah. I know Judge Berigan did that exactly in the fifth circuit--or is that the 11th? Louisiana. You can help me. Fifth. And the government tried to mandamus her on that issue, and the 11th circuit--I mean--sorry--the fifth circuit rejected the mandamus on her refusing

to go along with that agreement.

JUDGE MAROVICH: Mr. Chairman.

CHAIRMAN DAVIS: Yes.

JUDGE MAROVICH: I really appreciate your concerns, particularly when you address the knowing and voluntary part of it. People who are sitting around this table have heard me express my views about that on what I regard more important areas, and my conclusion is that the term "knowing and voluntary" under the guidelines is an oxymoron so this is not a new problem when it comes to the waiver of the right of sentencing. But are you not assuming or as a part of your concerns that the judge, whoever it is, that is going to be called upon to take this plea including the waiver, is going to be looking at the legality of the sentence in any event and how he's going to accept the plea with or without the waiver provision in any event?

JUDGE BORMAN: Well, the judge probably will not be looking at what's composed, what the agreement contains.

JUDGE MAROVICH: Why?

JUDGE BORMAN: Because they're going to wait for the probation officer to give the presentence report to say what the guidelines are. At that point, what's in the Rule 11 is the party's idea of what the appropriate sentence should be. It is not something that's been run by the probation officer. It's not something that judges when they take pleas will sit down with the guideline books and go over the whole thing because they won't have all the facts, you know, is the person a minor offender, a major offender, have they used the right provision?

JUDGE MAROVICH: But there's going to come a moment, there's going to later come a moment of truth when the judge is going to be called upon to look this thing over and says I am not going along with this deal for whatever reason he or she may not be able to get past the smell test.

JUDGE BORMAN: It may cause the judge at the later point to say I can't accept the Rule 11. I know what our judges generally do at the time of the plea is say we accept the plea and defer a

ruling on acceptance of the Rule 11 until the time of the sentencing to see--

JUDGE MAROVICH: Well, is included in your premise and your concerns, and I appreciate your concerns, is there included in that premise a feeling that under no circumstances is it appropriate to accept a sentence that does not neatly fit within the guidelines? Because there is contrary authority out there as far as that proposition is concerned as well if you look hard enough for it.

JUDGE BORMAN: Well, you know, I guess we all took the same oath to support the laws in the Constitution, and if we feel a sentence is illegal under the law, I think, you know, that we should not go ahead and accept it.

JUDGE MAROVICH: No, I took the same oath, too, Judge Borman, and there is no disagreement about that. I'm asking you about whether or not everybody agrees as to what the law is? Judge Weinstein in New York has an attitude about accepting pleas that are outside the--

JUDGE BORMAN: I'm not getting into that. I know what--I've read a lot of opinions reversing him. And you know I think he says that pleas are not under the guidelines but trial convictions are.

JUDGE MAROVICH: Well, the seventh circuit has spoken about that, too, and they upheld a sentence that was outside the guidelines. It just so happened that the guy pled to eight years when he only was entitled to two, and they said that was okay, and how they would say if it was reversed, I don't know, but I'm just saying to you that there is some law out there that indicates under some circumstances maybe the bargain of the parties could trump the workings of the guidelines. And whether that is good or bad, I don't debate with you either, but there is some law there it seems.

JUDGE BORMAN: Well, you know, my position is that the guidelines lay down the law and the courts of appeal lay down the law, and this will shield correcting the guidelines, making them legal at the court of appeals level. If 90 percent of the cases are disposed of by pleas and if these

agreements to waive appeals are implemented, then courts of appeals will not be able to fulfil their function under the guidelines scheme to make sure that sentences are correct and legal.

And, you know, I've talked with a lot of federal judges at district and appeals levels, and there is not, as Roger and the others know, a great understanding of the guidelines. There is not a great love of the guidelines. The guidelines are still, you know, they're there, but I think most people as judges wish they weren't, and at the same time they're there, but I don't think that they're subject to the same scrutiny on the part of judges as the rules of procedure in terms of carrying out a trial or its statutory legislation, which they are, but I think people still see them as like that uncle that you wish hadn't come to the Christmas dinner.

CHAIRMAN DAVIS: Any other committee members have questions?

MS. STITH: I have one question. Judge, would a second-best solution for you, let's assume

that Judge Marovich is right, that the parties can in some cases bargain around the guidelines, at least through 11(e)(1)(c). Is the answer that if there is a desire to have a particular type of sentence that the way to do it is through 11(e)(1)(c) but still allow appeals by the defendant if he feels that that bargain was not kept in the lower court? In other words, this issue, is that a separate issue from the appeal?

JUDGE BORMAN: I understand what you're saying. The (c) plea is a guaranteed sentence within a range, and if you don't get it, you can walk out. If it's an illegal sentence, then I think that it's something that should be able to be attacked. I think that the legality is the integrity of the guidelines and I think that we as judges and as practitioners should not be creating or supporting a rule. We're not creating it. We're supporting a rule that others have asked us to support that undermines the integrity of the sentencing process.

CHAIRMAN DAVIS: Judge Wilson?

JUDGE WILSON: I probably ought to direct this question to the Justice Department. But Judge, I join the others in thanking you for being here. I'm a liaison member. I'm not a voting member so I guess I'm just musing a little, but how big a problem is it on the appellate courts? In other words, how many people after they plead guilty under a plea agreement where you don't have a waiver, how many of them are going back and appealing? Do you have any feel for the numbers on that?

JUDGE BORMAN: Well, I think Judge Davis will probably have a better field, maybe Mr. McCabe. I'm a district court judge. But I would assume that there are a goodly number of appeals, and I assume that there's a lot of ones that don't belong in terms of I didn't get acceptance of responsibility, but that, you shouldn't throw out the bad money for the good. And I think that the judiciary still has a process to maintain the integrity of the guidelines. I still think that there are many, many errors at the district court

level that should be corrected to maintain that integrity.

JUDGE WILSON: Judge Dowd has a--when he accepts a plea, he almost has a sentencing hearing there at the same time, and I tried to go that route, but I can't read the guidelines well enough to give them enough advice.

[Laughter.]

JUDGE WILSON: Thank you.

CHAIRMAN DAVIS: Any further questions? Judge Borman, again, thank you very much for coming.

JUDGE BORMAN: I appreciate the opportunity. Thank you.

CHAIRMAN DAVIS: All right. Our next witness on Rule 11 is Mr. Thomas W. Hillier, a federal public defender. Is it Hillier or Hillier?

MR. HILLIER: Good morning. Hillier.

CHAIRMAN DAVIS: All right. Where are you from, Mr. Hillier?

MR. HILLIER: I'm from--I'm a third generation Washingtonian. I'm living in Seattle

currently.

CHAIRMAN DAVIS: All right, sir. We've read the written submission and we'd be delighted to hear a brief statement and then we hope you'll answer our questions.

MR. HILLIER: Well, I should apologize for the size of the paper submission, but somebody told me it might discourage reading as large as it was, but I hope perhaps I can use it as a symbol of the size of the problem that the defenders see this issue as creating. I'd like to begin by diverting from my prepared comments to answer perhaps some of the questions that I heard directed towards Judge Borman or give my opinion on them.

When, for example, we talk about seven circuits that have approved this process, I think that that may be a bit of an overstatement. Some of the circuits, for example, the second and the first, have talked about limited waiver provisions as being okay under the circumstances, but those circuits have questioned the wisdom of the very broad waiver and whether or not they might be

taking advantage of a defendant and undercutting the truth seeking function that Judge Borman was speaking about.

Some of the circuits that are in this seven circuit majority are highly skeptical of the broad waivers and, indeed, as we know now, some districts have condemned them entirely. Another question that is sort of out there with regard to waivers is the question of timing, and I think that is a critical question and one that your committee can help resolve. Oftentimes the courts of appeals look at the waiver of sentencing provisions and whether knowing and voluntary at the plea colloquy and try to discern whether or not the knowing and voluntary at that time, and as Judge Borman says, we don't know at that time whether or not there's going to be a legal sentence imposed or not or a sentence that's contrary to the guidelines or not. So it's hard to assume that a defendant at that point is making a knowing and voluntary waiver unless we assume that the defendant in all cases where there's a waiver is also knowingly and

voluntarily waiving her right to a fair sentence, a sentence that comports with the guidelines.

And I think if the Rule 11 if there's a broad waiver provision, if it's going to be an honest Rule 11 colloquy, the defendant has to be made to know that you cannot appeal a sentence that I impose in this case that's contrary to the guidelines. Is that something you understand? Is that something you're willing to do? So timing is highly important, and I would propose at the conclusion here that perhaps at the very minimum what this committee must do is ask the courts, the district courts, to not accept those broad waiver provisions until after the court has decided what it's going to do because only at that point can the court decide whether or not the defendant is receiving some benefit for that very important waiver.

I disagree with Judge Borman's belief that the parties can't bargain around the guidelines in any way. I agree with the implication of Profession Stith. The rules and the guidelines

quite clearly allow for the parties, the parties, to bargain around the guidelines, and the guidelines themselves say that 11(e)(1)(c) is fine and if you go outside of the guidelines, that's fine, but you got to tell us why and you got to assure us, me the court, that the purpose of sentencing as statutorily enacted in 35.53 are not being disintegrated by this plea bargain or compromised by this plea bargain, and we do that all the time, and that's perfectly appropriate.

But the issue there is the parties have made an agreement that 11(e)(1)(c) we've agreed to something that's entirely appropriate. Broad appeal waivers do not allow for that. They're one-sided. As Judge Friedman suggested, oftentimes they're contracts by adhesion and I'd like to move to that at this point. And I think and I hope that one of the points that my paper makes clear is that one of the problems with this whole notion is that there is a wide variation in the range of kind of waivers that we see throughout the country.

In Seattle, we don't see them very much.

And I think it's all cultural. It depends upon the strength, the relative strength of the bargaining parties historically in the particular district. But we see this wide variation which creates--right away should raise a red flag to you, the committee, that there is an uneven application of sentencing waiver provisions, appeal waiver provisions, throughout the country, which means there's going to be an uneven development of case law flowing from the particular districts and how they deal with this.

It also means there's going to be uneven treatment of the defendants from district to district and both of these notions run counter to an underlying purpose of the sentencing guidelines and the Sentencing Reform Act, which is promote some degree of uniformity and proportionality in the sentencing function.

But it's worse in other districts that are completely besieged by these broad waiver provisions. In those districts, the prosecutor effectively controls the appellate function by

taking away from the defendant the right to an appeal where there is a question on a sentencing guideline application but preserving for itself that same right. The government then in those districts and in those circuits is skewing the process entirely in a way which was not only not contemplated by Congress but was quite specifically designed to work the opposite way. When we got into this field of guidelines, Congress quite wisely said both parties get a right to appeal here because we don't know what's going to happen and we're going to want to develop a consistent and seemly body of case law as a result of that. So in those circuits where there is a lot of broad waiver provisions that strip the defendant of the right to appeal but preserve it for the government, we see a skewing of the process contrary also to the clear congressional intent in outlining the right to appeal.

I quoted at length in my paper from what happens in the Eastern District of Virginia where this notion of appellate waivers was born. I can't

overstate the seriousness of the problem in those districts that have those types of waivers. In Eastern Virginia, the standard plea agreement requires that the defendant give up the right to appeal a sentencing and any error that attaches to that sentencing without any consideration flowing from the government in exchange for that.

In the example that is attached to my submission, the only perceived consideration is the hope for a 5K motion. But the government writes in there if we don't give you the 5K motion, that decision is unreviewable by the court. So a defendant has to waive the right to review the one critical concession, if that's what it is, that the government is giving, which is a possibility of a 5K motion. And in exchange for that, if the judge makes a mistake at sentencing and creates a sentence that is contrary to a body of case law, the defendant cannot appeal that.

The lopsidedness of this product in these kinds of districts speaks to another problem with this broad appeal waiver provision, and that's been

characterized by the courts as quote "the awesome advantage of bargaining power that the government enjoys," and indeed it is an awesome bargaining advantage, and those decisions that say that, gee whiz, we can't take away this right that you have, Mr. Defendant, to waive your appeals because that's a chip that you bring to the table, that's true in some cases. But in some districts, for example, Virginia and in many, many other districts as the materials that we've given you show, that right is illusory or that chip is not a chip at all. It's something that's is the price of admission to the bargaining table, period.

So in those districts if the government decides not to bring the 5K motion, the defendant is left with no recourse whatsoever. We can't even--the courts of appeals can't even decide whether or not the prosecutor perhaps with impunity decided not to do the 5K knowing that there was a serious sentencing issue here that he felt might be decided to the advantage of the government in that case.

There's nothing like that in our system where the prosecutor can hedge in a way which is absolutely unreviewable by the courts of the appeals. The importance of all of this is that it carries huge public policy problems that--it creates huge public policy problems that really underlie this whole process and which have been sort of ignored or at least not directly confronted by many of the courts that have dealt with this issue.

The core inquiry in these kinds of cases where there's being a sentence appeal waiver is we should be trying to figure out not whether or not that waiver is knowing and voluntary but whether or not somebody is getting something for that waiver because the public policy that allows for waivers of important rights is that the ability of the parties to create something that works in their self-interest, their mutual self-interest, and as the Supreme Court has said that public policy requires a mutuality of advantage or equal bargaining power. And more importantly, the

Supreme Court said that the defendant in order for that waiver to be valid must benefit personally, got to get something for it, if it's going to be valid.

And you don't know if you're going to get something for it in a broad appeal waiver provision until the point of sentencing, and that's why timing is critically important. These broad agreements guarantee nothing and in some cases there may be no benefit whatsoever and the frequency of that can't be swept under the rug. We know from the statistics that 67 percent of the cases there is some sort of cooperation. In only 40 percent of the cases is there actually a 5K motion given. So oftentimes we can see a defendant is going to be hung out to dry if he signs off or she signs off on one of these provisions, and in Eastern Virginia--

CHAIRMAN DAVIS: Mr. Hillier, your yellow light is on. You got about two minutes left.

MR. HILLIER: Okay. I hope that I can get some questions here. In terms of sort of analyzing

this, I guess it's not like a guilty plea where, yeah, you can waive your right to a trial. Nobody is saying, gee, that might be terrible, but I would ask this committee to focus on some of the words that the courts are using when they look at these appeal waivers. In Ready, they quote "invite disrespect for the integrity of the courts. They discredit the legitimacy of the sentencing process. They create grave dangers. They threaten ordinary principles of fairness and justice. They are inherently unfair." These are words that are coming out of the courts that describe this process.

So this committee, I suggest, should move slowly and cautiously in deciding how to deal with this problem and decide what is at issue here and how do we help the district court get to whatever that issue is. And my belief is if you're going to advise the courts at all in this regard, and I think it's a little premature--case law is still developing and perhaps we should wait for the final word on it from the Supreme Court--but if you're

going to move forward, that the courts should be advised to withhold accepting a broad waiver until the point in sentencing when the court decides whether or not there has been some benefit that the defendant gets for that waiver and not simply are you knowingly and voluntarily waiving this right? Yes, I am. And then proceed with the sentencing some months later that might result in something the defendant didn't expect whatsoever. In addition, I think, well, I would invite some questions now if there are any.

CHAIRMAN DAVIS: All right. Thank you. Judge Dowd.

JUDGE DOWD: Do you enter into plea agreements on behalf of your clients where the only thing that they're going to get out of the plea agreement is accepting responsibility?

MR. HILLIER: Absolutely not. I mean, again, this is cultural, but in our district if you plead guilty you get acceptance of responsibility. We don't--but we looked--

JUDGE DOWD: Are you getting something

more than acceptance then?

MR. HILLIER: Well, you know, the plea agreement, if that's what I'm--I've entered pleas where I'm getting nothing, you know, we're just pleading to the indictment and hoping for the best at sentencing and I'm going to argue what I'm going to argue based upon--

JUDGE DOWD: But then you don't need a plea agreement; do you?

MR. HILLIER: Right, right, right. In Eastern Virginia, I wouldn't sign one of these. No lawyer should sign that, not even a prosecutor. A prosecutor should not sign what exists in Eastern Virginia because they're promoting a system that could create an unfair result which can't be reviewed. But I wouldn't sign that. In cases that contain waivers, we simply don't sign them.

JUDGE CARNES: Suppose you thought it was in the best interest of your client?

MR. HILLIER: To?

JUDGE CARNES: Sign that.

MR. HILLIER: Well, you know, a broad

waiver?

JUDGE CARNES: Any kind of waiver you're talking about.

MR. HILLIER: Well, a broad waiver I don't believe would be in the interest of my client until--

JUDGE CARNES: All right. Let me ask you this then. Do we not have any competent public defenders in Eastern Virginia?

MR. HILLIER: There is no federal public defender in Eastern Virginia, and I think that's one of the problems.

JUDGE CARNES: There is no one representing any of these clients who are competent? I mean why do we agree to it? Why do they agree to plea waivers?

MR. HILLIER: Why do they agree to them?

JUDGE CARNES: Yes, the sentence waivers and the plea waivers.

MR. HILLIER: Well, I think this committee should call some of those people in and ask them that question.

JUDGE CARNES: So you don't think a defendant ever gets anything in return for a sentence value of any value?

MR. HILLIER: Of course there are occasions when that occurs, and in my district, for example, if they want a sentencing appeal waiver, we ask, well, what are you going to give me for that? Well, I'll give you, you know, a cap on the fraud in this case at $100,000. I'm not going to hold you liable for what your codefendants did, something like that.

JUDGE CARNES: And what's wrong with that? And what's wrong with permitting that?

MR. HILLIER: Well, that is okay. That's what I describe as a limited waiver where there is a give and a take occurring.

JUDGE CARNES: Well, if a competent defense attorney would insist on that, and I understand from what you say he would, isn't the problem then not one of whether the appeal waivers are permitted or not, it's just the competency of defense counsel?

MR. HILLIER: No, I don't believe that's the case.

JUDGE CARNES: I don't understand why we should restrict something that could inure to the benefit of a defendant represented by a competent counsel just because there are incompetent counsel who aren't going to use the possibility to the benefit of their client.

MR. HILLIER: Well, let's assume that there are incompetent counsel out there and that sentencing error does occur, then what does the court of appeals--

JUDGE CARNES: I'm talking about the bargaining stage. If a competent counsel would insist on something in return for a sentence waiver and would get something in return for their client.

MR. HILLIER: Right.

JUDGE CARNES: Why not allow that possibility? Why not permit competent counsel to obtain something of benefit for their client in the bargaining process?

