~~+4768~~
116387

United States General Accounting Office
Washington, D.C. 20548

FOR RELEASE ON DELIVERY
EXPECTED AT 1:00 p.m.
September 16, 1981

STATEMENT OF

WILLIAM J. ANDERSON, DIRECTOR

GENERAL GOVERNMENT DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIME

HOUSE COMMITTEE ON THE JUDICIARY

ON IMPROVING

THE EFFECTIVENESS OF

CRIMINAL FORFEITURE OF ASSETS

Mr. Chairman and Members of the Subcommittee:

We are pleased to have the opportunity to testify on the Government's overall efforts to obtain the forfeiture of assets obtained through criminal activities and, specifically, on bills H.R. 2646, 2910, and 4110, designed to improve the forfeiture statutes. Last spring we issued a report entitled "Asset Forfeiture--A Seldom Used Tool in Combatting Drug Trafficking" (GGD-81-51, April 10, 1981). Our testimony today is, for the most part, based upon that report.

As the title of our report indicates, the Government's record in attacking crime through the forfeiture of assets is not good. And the Government's failure is not limited to drug trafficking.

Recently, at the request of Senator Max S. Baucus, we completed work on organized crime in which we found that the same problem applies to other types of criminal activities. Our report on this matter will be issued soon.

In our April 1981 report, we recommended that the Attorney General improve forfeiture program management and that the Congress clarify and broaden the scope of the criminal forfeiture statutes--the Racketeer Influenced and Corrupt Organization Act (RICO) and the Continuing Criminal Enterprise provision (CCE) of the Comprehensive Drug Prevention and Control Act. The Department of Justice has taken several actions to improve the Government's ability to pursue forfeiture. And hearings, such as this one, on proposals introduced to amend forfeiture statutes will, we hope, result in needed legislative changes.

The extent to which an improved asset forfeiture program will affect criminal activities such as drug trafficking is uncertain. But a successful forfeiture program could provide an additional dimension in the war on criminal activities by attacking the primary motive for such crimes--monetary gain.

Few assets have been forfeited

Billions of dollars are generated through gambling, prostitution, narcotics trafficking, and other illegal activities, yet very little has been forfeited by the criminals. For example, revenues generated through narcotics trafficking alone are estimated in excess of $70 billion annually, according to the National Narcotics Intelligence Consumers Committee. Yet, as we reported,

the amount of narcotic traffickers' assets forfeited since enactment of authorizing criminal forfeiture legislation in 1970 until March 1980 was only about $2 million. The amounts forfeited under civil forfeiture statutes were equally unimpressive.

Recently, the value of criminal and civil forfeitures resulting from drug cases has increased, but it is still small when compared to the profits generated from drug trafficking. Specifically:

--In our report we noted that from enactment of the statutes in 1970 through March 1980, RICO and CCE forfeitures had totaled only $2 million. Between April 1980 and July 1981, an additional $3.2 million had been forfeited.

--We reported that for fiscal years 1976 through 1979, civil forfeitures under 21 U.S.C. 881 totaled $5 million. In fiscal year 1980, civil forfeitures increased to $5.5 million, and during the first 9 months of fiscal year 1981 forfeitures were $4.8 million.

However, compared to the estimated $70 billion generated annually in drug trafficking, these amounts are miniscule.

Relatively little has been accomplished in the forfeiture area for several reasons. One of the key problems, we believe, has been the lack of leadership by the Department of Justice. Even though attacking criminal finances has been a primary objective of law enforcement for several years, until recently forfeiture has received scant attention.

For example, at the outset of our study in January 1980, no one in the Justice Department knew how many RICO and CCE narcotics cases had been attempted, the disposition of the cases, how many cases involved forfeiture attempts, and why those attempts either failed or succeeded. Similarly, Justice had accumulated only a paucity of data on cases involving the use of the expanded civil forfeiture provisions authorizing forfeiture of property traceable to drug profits. Justice investigators and prosecutors did not have the expertise or incentive to pursue asset forfeiture.

Efforts are being made to improve the Government's forfeiture program. Specifically, the Department of Justice has

--issued guidance to prosecutors on the use of forfeiture statutes,

--started to accumulate forfeiture statistics to analyze the extent forfeiture provisions are used and the reasons for their success or failure,

--made forfeiture a goal in every major drug investigation, and

--issued a 400 page detailed drug agents' guide to forfeiture of assets.

