

Access to Justice and Civil Forfeiture Reform: Providing Lawyers for the Poor and Recapturing Forfeited Assets for Impoverished Communities

Louis S. Rulli[†]

Since its inception, the national legal services program has faced serious political opposition and formidable challenges to fulfilling the promise of equal access to justice for the nation's poor.¹ The 104th Congress presented legal services programs with their most difficult challenges to date: reduced federal funding by almost one-third, the largest single-year funding reduction in the history of the program,² and sweeping restrictions imposed upon the activities of legal services lawyers.³ With such dramatic changes as a backdrop, Yale Law School convened the first annual Arthur Liman Colloquium⁴ to bring together legal services lawyers, private attorneys, and members of the academy to examine the future of civil legal services to the poor.

Law schools were appropriately included in this challenge. They were urged to take concrete steps to respond to the growing unmet legal needs of the poor by, among other things, adopting mandatory public service programs in law school,⁵ expanding clinical programs to offer law stu-

[†] Practice Associate Professor of Law, University of Pennsylvania Law School. The author is grateful to Matthew McDonald, Lincoln Frakes, and Gabriela Femenia, three excellent law students, for their valuable assistance.

1. See, e.g., Vice-President Spiro T. Agnew, *What's Wrong with the Legal Services Corporation*, 58 A.B.A. J. 930 (1972); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

2. While the 104th Congress did not succeed in eliminating all federal funding to the Legal Services Corporation, federal funding was reduced from \$415 million to just \$278 million. The previous largest single year reduction in federal funding occurred between fiscal years 1981 and 1982 when federal funding was reduced by one-fourth.

3. Congress imposed severe restrictions which struck at the core of the independence of legal services lawyers. Among other things, the restrictions prohibit administrative and legislative advocacy, challenges to welfare reform legislation and policies, representation of immigrants who are not lawful permanent residents, litigation on behalf of prisoners, representation of public housing residents threatened with eviction based upon alleged drug activity, prohibition of class action suits and claims for attorney's fees. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996) (Budget Act of 1996, § 504(a)); see also LSC regulations implementing restrictions, 61 Fed. Reg. 41960 (Aug 13, 1996), 1996 WL 452449, 61 Fed. Reg. 45740 (Aug 29, 1996), 1996 WL 489813.

4. The Colloquium was held March 5-6, 1998, and was co-sponsored by the Yale Law School Public Service Program and the Jerome N. Frank Legal Services Organization.

5. For example, the University of Pennsylvania Law School requires that all students perform 70 hours of public service as a condition of graduation.

dents experiential learning opportunities while satisfying the legal needs of impoverished clients, and performing needed research and coordination functions in the wake of federal defunding of legal services back-up centers.⁶ Above all, law schools were expected to integrate strong professional responsibility values into all aspects of the established curriculum, so that future lawyers would appreciate their unique role in providing access to justice for all Americans and in employing the rule of law to remedy pervasive discrimination based upon poverty.⁷

In short, the colloquium called upon each of its participant constituencies to join in new and innovative ways to insure that legal services programs succeed well into the future despite current adversities. The urgency of this message was heightened by the knowledge that a serious constitutional challenge to the nation's second largest funding source for civil legal services—the Interest On Lawyer Trust Account program (IOLTA)⁸—was briefed and argued, and awaiting decision by the U.S. Supreme Court.⁹

As constituent groups shared with each other impressive innovations from their local communities, there was an opportunity to reflect upon the many ways that law students enrolled in clinical courses were already contributing to this mission and how, through increased coordination with legal services and pro bono communities, these efforts could be strengthened in the future. Two examples from current clinical initiatives at the University of Pennsylvania Law School came quickly to mind.

First, clinical faculty should expressly coordinate their case acceptance policies with the priorities of legal services programs so that faculty give greater emphasis to cases that legal services lawyers are prohibited from handling under current federal restrictions. For example, legal services lawyers employed in programs that receive federal funding may

6. The Budget Act of 1996 eliminated federal funding to all 16 of the LSC's National Support Centers, all 50 State Support Units, LSC's five Regional Training Centers, six CALR Units, and the National Clearinghouse for Legal Services (publisher of the Clearinghouse Review, the poverty law journal for legal services lawyers).

7. Former President Jimmy Carter, in a recent commencement address at the University of Pennsylvania, stated that "the worst discrimination on earth is rich people against poor people. This is not a deliberate discrimination. It's not filled with hatred or animosity, but it permeates the human race." Commencement Address delivered on May 18, 1998 in Philadelphia, *reprinted in part, Who are the Rich People?*, PHILA. INQUIRER, May 26, 1998, at A13.