MR. HILLIER: I'm not asking you not to do

that. I'm asking--what I'm suggesting is that broad appeal waivers do not allow for that. The defendant is not getting anything, at least guaranteed, and he doesn't know if he's going to get anything at all until the time of sentencing. So in those cases, you're not operating--

JUDGE CARNES: Well, you could, however broad the appeal waiver is, you could agree to the government recommending a cap on the fraud amount, for example, or recommending a downward adjustment for minor or minimal role. They get something in return, whether it will bear fruit at the sentencing is a different thing, but if the government keeps its part of the bargain and recommends a downward adjustment for minimal role, it seems to me like this is something that a defense counsel would want to have in the bargaining process, particularly if he's not going to trial, and you know, the majority of your cases you can pretty much know that up front.

You would want something that you could bargain with the government to get something in

addition in return. So you're not saying you're opposed to appeal waivers per se?

MR. HILLIER: Correct.

JUDGE CARNES: Okay. All right.

MR. HILLIER: I'm saying they can be abused, and a broad appeal waiver is an abuse of this process because there are no guarantees and the defendant may end up getting up an illegal sentence and the defendant is left without recourse because some courts say that, gee, we're not even going to review the merits of this claim if there's a waiver. We're not going to use, we're not going to deal with our error correcting function here, the integrity of the court of the appeals to look at the merits of this case. We're just going to accept that waiver and that's wrong.

But your comments, Judge Carnes, suggests that there is equal bargaining power at every table that exists in this country, and that's simply not the case. So I think we've got to, you've got to, and that's one of the points I tried to make, is look at the reality of the landscape here. Some

defendants in some districts are getting hammered by these things. In other places, that's not the case.

JUDGE CARNES: But see that possibility to me argues in favor of the judge at the Rule 11 stage saying, look, do you understand what you're getting into here? Let me tell you what this appeal waiver means. It seems to me like the last thing in the world you would want is for the judge not to try to explain that to the defendant and make sure the defendant understands what he or she is doing.

MR. HILLIER: Well, I would love to see a judge try to explain to a defendant what she's getting in a broad appeal waiver.

JUDGE CARNES: Well, I don't think it's that difficult. You're risking whatever I decide on these guidelines without any exceptions whatsoever. You're going to be stuck with this appeal and if I make a mistake, you can't take it up on appeal with two exceptions. These are the exceptions we usually see in my circuit. And that

is if the government appeals the sentence--fat chance of that--but if they appeal the sentence, you can appeal. That's an exception that's written in the plea. And also if I give you a departure outside the sentence guidelines, outside what the written sentence guidelines provide for, if I give you a departure, you can appeal that. Other than that, when I say this is what you're sentenced to, you're stuck with it. I don't understand why that is so difficult to explain.

MR. HILLIER: Let me explain why. First of all, not every circuit is like yours. In Eastern Virginia, for example, we don't even get the departure language or the government appeal language. In fact, we don't even get the unconstitutional sentence language. If it's an unconstitutional sentence--

JUDGE CARNES: That makes it easier to explain to the defendant then.

MR. HILLIER: Well, yeah, you're not--well, okay. So at that point what you're saying to the defendant is whatever happens to you, no matter

unfair, no matter how unconstitutional, no matter how outrageous and irrational, you're stuck with. That sort of colloquy, that's the only colloquy that could be honest.

JUDGE CARNES: Sure.

MR. HILLIER: That could honestly address this. That undermines the integrity of the judicial progress. And undermines the integrity of the sentencing function.

JUDGE CARNES: But the only question before us--

MR. HILLIER: And it's contrary to public policy.

JUDGE CARNES: The only question before us is if that's going to be the reality should it be explained to the defendant before he or she pleads guilty?

MR. HILLIER: Should the defendant be made aware that she may suffer an unconstitutional sentence? I think public policy says no to that question, that the judiciary should be above--

JUDGE CARNES: We shouldn't tell her?

MR. HILLIER: --threatening a defendant with an unconstitutional sentence to make sure that he or she knows what's happening. I mean that just makes no sense to me.

JUDGE CARNES: So we don't tell her? Just let her find out after she suffers--

MR. HILLIER: Well, that's the problem.

CHAIRMAN DAVIS: Judge Marovich was next.

JUDGE MAROVICH: Well, I was just wondering whether or not you and Judge Borman have conflicting concerns here? I mean as I hear what you are saying to me that you would be in favor of a waiver if somebody got something in return for it, which kind of smacks like fact bargaining to me, and we will forget about all of your loss or we will give you less of a role or whatever. And from what I heard Judge Borman say, he is concerned that this kind of thing can go on between defense counsel and prosecution and nobody has a right to check it out by way of appeal and this thing that has a life of its own that we're all bound by, namely the sentencing guidelines, is under attack.

They seem to be conflicting concerns to me.

MR. HILLIER: Well, I think the notion of plea bargaining as embodied in 11(e)(1)(c) kinds of agreement is something that happens, and it's not improper and at times the requirement there, as I stated earlier, that the parties explain how it is that this bargain doesn't undermine the purposes of sentencing. There's this overarching, you know, philosophical belief that the purposes have to be satisfied.

Now that happens, and it may happen for a number of reasons, all of which are good. And I don't think that it ought not to happen. We all know that we enter into plea bargains, and there's a good policy behind that, a public policy, which is to promote the efficiency of the administration of justice, and where the parties come to an agreement that they can be satisfied with and that does promote the efficient administration of justice, and there is nothing wrong with that. What's a problem is when only one side is really making the decisions there, and in broad sentencing

appeal waivers that's the case. The prosecutor is making the decision that this person is not going to have a right to appeal in order just to come to the bargaining table, and that's where I part company with Judge Borman.

I think that there are limited waivers that can be effective and promote the interest of public policy and the efficient administration of justice.

MS. STITH: Can I follow up on how that works? If I understand this correctly, there would be a provision in the plea agreement that says the defendant waives the right to appeal if the loss--the number used in the sentence is $100,000 or below. He waives the right to appeal the loss issue; right?

MS. HILLIER: Right.

MS. STITH: That's limited and it's clear what the person is getting. Now let's say, I guess my question is why do you even need a limited waiver of appeal? Why not just do 11(e)(1)(c) and say the loss is no more than $100,000? Then, you

know, should the defendant try to appeal the 90,000 he loses because he's entered into 11(e)(1)(c)?

MR. HILLIER: Right. That's correct. In fact, the statute says you lose that appeal. Again, I think this is cultural.

MS. HARKENRIDER: Actually courts allow appeals from 11(e)(1)(c)s.

MS. STITH: Okay. So in order to make sure the 11(e)(1)(c) really is an 11(e)(1)(c) you need a limited appeal waiver as to those stipulations. Let me ask you about the broader waiver. I guess it does seem to me strange that defense counsel would enter into a waiver in other circumstances other than related to stipulations and caps on the sentence. I'm particularly concerned here about this or collaterally attack defense. No one has mentioned that. What does that mean? Does that mean that if it turns out later on that the probation officer who wrote the presentence report was being bribed by somebody? You can't attack the sentence or that, I mean all sorts of wild things?

MR. HILLIER: The government--

MS. STITH: And has any court actually enforced that, that collateral attack limitation?

MR. HILLIER: Well, that's exactly what the provision means. Now whether the government is going to sit down and allow that collateral attack because of this grave injustice, you know, remains to be seen, but by signing that, you're giving up your right to any constitutional challenge.

MS. STITH: I guess my concern is should we have this language in here if no court ever approved the validity of such a provision? Do we have any case law that says that, in fact, the defendant can waive collateral attack on ineffective assistance of counsel or something like that?

JUDGE CARNES: I've never seen such a provision.

CHAIRMAN DAVIS: I think we do.

MS. STITH: We do. So ineffective assistance of counsel at sentencing, you couldn't attack the sentence?

MR. HILLIER: There are a number of cases that say you can always--that you can raise that, which then, you know, creates this conflict between the language and the waiver and the reality of the case law which, as Judge Friedman said in his opinion, how can you understand something when the case law is contrary and the defendant may be able to go forward anyway? So it's another argument against the appeal waiver provisions, at least the broad ones.

CHAIRMAN DAVIS: Mr. Martin is next.

MR. MARTIN: Mr. Hillier, I gather from reading your paper and a number of conversations with you over the years and months that while you would like this committee to be able to change the bargaining table or to abolish or ban broad waivers, you recognize that the committee doesn't have that kind of views. And I gather that you think that some benefit could come from this committee taking action if, say, the commentary to this rule, if it goes forward, suggested to district judges that they do have the authority and

responsibility to consider the issues that Judge Greene and I think Judge Friedman did from this district in looking at whether or not it is a contract of adhesion, whether or not it is against public policy, in that district in that case. Could you elaborate on that a little bit about what kind of suggestions you make on the commentary?

MR. HILLIER: That's exactly right and thank you for that softball. That's really what we're asking for. I mean all the cases, the seven circuits, say that the courts have the authority to reject or limit waivers and all the case law says that these waivers should be scrutinized carefully. So what the advisory committee note should say is that if this language is in an agreement, the court should look carefully to determine whether and under what circumstances in this case it should be accepted and whether or not it operates against the public policy, and the note should make clear that the court has the authority to strike that provision from the plea agreement if necessary.

Usually when that happens, as a practical

matter, the plea is going to go forward anyway. The government is not going to insist upon withdrawing the plea and going to trial. It's just not to the government's advantage to do that. It's going to create some ill will with the court. So the court by acting in that fashion is going to promote good public policy instead of what's happening now.

JUDGE MILLER: Since I'm from the Eastern District of Virginia, I think I need to comment here.

[Laughter.]

JUDGE MILLER: I must say I left the U.S. Attorney's Office before this waiver came in and frankly I was appalled when our U.S. attorneys started doing it. But to explain why a lawyer would plead their client guilty with the broad waiver which includes collateral review is the fact that they cannot plead their client guilty with any sort of plea agreement unless they agree to this with the U.S. attorney. It's not an individual, it's a broad-based policy. They even do it in

misdemeanor cases where they plead before a magistrate judge, which ten minutes ago I just realized is probably unconstitutional considering the supervision that Article III judges should have over magistrate judges. So I'll rule it unconstitutional next time they try it with me. But that's why you just don't plead guilty unless you do have the waiver so--

JUDGE CARNES: Does no one plead blind in your district? I mean we have blind pleas all the time--

JUDGE MILLER: Sure.

JUDGE CARNES: --in middle Alabama. They can't agree on something and the defendant just comes up and says I'm guilty and we're going to argue about this, that and the other, and they do it.

JUDGE MILLER: They do that.

JUDGE CARNES: Well, then you don't do the appeal waiver on a blind plea.

JUDGE MILLER: That's right.

JUDGE CARNES: So you have a choice of

pleading. At a minimum you have a choice of pleading blind or having an agreement with the waiver in it.

JUDGE MILLER: And if you have the agreement with the waiver in it, unless the defense counsel is completely incompetent, they've gotten some consideration, maybe not from the--well, not a quid pro quo, but there is some--

JUDGE CARNES: Or they're hoping for it from the judge.

JUDGE MILLER: Right.

JUDGE CARNES: Yeah.

CHAIRMAN DAVIS: Judge Wilson.

JUDGE WILSON: Doesn't all this conversation presuppose that trial judges still have something to do with sentencing under the guidelines? I can't detect that I have much to do with it, and I have a real problem with this and that whole process, and Judge Dowd brought my attention to it more than anybody else when I was in baby judges school of how in the world you can accept a plea agreement at the front end, how can

you possibly know, and Judge Marovich and I have corresponded about this, and I'm very inclined to let people back out when we get to the sentencing time if it's not substantially what they thought they were going to get. I guess this gets beyond, but I think the problem here is part of the overall problem of pleading under just the plea agreement.

I see plea agreements all the time, and I ask the U.S. attorney, I say what is the defendant is getting out of this? Maybe it's acceptance of responsibility which ain't nothing.

MR. HILLIER: Well, that is at the heart of the problem. That's why if you're waiving your sentencing appeal right blindly and something happens totally unexpected and contrary to what counsel thought was going to happen and told the defendant, and even contrary to case law, then you got a problem. And it's the court of appeals that are responsible for correcting that problem. If they can't, then we have a public policy violation.

CHAIRMAN DAVIS: Any further questions? Mr. Josefsberg.

MR. JOSEFSBERG: I might be on your side, but this is not a softball. You said a lot about 5K and that part of the agreement is to get a 5K and then when not receiving it, they lose their right to appeal. With or without a waiver, a broad waiver or a limited waiver, doesn't the government have just about an absolute discretionary right as to whether they file a 5K or not? With no waiver, do you have success in going before a district court or an appellate court in getting the government to file a 5K because I've never heard of any successes? It's something you don't have to begin with so it's not giving up anything.

MR. HILLIER: Well, that's right. The problem is you're giving up something in the wrong context. The 5K motion--in our district we don't have sentencing appeal waivers conditioned upon 5K cooperation. 5K, the consideration for the 5K is the cooperation. That ends that package in our district. If you want a sentencing appeal waiver, then we got to get something else so we want something more for that. So those districts that

tie it into a 5K are especially problematic.

MR. JOSEFSBERG: You're saying it's part of a package in your district where they're saying if you want to be cooperative, you want a 5K, you've got to waive all your appellate rights?

MR. HILLIER: No, no, no. We will not waive and, in fact, the U.S. attorney does not require waivers in return for 5Ks because the consideration for the 5K is the cooperation, not the sentencing waiver. So we take that out of the mix. And it should be out of the mix because then if the government doesn't make the 5K motion, all those issues, not the decision on whether or not to make the 5K, but there may be sentencing issues that you want to appeal that operated to the detriment of your client.

A good example is U.S. v. Buchanan, which is in your materials. In the 11th circuit, the defendant bargained for a 5K. He didn't get it. There was a very critical sentencing issue on whether or not there was a cross-reference that would apply in that case. He thought it wasn't

going to apply to the defendant and he was going to get ten years even without the 5K. If it did apply, he got life. Well, the judge found it applied so he got life and he didn't get a 5K. So now he's up on a court of appeals with a waiver saying, hey, I waive all sentencing appeal issues and because of that waiver, not the 5K, he can't argue the merits of whether or not that cross-reference should have applied.

So we should be taking--5K--those districts that take advantage of the hope of a recommendation for cooperation and require that the sentencing waiver be part of that mix are really taking advantage of the defendant because, as you say, that decision is not reviewable, and he's given up an important right that may have a whole lot of meaning on other issues that are decided at the sentencing hearing for something that doesn't come about and that we can't review.

MR. JOSEFSBERG: 5K really isn't part of the sentence?

MR. HILLIER: Well, it is in some

districts. It shouldn't be at all. It isn't in our district, and, you know, most, I mean I can't speak for Justice, but U.S. attorneys I feel that are thinking correctly on this say, hey, the 5K motion is consideration. That's part of--that's over here. Sentencing guideline waiver or the guideline waiver, the appeal waiver, what else is going to be out on the table? In that kind of a case, if they wanted the waiver, it would be conditioned upon the 5K and a particular range in my district, not just the granting of the 5K but also something else.

CHAIRMAN DAVIS: All right. Thank you very much, Mr. Hillier. We appreciate your coming.

MR. HILLIER: Thank you.

CHAIRMAN DAVIS: Let's take about five minutes and get a cup of coffee, and we'll come back and hear the other two witnesses.

[Whereupon, a short break was taken.]

CHAIRMAN DAVIS: Our next witness has some insight to give us on our new Rule 32.2, and he's Mr. E.E. Edwards with the National Association of

Criminal Defense Lawyers and he has with him Mr. Smith. Mr. Edwards, we'll be glad--we've read yours and Mr. Smith's submission, and we'll be glad to hear a brief statement, and we hope you'll answer our questions.

MR. EDWARDS: Judge Davis, I'm very pleased to be here with all of you. Please sort of read past all the "E"s in my name. I'm Bo Edwards and have been since the day I was born, as I told Judge Wilson, in Little Rock, Arkansas a number of years ago. And David Smith, to my left, and I are the co-chairs of the Forfeiture Abuse Task Force of the National Association of Criminal Defense Lawyers, and from my home base in Nashville, I do a great deal of forfeiture practice, civil and criminal forfeiture, and, of course, David not only does practice, but he wrote the book. He's the author of the two volume treatise on forfeiture.

And I'm very pleased to talk to you for a few minutes about the proposed amendment to Rule 32.2. The dominant issue here is whether the right to trial by jury with respect to criminal

forfeiture proceedings is to be totally abrogated. Now there are many sub-issues, some of them very important sub-issues. Can this be done by amendment or is it a change in substantive law which is inappropriate for treatment by Rules of Criminal Procedure? Is it constitutionally permissible to remove this right? And if this right is removed, are some of the considerations that are mentioned in our submissions of great import? And I submit they are.

But I wanted to spend my time primarily speaking to you this morning about the core issue, the right of jury trial in criminal forfeiture proceedings. And I would like to begin by telling you briefly a story about two men, both who lived many years ago. One was a very wealthy merchant and a smuggler by trade. And the other was his lawyer. The merchant in 1768 had lost a ship to forfeiture to the British crown. The name of the ship was "The Liberty." That same year another action was brought against this merchant under the Sugar Act of 1764.

The problem from the point of view of King George III and his advisers was that the crown was just losing too many forfeiture cases in the colonies to jury trials. They thought that the colonial juries were not satisfactorily representing the crown's interest in forfeiting property. So in 1764, the Sugar Act was passed by the British Parliament. I've read that. If you're ever curious, it's found at 4 George III, Chapter 13. It's a very long act as forfeiture acts passed by the British Parliament in that period were, but there are two sections in that act that are particularly interesting.

Section 40 provided once again or reprovided, if you will, for trial before the Court of Exchequer, one of the three great common law courts of England, for forfeiture proceedings brought in England and Ireland. Section 41, however, provided for a special jurisdiction in British colonies, in colonies of the crown in North America, before Special Courts of Vice Admiralty, which were essentially bench trials before a judge

appointed by the king to go over to the new colonies in North America and hear some forfeiture cases.

In fact, Section 41 provided specifically that there was additional jurisdiction under the Sugar Act in any court of admiralty in the said colonies where such offense shall be committed or in any court of vice admiralty which may or shall be appointed over all America at the election of the informer or prosecutor.

Well, the action that I spoke of, the one that succeeded the forfeiture of his sloop The Liberty was brought against this merchant smuggler in Boston in 1768. He hired a lawyer who began to make speeches and write pamphlets and generally raise an outcry against Section 41 of the Sugar Act, and among other things, this is what he said:

Here is the contrast that stares us in the face. The Parliament in one clause guarding the people of the realm and securing to them the benefit of trial by the law of the land. And by the next clause depriving Americans of that

privilege. What shall we say to this distinction? Is there not in this clause a brand of infamy, of degradation and disgrace fixed upon every American? Is he not degraded below the rank of Englishman?