Although the Justice Department has taken some steps to strengthen its forfeiture program, these initial efforts must be continued and implementation monitored if the Government is going to improve its forfeiture effort.

Legislation Needed

In addition to improvements in the management of the forfeiture program, legislative changes to the RICO and CCE forfeiture

authorizations are also needed. Although the case law on these authorizations is not extensive, it has become clear that the Congress needs to strengthen the RICO and CCE statutes if forfeiture is to be a viable remedy. Four major problem areas have been identified. I will discuss them briefly before offering our views on the pending legislation. A more complete description of these problems can be found in chapter 4 of our April report.

First, the scope of the forfeiture authorizations has been narrowly defined. The CCE authorization, for example, speaks in terms of forfeiture of, among other matters, "profits"--a term commonly defined as the proceeds of a transaction less its cost. Under this definition, the costs of narcotics to a dealer are not profits, and a significant legal question exists as to whether proceeds allocable to costs are forfeitable under CCE. RICO, on the other hand, speaks only in terms of forfeiture of interests in an enterprise. Case law seems agreed that the term interests does not cover profits derived from the enterprise. The ramifications of this are obvious and I will not belabor them here.

Second, it is not clear whether RICO can reach any ill-gotten gains when a de facto combination of individuals constitutes the only enterprise through which a defendant engages in racketeering activity. As the Fifth Circuit's recent opinion in U.S. v. Martino indicates, there is often nothing to forfeit in the case of individuals associated "in fact" because one cannot actually own an interest in such an enterprise.

Third, there is considerable confusion under both RICO and CCE about the degree to which assets must be followed to their

illicit origin to be forfeitable. Both statutes require a connection, other than mere ownership, between the offense of conviction and the property to be forfeited. Serious asset identification problems may arise if the property subject to forfeiture has been laundered; that is, if it has changed hands in multiple transfers, changed forms, or both.

A fourth problem area concerns the preconviction transfer of ill-gotten gains. Preconviction transfers raise two fundamental legal questions. The first is whether the Government may seek forfeiture of a defendant's "clean" assets once transfer of the ill-gotten assets occurred. However, neither RICO nor CCE contain language authorizing the substitution of clean assets. The second is whether transferred assets in the hands of a third party are forfeitable, in criminal litigation, but there is almost no case law on this issue.

Two of the three pending bills, H.R. 2646 and 4110, address these problem areas, but in some respects differ in approach. H.R. 4110 and its companion Senate bill, S. 1126, track the proposed legislative package contained in our report, and would amend both the RICO and CCE statutes. H.R. 2646 would amend RICO, but not the CCE statute and apply to only those racketeering activities involving drugs.

Since both RICO and CCE contain similar substantive deficiencies, we recommend that the Congress consider remedial legislation covering both criminal forfeiture statutes. As the Fifth Circuit's recent opinion in U.S. v. Martino indicates, the proceeds of other forms of racketeering, such as an arson ring

defrauding insurance companies, can be substantial. We, therefore, recommend the Committee consider the more comprehensive approach proposed by H.R. 4110.

As far as RICO is concerned, H.R. 4110 and H.R. 2646 clearly and unequivocably cover profits and proceeds. Both of these bills also deal effectively with the de facto association problem, though once again, H.R. 2646 is limited to those associations or enterprises that traffic in drugs. Under the Supreme Court's recent opinion in U.S. v. Turkette, it is now clear that those using a wholly illegitimate enterprise for illegal activities can be convicted under RICO and sent to prison. Under H.R. 2646, drug traffickers, and under H.R. 4110, all organized criminals who use a de facto association would also forfeit their ill-gotten gains.

On the matter of tracing and preconviction transfers of ill-gotten gains, the bills take markedly different approaches. H.R. 4110 would authorize forfeiture of substitute, so-called clean assets, to the extent that the defendant's ill-gotten gains (1) cannot be located; (2) have been transferred to third parties; or (3) have been placed beyond the jurisdiction of the courts. The forfeiture amount, however, would be limited to the value of the illicitly derived assets.