8. IOLTA programs generate more than \$100 million annually for civil legal services. See Brief of Amici Curiae in Support of the Petitioners at *11, *Phillips v. Washington Legal Foundation*, 1998 WL 309070 (U.S. 1998) (No. 96-1578) (Brief available at 1997 WL 476500).

9. On June 15, 1998, the U.S. Supreme Court held, by a narrow 5-4 margin, that interest income generated by funds held in IOLTA accounts is the private property of the owner of the principal. However, the Court expressly took no view on whether IOLTA funds constitute a taking under Fifth Amendment jurisprudence or whether just compensation is due. These issues were remanded to the Fifth Circuit for further consideration. See *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925 (1998).

no longer represent public housing tenants facing eviction based upon alleged drug activity.¹⁰ Without legal services lawyers to help, many families will wrongfully lose subsidized housing and be unable to pay for comparable housing in the private market. The results will be disastrous: some families will become homeless and be forced to live in shelters or on the streets; others will split up and assign children to overcrowded homes of family relatives; still others will move into uninhabitable and unsafe apartments. Obviously, clinical programs can play a vital role in safeguarding the rights of tenants who otherwise would receive no legal help at all.

Clinical programs will also benefit from undertaking these cases. They are excellent teaching cases for law students because they involve extensive client and witness interviewing, sophisticated factual investigation and development of evidence, case planning, negotiation and in-court representation. Perhaps more importantly, law students must leave sheltered law school environments to visit public housing projects where they directly confront the face of poverty, sometimes for the first time, and learn how a growing underclass of American society struggles for its daily survival. As the legal process unfolds, clinical supervisors help students to wrestle with agency incompetence and maliciousness, opposing counsel intransigence, and the rigidity and unfairness of a national "one strike" policy¹¹ that purports to justify the eviction of a long-time tenant-grandmother for the alleged sins of her adult grandson.¹² Students learn the importance of having a lawyer at one's side in administrative and judicial systems that are intimidating and unforgiving (and they rightfully question why Congress has taken away an indigent tenant's lawyer just when legal help is needed most). Students observe the powerful role that lawyers play in the drafting of policies and administrative regulations and in the counseling of governmental clients when vital interests are at stake. These are powerful lessons not readily learned in the classroom.

10. See Budget Act of 1996, § 504(a)(17); see also LSC Interim Regulation, 61 Fed. Reg. 41965 (August 13, 1996).

11. Notice PIH 96-16 (HA) issued on April 12, 1996, by the U.S. Department of Housing and Urban Development on the subject of "one strike and you're out" screening and eviction guidelines for public housing authorities. The notice provides guidance for stricter screening and eviction policies following the President's announcement on March 28, 1996, of a "one strike and you're out" policy.

12. The "one strike" policy works injustice in many family contexts but perhaps most frequently when mothers and grandmothers, who have lived responsibly in public housing for many years, face eviction because of the alleged wrongdoing of their adult children or grandchildren. Policies such as these raise important legal and non-legal questions that should be closely examined with actual experience, not only by future public interest lawyers but also by future corporate and government lawyers who wield considerable influence over the formation of public policy.

In addition to providing representation in restricted cases, law school clinical programs should also assist legal services programs by identifying unrestricted cases that pose potential loss of shelter, income, or safety to indigent clients, but which historically have not received legal help from the local legal community. In such areas, the rights of the poor are particularly vulnerable because administrative and judicial proceedings routinely take place without the scrutiny of lawyers. For example, the clinical program of the University of Pennsylvania Law School has undertaken representation in a limited number of civil forfeiture cases in which the homes of indigent families are at stake. These cases provide law students (and faculty) with an unobstructed view of how poor people often lose their most important asset—their homes—without any assistance of counsel to safeguard their interests against erroneous government intrusion. The poor are literally driven onto the streets or into overburdened city shelters creating higher tax burdens on the general community, while the proceeds from the forced sale of their homes go to enrich law enforcement agencies.

These cases allow students to witness the harsh consequences of punitive forfeiture statutes that permit the exercise of enormous police power but which fail to provide adequate safeguards against wrongful governmental action. Without legal representation, the scales of justice are grossly unbalanced, providing students with an experience that dramatically contrasts with their classroom study of appellate cases in which all litigants appear to be represented by experienced counsel who skillfully argue the finer points of law to their clients' advantage. There is simply no hiding the fact that the adversarial system doesn't work as it should when disadvantaged and unsophisticated individuals are forced to stand alone in defending their property against superior governmental resources. Once this genie is out of the bottle, it can never go back in. The hope is that the experience transforms students into enthusiastic advocates for a just legal system that serves the needs of the powerless as well as the powerful.