Well, the story has great significance for all of us in this room and for all Americans because in 1774, that very same New England merchant and smuggler wound up as the president of the First Continental Congress. He was a fellow named John Hancock. You may recall hearing his name. And in the First Continental Congress a resolution was passed and forwarded to King George, which denounced the king and the parliament for extending the powers of the admiralty courts beyond their ancient limits. And as you will also recall, two years later that same John Hancock was president of a meeting in Philadelphia which adopted the Declaration of independence, and as Mr. Jefferson was drafting the Declaration of Independence, in the central portion of that historic document, he listed the grievances that the colonies had which compelled then to rebel and

to separate from the crown.

And one of the major grievances which Mr. Jefferson listed and which we quoted to you in our submission was depriving us in many cases of the benefit of trial by jury. And incidentally, John Hancock's lawyer from whom I quoted a moment ago was the second president of the United States, John Adams.

I tell you that story because the right of trial by jury in forfeiture cases was in no little way a major reason that we no longer sing "God Save the Queen" but rather sing of a "Star Spangled Banner." It is not an issue that was ancillary to the formation of our country and for that reason, I believe, it gives us all pause to think about the provision that is proposed here that would discard with almost little care such a valued right.

The government argues that the jury is not properly involved in this process on page one of their response to our submission, and they contend that criminal forfeiture was unknown in federal law until 1970 when rules from a recognized special

jury verdicts in criminal forfeiture proceedings. But I submit that that overlooks a higher federal law, the Constitution itself, because at the time our country was formed, there were three kinds or three types of forfeitures known to English law and that had in large part been known to English law for centuries.

There was the law of Dayadan [ph], which was the forfeiture to the crown of any object, an animal or a thing, that caused the death of a human being. For example, if someone fell into a mill run and the mill stone crushed him, then either the millstone itself or its value as determined by an English jury was forfeited to the crown. Then there was statutory forfeiture, which was very popular--the Sugar Act is an example-- during the Renaissance because the prevailing notion of national economies at the time was an economic theory called mercantile economics, and the notion was that each nation in order to become wealthy had to develop its own system of colonies and control commerce between the mother country and those

colonies which the English crown did very, very carefully.

And the third was forfeiture of the states, which was essentially criminal forfeiture, and it was something that was not followed in this country because it was banned by the Constitution. The practice of forfeiture of the states was so hated by Englishmen who put this country together that they found it necessary to abolish it constitutionally, not just statutorily. However, Professor Sun Beale in her brief in Libretti, which we have attached to our submission, shows that there was a history not only in England but even in the early years of our Republic where there was, in fact, criminal forfeitures which were decided by a jury and there were provisions for jury verdicts in that regard.

So I would submit for your consideration that what this submission is all about is not just bringing together in one place a set of rules to govern criminal forfeitures as the government suggested in its submission. It's not just tidying

up. It's not just lifting an imposition or a burden on juries. What it's really about is whether we should essentially forfeit, if you will, our birthright. Whether we should throw out better than half a millennium of judicial practice in England and then in this country that before the government can take property in whatever kind of proceeding, be it civil or criminal, there should be a group of unbiased peers who hears the case and makes the decision.

The government wants a hearing, and this is really what I believe this is about, and it's not tidying up and it's not removing the burden from the jury, what the government really wants is a procedure that allows them to take privately owned property without the intervention of a jury of peers and furthermore in the proposed amendment without a proceeding in which the rules of evidence apply. In fact, virtually a summary proceeding that could be based on hearsay, that could be based on proffers, that has little semblance of the sort of protection of the right of private ownership of

property that this country and its predecessors have known for centuries.

The government suggests that the Libretti decision from the Supreme Court either invites or mandates this rule. But I submit to you that the government is premature in that suggestion. The one sentence in the Libretti decision upon which the government bases its assertion and which I would concede a number of lower courts since Libretti have cited for this proposition is inadequate foundation, if you will. That sentence found in the majority opinion in Libretti states our analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection.

It's just that one sentence that the government and the other cases rely upon to say, to suggest that there is no Sixth Amendment protection. But the issue of the right to trial by jury in criminal forfeiture was not directly before

the Supreme Court in Libretti. In fact, it was not even briefed by the government. And this one sentence, which is submitted in the majority opinion with very little support or discussion, I submit does not necessarily suggest that if the issue were squarely presented to the Supreme Court that the outcome would be the same.

I submit to you that given the rich and full and unambiguous history of forfeiture proceedings both in England and in this country, if that issue were squarely presented to the Supreme Court, there would be a confluence of considerations under the Sixth Amendment right to counsel, which Libretti mentioned, under the Seventh Amendment, right to counsel in all civil cases, in all civil trials at common law, which was not before the court in Libretti at all, and due process considerations of the Fifth Amendment as well as the takings clause of the Fifth Amendment.

When you consider the consideration, the policy, the intent of the constitutional framers in all three of these amendments to the Bill of

Rights, it seems inconceivable to me that the Supreme Court could conclude that there is such a crack between the Sixth Amendment right to trial by jury protection in criminal cases and the Seventh Amendment right to trial by jury protection in civil cases that criminal forfeiture could slip between the cracks. I just don't believe it.

It seems to me that the government's assertion that we did not know criminal forfeiture until 1970 in this country really misses the point. It seems to me that the government is trying to take modern criminal forfeiture, which is really a forfeiture proceeding after all, and slap a new hairpiece on it and say because it's this modern type of pleading, this modern type of proceeding, that we can just ignore the history of the Sixth and Seventh Amendments, and I submit that we cannot.

For example, in Austin v. United States, the Supreme Court without dissent had no trouble in ignoring labels of civil or criminal or punishment or nonpunishment in holding that the Eighth

Amendment excessive fines clause applied to forfeitures. The seventh circuit in a pair of decisions, United States v. Moi Gomez [ph] and subsequently United States v. Michelle's Lounge held that no matter whether the government used a TRO under the criminal forfeiture laws or the seizures under civil forfeiture laws, in either event, when the government seized all the property that a person had and then indicted that person, thereby attaching that person's right to counsel, that that person was entitled to a due process adversary hearing and the government would have to prove that all the property the government had tied up was probably subject to forfeiture or otherwise some of that property would have to be released so the defendant could use that property to hire their lawyer to represent them in the criminal case.

And the label didn't matter. It didn't matter whether it was a criminal forfeiture or a civil forfeiture. What mattered was that the government was using forfeiture proceedings to tie up property.

I submit that there are several very good reasons to reject the proposed amendment. One, because the proposed amendment very clearly makes substantive changes in the law and, therefore, changing the law by rules of criminal procedure is inappropriate. Second, the law, the language of the proposed rule very clearly would conflict with the language in Section 853, the criminal forfeiture statute, in particular with 853(c) which provides for special verdicts but throughout 853 it is implicit that 853 was directed toward a proceeding that engaged a jury trial.

Third, because Congress is at present undertaking to reform and review forfeiture statutes in general. Chairman Henry Hyde of the House Judiciary Committee has been involved for two or three years now in considering the civil forfeiture statutes and how they should be reformed in order to protect the right of private ownership of property and provide for a more even playing field in civil forfeiture. It is not inconceivable that the Congress could pass a law even this year

if it adopted Congressman Hyde's bill now pending in Congress which would raise the burden of proof in civil forfeiture cases to place a burden of clear and convincing evidence upon the government.

How ironic it would be if that law were enacted this year at the same time a rule was being enacted that removed jury trial and removed the rules of evidence from criminal forfeiture proceedings. So I think it is very likely that in the very near future--I hesitate to predict when Congress will act on anything--but in the near future, both the House and Senate Judiciary Committees will be looking at both the civil forfeiture statutes and Section 853, and to be sure my friend Stef Cassella and I disagree about what direction that review should take, but nevertheless it is underway. So I think a very compelling argument could be made that action on this rule is premature because the landscape is very likely to be altered in the near future.

And also because the DOJ in coming before this committee and asking for this rule amendment

is seeking something that it attempted to get from the House Judiciary Committee just late last year. I appeared along with Mr. Smith and Mr. Cassella before the Crime Subcommittee of the House Judiciary Committee on a proposal to do exactly the same thing that this amended, proposed amended rule would do, which is remove the right of trial by jury in criminal forfeiture cases, and the Crime Subcommittee after considering the matters very much as you have heard today would have nothing of it and determined not to take any action on a new measure that would repeal the statutory right of trial by jury in criminal forfeiture matters.

So I would urge this committee at the very least to postpone consideration for a year or two to see what Congress does, but beyond that I really think the appropriate action would be to say that this is not a subject matter that is appropriate for treatment by an amendment to the Rules of Criminal Procedure, and beyond that, and surpassing that, the right to trial by jury any time the government seeks to take privately owned property

is a matter that is of such high import and so central to the fabric of our society that its removal is unthinkable, and I welcome your questions as does Mr. Smith.

CHAIRMAN DAVIS: All right. Thank you very much. Professor Stith, you want to go first?

MS. STITH: Yes. You've focused on the jury trial right and let me follow up a little bit with that and then you may want to state your views on what you referred to as the subsidiary issues, other aspects of the rule. You mentioned that this proposal would remove the determination from trial with the jury to a proceeding in which the rules of evidence don't apply and the burden of proof is different, et cetera. Now, are you referring there to the sentencing proceeding of the defendant?

MR. EDWARDS: Yes.

MS. STITH: Not to the ancillary proceeding?

MR. EDWARDS: No. I was referring to a sentencing proceeding. It seems to me that what the Justice Department is really interested in

doing is avoiding two things, is avoiding a jury trial before they can take property and secondarily getting the matter of criminal forfeiture at the stage of the proceeding where the rules of evidence have gone out the window and they can present innuendo, they can present rumor, they can do almost anything the district judge will permit them to do.

MR. SMITH: If I could respond to Professor Stith's question. The defendant is presently barred from participating in the ancillary proceeding by the criminal forfeiture statutes themselves, not by the rule, but by the statutes. 853(n)(2) specifically bars from the defendant from participating in the ancillary proceeding. So whatever rights the defendant has can only be asserted in the trial itself and that sort of reiterates a point that Bo Edwards made, which is that the criminal forfeiture statutes themselves are written based on the premise that there is a right to jury trial, and if you look carefully at the provisions of the criminal

forfeiture statutes, they can't be understood without that premise.

We think that abolishing the right to jury trial, in effect, makes these criminal forfeiture statutes unintelligible and incoherent. And you would really need an amendment to the statutes themselves in order to make them mesh with an amended rule which abolishes jury trial rights. Mr. Edwards mentioned 853(c) which specifically refers to a special verdict of forfeiture. But throughout 853 and the corresponding provisions of the RICO statute and the other criminal forfeiture statutes, which are all procedurally the same, there are assumptions built into the statute that there is a right to a jury verdict on the issue of forfeiture, and these statutes would have to be completely rewritten around the change in the rule that's before this committee.

We don't see how the committee really has jurisdiction to do that when it, in effect, it would rewrite the substantive criminal forfeiture statutes.

MS. STITH: Let me ask about several subsidiary issues. It seems to me that this proposed rule besides taking the issue from the jury and giving it to the judge also changes the nature of what the issue is. And I wonder if you have any comments or concerns here. 31(e) says that the jury shall have a finding as to the extent of the defendant's interest in the property. As I understand the proposed rule, if there is an ancillary proceeding, then all the judge decides at sentencing is that the property was used in the crime or otherwise had a nexus to the crime as required by statute with no finding at the sentencing itself that the defendant had an interest in the property. If there is no ancillary proceeding, I gather that as I read the rule the judge finds the defendant had a possessory or a legal interest in the property. Does this have any significance? I notice it's a change so I'm assuming it must be significant. Tell me.

MR. EDWARDS: Well, I think it's highly significant. For one reason, it would appear to me

that the broad and rather loose language in the proposed rule amendment is contrary to the standard, the substantive standard for forfeiture that appears in 853, and I did not find in either of the Justice Department's responses to our submission any adequate response to that. There are two different--there's an A and a B in 853, and the standards of when the property interest of third parties can be forfeited, and that does--strike that--when property can be forfeited under the criminal forfeiture provisions of 853.

And the second area was scarcely mentioned at all. And so I find that the proposed language in the amended rule is inconsistent and broader than the language in 853 which sets the statutory standard for criminal forfeiture. David, do you agree with that?

MR. SMITH: Yes, I do. Professor, I'm not sure I fully understand your question. I have to be candid. So I can't respond.

MS. STITH: Is the nature of the factual finding that the jury makes under 31(e), the

language used in 31(e) is not repeated, it's not simply transferred to the judge but the actual finding itself seems to be altered?

MR. SMITH: Yes. We noted that, I think, in our written papers that throughout the proposal, as a matter of fact, there are subtle changes in the standards that the statute has established. They may be inadvertent and they obviously could be cleaned up, but we've noted at a number of places where subtle or not so subtle changes in the substantive standards for forfeiture have crept into the note at various places. And obviously those things shouldn't be done because Congress decides what property is subject to forfeiture. Is that what you're getting at?

MS. STITH: Right.

MR. SMITH: Yes.

MS. STITH: But I wondered if you had anything more to say on it? There is one other issue that I saw that--I was asked to make sure all the issues get on the table. As you read the final portion of our proposed Rule F, substitute

property, as I read your statement, particularly your statement before Congress in the fall, Mr. Edwards, you read this as permitting pretrial restraining orders with respect to substitute property. Is that correct?

MR. EDWARDS: The proposal that I had read a day or two before my testimony before the Crime Subcommittee, which had not been introduced but was the subject of the Crime Subcommittee hearing, did provide for pretrial restraint of substitute assets, and I was pointing out to the Crime Subcommittee that that was a vast expansion of government's forfeiture powers because under present law the government can either through criminal forfeiture restrain property that it alleges in an indictment is subject to forfeiture or it can seize property under the civil forfeiture statutes upon an ex parte showing of probable cause that that property is subject to forfeiture, but it cannot seize untainted privately owned property, not without getting a judgment first.

MS. STITH: And were you asserting that

Part F permits that in this proposed rule?

MR. EDWARDS: I don't believe that the amended rule speaks to that. At least it if does, I haven't ferreted it out yet.

MR. SMITH: But I think the point that Mr. Edwards was trying to make was that you have to look at this proposal that's before the committee in light of the various proposals that are circulating in Congress, DOJ proposals, to make other tremendous changes in the criminal forfeiture statutes. And one of the more significant changes that DOJ has proposed and is always pushing is this idea that they ought to be able to seize substitute assets prior or freeze substitute assets prior to trial, and it's an example of the way in which this proposal would aggravate the losses to the defendants inherent in DOJ's other proposals. It's all one ball of wax to DOJ.

It's unfortunate that this committee doesn't really know what's going on in Congress and to the same extent Congress sometimes doesn't know what's going on in this committee, and we're the

only organization that's trying to inform both the committee and Congress of what's going on in the other forum because if you put the two things together, you see this tremendous expansion of the government's powers to carry out criminal forfeitures, a great substantive expansion of the scope of criminal forfeiture law and at the same time a great diminution in the rights of both the defendants and the third parties to defend against criminal forfeitures, and if you don't see the whole picture you don't really get a sense of what's going on.

CHAIRMAN DAVIS: Judge Dowd, do you or anybody else on the committee have any questions?

JUDGE DOWD: If any other member of the committee wants to inquire, they can.

CHAIRMAN DAVIS: Mr. Josefsberg.

MR. JOSEFSBERG: I have one practical question, something I don't understand. If we were to vote against this, there would be a criminal trial and after the criminal trial if there's a conviction, there would be a bifurcated jury trial

on the forfeiture issue; right?

MR. EDWARDS: That's the way things work today; yes.

MR. JOSEFSBERG: And here's what I don't understand. Representing a defendant and representing claimants, I'm in favor of a jury trial because there's the possibility of maybe jury nullification, maybe a little more mercy, maybe as two federal judges were discussing this morning, Judge Borman and Judge Marovich, them following their oath, and maybe jurors may be just a little more loose toward some wife or some children. What I don't understand is if I'm trying the case, and I've just had 12 jurors say that beyond a reasonable doubt my client is a lying dirt bag, and that my closing argument was garbage, I really don't enjoy going back before those 12, and then I like some of the ten, eight or six or whatever preemptories you're leaving us retroactively.

[Laughter.]

MR. JOSEFSBERG: What is the bargain about trying this forfeiture in front of 12 people who

have just stepped all over me?

MR. SMITH: Let me answer that. You don't have to. You can waive your right to have the jury try the forfeiture aspect of the case. The government doesn't have to agree to that, but they usually will because they prefer trying these things to judges normally.

MR. JOSEFSBERG: They wouldn't if you'd seen some of the juries I've seen walk out.

MR. SMITH: They don't always agree to the waiver, that's true. I've seen them refuse it sometimes. But you know jurors often see the forfeiture issues completely differently, as they should, than the question of guilt or innocence because your client can be guilty, obviously guilty, but the property not subject to forfeiture. They really present totally different factual questions. So it's very common for juries to quickly agree on guilt but then return a no forfeiture verdict because the two issues are often completely different.

JUDGE MILLER: How common is that? Do you

have any statistics?

MR. SMITH: It's quite common. We don't keep statistics. I don't think DOJ has statistics on that, but--

JUDGE MILLER: Wouldn't that require really intellectual honesty to distinguish between those two, in which case I'd prefer a judge over a jury?

MR. SMITH: No. I think the jurors are perfectly honest. The question is they're simply separate factual issues. The government often will seek forfeiture of let's say ten items of property. Maybe five of those are subject to forfeiture and for five the evidence just isn't there, and the juries will distinguish between these things. And not only that, but there are jurors--and this really lies at the root of the government's proposal--there are jurors who simply don't like criminal forfeiture, who think it's a harsh punishment, they don't want to take away the family homestead, and occasionally nullification occurs, even for an obviously guilty defendant because

don't forget there are third parties such as children and wives who may be innocent who have an interest, who are going to be hurt just as badly as the defendant by taking away the family home, and the jurors may sympathize with those people.

JUDGE MILLER: They have no problem being honest about taking away father?

MR. SMITH: Right. They have no problem taking away father, but they may have a problem taking away the family home.

CHAIRMAN DAVIS: Judge Marovich and then Judge Wilson.

JUDGE MAROVICH: I'm just curious whether --I'm inclined to think that Bob Josefsberg's concerns are how it plays it out in real life. In 11 years, I have never once, not one time, had a jury on a forfeiture. They might feel sorry for women and children, but most of these things are in drug cases almost universally, and they sure as hell don't feel sorry for people who get close to that nasty stuff.