H.R. 2646 does not authorize forfeiture of substitute assets. Instead, the bill creates a presumption that all property of the defendant is illegally derived and hence forfeitable in criminal litigation. But if the defendant can demonstrate, presumably to the jury, that his property is not connected with the offense of

conviction, the assets would not be forfeited. We do not know whether the courts would consider the rebuttable presumption that the defendant's entire estate is connected in some way with illegal activity to be a constitutionally reasonable one, particularly if the defendant had no prior criminal record or had been previously gainfully employed.

To the extent that courts sustain such a presumption, the bill still would not solve the preconviction transfer problem. If the illegal gains have been transferred and the defendant demonstrates that his remaining assets are "clean," the bill contains no specific provision for forfeiture of substitute assets in the amount of the illegal gain. The provision in H.R. 4110 would fill this void.

Mr. Chairman, we should emphasize that neither bill fully resolves the issues surrounding the forfeitable status of assets that the defendant transferred, sold to, or deposited with third parties. Significant questions are involved in this issue, since the defendant--not the third party--is the individual who is accused of and tried for the offense. In one of the U.S. v. Mandel cases the court deferred decision on the rights of third parties in these circumstances but has retained jurisdiction over the case pending exhaustion of administrative remedies. Legislative changes in this area should, in our opinion, await the basic guidance that case law can provide.

H.R. 2646 also has provisions which allow for the proceeds of forfeited property to be used for drug law enforcement. Similar language is contained in H.R. 2910 with regard to civil

forfeiture of drug proceeds. Although we find appealing the idea of using criminal assets, particularly drug dollars, to stop the perpetration of crime, we have some concern about the use, accountability, and congressional oversight of these assets provided by the bills.

H.R. 2646 would, in part, amend the RICO statute to permit the use of forfeiture proceeds for Federal, State, and local law enforcement. This provision would provide an annual blanket authorization of an amount of funds, limited only to the amount forfeited in the preceding year, for drug enforcement without any type of report on fund expenditure. If the use of forfeiture proceeds is desired, we suggest that the Congress amend the legislation to require the Attorney General, as a part of the Justice Department's normal authorization and appropriation oversight process, to estimate the amount of funds that will become available under this authorization and to determine how the funds will be used. In addition, after the end of the fiscal year, the Attorney General should be required to report how the funds were expended.

The other bill, H.R. 2910, amends Section 881 of Title 21, the civil forfeiture authorization for drug assets, to permit the use of the forfeiture proceeds under this provision for purchase of evidence and information in drug investigations. The maximum authorized under this amendment is $10 million, or 5 percent of the Drug Enforcement Administration's budget, whichever is greater. Additionally, the amendment stipulates that the Attorney General should transmit to the Congress a report after the end

of the fiscal year on the use of all funds spent on the purchase of evidence and information. To provide better congressional oversight, we believe the Congress should also include in this legislation a requirement that the Attorney General estimate the amount of funds anticipated to be available under this section and determine how these funds will be spent. With this annual estimate by the Attorney General, the Congress might wish to consider broadening the use of forfeiture funds beyond the purchase of evidence and information.

Mr. Chairman, this concludes my prepared statement. We would be pleased to answer any questions.

141168

United States General Accounting Office
Washington, D.C. 20548

STATEMENT SUMMARY

* Billions of dollars are generated through gambling, prostitution, narcotics trafficking, and other illegal activities annually. And, although the Government attempted to take the profit out of crime through asset forfeiture, it has had little success.

* Reversing the Government's efforts involves both improving the management of the forfeiture program and legislative changes.

* The Department of Justice has taken several steps to deal with program management problems and congressional hearings will, hopefully, result in needed legislative changes.

* There are four major legislative problems: (1) the scope of the forfeiture authorizations is too narrow and in many respects does not cover forfeiture of profits; (2) it is not clear whether any ill-gotten gains can be reached when a de facto combination of individuals constitutes the only enterprise through which a defendant engages in racketeering activity; (3) the extent to which assets must be traced to the crime is unclear; and (4) transfers of assets prior to convicion limit the effectiveness of forfeiture.

* Legislative remedies have been proposed for most of these problems and should be enacted.