Clinical involvement in cases such as these also permits law schools to fulfill their historic role of identifying and writing about needed legal reform. While limited in number, the experiences gained from representing indigent homeowners in state civil forfeiture proceedings and observing others who proceed without counsel demonstrate that overall forfeiture reform is seriously overdue. The balance of this Paper calls for three specific changes in the civil forfeiture system intended to achieve measurable progress in balancing the important interests at stake in these proceedings: court-appointed counsel for indigent property owners; detailed, public accounting of all assets forfeited annually to law enforcement

authorities; and redirection of not less than fifty percent of forfeited asset funds from law enforcement agencies to the creation of special services districts in high poverty communities, so that drug prevention and community empowerment services, including free civil legal services to the poor, can be purchased for community benefit.

Civil asset forfeiture is based on the legal fiction that property—homes, vessels, cars and even cash—can be found guilty of wrongdoing and thereby be subject to forfeiture to the government.¹³ While there are many federal forfeiture statutes,¹⁴ civil forfeiture became a weapon in the war against drugs with the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹⁵ As amended, the Act provided for the forfeiture of controlled substances¹⁶ and conveyances used to transport controlled substances,¹⁷ moneys and negotiable instruments,¹⁸ and real property¹⁹ used to facilitate violations. Civil asset forfeitures increased enormously when Congress revised the federal drug forfeiture program to create this “surgical strike” weapon in the war on drugs.²⁰ The purpose of this change was to strike a fatal blow at drug traffickers by taking away their cars, boats, airplanes, homes, and cash, while simultaneously increasing the resources of the seizing agency. Once seized and forfeited, the property may be destroyed, retained for official use by law enforcement agencies participating in the seizure and forfeiture, or sold. Proceeds from the sale of forfeited assets were formerly deposited in the general fund of the U.S. Treasury but now flow primarily to the Department of Justice’s Asset Forfeiture Fund²¹ and the Department of the Treasury’s Forfeiture Fund²² to be used for law enforcement purposes.²³ As of June 30, 1990, the seized asset inventories of the two programs were valued at \$1.167 billion and \$389 million, respectively, totaling \$1.556 billion in assets. After deducting for expenses estimated to be \$55.4 million, the two programs netted a huge surplus. In fiscal year 1991 alone, the Department of Justice Asset Forfeiture Fund reported income

13. See H.R. Rep. No. 105-358, Part 1, at 20 (summarizing antecedents of civil asset forfeiture as background materials for report on Civil Asset Forfeiture Reform Act, H.R. 1965).

14. See, e.g., 18 U.S.C. § 2344 (cigarettes), 7 U.S.C. § 2156 (gamecocks), 18 U.S.C. § 1963 (RICO violation property).

15. 21 U.S.C. § 881(a).

16. See 21 U.S.C. § 881(a)(1).

17. See 21 U.S.C. § 881(a)(4).

18. See 21 U.S.C. § 881(a)(6) (1978).

19. See 21 U.S.C. § 881(a)(7) (1984).

20. See, e.g., Michele M. Jochner, *From Fiction to Fact: The Supreme Court’s Re-Evaluation of Civil Asset Forfeiture Laws*, 82 ILL. B.J. 560 (1994).

21. 28 U.S.C. § 524(c)(4).

22. 31 U.S.C. § 9703.

23. See 28 U.S.C. § 524(c)(1).

of \$658 million and expenses of \$118 million, netting a surplus of \$464 million.²⁴

State and local law enforcement agencies can receive a portion of forfeited assets in return for cooperating with the Department of Justice and Customs Service in seizure and forfeiture cases. The amounts of shared funds have also increased significantly and state and local law enforcement authorities have increasingly relied upon shared assets for their budgetary operations.²⁵ In addition, individual states have adopted their own civil forfeiture laws modeled upon the Uniform Controlled Substances Act.²⁶ For example, in 1988 Pennsylvania enacted legislation²⁷ providing for the loss of property rights to the Commonwealth for violations of the state Controlled Substance, Drug, Device and Cosmetic Act.²⁸ The state law directs that the district attorney and the state attorney general utilize forfeited property or proceeds therefrom for the purpose of enforcing the provisions of the same Act.²⁹

In recent years, the civil asset forfeiture program has attracted growing criticism. Since the program is civil in nature, it does not contain the constitutional safeguards mandated in criminal cases and it places property owners at risk for loss of their property without ever being convicted or even charged with a crime.³⁰ As a result, commentators have charged that the use of forfeiture has become too widespread and that the war on drugs has become a "war on the Constitution."³¹

The public is also genuinely concerned that the government's strong pecuniary interest in civil forfeiture creates a potential conflict of interest that threatens to distort valid police goals, thereby encouraging law enforcement officers to maximize revenue at the expense of crime prevention.³² A former Department of Justice Chief responsible for the Asset Forfeiture Section stated that the department's "marching orders" were:

24. See Alison Roberts Solomon, *Drugs and Money: How Successful Is the Seizure and Forfeiture Program at Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1167 (1993).