But I was curious as to whether my

experience is unique or whether other judges have the same history? I've never had one jury trial. I don't know if anybody else has.

MR. EDWARDS: Well, I can simply say that from my experience the way I have looked at it is I would rather have a chance at persuading one or two or three members of the jury that the government is overreaching, that the government is going too far, and you've already--you're taking this person's liberty is going to be, this defendant's liberty is going to be removed, but there are other matters to be considered here. And it has also been my experience that the government very often overcharges with respect to criminal forfeiture so there very often are factual defenses that a jury could identify with, that, as David said, perhaps not to all of the properties listed in a criminal forfeiture count but as to some of them, and most of the time I would rather take my chances with the jury even though it's the jury that just found my client guilty.

After all, in a capital case, that's what

you're doing, too, and a life is on the line. But let me add finally, there is a tradition centuries long among English speaking peoples juries somehow or another sense that the right of ownership of property is a very important part of what we have vis-a-vis our government, and from the 14th century, there are many examples of English juries and later of American juries that acted as a buffer between the government and the property owner, even property owners that they had already decided needed to be put away.

So I can simply say that it does happen and it is very meaningful to have 12 people who aren't back in the courtroom everyday and who haven't heard dozens of cases like this the month and the year and the years before. It makes a difference.

CHAIRMAN DAVIS: Judge Wilson.

JUDGE WILSON: First, on the question Judge Marovich talked about, I have had two or three requests for jury trials on forfeiture and each of those cases the government threw in the

towel and so I didn't actually go to trial, but I have heard of them where the jury did not forfeit in the Eastern District of Arkansas. At least in Arkansas--it may have been in the Western District. And I tell you you're preaching to the saved as far as I'm concerned. I spent 25 years as a practitioner trying to get the Arkansas legislature to pass a bill to give the right to jury trial in child custody cases, at least in the first instance, and never could anybody even to sponsor the bill, but I agree with that great English barrister of the last century that said a judge is but a juror in ermine skin robe.

And I think jurors are perfectly capable of--I notice in the comment it says that jurors may have a hard time understanding the different burdens of proof. I think properly instructed they can do that and sometimes there are some legitimate hard issues between interest in property and whether or not they toted this dope in from somewhere or whether they robbed this bank and there is some real good real law property issues

there that I think are more properly submitted to a jury.

But let me get back--I'm like one of these congressman I see on C-SPAN, they make a speech and then they ask a little old bitty tadpole question at the end.

[Laughter.]

JUDGE WILSON: But I noticed you said there is one sentence in Libretti and then a comment on page seven in our book. I don't believe you have our book. It says in light of Libretti, it is questionable whether the jury should have any role in the forfeiture process. Well, I read Libretti when it first came out, but I haven't read it in some time. I thought it pretty much knocked the issue in the head as far as the Constitution, but apparently even the--well, I guess I will ask this of government--even the government concedes there is still a question after Libretti. And obviously your position is that Libretti doesn't make a definitive decision on the point?

MR. EDWARDS: Libretti does not mention

the Seventh Amendment at all and does not discuss whether simply placing a new label on a forfeiture proceeding by attaching it to a criminal indictment and making it part of a criminal proceeding matters constitutionally. Libretti only says that our analysis of the nature of criminal forfeiture as an aspect of sentencing rather than an element of the criminal offense compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. And that's what I meant when I referred to the crack between the Sixth and the Seventh Amendment.

The only way it would seem to me that the government could successfully persuade the Supreme Court that there was no right to jury trial would be to argue that somehow or another by the Congress' adopting 853 and allowing the government to attach a forfeiture proceeding on to an indictment and thereby on to a criminal proceeding, that they have created some sort of hybrid forfeiture action that slips between the Sixth

Amendment right to protection in criminal trials, jury trial rights in criminal cases, and the Seventh Amendment right to jury trial protection in civil cases.

And somehow or another they squeak in between those two. But if you consider the history, what brought the Declaration of Independence and the Bill of Rights about, I think that simply can't fly, and I don't know what the Supreme Court would do, how they would fashion a conclusion that there was a constitutionally protected right under this new hybrid type, this forfeiture action with the new hair piece, as I said, but I believe they would. I believe they would say there is a right to jury trial.

CHAIRMAN DAVIS: Judge Roll.

JUDGE ROLL: Although I think that Libretti may answer much of this, one of the things that I found alarming in the government's March 20 report or statement, page three dealt with identification of property to be forfeited and the assertion that it needn't be identified, that just

the general allegation and everything that is subject to forfeiture may be forfeited. I can understand perhaps as far as currency or proceeds from drug trafficking, money seized and so on, but I'd like your comment regarding that.

MR. EDWARDS: Well, if I'm going to have to prepare a defense, I've got to know what property the government is claiming is subject to forfeiture. And you're absolutely right, when it's money, money being fungible, a criminal forfeiture count might very well say a million dollars or a half million dollars or whatever, and then go about proving from several different directions how you reached that bottom line, but if it's specific personal or real property, I believe that must be included in the forfeiture count of an indictment. Otherwise how is due process, the notice requirement of due process, satisfied.

JUDGE ROLL: We've been talking about culture earlier, about cultural differences between districts, and I know in our district if it's vehicles, if it's residences, if it's specific

property, it is always identified in the indictment as specifically subject to forfeiture.

MR. EDWARDS: Well, because I've handled forfeiture cases in a number of different jurisdictions, it varies widely, and I believe that's David's experience, too.

MR. SMITH: Yes, it does, Judge. I know you're from Tucson because my brother practices there and my wife has been out there, too.

JUDGE ROLL: Did he tell you about me and what's his name?

[Laughter.]

MR. SMITH: Jesse Smith, and a lot of things are done better in Tucson than elsewhere. I can tell you that in many, many districts, the forfeiture allegations have become more and more general as the years go by. When these statutes were first enacted, when Rule 7(c)(2) was fresh, the prosecutors made darn sure that they were specific about the allegations because that's the way the rule read, but as these cases began to come down saying, well, it doesn't really matter whether

you specifically allege it in the indictment, as long as you give the defendant notice in some other way, prosecutors started getting more lax about specifically naming it in the indictment. They learned they didn't have to and they could get away with it. And that's the trend we've seen.

Unfortunately, the courts have really given Rule 7(c)(2)s interpreted very, very loosely, and we're not happy with that state of affairs, but what the government would do here, as you point out, is just abolish it all together and allow the government to make generalized allegations. Not only does that mean that the grand jury is no longer a check for whatever it's worth on the prosecutor's ability to include property in the indictment for forfeiture and to seize that property prior to trial, but it also has another very pernicious effect, and that is--obviously the defendant doesn't know what he's up against unless he gets some other form of notice--but at the same time the government is arguing we ought to expand the scope of property that we can seize prior to

trial to include substitute assets. That is property that's not tainted, that's never been involved in a crime, but which is substituted for the tainted property that they can't find.

And often what that means is seizing all of the defendant's property, and the government says, well, not only do we want to do that, but we don't even want to allow the defendant to have a hearing after it's been seized, after it's been restrained, to try to get it unrestrained so that he can use it to carry on with his life. And why aren't you entitled to a hearing on that? Because the grand jury has already found that the property is subject to forfeiture, they say, so that's probable cause enough and you're not entitled to a hearing. So they are sort of speaking out of both sides of their mouths.

On the one hand, they say we don't need Rule 7(c)(2). We don't need any specificity, but in Congress, when they're trying to justify the other proposal for expanding the scope of property that's subject to pretrial restraint or seizure,

they say there is plenty of protection in Rule 7(c)(2). After all, the indictment--the grand jury has passed upon what's subject to forfeiture.

So really the two justifications are completely at odds with each other, but they're presented before different committee--I mean before this committee and Congress, and nobody seems to know except those of who are watching what they do that they're speaking out of both sides of their mouths at the same time.

MR. EDWARDS: I would also comment. I have observed that bad cases make bad law applies here. In the BCCI case, for example, the government got a lot of legal precedent that they can use to avoid specificity because they had some international gangsters doing a lot of very bad things. And I can think of a couple of other cases where they caught some cartel agents with millions and millions of dollars, and some of the precedent that came out of those cases were very favorable for Justice and very unfavorable to small time property owners who might find themselves caught up

in a bad situation. And I don't know that there is any solution for that. That's just the way our system works. Sometimes bad cases do make bad law.

CHAIRMAN DAVIS: Professor Schlueter.

MR. SCHLUETER: I have a quick question for you. I think one of the arguments the department will probably say is that Libretti stands for the proposition that all of this forfeiture proceeding really is more in the nature of sentencing, and if you can follow that line of logic, then your burden of proof changes. The rules of evidence are gone. You have not addressed that issue in your comments. You make some very persuasive arguments about the right to jury trial, but if the Supreme Court has said that forfeiture is really more in the nature of sentencing, then this committee is going to have to struggle with the question of whether or not to follow that logic and continue to treat this rule, if it does, as a question of sentencing.

MR. EDWARDS: Well, I attempted to address that by acknowledging that there is one sentence in

Libretti that supports the government's reading of Libretti. However, the issue was not squarely before the Supreme Court in Libretti. In fact, I would--

MR. SCHLUETER: On the question of sentencing or on the question of a jury trial?

MR. EDWARDS: The issue of the scope of constitutional protection of the right to jury trial was not squarely before the Supreme Court. The Supreme Court did say that when considering A or B--is criminal forfeiture an element of a criminal offense or a matter of punishment to be considered in the sentencing hearing, they said it's a matter of punishment.

I cannot argue that criminal forfeiture is not punishment. I would simply say it is a special brand of punishment that goes all the way back to the reign of Edward I, and it is different from the traditional matters that come before a sentencing judge in a sentencing hearing, and because of that background and the background of our separation from England, it has other constitutional

ramifications that do not attach to the simple issue of is it constitutional for a judge to impose a sentence.

MR. SCHLUETER: So if I can interrupt you? Do you see it as a hybrid then? In the sense that if we continue with the special verdict procedures under 31, that treats it more as a matter of verdict. If we go with Libretti's suggestion that it's a matter of sentencing, then that sends us down another road, but you're suggesting perhaps that this committee keep it as a hybrid. That is you continue to provide a jury trial, the rules of evidence apply, and at the same time consider it an aspect of sentencing.

MR. EDWARDS: Libretti did not hold 853's provision for a jury trial unconstitutional. I mean that issue has not been presented, and in fact, it would be my contention that the most appropriate action for this committee to take is to reject this amendment.

MS. STITH: Mr. Edwards, I wonder why when you keep quoting from Libretti, you don't quote

whole sentence? In fact, doesn't the Supreme Court say without disparaging the importance of the right provided by Rule 31(e), our analysis compels the conclusion that this is merely a statutory right and not a constitutional right?

MR. EDWARDS: It does say that. Yes, of course. Judge Souter in his concurrence said I would not reach the question of a Sixth Amendment right to trial by jury on the scope of forfeiture or whether the Constitution obliges a trial court to advise a defendant of whether a jury trial right he may have. Had I had the privilege of sitting on the court in Libretti, I would have joined Justice Souter. I think it was unnecessary for the court to reach that because about half a page later, the court in its majority opinion found that Libretti understood his rights and had waived them. So I simply thought that the court was improvident in even discussing Sixth Amendment rights, and of course it didn't discuss Seventh.

MR. SMITH: If I could add to that, even if you assume, and this is in response to both

professors' questions, even if Libretti is correct in that criminal forfeiture is purely a matter of sentencing, there is nothing to prevent Congress or this committee from assigning that sentencing matter to a jury verdict. Juries do sentence, we noted, in six or seven states in all felony cases including my state of Virginia, and juries, of course, sentence in capital cases, and there was a long tradition of jury sentencing in other states which has gradually changed.

But what's clear is that juries have always been the fact finders in criminal forfeiture cases, always. There's never been an exception to that. And what the government is urging the committee to do is to change that. And we don't think they've born the burden of persuasion on that because there are good policy reasons, none of which Libretti addresses, for continuing to do it exactly that way. Libretti says nothing about the policy choices involved. It merely says that the Sixth Amendment doesn't require a jury to pass on these issues.

And we think all the policy choices are in favor of continuing the present rule, as it stands. And not only that, but the statute, the criminal forfeiture statutes themselves are drafted and were enacted based on that premise, that a jury will return a verdict of forfeiture, and those statutes will become unintelligible really if that rule is changed. You'd have to change those statutes, too, and that's why we don't think it's an appropriate matter for this committee to be taking up.

Congress should take it up if it wants to in connection with a complete rewrite of the criminal forfeiture statutes, and we are very confident that Congress will never ever go along with the Justice Department's proposal and we're also confident that if this committee passes the proposal, Congress will reject it.

CHAIRMAN DAVIS: You mentioned in your statement that you think the proposed amendment makes some substantive changes. Could you tell me the main provisions that you're referring to in our rule?

MR. SMITH: I can answer that, Judge. Well, one of them is the way we interpret the government's proposal the jury would or rather the judge under the proposal would not make any determination of the extent of the defendant's interest that is subject to forfeiture. That question would be reserved for the ancillary proceeding involving the third parties at which the defendant, of course, has no right to be present. And we don't, to us that makes no sense at all because you've got to determine the defendant, what part of the defendant's interest in the property is subject to forfeiture. It is not always 100 percent of the defendant's interest that is subject to forfeiture.

CHAIRMAN DAVIS: My question is leveled at what do you consider a substantive change as opposed to a procedural change in our proposed rule?

MR. SMITH: Well, that is a substantive change because presently the jury or in the case of a bench trial the judge must determine the extent

of the defendant's interest that is subject to forfeiture. And the defendant can obviously argue, well, only ten percent of my property interest is subject to forfeiture, the rest isn't tainted. It's clean money that went into that, Let's say that boat. 90 percent of the money that went into that boat is clean. I earned it honestly. Only ten percent of it is drug money. So only ten percent of that boat is subject to forfeiture.

The way the proposal seems to be written is all of the defendant's interest would always be subject to forfeiture and the only person who could raise a claim against that would be a third party who might have an interest in that boat. Let's say somebody with a mortgage on the boat. And that is obviously not what the law is today and we don't see how the committee could change that.

CHAIRMAN DAVIS: Okay. Anything else?

MR. EDWARDS: Well, Judge Davis, I would submit that getting a jury trial or not getting a jury trial is a substantive matter. There is at bare minimum a statutory right under present under

the United States Code at present to a jury trial on issues of criminal forfeiture and this would change that.

I think it bears sharing with this jury an experience that Stef Cassella and I had two or three years ago appearing at an symposium at Notre Dame Law School on forfeiture in which Professor Blakey of Notre Dame Law School participated. Professor Blakey was general counsel to Senator John McClellan's Senate committee that drafted and passed the first RICO statute, which initiated the notion of criminal forfeiture. And 853 was taken directly from the criminal forfeiture provisions of RICO, which Professor Blakey drafted.

And he said in that symposium that perhaps in drafting the RICO statute, they did not think carefully through the procedures that relate to criminal forfeiture, and in particular we were addressing at that point the right of third party claimants in criminal forfeitures to have a jury trial which the federal code does not now allow.

I noticed that a case cited in the

government submission, United States versus Mussino in the seventh circuit, is a case I have in which I represent a third party claimant and I asked the district court to hold 853 unconstitutional under the Seventh Amendment as to third party claimants, and the seventh circuit was about to take that up and decided that the underlying criminal conviction was going to have to be overturned, which mooted the judgment of forfeiture and sent me back to district court. So I missed out on the opportunity to have the seventh circuit pass on whether third party claimants in ancillary criminal forfeiture proceedings had a right under the Seventh Amendment to jury trial, but I believe the right to jury trial itself is a substantive right and it's not appropriate to remove that by rule amendment.

MR. PAULEY: Is Rule 23 invalid then?

MR. EDWARDS: What?

MR. PAULEY: Is Rule 23 invalid?

MR. EDWARDS: In what respect?

MR. PAULEY: Existing that way. It gives the government the right to have a jury trial.

MR. SMITH: No.

MR. EDWARDS: No, no.

MR. PAULEY: I mean the defendant cannot waive without the consent of the government.

MR. SMITH: We don't disagree with that.

MR. EDWARDS: No, we wouldn't disagree with it.

MR. PAULEY: You don't disagree with the policy or you--

CHAIRMAN DAVIS: Mr. Pauley, I'm having trouble hearing you.

MR. PAULEY: I mean is in--

MR. SMITH: We think the government should have a right to a jury trial too, if it wants it, and as I said before, sometimes the government insists on its right to a jury trial.

MR. PAULEY: I understand, but if the rule is delving into substance rather than procedure, then whether or not we agree with the substance of the rule, it's an invalid rule?

MR. SMITH: Oh, I see.

MR. PAULEY: Is that your submission?

MR. SMITH: It's not my submission.

JUDGE CARNES: It seems to me you're substantive as a synonym for really important or really valuable or constitutionally guaranteed. That's different from, I think, the way in which the chairman intended the question. We can't adopt regardless of which way we go on any rules that affect substantive matters or we're not supposed to. That's supposed to be outside of the scope of the rules.

MR. EDWARDS: Yes.

JUDGE CARNES: And if we adopt a rule giving somebody a right to a jury or trying to take it away from a right to a jury, that may be wise or unconstitutional or what not, but in our view or at least some of the questions, it's not a substantive matter, it's a procedural matter. How a substantive right to property is taken away from you or you're deprived or it's defined is by procedure, and I think the question was is there anything in here that transgresses the distinction between procedural rights, however important, and

substantive rights, which is whether you can be deprived of the property regardless of the procedure?

MR. SMITH: Well, we think that the burden of proof is also a substantive matter. That's what we've said in our submission. While this committee's proposal doesn't directly address burden of proof, it does address it in a note, and weighs in, in effect, on behalf of the government's view that the burden of proof is merely a preponderance of the evidence. Of course if you treat forfeiture as purely a sentencing matter for the judge, that would tend to promote the notion that preponderance standard is sufficient.

We think, as we've said over and over again, that Congress clearly intended to provide for a beyond reasonable doubt burden of proof. I'd be prepared to concede that that's not constitutionally required, but if you look at the legislative history, and there was a fine opinion from your circuit, Judge, that did--Elgersma. Unfortunately it was overruled en banc. But if you

look at that--

JUDGE CARNES: By a less fine opinion.

[Laughter.]