25. See *id.* at 1174.

26. See Solomon, *supra* note 24, at 1180.

27. Controlled Substances Forfeiture Act, 42 PA. C.S.A. § 6801-6802.

28. Act of April 14, 1972, P.L. 233, No. 64, 35 P.S. § 780-101 *et seq.*

29. 42 PA. C.S.A. §6801(e)-(h).

30. For example, a 1993 study in Arizona found that three-fourths of those who lost property in Arizona police seizures were never accused of any wrongdoing, and more than \$4 million in cash was seized from people never charged with a crime. Eric Miller, *DPS to Close Forfeiture Unit, Director Notes Potential Conflicts*, ARIZ. REPUBLIC, Feb. 13, 1997, at B1.

31. See, e.g., Solomon, *supra* note 24, at 1150.

32. See Erik Grant Luna, *Fiction Trumps Innocence: The Bennis Court's Constitutional House Of Cards*, 49 STAN. L. REV. 409, 432 (1997); see also Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56-84 (1998).

“Forfeit, forfeit, forfeit. Get money, get money, get money.”³³ A 1990 memo from the Attorney General admonished U.S. Attorneys to increase the volume of forfeitures in order to meet the Department of Justice’s annual budget target.³⁴

In addition, there is deep concern that current forfeiture law vests unfettered discretion over the expenditure of large sums of public moneys in the hands of unelected officials,³⁵ and permits expenditures unrelated to law enforcement objectives without appropriate public accountability.³⁶ Cynicism and public distrust have been heightened by highly publicized instances of abuse.³⁷

These legitimate concerns signal that the drug asset forfeiture program, while well-intended and undoubtedly a powerful weapon in the war on drugs, is in dire need of legislative reform at all levels.³⁸

I. COURT-APPOINTED COUNSEL

Forfeiture actions filed under the Pennsylvania Controlled Substances Forfeiture Act³⁹ are civil cases,⁴⁰ but in practice they closely resemble criminal proceedings. The cases are brought in the name of the Com-

33. Luna, *supra* note 32, at 433 n.198.

34. *Id.* at 433, n.199; *see also* United States v. James David Good Real Property, 510 U.S. 43, 56, n.2 (1993) (quoting Executive Office for United States Attorneys, 38 United States Attorney’s Bulletin 180 (DOJ 1990)).

35. *See* Eddie Olsen, *N.J. Prosecutor Seizes on Forfeitures*, PHILA. INQUIRER, June 18, 1998, at A1 (quoting a State Senator who contends that county government—and not a prosecutor appointed by the governor—should decide how hundreds of thousands of public dollars are spent).

36. Among the questioned uses of increased forfeiture funds by the County Prosecutor were the purchases of two \$11,000 backdrops used for the County Prosecutor’s news conferences. *See id.*

37. *See, e.g.*, H.R. REP. NO. 105-358, Part 1, at 23-27 (stories of Willie Jones and Billy Munnerlyn, two witnesses at Judiciary Committee hearings); *see also* Michael Isikoff, *Drug Raids Net Much Valuable Property—And Legal Uproar*, WASH. POST, Apr. 1, 1991, at A1 (reporting the federal seizure of three fraternity houses at the University of Virginia with estimated value of \$1 million for the confiscation of several hundred dollars worth of drugs); Luna, *supra* note 32, at 432 n.194 (noting that law enforcement personnel use seized televisions and stereos in their offices) and at 433 n.195 (noting that the district attorney in Suffolk County, New York, drives a seized BMW 735i); Solomon, *supra* note 24, at 1171 n.133 (describing a GAO audit that discovered that a DEA field office had converted curio cabinets and Norman Rockwell figurines for official use) and at 1171 n.138 (noting that in some cases the DEA placed items into official use without ever processing the forfeited items); Platte, *Duffy Diverted U.S. Drug-Seizure Funds to Secret Account Sheriff*, L.A. TIMES, November 1, 1990 (reporting that drug seizure funds of more than \$300,000 were not deposited in the county treasury and, according to news accounts, were diverted to a secret sheriff’s account).

38. In an excellent article on the subject of civil forfeiture, authors Blumenson and Nilsen conclude that while the massive outpourings of money and effort have produced record numbers of drug seizures, asset forfeitures and prosecutions, by more meaningful measures the drug war has been an extraordinary failure. *See* Blumenson & Nilsen, *supra* note 32, at 37.

39. 42 PA. CONS. STAT. ANN. §§ 6801-02 (West 1997).

40. *See* Commonwealth v. Wingait Farms, 690 A.2d 222 (Pa. 1997).

monwealth of Pennsylvania⁴¹ and are prosecuted by the local district attorney's office.⁴² In Philadelphia, forfeiture hearings are held in the Criminal Justice Center, a newly constructed high-rise courthouse, specially designed to efficiently process the large number of criminal cases arising each year in a major urban center. All individuals entering the building are electronically searched for weapons before entering a bank of elevators which deliver them to courtrooms on upper floors. The elevators open to crowded hallways where prosecutors, defense lawyers and uniformed police officers scurry to find the courtrooms in which their cases will be called.

Forfeiture cases are assigned to Courtroom 501. Once inside the courtroom, cases are called from a list. They are prosecuted by the same assistant district attorney and tried by the same assigned judge, subject only to infrequent rotation. Scores of indigent citizens, disproportionately people of color, sit on benches toward the back of the courtroom waiting for their names (or descriptions of their properties) to be called aloud by the clerk of the court. The prosecutor and court staff do most of the talking, pausing frequently to inquire about the presence of police officers expected to testify in cases appearing on the court list. Most of the time, however, cases are simply continued to new trial dates months into the future. In the interim, private property seized by law enforcement agencies remains within the exclusive custody and control of the district attorney's office.

It is clear that forfeiture cases enjoy the full resources and power of the state. Unlike civil courtrooms in which the presiding judge exercises dominant control, forfeiture court appears to revolve around the actions of the prosecutor. Cases proceed or await new hearing dates seemingly at the wish of the prosecutor. Property owners confused by the court's procedures direct their inquiries to her. Except for an occasional contested hearing, the judge's role appears limited to approving rescheduled hearing dates that have been mutually agreed upon by the prosecutor and the scheduling clerk. Without knowing more, a casual observer would almost certainly identify forfeiture court as a criminal courtroom. It is a confusing and intimidating place.

On closer observation, however, the civil nature of the courtroom becomes more evident. There are no public defenders present and only occasionally does a private defense lawyer enter the courtroom. Indigent parties are alone, confused by the process and unsure of what is expected of them. They passively wait for long periods of time while retaining

41. See 42 PA.CONS. STAT. ANN. § 6802(a) (West 1997).

42. See 42 PA.CONS. STAT. ANN. § 6802(b) (West 1997).

hope that they will regain their property once they tell their stories to the judge.

Indigent property owners come to forfeiture court without an attorney for many reasons. Some do not know that they may seek legal assistance or even that a lawyer might be helpful to them in such a proceeding. Unlike other civil actions commenced with a formal complaint and a notice to defend⁴³ that informs defendants in English and Spanish where they can go to obtain legal help, forfeiture proceedings are begun by a petition⁴⁴ and an abbreviated notice which states simply that a default judgment may be entered if a timely response is not filed.⁴⁵ The district attorney's office does not attach voluntarily the more detailed notice to defend.

In any event, indigent property owners lack the ability to pay a lawyer and are therefore dependent entirely upon the availability of free legal assistance in the local community. However, the public defender's office will not represent them because these are not criminal proceedings, and the local legal services program, already seriously under-funded and facing exploding client demand, cannot staff forfeiture cases even if they fall within the program's ever-narrowing case acceptance priorities. The private bar's pro bono program would like to help, but also is overtaxed with referrals for family law and child disability cases.

The truth is that civil forfeiture cases fall between the cracks of the public defender and legal services delivery systems. Indigent homeowners must fend for themselves, too often with disastrous results. It is not difficult to understand why.

Many low-income homeowners who come to forfeiture court are living on the street or in homeless shelters because their homes have already been seized by law enforcement authorities without advance notice or an opportunity to make alternative living plans. Merely surviving in such a hostile environment consumes the homeowner's time and energies. This leaves them little capacity, time, or money to prepare and file responsive pleadings or to develop factual evidence in support of their claims. It is unreasonable to believe that clients can mount a credible defense under such adverse conditions.