MR. SMITH: If you look at the decision, rather than rehashing the whole legislative history, we cited that case, and it really does show that there is no question about it. Congress intended a beyond a reasonable doubt burden of proof for all criminal forfeiture statutes. In fact, one of the statutes specifically incorporates that language into it. That is the obscenity criminal forfeiture statute. It says beyond a reasonable doubt. The others merely assume that that would be the burden, and the government initially agreed--in fact, the government asked for that.

I was in Mr. Cassella's position in 1984 and I was involved with that legislation, and I still remember it. There were people in Congress who said, well, what about preponderance of the evidence? Why shouldn't we make it preponderance of the evidence? And it was the Justice Department

that insisted that the burden of proof should be beyond a reasonable doubt because they didn't want to have to litigate the issue in the courts. They thought it raised constitutional questions back then.

So they went with the beyond a reasonable doubt standard and you can find that in the legislative history. In fact, we've cited the House committee report that says that. But despite all this legislative history, the courts have been saying ever since Libretti and indeed even some courts before Libretti that the standard of proof is preponderance of the evidence. But there is inconsistent decisions, and we don't think that's a matter that this committee should decide by rule. We think it's a substantive right conferred by Congress which shouldn't be overruled by the committee.

CHAIRMAN DAVIS: Any further questions?

MR. EDWARDS: Judge Davis, just one thing I wanted to tell Judge Marovich. I have won a civil forfeiture case before a jury, and it was

fun.

JUDGE MAROVICH: I didn't disagree with the distinction that you've drawn. I'm just trying to say as a practical matter that there is a lot of backing for Bob's position and without disagreeing or taking the stand on the proposition.

CHAIRMAN DAVIS: Gentlemen.

JUDGE WILSON: I realize the judicial economy of time is most important consideration these days. I found that out when we supported the lawyer voir dire right, and we might take ten or 15 minutes longer during a trial to select a jury so that wouldn't work.

[Laughter.]

JUDGE WILSON: We're not really talking--and maybe the Justice Department will address this, too, but how many cases does a defendant really want? How often are they going to request a jury trial? And by and large, they're not going to argue that that's not forfeited money. Aren't we really talking about issues where there--let me back up and see if I can ask this question plainly.

How many cases will a defendant really want a jury trial?

MR. EDWARDS: I think it would be fairly rare. Of course, let me temper that by it's difficult to say right now in the coming years how often the Justice Department will choose to use criminal forfeiture as opposed to civil forfeiture. That may depend in large part on what Chairman Hyde does to reform civil forfeiture and make the playing field a little more even and what this committee does with Justice's attempt to avoid juries.

But let's say under present circumstances, it is rare, and to be fair about it, Judge Marovich, if I were in a criminal forfeiture case and I had comfort in the federal judge hearing the case not being too knocked out by the proof against my client, I might very well waive jury trial on the forfeiture issues.

JUDGE MAROVICH: You've put your finger on why it is my experience.

[Laughter.]

MR. EDWARDS: But unfortunately, I would say my experiences run to the contrary. I'd rather take my chances with a jury of 12 impartial citizens who don't come in the courtroom everyday.

JUDGE MAROVICH: I will accept your first answer as the better--

[Laughter.]

JUDGE WILSON: I think you're wise.

CHAIRMAN DAVIS: All right, gentlemen. Thank you very much for coming. We appreciate it very much.

MR. EDWARDS: Judge Davis, thank you for having us. Thank you, all.

CHAIRMAN DAVIS: We'll hear next from Mr. Stefan Cassella. And I think we've all met Mr. Cassella before. He's the Deputy Chief, Asset Forfeiture and Money Laundering Section of the department. Mr. Cassella, we've read your written submission and we'd be glad to hear a brief statement and hope you'll answer our questions after that.

MR. CASSELLA: Thank you, Judge Davis. I

did prepare a statement which I promise is not longer than ten minutes long and I will be happy to take the committee's questions. We thank the committee for the opportunity to present our views on Rule 32.2. Federal prosecutors are now including forfeiture counts in many if not most of their criminal indictments, and they've started to ask some very practical questions.

How do you bifurcate the criminal trial? What does the special verdict form look like? Does the jury have to resolve issues of state property law? What do I do with property that I don't discover until after the trial is over? The current rules do not answer those questions, and we think that they need to be replaced with a new rule that sets forth a clear and orderly process that everyone can follow.

As we've said in the papers we've filed with the committee, one of the best ways to improve the law is to eliminate the role of the jury in the forfeiture phase of the trial. The present rules require a bifurcated proceeding in which the jury

must return to the courtroom to hear additional evidence and instructions before returning a special verdict of forfeiture. This procedure is virtually universal. I can't remember the last time I heard anyone tell me that a judge had allowed a jury to hear evidence regarding the forfeiture during the government's case in chief.

Without a doubt, this procedure is burdensome to everyone involved in the process, to the judge, the jury and to the litigants. At the end of a long trial, no one wants to be the one to tell the jurors who are in the process of putting on their hats and coats and getting ready to go home that they have to stay to hear new evidence, to hear new instructions, and to return a verdict on forfeiture law. A room filled with jurors who are visibly upset that they're not ready to go home is not the proper environment in which to seek the deliberate and fair administration of justice.

Of course, such burdens might be justified if they were necessary, but they're not. It is now settled that criminal forfeiture is part of the

defendant's sentence and sentencing matters are commonly assigned to the court. Mr. Smith and Mr. Edwards have just argued that just because the Constitution permits forfeitures to be resolved by judges doesn't mean that they should be, but the same could be said for all sentencing issues. We could insist that the jury make all factual findings necessary under the sentencing guidelines, but we don't.

If the court can make the decisions that might result in the imposition of a life sentence, it seems the court can also find that the defendant will have to forfeit his car or his house or his bank account. Moreover, having the jury make findings of fact with respect to forfeiture can lead to inconsistent results. In a drug case, the jury might find that the defendant earned so much money from his drug dealing and he has to forfeit that amount.

The court, however, can ignore that finding and use a larger or smaller amount to calculate the offense level that determines the

sentencing guideline. We cited in our written testimony a recent fourth circuit case where that happened. It seems to us that it makes little sense to have both the judge and the jury make the same calculation with each free to ignore the other.

And finally, having the jury make the forfeiture findings is often simply impractical. The statutes provide for post-trial discovery to give the government a chance to locate and identify property traceable to the offense. In other words, they contemplate that at least some of the forfeitable property will not be found until after the jury is dismissed. Now, suppose in a drug case, the government discovers a cache of gold bars buried in the defendant's backyard long after the trial is over. To add that property to the forfeiture order requires a finding that it is traceable to the offense, but who makes that finding?

It's not practical to bring the jury back to have them fill out a new special verdict form.

It has to be left to the court, and if the court can make that finding with respect to subsequently discovered assets, why can't the court make the same finding with respect to assets that were identified at the time of trial? For all of these reasons, we think that the better practice is to remove the jury altogether from the sentencing process.

I'd like to make just one point regarding the burden of proof issue that Mr. Smith mentioned. The new Rule 32.2 does not change the burden of proof. If the rule takes effect, the preponderance standard will continue to apply in the overwhelming number of courts that have adopted it. But the reasonable doubt standard will continue to apply elsewhere. In particular, it will apply in RICO cases in the third circuit until that court or the Supreme Court or Congress by legislation changes it. This rule does not change it.

We cited the case law on the burden of proof only to emphasize the degree to which courts already recognize forfeiture as part of the

sentencing process and to underscore the incongruity of making it an issue for the jury.

The most significant of the remaining issues concerns the defendant's interest in the property vis-a-vis third parties. We think the better rule is to defer that issue to the ancillary proceeding. As a practical matter, that would avoid prolonging the criminal trial with difficult issues of state property law that only have to be relitigated in the ancillary proceeding if someone files a claim. But more important, the procedure reflects the true nature of a criminal forfeiture which focuses primarily on the property and only secondarily on the issues of ownership.

And the best way to explain this is to compare a criminal forfeiture with a civil forfeiture. A civil forfeiture is almost purely in rem. We don't care who owns the property. We care only that the property was derived from or used to commit an offense. For example, suppose a drug dealer uses an airplane to fly drugs from Mexico into California. In that case, we want to forfeit

the plane. It's an instrumentality of the crime. We don't care if the plane belongs to the pilot, to his wife, a South American corporation, or anybody else. We file a forfeiture action and we let anyone who asserts an interest file a claim.

The idea is to get everyone in the room at the same time, and once they're all in the same room, we litigate the merits of the case. We litigate standing, forfeitability, and innocent owner defenses all at the same time. And if we win, if the government wins, we obtain an order of forfeiture that's good against the whole world. The plane belongs to the government.

Now, criminal forfeiture is very different. It is not an in rem action. But it is not a purely in personam action either. It is a hybrid between the two. In a criminal case just as in a civil case, we start with a focus on the property. Only the property derived from or used to commit the offense is subject to forfeiture. That's the in rem aspect of a criminal forfeiture. But in addition, the government is limited to

forfeiting the defendant's interest in the property. Third party interests cannot be forfeited in a criminal case because the third parties were not participants in the criminal trial. That's the in personam aspect of a criminal forfeiture. It's a limiting factor that makes criminal forfeiture an inherently more limited law enforcement tool.

So in the airplane case, for example, suppose we prosecute the pilot for smuggling drugs. We still want to forfeit the plane. It's still an instrumentality of the offense, but suppose the pilot owns it jointly with his wife or if there is a lien on the plane? We can't forfeit the interest of third parties unless we allow them to participate in the trial and challenge the forfeitability of the property. But unlike the civil case, we don't want all these folks in the same room at the same time. We don't want a third table in the courtroom during the trial so people who oppose the forfeiture can make objections to the evidence being presented or to object to the

forfeitability of the property.

So what do we do? We proceed with the in rem aspect of the forfeiture at trial. That is we have to establish the nexus between the property and the offense or in my example between the airplane and the drug trafficking. And then we hold a separate post-trial ancillary proceeding where third parties can assert that they have an interest in the property that can't be forfeited.

The ancillary proceeding is not a civil forfeiture case. It's not an opportunity for the government to forfeit the third party's interest. We cannot do that because the third party, the wife, the lien holder, the corporation, has not had an opportunity to participate in the trial and challenge the forfeitability of the property. The purpose of the ancillary proceeding is just to find out if the property really belongs to someone else and not to the defendant.

That's why third parties can't challenge forfeitability in the ancillary proceeding. They don't have to. If they're the real owner of the

property, they prevail and take the property whether it was forfeitable or not. That's why there is no innocent owner defense in an ancillary proceeding. You don't need one. Whether the third party is innocent or not, if he's the true owner of the property, he prevails. And that's why there is no right to a jury in the ancillary proceeding. The ancillary proceeding is really equitable quiet title action.

If the third party has a superior legal interest in all or part of the forfeited property, he or she will prevail whether innocent or not, whether the property was subject to forfeiture or not. If the government wants to forfeit the interest of a third party, it must file a separate civil forfeiture action where the third party can contest the forfeitability of the property and assert innocent owner defenses.

So, in short, the in rem aspects of the criminal forfeiture take place at trial when we establish the forfeitability of the property, and the in personam aspects take place in the ancillary

proceeding. If no one files a claim, the property may be forfeited in its entirety because the nexus to the offense has been established, and there is no reason to believe that anyone other than the defendant has an interest in the thing being forfeited.

Now, Rule 32.2 reflects this dichotomy. It provides that at trial the court determines only whether the necessary relationship exists between the property and the offense. The determination of the extent of the defendant's interest vis-a-vis third parties, the in personam aspect of the case, is deferred to the ancillary proceeding.

Now, Mr. Smith and Mr. Edwards object that the rule would force the court to order the forfeiture of a defendant's entire bank account even though only ten percent of the account was traceable to the offense. That is not so. Determining what part of the bank account is traceable to the offense is part of the forfeitability issue. If the court found that only ten percent of the money was involved in the

offense, it would limit the forfeiture to that amount, and surely the defendant in the forfeiture phase of the trial has the opportunity to make arguments that would lead the court to agree with him that that was the case. That goes to the forfeitability issue.

The issues that Rule 32.2 deals with were the in personam aspects of the case. That is where the defendant says that bank account doesn't belong to me, I'm just a nominee. It belongs to my brother or to my wife or to my girlfriend. We think it evident that a defendant should not be permitted to defend against a forfeiture on that basis. A criminal defendant has no more right to assert his girlfriend's interest in his forfeited sports car than he would have a right to assert her Fourth Amendment rights were violated when the murder weapon was found in her purse. An uninterested person simply cannot assert in a court of law the legal rights of another person.

Finally, it is clear that if the government filed a civil forfeiture action against

the same property, each of the third parties would have to file his own claim and assert his own defenses. The same rule should apply in a decidedly less onerous ancillary proceeding process where the third party is required to do nothing more than establish a superior legal interest in the property.

For all these reasons, Mr. Chairman, we think that this rule should be adopted by the committee. We thank the committee for its interest and we look forward, I look forward to any questions you might have on our position.

CHAIRMAN DAVIS: All right. Thank you very much, sir. Mr. Josefsberg, you want to go first?

MR. JOSEFSBERG: I am prepared but I would prefer to defer to the committee and then at the end if my issues aren't covered to cover them.

CHAIRMAN DAVIS: Okay. Judge Carnes.

JUDGE CARNES: I had one question about the gold bars in the backyard a couple, three years later. How does that procedurally work? Say

you've got a forfeiture order against what you then know to be discrete assets used in the offense and the defendant forfeits those. Three years later, the dog digs up a gold bar, whatever, in the back yard--

MR. CASSELLA: Right.

JUDGE CARNES: Do you go in and move to amend the forfeiture order under the original criminal number, case number?

MR. CASSELLA: The case I was speaking of was United States versus Saccoccia in the first circuit. What happened in that case was that the order of forfeiture said that the defendant was required to forfeit all property involved in the money laundering offense and similar language with respect to the RICO conviction. There was a conviction both for money laundering and for RICO totaling up to, I believe, it was $137 million. Then the government conducted post-trial discovery to attempt to locate the $137 million or what part of it could be found.

And through discovery, some years later,

the gold bars were dug up in the backyard. Now procedurally what has to happen is someone has to make a finding that that property was involved in the money laundering, that it was traceable to the offense, and therefore is within the ambit of the original order of forfeiture.

JUDGE CARNES: But the original forfeiture proceedings more or less were ongoing and there was discovery going on until the bars were discovered?

MR. CASSELLA: Correct. We're still under the same criminal number so the government has to come back to the same trial judge and to the same criminal number and ask for an amendment to the order of forfeiture. Now it can be done one of two ways. The government can say, your honor, this is the property traceable to the offense. It's within the ambit of the original forfeiture order so please amend the order of forfeiture to include these specific gold bars so that we may then give notice to the world and conduct an ancillary proceeding as to the gold bars or the government can treat the original order of forfeiture

basically as a money judgment and then say these gold bars should be substituted as substitute assets.

JUDGE CARNES: Well, is there any limitations on the time period?

MR. CASSELLA: No, there is no limitation on the time. We don't think there ought to be because that would just encourage the defendant to do that much better job of concealing his assets. In a case such as Saccoccia and so many others, the defendant has gone to great lengths in money laundering case, for example, to conceal his assets.

JUDGE CARNES: Well, let me ask you about that. You say that the rule is pretty much essential in order to cover things like subsequently discovered assets years later. Why couldn't you just file a civil forfeiture proceeding against those assets?

MR. CASSELLA: You could. You could file a civil forfeiture proceeding against those assets. Of course if you're initiating a new civil

forfeiture action, you do have a five year statute of limitations period from the time that the events giving rise to the forfeiture were discovered.

JUDGE CARNES: So this is a way to circumvent the statute of limitation problem?

MR. CASSELLA: It could be, but the criminal case is still ongoing. We have kept the criminal case active all this time to conduct this discovery in an attempt to locate the property. Having done so, it seems to make the most sense to do the forfeiture in the criminal case.

JUDGE CARNES: Well, you don't hold the final judgment in the criminal case for purposes of appellate jurisdiction.

MR. CASSELLA: No.

JUDGE CARNES: The appeal is ongoing?

MR. CASSELLA: The appeal goes forward and can be made final after the defendant; that's correct.

JUDGE CARNES: So this is one of those rare exceptions where you've got two courts with jurisdiction?

MR. CASSELLA: Well, what would happen, I suppose, is--this hasn't yet been litigated--but if the court were to find that these gold bars were indeed traceable to the offense, and the defendant were to disagree, he could probably appeal from the new or the amended order of forfeiture.

JUDGE CARNES: Yeah, but I mean you have a judgment. If you take the government's position that forfeiture is part of sentencing.

MR. CASSELLA: Right.

JUDGE CARNES: Well, the sentence is on appeal. It's in the court of appeals.

MR. CASSELLA: That's right.

JUDGE CARNES: And then you have a district judge amending the sentence even though the sentence is in the court of appeals at the time he amends his sentence.

MR. CASSELLA: That is correct. That is the case with respect to forfeiture because otherwise you'd have to hold the appeal until the government finished locating all the property and that might take forever.

JUDGE MILLER: Following up on that, if the criminal judgment order of forfeiture says that the defendant is to forfeit a million dollars, and in the course of two years the government recovers a million dollars, then you find $10 million in gold bars, you would not be able to proceed under the criminal forfeiture to get that $10 million in gold bars?

MR. CASSELLA: That's correct. If the original order of forfeiture had a dollar limit in it, which it generally would, with respect to the amount of money derived from fraud, drug trafficking, whatever it might be, or involved in money laundering, then we could conduct this discovery to locate those assets up to that amount. If we later found that we had not been aggressive enough in obtaining our original order of forfeiture, and the defendant actually had used other property to commit the offense or had realized additional proceeds than were included in the original proof submitted at the forfeiture phase of the trial, then we'd have to conduct some

new forfeiture action with respect to the newly discovered property, presumably a civil forfeiture action.

CHAIRMAN DAVIS: Judge Wilson.

JUDGE WILSON: Is the government being plagued by requests for jury trials in forfeiture actions?

MR. CASSELLA: No. I'm glad you asked because I was listening to the previous discussion. It's our experience that most of the time the defendant will waive the request for the jury. What they generally do is eyeball the jury and if these 12 folks who just found the defendant guilty of 47 counts look like they're not going to be particularly likely to be enamored with Mr. Edwards' recitation of the history of John Hancock and John Adams, then they will waive.

On the other hand, if they think they've got a good shot at jury nullification, then they'll go for the jury. I would say it's the minority of cases where they go for the jury.

JUDGE WILSON: Isn't it true that there

are very, very few cases where they ask for a jury trial in a criminal case for forfeiture?

MR. CASSELLA: I think it is.