The civil practice clinic at the University of Pennsylvania Law School accepted its first drug-related civil forfeiture case when a single mother

43. See Pa. R.C.P. 1018.1.

44. See 42 PA. CONS. STAT. ANN. § 6802(a) (West 1997).

45. See 42 PA. CONS. STAT. ANN. § 6802(b) (requiring that the notice state the following: "You are required to file an answer to this petition, setting forth your title in, and right to possession of, said property within 30 days from the service hereof, and you are also notified that, if you fail to file said answer, a defense of forfeiture and condemnation will be entered against said property.").

was thrust into the city's homeless shelter after her home was seized and the district attorney's office filed a petition seeking forfeiture of the house. The referral for help highlighted the need for access to counsel in such important matters. The Commonwealth Court, Pennsylvania's intermediate appellate court, had previously ruled in a case of first impression that an indigent property owner was entitled to counsel in civil forfeiture cases under the due process clause of the Fourteenth Amendment.⁴⁶ While acknowledging that the due process clause historically required appointments of counsel only in cases threatening the physical liberty of criminal defendants,⁴⁷ the Commonwealth Court interpreted the U.S. Supreme Court's holding in *Lassiter v. Department of Social Services*⁴⁸ simply to create a presumption against appointment of counsel where liberty interests were not involved. In the Court's opinion, due process protections might still require the appointment of counsel in appropriate cases when applying the factors enumerated by the Supreme Court in *Mathews v. Eldridge*.⁴⁹

While Pennsylvania courts require that an indigent parent be informed of the right to free counsel in involuntary parental rights cases⁵⁰ and certain paternity actions,⁵¹ the Commonwealth Court noted that no Pennsylvania appellate court, and only one non-Pennsylvania court, had answered the precise question of whether an indigent property owner was constitutionally entitled to court-appointed counsel in civil forfeiture actions.⁵² In a case known as *United States v. 1604 Oceola*, a district court in Texas concluded that because there was little likelihood of an erroneous deprivation of property, court-appointed counsel was not required where a property owner pled guilty to drug charges stemming from transactions involving the home. However, the *Oceola* court expressly limited its holding to the facts of that case, going to great pains to note in dicta that the interests of a homeowner in maintaining a family home upon which the mortgage had been paid for many years was substantial, and that the government's interest was less compelling where the home was not a present danger to society. The Court viewed the forfeiture as an attempt by government to exact an additional penalty upon the

46. See *Commonwealth v. \$9,847.00 U.S. Currency*, 637 A.2d 736 (Pa. Commw. Ct. 1994).

47. See *id.* at 742.

48. 452 U.S. 18 (1981).

49. 424 U.S. 319 (1976).

50. See *In re Adoption of R.I.*, 312 A.2d 601 (Pa. 1973).

51. See *Corra v. Coll*, 451 A.2d 480 (Pa. Super. Ct. 1982).

52. See *United States v. 1604 Oceola*, 803 F.Supp 1194 (N.D. Tex 1992) (hereinafter *Oceola*).

homeowner⁵³ for which the additional burden of appointing counsel would not be overwhelming. The *Oceola* court continued:

Perhaps the most substantial imposition upon the government would be requiring the Plaintiff to oppose an attorney in a complicated and abstruse field where the Plaintiff normally expects to meet only pro-se litigants struggling through the claimant process.⁵⁴

After the *Oceola* decision, the U.S. Supreme Court held in *Austin v. U.S.*⁵⁵ that the excessive fines clause of the Eighth Amendment was applicable to civil forfeiture proceedings. The Commonwealth Court reasoned that the *Austin* holding would require a different result in *Oceola* because of the homeowner's increased likelihood of suffering an erroneous deprivation of property. Therefore, based largely upon the *Austin* holding, the Commonwealth Court concluded that court-appointed counsel for indigent property owners was constitutionally required.⁵⁶

On the strength of the Commonwealth Court's ruling, the clinic filed a motion requesting that counsel be appointed to represent the client. The hope was that a favorable ruling at the trial level would have the practical effect not only of insuring counsel in this case but also of leading to routine court appointments in all of the pro se forfeiture cases awaiting adjudication. Unfortunately, the forfeiture judge decided not to grant any such motions until the State Supreme Court completed its review of the Commonwealth Court's decision.

The landmark decision of the Commonwealth Court was short-lived. In 1997, the Pennsylvania Supreme Court reversed the Commonwealth Court and expressly adopted the *Lassiter* presumption that an appointment of counsel is not constitutionally required in civil cases that do not implicate a liberty interest.⁵⁷ When applying the *Mathews v. Eldridge* factors, the State Supreme Court found that the property interest at stake commanded a lesser level of due process protection, while the government's interest in deterring illegal drug activity by confiscating the profits therefrom was significant. The Court also found the risk of erroneous deprivation to be minimal and the burden to government of providing counsel to an entire class of claimants to be substantial.⁵⁸ As a result, the Pennsylvania Supreme Court held that the due process clause of the

53. See *Oceola*, 803 F. Supp. at 1197.

54. *Id.*

55. 509 U.S. 602 (1993).