JUDGE WILSON: And so why do we need the-- I see this as a really monumental change in concept, at least, and why does the Justice Department want this change at this period in time if you're not being plagued by requests for jury trial? Are you trying to get an easier vehicle in a civil forfeiture?

MR. CASSELLA: Because of the enormous problems that occur procedurally when the request is made for jury trial. You have the issues that I just mentioned about property that is discovered afterwards. You have issues that arise when the jury might hang on the forfeitability question. What do you do then? Do you impanel a new jury just to hear the forfeiture action or does the government have to punt and go to a civil forfeiture? That's a difficult question.

The juries have to listen to issues of state property law that have to do with if we leave

before the jury the question of the extent of the defendant's interest. So it's a very complicated procedure in addition to the one that I stress, which is that juries just don't like it and it's just not the proper environment. I mean no one likes to try a case for weeks, have the jury go out for days, argue over guilt or innocence perhaps with an eye out the window noticing that it's snowing and it's Friday night, and they're ready to go home, and then they have to come back and find out that they're going to hear additional evidence of forfeiture. Whether they take it out on the government or they take it out on the defense attorney or the defendant isn't really the issue. It's just not the right way to do this if we don't have to it that way and we don't think we have to do it that way.

JUDGE WILSON: It's been my experience that judges are more bedraggled and irritated at the end of a long trial than the jurors, but what's wrong with asking the juror to take an instruction on local property law? I mean surely it's not more

complicated that the racketeering act they just tried.

MR. CASSELLA: Well, it can be. I mean there are some extremely complicated issues of property law. Mr. Edwards mentioned that I handled the BCCI case, and the BCCI case, which is not a jury issue, it's an ancillary proceeding, but the issue of property law is when property is wired from a bank account in one place to a bank account in another place and it's received in the second place, who is the owner of the property? It depends on how you construe Article 4(a) of the Uniform Commercial Code having to do with wire transfers and whether or not the recipient is the owner or the sender is the owner or the bank is the custodian, is the intermediary bank the owner? I don't want to have to explain all that to a jury if I don't have to.

JUDGE WILSON: With proper instructions, they can do it.

MS. STITH: But if you proceeded under civil forfeiture, you would have to explain all

that to a jury; right?

MR. CASSELLA: Yes. In a civil forfeiture case, if we were--well, let me take that back. If standing were an issue--because in a civil forfeiture case, we're concerned only with the forfeitability of the property. But if a person filed a claim and the person's standing were in question because the person was not really an owner under state law, then, yes, they would have that right.

MS. STITH: I want to go--the gold bar case is helpful for thinking about this in a concrete way. So if I can just go back to that for a minute. I'm trying to figure out why if there is all this problem with having juries decide criminal forfeiture, you just don't use civil forfeiture? And I see one answer is the statute of limitations. Is another answer that in the government in civil forfeiture bears the burden by a preponderance? And here with respect to the ownership issue in the ancillary proceeding, Congress has provided that the claimant, the third party, bears the burden by

a preponderance.

MR. CASSELLA: No, that's not--the claimant bears the burden to establish his ownership interest in both proceedings. It's identical.

MS. STITH: In both proceedings.

MR. CASSELLA: In a civil case the party making the claim has the burden of proof on all issues as it turns out. If Mr. Hyde succeeds in changing the law, it would be that the government would have the burden with respect to forfeitability, but even with respect, but even so, the defendant, the third party claimant would have the burden with respect to establishing his or her standing to assert the claim. So ownership is a burden that is always on the person making the claim in both the civil context--

MS. STITH: His or her standing, but then who bears the burden of showing what percentage of the bank account belongs to X and what percentage belongs--

MR. CASSELLA: Ah. That's not the

ownership issue. That's what I'm calling the in rem issue.

MS. STITH: Okay.

MR. CASSELLA: And in a civil case, the burden will be, if the law changes, on the government. It presently is on the claimant. In a criminal case, the burden obviously is on the government. So right now--the reverse of your question is the one I'm usually asked--why isn't the government overusing civil forfeiture because that's the easier procedure for the government? We've been trying to shift prosecutors over to the criminal arena because we think it's just better practice where it's possible to identify the defendant as the owner of the property and to forfeit all the property in the criminal case.

But as to which is easier for the government? Is the table not level? I think as Mr. Smith and Mr. Edwards just said, they think that the table is tilted so that civil forfeiture is easier for us right now.

MS. STITH: Right. That's why I'm

wondering why we have to go through all of these changes with respect to criminal forfeiture. Let me follow up on what was identified as one of the asserted substantive changes. I don't know if substance or procedure--it does seem to be a change--and that is that the jury was required to make a finding under 31(e) as to the extent of the defendant's interest in the property. The way that's being changed now is that the judge actually only even addresses the extent of the defendant's interest in an ancillary proceeding.

So if there is no ancillary proceeding, all the judge really has to find is the in rem part as you called it, the in rem issue, that this property was used. That sounds very in rem, very civil, and I wonder why we're calling it criminal forfeiture. If there is no ancillary proceeding, it really is just a finding that it was used in the crime. And I guess my concern about that is that are we perceiving to do something which is a pretense or a guise, and if it's really in rem, why don't we just make it civil?

My other concern is that when Congress provided for the ancillary proceedings in 1984, it clearly assumed that there would have already been a determination beyond a reasonable doubt as it happens. My concern is not the burden of proof. It clearly assumed that there would already be a determination that this was the defendant's property. In fact, I have the legislative history.

It says in deciding how the ancillary proceeding will work, it said since the United States will have already proven its forfeiture allegations in a criminal case, beyond a reasonable doubt, the burden of proof at the hearing will be on the third party. But now you're proposing that the United States does not have to prove all of its forfeiture allegations in the criminal case even in the criminal sentencing, not just not to a reasonable doubt, not to any doubt. All it's got to prove is that the property was used in the crime.

It doesn't have to prove the second part that this was the defendant's property. So it

seems to me that's sort of pulling the rug out from Congress. When Congress put the burden of proof on the third party, that made sense because somebody has already decided this is the defendant's property, and if you want to come and upset that, the burden is on you.

But now we're not going to decide if it's the defendant's property. So I worry in the third bar case, in the gold bar case, first of all I assume that there will have been notice to the defendant and he can challenge in the in rem issue as to substitute property; right?

MR. CASSELLA: Yes.

MS. STITH: Okay. That's not in (f) as part F as we received it. And I understand the Department of Justice has a new proposal that does explicitly spell that out. But this means that, in fact, in that case it was the defendant's mother's house, not his house, so if his mother wanted to challenge something three years down the line, she has to, the government has been on top of this the whole time, she hasn't been on top of it the whole

time, and--

MR. CASSELLA: Well, she literally has been on top of the property.

[Laughter.]

MS. STITH: Right, right. And, you know, I understand it avoids some of the problems of the civil proceeding, but it does seem to make sense to me that that would be the way to proceed there rather than pretending that we're really continuing this criminal case.

MR. CASSELLA: Okay.

MS. STITH: The defendant has already appealed and escaped from jail and gone and, you know. Everything is cold.

MR. CASSELLA: Okay. He's actually serving a 660 year sentence. Well, he gets 15 percent off--

MS. STITH: But there was an escape.

MR. CASSELLA: But he's still going to be there awhile longer. I think his counsel said that any time your client is sentenced to 660 years and ordered to forfeit $137 million, it's not been a

good day. So, well, you've asked me--I was trying to keep track of all the questions, and I think I've got six of them in my head. Please forgive me if I forget one of them.

MS. STITH: They're all tied together with why isn't civil forfeiture your answer?

MR. CASSELLA: I understand. Well, number one, in a case like this, you would not want to go back and do a civil forfeiture proceeding because you've already established at trial in a very lengthy trial that the crime occurred. What is yet to be established with respect to the gold bars is the nexus between the property and the offense. If we were to start over again with the civil case, we have to start over again by proving that these guys laundered money. That might take months of retrying an extremely contentious and complicated case involving the Colombian cartel and faxes that came to Rhode Island and barrels of cash that were counted out in counting houses and so forth and so on to establish the money laundering offense. So you wouldn't want to have to relitigate that if

you've already in the criminal case established that a crime occurred and all that remains is the nexus question.

Now, we have established all the government needs to establish when we establish the nexus question. That's all there is to establishing the criminal case is there a link between the property and the offense. I think you were citing the legislative history and the references in the statutes. My recollection is that those refer to, in my view, the government's having to put on what proof it needs to put on, whether it's beyond a reasonable doubt or by preponderance, establishing that this property was involved in, derived from, or used to commit the crime.

MS. STITH: Now, wait, because that's another issue that arises here. I've read all these statutes. I've read all the cases under 31(e). They all require two things. One, that the property was used in the offense, and, two, that it belongs to the defendant. So it's used in the

offense or proceeds of the offense, that's the nexus, and, two, the defendant's property.

Okay. It says a typical instruction to the jury is answer yes or no, did the defendant acquire this property blah-blah-blah-blah, you know at a certain time?

MR. CASSELLA: In my experience, the typical special verdict form only asks the nexus question. The typical special verdict form says did the defendant derive $3 million from this offense or was this automobile used to transport these drugs, or whatever? It's the nexus question. Is there a link between the property and the offense? In the third circuit's decision in Soccolow which I think we cite somewhere in this material--I have the cite if anyone wants it--the third circuit approved without discussion a special verdict form that asks only the nexus question.

And I think in my experience from talking to prosecutors around the country and from my own cases, that's the way it's usually done. I think given the present Rule 31(e) that the prosecutor

ought to ask the court to include in the special verdict form the additional ownership question: does the defendant have at least some ownership or possessory interest in this property? I don't think that's what's generally done around the country.

It is done in the fourth circuit which has gone to the other extreme and held that the jury must not only find that the defendant had some ownership interest but must find further the extent of the defendant's ownership interest vis-a-vis third parties. So you have that spectrum, and one of the reasons we're here today is because that spectrum reveals some confusion and ambiguity about what the current rule requires.

Our view is that the current rule ought to be just made--the new rule ought to just make it clear that the nexus issue is what has to be established first and that the other issues are taken up in the ancillary proceeding. Why does that make sense to me? Because if we've established the nexus between the property and the

offense, and the case--notice is then--an order of forfeiture is then established, notice goes out to the world, we're in the exact same posture as we would be in a civil case. That is the world is on notice that we're forfeiting this property and anyone who says, hey, that's my truck, not his, has the opportunity to come forward.

If we do it in the criminal case, the government is limited. If we didn't, if the prosecutor did not have a good faith reason to believe that the truck really was the defendant's, then he's wasting his time going criminal, as we call it.

MS. STITH: Only if he thinks the true owner is going to come forth in the ancillary proceeding.

MR. CASSELLA: And if no one comes forward, then they have waived. I mean that's the whole notion of providing due process notice to everyone, and it would be the same in a civil case. If we think this truck was used to drive illegal aliens across the border, we can go either civil or

criminal. If we think the defendant owns the truck, we can do it as part of the criminal case and give notice to any would-be third parties. In a civil case, we're establishing the nexus and giving notice to would-be parties.

MS. STITH: But I may have misunderstood your first part answer to my question, and I thought you would establish first that once you've already proved the crime, it's so much more efficient just to go criminally instead of having to prove the crime again.

MR. CASSELLA: With respect to property that's acquired years later.

MS. STITH: Yeah, well, so you have A and B. They do a drug deal in B's house. A is on trial. B is gone, and, you know, his wife is living in the house--

MR. CASSELLA: If we think the property belongs to A, then it makes sense to prosecute A and forfeit the property in A's case.

MS. STITH: But if it belongs to B, let's say, it turns out?

MR. CASSELLA: It belongs to B, then we're wasting our time in the criminal case.

MS. STITH: The government doesn't--you said all the government has to prove is that it was used in a crime.

MR. CASSELLA: To get to the point where we start an ancillary proceeding. But we've wasted our time if we think the property really belongs to B, because then he files a claim in the ancillary proceeding, and he prevails whether he's innocent or not. Under your hypothetical, B is complicit so we're better off doing a civil forfeiture.

MS. STITH: But you haven't really wasted your time, have you, because you've already had to prove the crime against A. You didn't have to set up a, have a separate civil proceeding, and--

MR. CASSELLA: We're wasting our time going into the forfeiture phase in the criminal trial. What we try to teach prosecutors to do is to look at the case from the beginning as to what the end game is going to be. If you have a pilot flying an airplane into the country, and you

believe that you can establish that that pilot owned that airplane, then do the forfeiture in the criminal case because it's more efficient. You can do it all at once. There's some resistance among prosecutors to doing that because they kind of like to have the guy down the hall who handles forfeitures do the case civilly, but more and more they're getting around to the notion of doing it all as part of the criminal case.

But we tell them look ahead. If that plane really is jointly owned with the spouse in a community property state or if there is a lien on the plane by someone who is not a legitimate lien holder, then you might want to file the case civilly at the outset because you know you're going to have to ultimately use civil to take out the interest of the wife or the lien holder or whoever it might be.

So the prosecutor has to determine which is the better vehicle, and, in fact, as judges I'm sure would know, what normally is done is you file a civil case and stay it, proceed with the case

criminally, and if the defendant was the only owner of the property, then the case concludes with the criminal case, but if somebody else pops up, and it turns out to be somebody who is not an innocent owner but a confederate but who would win in the ancillary proceeding because ownership is the only issue in the ancillary proceeding, then you revive the civil forfeiture action and proceed and take out the third party's interest.

So I mean to try to get back to your question, the government has to have a good faith basis to believe that the defendant has an ownership interest in the property. Otherwise, it doesn't make any sense to proceed with the criminal case. A third party could pop up and win in the ancillary proceeding, or if no one filed a claim in the ancillary proceeding under this rule, the court still has to find that the defendant had some possessory or ownership interest to guard against the government's attempt to use the criminal forfeiture action.

MS. STITH: And that's what I'm getting

at. The words "possessory interest," I couldn't actually find those in any of the forfeiture statutes. It seems to be talking just about the defendant's property, and the kind of words I found, I wrote it down, were legal right, interest.

MR. CASSELLA: Legal right, title or interest?

MS. STITH: Yeah.

MR. CASSELLA: Yes.

MS. STITH: Right, title or interest.

MR. CASSELLA: That's what a third party has to assert in order to recover. The reason we think it's important that the property be forfeitable upon a showing of a possessory interest is because one does not have a legal interest in stolen property. So if the defendant has stolen property in his possession, we're trying to forfeit that and we're trying to use the forfeiture as the vehicle to get it back to the victim, it doesn't make sense to talk about the defendant's legal interest in the property being forfeited because he has none under property law.

However, he's exercised dominion and control over the property. He is the one who wrongfully took it. In a case involving nominees, you could easily see a case where the defendant is driving the car and does all the maintenance on the car, and paid for the car, yet he registered the car in the name of his elderly aunt from Vermont. Why did he do that? Well, presumably because he's trying to avoid the forfeiture of the property in the criminal case because it's not his property, it's his aunt's.

So in that kind of case, the fact that he's exercising the dominion and control would be enough if the aunt doesn't even file a claim. If she does file a claim, of course she has a right to establish that it's her car, and if she wins then she gets the car back.

JUDGE DOWD: You were questioned earlier about the defendant who says, yeah, you seized $100,000 but 90,000 of it came to me lawfully. And you said, well, that's no problem under 32.2(b), that somewhere the judge would make that decision,

and I for the life of me can't figure out where he makes the call on the 10,000 versus the 100,000.

MR. CASSELLA: Well, in Rule 32.2(b), it says that the court must determine what property is subject to forfeiture.

JUDGE DOWD: So your point is that's where he makes the call?

MR. CASSELLA: Exactly. If the government says--

JUDGE DOWD: Later on it talks about the extent of each defendant's interest is deferred.

MR. CASSELLA: Vis-a-vis third parties. The question, the first question is how much of the bank account is forfeitable, and that's what the first sentence refers to. The government wants to forfeit all $100,000, the defendant says no, your honor, only ten percent of that was derived from the offense, the rest is the money I got from my aunt for my birthday. That's the forfeitability issue which is fairly litigated in the forfeiture phase of the trial. The defendant can put on his evidence and the government can put on its, and the

court will decide if only ten percent is forfeitable. The issue that is deferred is to what extent does the defendant own that ten percent vis-a-vis his wife who claims that in a community property state, she has a right to half of all the illegal gains the defendant earned while he was committing crimes during the marriage.

CHAIRMAN DAVIS: So if the 90 percent, if the defendant claimed that the 90 percent was owned by his wife, you wouldn't try that in the initial proceeding?

MR. CASSELLA: That's right. I don't think you should, and the reason why is because the wife is going to make that claim in the ancillary proceeding, and we're going to litigate that question all over again. In Mr. Edwards case of Mussino, he was very persuasive and convinced the judge to in the trial to hear the defendant's, oh, father, daughter, brother-in-law, girlfriend. All these other folks came in and testified that the property belonged to them and not to the defendant. The defendant is standing there at trial saying,

judge, don't forfeit this property because it doesn't belong to me. Our view is if it doesn't belong to him, he should sit down, and we'll hear from the other folks in the ancillary proceeding.

And indeed in Mussino, after the court or the jury, I guess, in that case, rejected all of these witnesses' contentions that they were the real owners, we had an ancillary proceeding, and guess what? Same parade of folks came in and all filed claims and made the same claims over again that they were the true owners of the property, and now the judge litigating the same issues all over again found that they were not. It's duplicative. It makes more sense to just focus on the in rem.

CHAIRMAN DAVIS: You may have answered this, but I'm not clear on it. Are you saying that in the initial proceeding the government need not put any evidence on showing that the defendant has a legal or possessory interest in the property?

MR. CASSELLA: That's right. I mean generally when the prosecutor puts his case together, he makes sure that he's able to do that

because he's going to have to do it ultimately, but in the initial proceeding, no, I think that's right. At the initial proceeding, the government shows the nexus between the property and the offense.

CHAIRMAN DAVIS: Because (a), 32.2(a), the very first sentence requires that the government allege that in the indictment. So they have to allege it, but they need not prove it?

MR. CASSELLA: Well, need not prove it at this stage. We're going to prove it ultimately.

MS. STITH: If there's an ancillary--

MR. CASSELLA: Yes, we put it in the indictment.

CHAIRMAN DAVIS: If there's a later stage.

MR. CASSELLA: If there's a later stage. Well, no, we have to prove it either way. Because the rule says that if no one files a claim, then the court has to find that there is a possessory or legal interest. So we have to make the showing either in the ancillary proceeding when a third party files a claim or if no one files a claim,

then we have to satisfy the court before the court enters the final order of forfeiture that there is a possessory interest or legal interest.

MS. STITH: But how about the community property state where you got this bank account, the defendant put some of his stuff into it, you prove that the bank account was used in the crime or whatever, it's got proceeds, maybe it was even used in and out, and the wife never comes forward. She decides I don't want to deal with it anymore, then the government just gets it all, without ever showing what--even if the government knew that--

MR. CASSELLA: Right. That's the way the law is today. We cite the Hentz case in Philadelphia where--

MS. STITH: That's the way the law is in civil forfeiture or in criminal forfeiture?

MR. CASSELLA: In criminal forfeiture in the Hentz case we prosecuted the defendant, we got an order of forfeiture as to White Acre, whatever it was, defendant's mother's name was on the title to White Acre. We had the ancillary proceeding.

She got notice. She never filed a claim. Now we come to sell White Acre and the marshals are out there making sure they've got clear title, and they have to go to court to clear the title, and the court held because the third party never filed a claim in the ancillary proceeding, their rights were extinguished. That's their window of opportunity to come in and say I have title to White Acre.

Mother didn't do it. Her claim is extinguished even though her name is on the title. The marshals have clear title to the property, and they can market it. That's the way a criminal forfeiture works now.

MS. STITH: It may work in some places like that, but I have all these examples where the court, where the jury actually finds, is asked to find the extent of the defendant's interest in the property--

MR. CASSELLA: Right.

MS. STITH: --as Rule 31(e) requires.

MR. CASSELLA: Right.

MS. STITH: I mean there may be some judges--

MR. CASSELLA: I mean some believe that it requires that, and I am perfectly happy to concede that it requires that today because a lot of courts say it does, and there are others that say it doesn't. But if today there's a finding up-front that the defendant has some interest, but other than the fourth circuit, I don't know if any court is requiring the government to establish or the court to find or the jury to find the extent of the defendant's interest. It's one thing to say the defendant has an interest in this house, but in a community property state, the wife might have a claim. Whether the wife does or does not have a claim does not enter into the matrix in the case in chief or during the forfeiture phase of the trial. It's reserved for the ancillary proceeding or properly should be.

For example, in Oregon, the wife does not have an interest under state law in the house unless her name is specifically on the deed, but in

California, community property state, she has an interest whether her name is on the deed or not. So that question does the wife have an interest in the property, a question of state property law, is not one that is litigated today during the forfeiture phase of the trial. One waits until in the ancillary proceeding the third parties file a claim. In the ninth circuit case on Mrs. Lester, the one where the wife or someone comes in in the ancillary proceeding and says this substitute asset that's being forfeited really belongs to me, and they litigate that.

JUDGE WILSON: I have a question on the statute of limitations. Are you telling me that if you keep that gold buried five years, you're free, and there's not any discovery? What triggers? What starts the statute of limitation to run?

MR. CASSELLA: In the civil cases?

JUDGE WILSON: Yes.

MR. CASSELLA: $64,000 question. The statute says the time runs from the date the government discovered the offense. It does not say

it runs from the time the government discovers the involvement of the property in the offense. So my colleagues would surely argue that our five years ran from when we knew this fellow was a drug dealer, and if he succeeds in hiding the property for five years after that, we're out of luck in a civil case.

We succeeded in arguing in one case in Wyoming that the statute of limitations gets tolled during that period of time if the claimant was purposefully concealing the connection between the property and the offense from the government.

JUDGE WILSON: Well, isn't that, the statute of limitations, isn't that generally always the law, the common law, that if you hide something, it tolls the statute of limitations? If that's not the law, why don't you just go to Congress because I'm sure they would amend the statute.

MR. CASSELLA: Surely they would except for the fact that NACDL has been vigorously opposing that amendment ever since we've tried to

get that amendment made so--

CHAIRMAN DAVIS: Professor Schlueter.

MR. SCHLUETER: Let me change the subject slightly and follow-up on that very point. I understand that last summer, the department submitted virtually identical language to Congress on a kind of dual track. The prior witnesses have indicated that Congress has rejected that. Can you give us a status report on that particular proposal?

MR. CASSELLA: Half of the recitation is correct. We did submit the proposal to Congress both in 1997 and in prior years. It's a comprehensive clarification and expansion and a correction of the criminal forfeiture statutes. One of the 15 sections is identical to this Rule 32.2. There are many other provisions in there such as making criminal forfeiture apply in all cases where civil forfeiture applies. It deals with the pretrial restraint of substitute assets. It deals with lots of things.

Congress has not rejected that. It is

still pending in Congress. There was a hearing on it last fall. Our understanding is that on the basis of that hearing they can move the bill whenever they want and we sure hope they will. But the Congress can do that any time before they adjourn this year.

MR. SCHLUETER: Is it possible that if that were to move more quickly that it would basically preempt this rule? I take it if it's part of the statute, department is working in Congress to move that entire piece of legislation through.

MR. CASSELLA: We've made sure that whatever is pending before Congress is identical to what this committee is considering, that the drafts are the same, so that there's not a conflict between the two. But you're absolutely right. It could happen that Congress could take your draft and enact it legislatively before this year it out. I don't know if that would happen or not or whether they would carve this particular rule out of the larger package or whether the larger package will

move at all.

MR. SCHLUETER: One other follow-up real quickly. What if Congress rejects this specific language, then this rule goes forward, and Congress is then faced with operation of the super-session clause?

MR. CASSELLA: It seems to me unlikely that Congress--I mean Congress will either take it up or not take it up. I guess there's some possibility that there could be an up or down vote on a particular provision, but that doesn't seem to be in the cards. Right now it's either they're going to move criminal forfeiture reform or they're not going to move criminal forfeiture reform, and this will or will not be part of that.

CHAIRMAN DAVIS: Let me ask one follow-up and then Judge Carnes. What do you say about Mr. Smith's statement that our proposed rule conflicts with Section 853 in that 853 now at least implicitly requires special verdicts indicating that a jury trial is required or allowed?

MR. CASSELLA: I mean I just totally

disagree with this notion that we'd have to totally rewrite Section 853. I think I know 853 fairly well, and I don't think there is anything in there with the possible exception of the one line in 853(c) that makes any suggestion that a jury trial is gone before. Indeed, 853 was enacted and the ancillary proceeding provisions of 853 were enacted in 1984 largely in reaction to what happens in guilty plea situations.

The concern in 1984, as I understand it--I was not involved--was that a defendant who pleads guilty is perfectly happy to agree to the forfeiture of everything, whether he owns it or not, but it's all part of the guilty plea, and there needed to be some procedure to protect third party rights. And that's why the ancillary proceeding provision was enacted. Now there is in 853(c) a line that says something like--I don't have it in front of me--the property--that's the Russian back doctrine statute--and it says that the property is forfeitable if it belongs to the defendant unless it's been transferred to a third

party, and the third party's interest is voided pursuant to a special verdict.

So to the extent that 853 says anything at all about the role of the jury, it's only in the particular context where the property used to be the defendant's, he has since given it to someone else, we've gone through the court and said that transfer was void because that person is not a bona fide purchaser for value, and the property has to revert to the defendant and be forfeited.

CHAIRMAN DAVIS: Judge Carnes.

JUDGE CARNES: Yeah. A question I had, and you touched on this before when you were talking about Congress and what it's likely to do or not. But Mr. Edwards and Mr. Smith, one, guaranteed us that Congress would reject any rule we proposed curtailing the jury trial.

MR. CASSELLA: I appreciate their confidence in their lobbying ability.

JUDGE CARNES: Well, it may be more they've read Chairman Hyde's book and or read it differently. What I pick up from just a non-

scientific sampling of what I hear coming from Congress about forfeiture is the winds seem to be blowing the other way. It seems to be that the dissatisfaction with current forfeiture law is that it permits instances, anecdotal perhaps, but instances of overreaching by the government.

Do you really think that Congress is in the mood to dispense with a statutory or jury trial right or--

MR. CASSELLA: Yes, I do. And for this reason. We're really talking about apples and oranges, Judge Carnes. The dissatisfaction with the way forfeiture works applies to civil forfeiture.

JUDGE CARNES: Hence the book?

MR. CASSELLA: Hence the book; right. The gestapo officers on the front cover and references to people like me as being out to trample everyone's forfeiture property rights and so forth. The civil forfeiture statutes do need reform and we've acknowledged they need reform because right now the burden of proof, even as to the

forfeitability, is on the third party, and there are other aspects of civil forfeiture that could be reformed. And we're working with Chairman Hyde to try to come up with a set of procedures that bring forfeiture law into the 21st century.

The civil forfeiture procedures come from admiralty law where you originally were out to forfeit the pirate ship and putting the burden of proof on Bluebeard the pirate seemed like a good way to go, but maybe that doesn't apply when you're trying to forfeit someone's house or his bank account. So civil forfeitures are controversial and they will be reformed, and it will come to a point, we hope, at the end of the day where the burden of proof is on the government to prove the forfeitability by a preponderance of the evidence and the third party then has the burden to come forward and prove by a preponderance any affirmative defenses, to wit that civil forfeiture will come to a point where it mirrors where we think criminal forfeiture is today. The government has to prove the forfeitability with respect to a

preponderance, and the third party has to come in and establish that he or she has a legal right, title or interest in the property.

Criminal forfeiture reform has not been particularly controversial. At the hearing we all testified at last fall, as I recall, there was one member of Congress, Mr. Barr from Georgia, who avidly reading from the questions Mr. Edwards was handing him did have some hostile questions, but I did not sense from the rest of the subcommittee that there was controversy regarding criminal forfeiture reform, which generally is considered to be the preferable way for the government to go because after all we've just convicted somebody beyond a reasonable doubt and the rest of it should follow.

CHAIRMAN DAVIS: Judge Roll is next.

JUDGE ROLL: I share, I think, some of Professor Stith's concerns concerning the blurring of the lines between criminal and civil forfeiture, and this is not to suggest that you do want to trample people's rights. But is it the

government's position that pretrial the government need not identify with specificity the property that is subject to forfeiture and then any time after a guilty verdict, the government can identify assets and once they do that, they can obtain forfeiture based on the guilty verdict?

MR. CASSELLA: The government has to identify the specific asset subject to forfeiture at some point in order to give the defendant notice of what's being forfeited so he can defend against it. The question is at what point in the procedure does that happen? It's our view that in the indictment, which is a notice provision, we can be fairly general with respect to all proceeds of the offense, all property used to facilitate the offense or whatever.

The most recent decision in this is a D.C. Circuit opinion in DeFrieves [ph], which we cite, which holds that all that's required is for the indictment to contain general pleading language, putting the defendant on notice that all property that can be forfeited under the statute will be

forfeited. Now, before we get to the point where some finder of fact, whether it be the judge or the jury depending on how this rule turns out, orders the forfeiture of this car, this plot of land, this bank account, we have to put the defendant on notice that that's what we intend to forfeit. We can do it in a bill of particulars, which we would normally do if we have identified the property before or during the trial, and then there would be a finding made with respect to that particular asset then that the defendant could oppose.

Or if we get a more general order of forfeiture such as the one in Saccoccia, $137 million laundered in the offense, and we subsequently find gold bars, we'd have to send notice to the defendant or his counsel, saying we have found this property, we want to add it to the order of forfeiture, you're on notice that we're going to do that, and there will be a hearing, and there will be a hearing much along the lines of what would have occurred right at trial or the day after trial if the gold bars had been discovered

during the course of the investigation and/or the trial.

So the defendant ultimately gets notice of what property is going to be forfeited. It's a question of when and it makes more sense, it seems to us, to put that at the point where he is going to be opposing the forfeiture in the hearing. And then if it's forfeited, then you put notice, you publish notice of the forfeiture to third parties and they can contest it in the ancillary proceeding.

CHAIRMAN DAVIS: Mr. Martin, did you have your hand up?

MR. MARTIN: Yes, I did. Let me first profess a profound lack of understanding of forfeiture as part of the burden of being a public defender is rarely do I have clients with assets.

[Laughter.]

MR. MARTIN: Other their liberties and their right to waive an appeal. I've been given a number of proposed questions from my friend Bo Edwards that I don't understand well enough to even

ask, but it seems like with--I know we've been going a long time with this, but with Mr. Edwards and Mr. Davis here, if we could give them a couple of minutes to respond to some of these issues, it might be educational for us better than me trying--

CHAIRMAN DAVIS: Let's see how long we go here. We do have some time problems, but I understand what you're saying. Yes, sir.

JUDGE MAROVICH: What is the likelihood that Congress is going to do something here one way or another and why after all of this lengthy debate, which is interesting, isn't it wiser to just defer for a little bit to see what the hell they do?

MR. CASSELLA: Sad to say I think the likelihood is not great that they're going to do anything on forfeiture reform. I for one think that the passage of a comprehensive forfeiture reform bill that touches upon both civil and criminal forfeiture is a good idea and ought to be done. When one reads tea leaves to some extent when trying to figure out what Congress is going to

do, but it sure looks right now as if forfeiture reform is dead in the water. There's only a few, relatively few tens of days left in the legislative session, 60 or something like that, of days when they're actually going to be in session.

They have not yet gotten past the Judiciary Committee, nothing has come to the floor. The provision that is likely to come to the floor, if anything comes to the floor, is a civil forfeiture only provision that this is not part of. The provision that is civil forfeiture only is hotly contested. You've got all of the groups like the NACDL and the ACLU on one side. You have all the law enforcement organizations in the country on the other side. It's the kind of thing which might very well and likely will stalemate in the House.

And if by some chance, something came out of the House, it would almost surely die in the Senate given the late day. There's been no bill introduced in the Senate. The Senate hasn't taken this up at all. So while this process of considering an amendment to the criminal rule

typically takes three years, it's actually moving quickly compared to what I think Congress is likely to do with the issue.

CHAIRMAN DAVIS: Mr. Josefsberg, we'll turn to you now.

MR. JOSEFSBERG: You've covered two-thirds of my questions, but I have some areas, and if they're repetitive, please stop me. The first one we kind of touched on. It has to do with finality. The Department of Justice has no problem with the statute of limitations for criminal cases. So if I robbed a bank and took a bunch of gold bars, after six years of hiding them, I'm free?

MR. CASSELLA: Yes.

MR. JOSEFSBERG: But if I am convicted, you could 20 years later when you find those gold bars, reinstitute it and there is no finality to the litigation?

MR. CASSELLA: I want to correct one statement you said, Professor Josefsberg. With respect to the criminal prosecution, we could not prosecute the defendant for bank robbery more than

five years after the bank robbery occurred, but we could forfeit the proceeds of the bank robbery within five years of when we discover his involvement in the offense.

MR. JOSEFSBERG: I'm going to have it buried for seven years.

MR. CASSELLA: And if seven years later we find out that you were the one who robbed the bank, we can then institute the forfeiture action. So the forfeiture action springs from the date we discover the offense, not from the date of the offense, so there is a difference there.

MR. JOSEFSBERG: Right.

MR. CASSELLA: But the notion of being able to convict the defendant and then years later find the property is no different, it seems to me, than collecting the fine or ordering him to pay the restitution. There may be ultimately some statute of limitations on those things, but it's not a short one.

MR. JOSEFSBERG: Like collection on a judgment? That's how you're viewing it?

MR. CASSELLA: Or collection of a fine. Criminal forfeiture under the Alexander case, the Supreme Court case from 1993, which had to do with Eighth Amendment issues, is really much like a fine. I don't think this should be a reward for the defendant who succeeds in concealing from the world that he took the proceeds from the drug trafficking and bought a ranch in Wyoming.

MR. JOSEFSBERG: But he's rewarded by not being convicted if he hides it--if it's a critical piece of evidence and the government can't proceed.

MR. CASSELLA: If we never were able to prosecute him for the drug trafficking at all because he concealed that from us.

MR. JOSEFSBERG: Yeah.

MR. CASSELLA: Yeah. But this is a case where we have convicted him of the offense, and we know that he's a wrongdoer and that he's gotten proceeds from that, we just can't find the proceeds.

MS. HARKENRIDER: Just to clarify, we've not only convicted him of the offense, but we've

had an order of forfeiture?

MR. CASSELLA: Correct.

MR. JOSEFSBERG: Let me ask a second issue. One of the objections you have to the jury trial is the burdensome procedure of the bifurcated trial when the jury wants to go home. I've seen this procedure in civil cases where judges for the purposes of efficiency bifurcated liability and damages.

MR. CASSELLA: Right.

MR. JOSEFSBERG: And I've seen jurors very upset when they're told they have to stay and now decide damages. I'm also quite familiar with capital cases where jurors have to return on a rather important issue of a sentence. And Judge Carnes is our expert on those. Has the department ever taken the position that this burdensome impractical procedure is inappropriate in any of those situations?

MR. CASSELLA: I don't know, but there's a difference between those situations, and I've said in my statement that if those burdens were

necessary to achieve some greater purpose--in a capital case, I would concede there is a greater purpose because we're talking about someone's life being taken, that it might make sense to impose these burdens on a jury.

But as I said a year ago when I was here, I've spoken with some judges. One judge from the Northern District of Florida said to me the problem I have with this procedure is that I can't tell the jurors during the first set of instructions that they're going to have to come back so they're led to believe that when they finish their deliberations, they're going to go home. And I can't tell them that because I'm not permitted to tell them in advance what the consequences are of their convicting the defendant.

And so the jurors come back to the jury box, they literally are looking for their hats and coats and someone says, no, we're going to hear about the application of Article 4(a) of the Uniform Commercial Code dealing with wire transfers for the next hours or days or whatever it might be,

and that is a burden on everyone, and it's not a good environment to resolve those issues, and if it's not necessary, which we think it's not, we think it better to dispense with it.

MR. PAULEY: Let me also comment, if I may, just very briefly on a slightly different aspect of this which was the allegation, I think, made by the previous witnesses that this was some kind of nefarious effort by the department to get rid of some burden of proving our case before a jury as opposed to a court.

When we embarked on this potential rule, we asked federal prosecutors around the country what they thought from a purely parochial standpoint about would our prospects be enhanced or not by the elimination of the jury from the process, and the response we got was decidedly mixed. And that I just wanted to put on the record, that we are not seeking here some kind of advantage. In fact, it might be entirely desirable from a purely parochial standpoint to have juries determine restitution, the extent of restitution,

rather than courts, and I think juries would be likely to be somewhat more sympathetic in some cases toward victims.

But that isn't done, and we don't advocate that it be done, or the amount of a fine or any other aspect of what the Supreme Court has now determined is a sentencing issue. And it just seems to us, I think, unseemly. I think when the rule was first promulgated, almost everyone, probably the department included, because this was a new concept, criminal forfeiture, wanted to lean over backwards in terms of doing away with potential challenges to it, constitutional and otherwise, just fairness grounds, and that's why it comes embellished, as restitution does not, with the requirement that the indictment actually say something about it unlike any other aspect of sentencing. And we're not proposing--because it is purely a notice issue--that that be taken away.