56. See *Commonwealth v. \$9,847.00 U.S. Currency*, 637 A.2d 736, 744-47 (Pa. Commw. Ct. 1994).

57. See *Commonwealth v. \$9,847.00 U.S. Currency*, 704 A.2d 612 (Pa. 1997). The case did not raise the question of whether the governmental seizure of a family home without advance notice or opportunity for the family to make alternative living plans, thereby subjecting the family to homelessness, implicates a constitutionally protected liberty interest.

58. See *id.* at 616.

Fourteenth Amendment does not require the appointment of counsel to indigent claimants in forfeiture cases.⁵⁹ Courts in at least eight other states have agreed that court-appointed counsel is not constitutionally required.⁶⁰

While court-appointed counsel appears not to be constitutionally required in civil forfeiture proceedings, it is clear that Congress and state legislatures may afford property owners greater protection than what the constitution requires. Indigent homeowners in particular have substantial interests at stake and do face a high likelihood of erroneous deprivation for the reasons previously discussed. In many such cases, homeowners may never be convicted of any offense and some may not even be charged with any wrongdoing. But, without counsel, they are likely to forfeit their property in uncontested actions or in hastily prepared contested actions where their pro se defenses offer little real hope of success against superior governmental resources.⁶¹

The Civil Asset Forfeiture Reform Act,⁶² sponsored by Representative Henry J. Hyde⁶³ and introduced in the House of Representatives on June 19, 1997, proposes important procedural reforms for federal forfeiture actions, including the appointment of counsel for indigent parties in appropriate cases.⁶⁴ The proposed Act provides as follows:

(d) APPOINTMENT OF COUNSEL. — (1) If the person filing a claim is financially unable to obtain representation by counsel and requests that counsel be appointed, the court may appoint counsel to represent that person with respect to the claim. In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account—

(A) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointing counsel;

59. The Court did not reach the issue of whether court-appointed counsel is mandated by the Pennsylvania Constitution. *See id.* at 617.

60. *See, e.g.*, *Resek v. State*, 706 P.2d 288 (Alaska 1985) (declining to establish a right to counsel but granting courts discretion to appoint counsel in forfeiture proceedings conducted prior to criminal proceedings so that the property owner's right against self-incrimination can be protected); *People v. \$30,000 United States Currency*, 35 Cal. App. 4th 936 (Cal. Ct. App. 1995); *State v. Tuipuapua*, 925 P.2d 311 (Haw. 1996); *State v. One 1990 Geo Metro*, 889 P.2d 109 (Idaho 1995); *In re Bly*, 456 N.W. 2d 195 (Iowa 1990); *State v. Predka*, 555 N.W. 2d 202 (Iowa 1996); *Vergari v. Lockhart*, 545 N.Y.S.2d 233 (N.Y. App. Div. 1989); *Morgenthau v. Garcia*, 148 Misc. 2d 900, 561 N.Y.S.2d 867 (N.Y. App. Div. 1990); *State ex rel. Eikenberry v. Frodert*, 924 P.2d 933 (Wash. Ct. App. 1996).

61. It has been suggested that the absence of counsel is one of the primary reasons why at least 80% of civil forfeiture cases are not challenged. *See* H.R. REP. NO. 105-358, at 28-29 (1997).

62. H.R. 1965, 105th Cong. (1997).

63. U.S. House of Representatives, Illinois (6th District). Representative Hyde is Chair of the House Committee on the Judiciary.

64. *See* H.R. 1965, § 2(d) (Appointment of Counsel).

Access to Justice and Civil Forfeiture Reform

(B) the claimant's standing to contest the forfeiture; and

(C) whether the claim appears to be made in good faith or to be frivolous.