It's only here because of the burdensome nature of what we perceive to be the jury's involvement at the sentencing phase that we're

asking that in the wake of Libretti, which has now said, no, Criminal Rules Committee and others, you were wrong in thinking of criminal forfeiture as an element of the offense and surrounding it with all the usual attributes of elements of the offense,--

CHAIRMAN DAVIS: Let's get back to the witness.

MR. PAULEY: --that we do this.

MR. JOSEFSBERG: Let me ask my third out of the four issues. In some of the documents we received beforehand, there was the issue of the financial inability of spouses, children or others to litigate in ancillary proceedings. I'd like you to address that, and as part of it also to address it in light of who would have the burden of going forward and the burden of proof? Might some children who have potential frozen assets that they can't use? How do they get a lawyer when they have the burden of going forward and the burden of proof to show that some property was really given to them three years ago?

MR. CASSELLA: It's entirely the case that

there might be a spouse or a child or some third party who wants to file a claim in the ancillary proceeding, and he doesn't have the resources to do so. The answer to that, however, cannot be to appoint the convicted defendant to raise their issues for them. The defendant can only raise issues that relate to his property interests. A defendant who wants to assert in the criminal forfeiture phase of the trial that he was only a nominee, that the sports car really belongs to his girlfriend, may be motivated by the fact that the girlfriend can't afford to hire counsel or he may be looking at this as a situation where he has no legal defense as to the forfeiture of the sports car and is hoping to assert his girlfriend's alleged interest as the only way he can think of short of jury nullification to get out from the forfeiture action.

The point is it should be the girlfriend that raises the claim, and there is a procedure, an orderly process, for doing that called the ancillary proceeding. Third parties generally, I

mean persons cannot raise the issues and rights of third parties whether it be in a suppression motion or the exclusionary rule, whether it be in a civil action for tort damages or whether it be in this context.

The same would be true of we filed a civil forfeiture action. If we took Professor Stith's suggestion and did mostly civil forfeitures instead of criminal forfeitures, what would happen? The wife or the child or whoever it might be would have to file a claim in the civil forfeiture action and the same as they would in the criminal action.

MR. JOSEFSBERG: Might there would be a difference under the federal guidelines under legal services of being able to get counsel if you're bringing an action or if you're defending an action?

MR. CASSELLA: I don't know what the rule is with respect to appointment of counsel in a civil forfeiture case today. I think it's unlikely that--it's rarely done.

MR. JOSEFSBERG: But if you went to your

community legal services for the poor--

MR. CASSELLA: Right. The standard should be the same.

MR. JOSEFSBERG: --there's a distinction whether you're bringing the claim, which they very often won't allow you to do, as opposed to defending a claim.

MR. CASSELLA: And which is it that a third party is doing in a criminal forfeiture action or in a civil forfeiture action? Whichever they're doing, it's identical in those two contexts. The action brought by the claimant in the civil forfeiture is equivalent to the action brought by the claimant in the ancillary proceeding for this purpose. Of course the burden on the claimant is much less in the criminal case. All he or she has to show is that he or she is the true owner of the property and they win, whether they're complicit in the offense, whether the property was subject to forfeiture or not. They have a much heavier burden in the civil case because they have to negate a lot more things and establish a lot

more things.

But I would think that with respect to the inability to hire counsel it's identical in those two procedures. I just don't see how it's any different.

MR. JOSEFSBERG: Let me ask you the last issue. In your writings and in your appearances before congressional bodies, you had mentioned the administrative issues that you've handled and that you're aware even with passage of this rule will continue in the future as the bugs get ironed out. You're working on developing policies, and I assume you would continue to do so.

MR. CASSELLA: Right.

MR. JOSEFSBERG: I want to ask you a hypothetical question.

MR. CASSELLA: If I may ask, you said administrative--I think you're talking about administrative forfeitures or--

MR. JOSEFSBERG: No, no. I'm just saying administratively within your office that you're working on all of these questions that you've been

receiving from the field.

MR. CASSELLA: We get all these questions and we're trying to answer these questions for folks.

MR. JOSEFSBERG: Right.

MR. CASSELLA: Right.

MR. JOSEFSBERG: And you're going to be.

MR. CASSELLA: Yes.

MR. JOSEFSBERG: Regardless of what decisions we make. I want to ask you a hypothetical question. I would like you to assume an unfair administration, an unfair and political attorney general. I would like you to assume people in your position are willing to retaliate against enemies, with an agenda, who want to avoid discovery that would be available in civil cases, an agenda and a willingness to circumvent civil statutes of limitations. Would you be comfortable with this set of rules with those people running it? Not you.

MR. CASSELLA: Yes. The criminal forfeiture rules would provide much more protection

in those circumstances than would the existing civil rules. Under the civil forfeiture, assuming now no amendment to the statutes, but only the enactment of this rule, the abusive attorney general and administration would do all forfeiture civilly and not do any of them criminally because of the way the burdens of proof are allocated in the civil context.

In a criminal case, we still have to prove that someone is guilty beyond a reasonable doubt and he gets a jury trial. I mean we're not taking away the defendant's right to a jury trial with respect to whether or not the crime occurred. We have to prove that. And we have to prove it beyond a reasonable doubt. We have to then prove by a preponderance in our view and in the third circuit and RICO cases it may be different, we have to prove that there is a connection between the property and the offense. That's following a conviction by a jury on the commission of the offense itself.

So I think that the protections are

greater in the criminal context with the enactment of this rule than they are in the civil context.

MR. JOSEFSBERG: Once you got the conviction, you would have 20 years, you would have forever to find gold bars or anything else and to take them from this person?

MR. CASSELLA: If we got an order of forfeiture stating that the defendant was liable to forfeit that amount of money at the time of trial. I mean we don't just convict someone and then go off searching for gold bars. We have to get an order of forfeiture. We have to establish in the forfeiture phase of the trial that this defendant laundered in the Saccoccia case $137 million. The only thing we haven't done yet is find it because we don't know which Swiss bank account he put it in or which backyard he buried it in or, you know, the trunk of whose car it might be found in or whatever it might be, and we should have the opportunity to go off and find this rather than reward people who have been convicted and who have been ordered to forfeit this much money. You should not reward

them for being able to hide the money.

The defendant if he's brave and honest ought to say, oh, you've ordered me to forfeit $137 million, I will now go dig up all the gold bars and deliver it to you but some don't do that. And so we have to--

MR. JOSEFSBERG: Considering--you've read all of the high parade of horribles.

MR. CASSELLA: Oh, sure.

MR. JOSEFSBERG: You don't think those would be more likely to occur under these procedures than less?

MR. CASSELLA: Not at all. I think again it's apples and oranges. I think what Mr. Hyde is concerned about is the seizure of property and the summary forfeiture in his view of that property in a civil forfeiture case. His biggest complaint is that there is no requirement that the government ever prove that anyone has committed a crime in a civil forfeiture case. Under this rule, it only applies if we first convict someone beyond a reasonable doubt of committing a crime and

establish by a preponderance the connection between the crime and the property. We're not going to use this rule against someone who, under the hypothetical you find in Mr. Hyde's book, the police are just staking out the airport and taking off everyone who looks hispanic and then letting them go and keeping their property. You can't do a criminal forfeiture case if you let the guy go. You have to convict him or convict someone and then establish the connection between this property and the offense.

MR. JOSEFSBERG: I have no other questions.

JUDGE DOWD: Is it fair to say that most forfeitures are done administratively as opposed to civil or criminal?

MR. CASSELLA: Yes, that's correct. About 85 percent of all forfeitures are done administratively because no one ever files a claim at all. And then of the contested ones, the 15 percent that are contested, it breaks down today about 50/50 between civil and criminal. It used to

be that they were overwhelmingly civil, and we've been trying to get the prosecutors to do more criminal forfeitures. But if no one is filing a claim, then obviously nothing happens in the courtroom at all.

CHAIRMAN DAVIS: All right. Thank you very much, Mr. Cassella. We appreciate your coming here. All right. I just spoke to the committee and they have a couple of issues that they would like Mr. Edwards and Mr. Smith to address, and Professor, if you would just tell them what issues you'd like for them to address, and we're going to restrict them to those issues, and hopefully in about ten or 15 minutes.

MS. STITH: Well, I don't want to speak for the committee so if other people have issues that they'd like them to address, please step forward. But there were a number of times over there where I saw you shaking your head. And--

MR. EDWARDS: And probably writing. As a matter of fact, Henry, could I get some of those notes back?

[Laughter.]

MS. STITH: Yeah. I didn't know if that was a sigh or a factual disagreement, but perhaps concisely you could tell us if there's other information that we should be aware of.

MR. SMITH: Well, it's difficult to know where to begin, Professor, because you saw us shaking our heads a lot. We disagreed a lot with what Mr. Cassella was saying, not only about the law but about what's going on in Congress as well. And perhaps that's the thing that is most important. We feel the tide is strongly in favor of reform, and it's not just limited to civil forfeiture although that's been the focus of much of the reform efforts. These proposals that you have before you were never submitted to Mr. Hyde as part of the government's effort to come up with a compromise bill that was acceptable to Congress, and that should be significant to you.

These proposals were never submitted to Mr. Hyde. They were submitted to Mr. McCollum in a subcommittee, in the Crime Subcommittee, because

they viewed Mr. McCollum as perhaps more favorable to their proposal, but guess what? It never even got introduced as a bill. They submitted the proposal to Mr. McCollum and it died on the vine, Not one congressman was willing to sponsor this bill in congressional forum. Not one from either party. And that shows you graphically how incredibly little support there is for what the government is trying to do in this committee.

JUDGE CARNES: But that doesn't explain your concern and your presence here today. If you've got such a lock on Congress against these proposals, I don't understand.

MR. SMITH: Well, the explanation is we don't want to see the same proposal enacted by this committee and then have to go to Congress and say shoot it down because, as you know, Congress doesn't like to do that too often.

CHAIRMAN DAVIS: I'm going to let Mr. Pauley answer that.

MR. PAULEY: It just isn't true. All of our legislative proposals are submitted to the

Speaker on the House side and they are then referred to the chairman of the appropriate committee. In fact, in this instance, they were submitted to Mr. Hyde. Mr. Hyde determined that he only wished to deal with civil forfeiture. Our bill dealt both with civil and criminal forfeiture, and he therefore allowed the criminal forfeiture part of our proposal to be referred to the Subcommittee on Crime, which Mr. McCollum chairs.

MR. SMITH: If I could respond to that. If you check with Mr. Hyde or any of the people in the House, you'll see that the bill that was debated for months as the so-called compromise bill, H.R. 1965, is actually about 80 percent criminal forfeiture provisions, 20 percent civil perhaps. But none of these provisions, the ones in this committee's proposal, were in that criminal forfeiture package that went into 1965. Instead, and the reason they weren't is because the Justice Department knew they could never get it out of the House Judiciary Committee.

CHAIRMAN DAVIS: Okay. Let's talk about

32.2. Any rebuttal to what--

MR. EDWARDS: Yeah. I just want to emphasize that the provisions that are in 32.2 were in a piece of proposed legislation that was before the Crime Subcommittee. It included other provisions as well. It included one that we talked about, pretrial seizure of substitute assets. But as a result of the hearing, Congressman McCollum announced from the bench or from the chair that he was not going to introduce that bill, that piece of proposed bill.

CHAIRMAN DAVIS: All right. Let's talk about the merits of 32.

MR. EDWARDS: And it's not there now.

CHAIRMAN DAVIS: Let's talk about anything about 32.2, and we got about seven minutes.

MR. EDWARDS: Very good. One thing that I think is important that I would like to respectfully differ with Mr. Cassella, very often district judges warn jurors that there may be subsequent issues or other matters that they're going to have to consider. If you'll read the

Libretti decision, you'll find that the district judge in Libretti did just that. At the beginning of the trial, he warned the jurors or advised the jurors that there might be other matters that they had to determine after they deliberated on the question of guilt or non-guilt.

So while there is no requirement that district judges do that, it is frequently done. So it doesn't come as a shock as the jurors go to the coat rack.

MR. SMITH: Let me take a turn here.

MR. EDWARDS: Okay. Please do.

MR. SMITH: We'll play tag team here. I thought Professor Stith made a couple of excellent points about the scope, the present scope of the required jury finding, including the extent of the defendant's interest in the property, and that's very important. I believe it is a substantive change that the committee's proposal includes.

Mr. Cassella pointed out that the fourth circuit in Hamm holds that the jury has to find the extent of the defendant's interest, and he said he

wasn't aware of any other case that so held. Well, I'm not aware of any case that holds to the contrary, and Hamm is a fourth circuit case. You all know about the fourth circuit, I'm sure. if they thought that this was a right that Rule 31(e) embodies, it's not likely that any other circuit is going to reject that.

And as Professor Stith pointed out, the legislative history is completely clear on that as is the language of the rule itself. So that is something that the committee proposal would change, and it's a substantive right, and it's very important. I think it was Professor Josefsberg made the other point about the lack of counsel due to lack of funds.

MR. JOSEFSBERG: Judge Josefsberg.

[Laughter.]

MR. SMITH: Excuse me. Judge. You don't have--excuse me--it's not on your card. That's a very important point because right now as Mr. Cassella conceded, many third parties don't have adequate funds to hire counsel. Right now a

defendant can protect an innocent spouse or an innocent parent from criminal forfeiture by proving to the jury himself that it's not his property. If he doesn't have that opportunity to in effect represent the third party who can't afford counsel, then in many cases that third party, the innocent third party, is going to be deprived of their property without any kind of a hearing just for lack of counsel. And it's a policy reason for maintaining the present rule.

JUDGE CARNES: Let me ask you about that specific point. Why wouldn't it be an answer to that and a good policy to amend the CJA Act to provide for appointment of counsel on ancillary parts of criminal proceedings?

MR. SMITH: That's an excellent proposal and we would certainly support that. In fact, part of the Hyde bill, one of the parts that the government is opposed to, would provide for counsel in civil forfeiture proceedings.

JUDGE CARNES: I'm not talking civil.

MR. SMITH: I know. You're talking about

criminal forfeiture, and that's an even more obvious reform than the Hyde bill.

JUDGE CARNES: Well, that's the one area in which you proposed letting the defendant represent somebody else's interest is in criminal, not civil.

MR. SMITH: Yes, Your Honor.

JUDGE CARNES: So if the CJA was amended to provide that anyone involved in a criminal proceeding, ancillary claimant or otherwise, was entitled to, who was indigent, was entitled to counsel, that would take--I can't imagine Congress objecting to that kind of proposal.

MR. SMITH: I think they would enact it, too, but it hasn't been enacted yet. So we're just dealing with the real world as it exists today. It is an excellent idea, and we would favor that.

JUDGE WILSON: I think we ought to ask the Justice Department if they would support that change.

CHAIRMAN DAVIS: Mr. Jackson.

MR. JACKSON: Yeah. The government, I

think, has made the point today that we don't need a judge to separate a defendant from his or her property if a fine is imposed or if restitution is ordered. Is there a principal distinction when it comes to forfeiture?

MR. SMITH: I don't believe there is. The way Mr. Cassella was putting it in his testimony today, I didn't have a problem, the example of the gold bars found later. You can do that right now. In fact, the government did that in the Saccoccia case as he said, and they wouldn't need a change in the rule to enable them to do that. They can do that right now, and they have done it. The way we were reading his proposal, though, was as extending far beyond that. He was talking about wanting to allow the judge to make factual findings on whether property was subject to forfeiture years later. That's the way we interpreted the proposal, which would take away the jury's right to determine whether or not the property was subject to forfeiture.

And in effect, abolishing any statute of

limitations. That seemed to be where they were going. And we're obviously opposed to that, and I heard a lot of opposition to that kind of notion from the committee. But what they did in the Saccoccia case is fine, and they can do it under present law.

JUDGE CARNES: Did the jury come back in in Saccoccia? How did they get the jury determination that these gold bars were the proceeds?

MR. SMITH: They didn't, but they didn't need it, and we don't disagree with that. They didn't need it because the jury had already determined that $137 million was subject to forfeiture. Okay.

JUDGE CARNES: Who determined that these gold bars were part of the 137 million?

MR. SMITH: Nobody, but they didn't need that because what they got was a judgment, in effect, a substitute asset judgment for $137 million. It's a personal money judgment, and they frequently get those kinds of judgments. When they

get that personal money judgment for a fixed amount, they can seize any assets of the defendant, even if they're completely untainted to satisfy that judgment, and they can do that under present law so they don't need this change in the rules to accomplish that.

MR. JACKSON: If I can just come back for one second because I think I meant my question in a broader sense. I mean a judge sits there and says $10,000 fine, no jury involved, or multiplier effect under the guidelines or whatever, $10,000 fine. Okay. $10,000 restitution I hereby fine. No jury involved.

But now we come to your situation which you're arguing that if we're going to forfeit $10,000, there's a different mechanism involved, and I just want to understand why you are asserting that now the jury has to become involved when the government is using the mechanism of forfeiture?

MR. EDWARDS: Well, I think at least a partial answer is where the property to be forfeited is not fungible money, it's not just a

dollar figure, but a specific property, then there is a huge difference because there may very well be other owners of that property, and that property may not be otherwise subject to forfeiture to the government unless the government can prove to the finder of fact that it was an instrumentality of the offense and that it was owned by the defendant and therefore should be subject to forfeiture.

So probably the principled differences are more applicable when you're talking about specific property rather than just saying this defendant made $50,000 profit in a drug deal and therefore there should be a forfeiture entered of $50,000. Nevertheless, the notion, the concept, which is deeply embedded in Anglo-American jurisprudence of where the government steps in and takes privately owned property that a jury should be involved, is one that is very serious.

MR. SMITH: If I could respond to Mr. Jackson's question. Forfeiture is different than fines or restitution because a judge has no control over the amount of the forfeiture. The amount of

the forfeiture is often arbitrary especially in facilitation cases where you get these huge excessiveness problems, and the only limitation on the size of the forfeiture is the Eighth Amendment excessive fines clause. So there's a much greater potential here for abuse than there is in the case of fines or restitution which are carefully controlled by the judge and have to correspond to the sentencing guidelines or in the case of restitution the exact amount of the loss to the victims.

CHAIRMAN DAVIS: All right. Any other questions from the members of the committee? Thank you very much, gentlemen. We appreciate your coming. All right. We're going to break for lunch. Let's take an hour. Let's get back at 1:15 and get started on the regular agenda.

[Whereupon, at 12:15 p.m., the hearing was concluded.]

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