While this provision would not make court appointments of counsel automatic, it would take a major step toward insuring that counsel is appointed in appropriate cases. Unfortunately, this proposed reform (and previous similar versions) has been pending for some time in Congress.⁶⁵ Unquestionably, the Department of Justice has undermined this reform effort by opposing court-appointments in federal forfeiture proceedings.⁶⁶ While the government's interests never go unrepresented in forfeiture proceedings, the Department apparently believes that a property owner's interests are adequately protected by the individual's potential ability to recover legal expenses in a successful action against the United States under the Equal Access to Justice Act (EAJA).⁶⁷

The Department's argument is plainly unconvincing. Only court-appointed counsel will assure that indigent property owners have the help of a lawyer in all appropriate civil forfeiture cases and, most importantly, from the earliest stages of the proceedings. In contrast, EAJA fees will at best serve as a very limited financial inducement for some private attorneys to get involved in selected cases, but only if an indigent property owner is able to engage in a search for a lawyer and then is able to convince the lawyer to take on protracted litigation for contingent remuneration under a forfeiture statute that is strongly weighted in favor of the government. Even if a lawyer takes a case and wins it, EAJA fees still are not guaranteed. Instead, the government is likely to oppose a motion for EAJA fees on the basis that the government's action was substantially justified under the statute.⁶⁸ Collateral litigation challenging the lawyer's entitlement to EAJA fees and opposing the amount of compensable hours will almost certainly discourage private counsel from representing indigent parties. If the availability of EAJA fees is an acceptable answer, why do so many property owners go unrepresented?

65. H.R. 1965 (introduced on June 19, 1997 and co-sponsored by only 3 representatives) is the most recent version of the proposed Civil Asset Forfeiture Reform Act proposed by Representative Hyde. Prior versions include H.R. 1835, 105th Cong., introduced on June 10, 1997 with 29 cosponsors; H.R. 1916, 104th Cong., introduced on June 22, 1995 with 23 cosponsors; and H.R. 2417, 103rd Cong., introduced on June 15, 1993 with 62 cosponsors. *See also* H.R. 3347, 103rd Cong. (Asset Forfeiture Justice Act, introduced by Representative Conyers on October 22, 1993).

66. *See Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary*, 105th Cong. 111, 120 (1997).

67. *See id.*; *see also Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Committee on the Judiciary*, 104th Cong. 229 (1996).

68. *See, e.g., United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995); *Creative Electric v. United States*, 1997 WL 151779 (N.D.N.Y. 1997).

Moreover, in state forfeiture proceedings where the United States is not a party, federal EAJA fees obviously are not available to indigent property owners. Only court-appointed counsel in state proceedings offer indigent property owners any meaningful chance of safeguarding vital interests.

The cost of providing court-appointed counsel can easily be paid from funds deposited in the federal or state forfeiture asset fund (whichever is appropriate) without imposing any additional burden on taxpayers. To keep legal costs to a necessary minimum, court appointments could be mandatory in those cases in which an indigent family's home is at stake, and discretionary in all other cases. Courts can be authorized to exercise that discretion in accordance with factors such as those proposed in the Civil Asset Forfeiture Reform Act.⁶⁹ Only by providing for the appointment of counsel in both state and federal forfeiture proceedings can the public begin to have confidence that property which is ultimately forfeited to the government actually belongs in a forfeiture asset fund and that meritorious defenses possessed by ordinary citizens are not simply abandoned or drummed out because of superior governmental resources.

II. DETAILED PUBLIC ACCOUNTING OF FORFEITED ASSETS

The public also has a compelling interest in knowing the precise nature and value of privately owned assets forfeited each year to law enforcement authorities. While federal law requires the Attorney General to make an annual report to Congress outlining the value of property taken into the Fund,⁷⁰ and the ending balance of the Fund and payments made to state and local law enforcement agencies,⁷¹ the public is not afforded a meaningful understanding of the extent to which private property is forfeited each year. Congressional testimony from law enforcement authorities reveals that amounts flowing into the federal Fund are very significant.⁷² Payments made to state and local authorities by federal

69. The Reform Act would require a court to take into account: the nature and value of the property subject to foreclosure, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointing counsel; the claimant's standing to contest the forfeiture; and whether the claim appears to be made in good faith or to be frivolous. See H.R. 1965, 105th Cong. § 2(d) (1997).

70. 28 U.S.C. § 524(c)(1) creates the Department of Justice Assets Forfeiture Fund to serve as the repository of all forfeited property seized by the Department of Justice.

71. 28 U.S.C. § 524(c)(6) requires the Attorney General to make this annual report.

72. On July 22, 1996, Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section of the Department of Justice, testified before the House Committee on the Judiciary that the Fund received \$325 million (projected) in FY 1996, \$487.5 million in FY 1995, \$549.9 million in 1994, \$555.7 million in FY 1993, and \$531 million in FY 1992. See *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Committee on the Judiciary*, 104th Cong. 42, 216-217 (1996). On June 11, 1997, Mr. Cassella reported to the House Committee on the Judiciary that final figures for FY 1996 amounted to \$338.1 million and that first quarter

Access to Justice and Civil Forfeiture Reform

authorities through equitable sharing are also sizable.⁷³ While total forfeiture figures are reported to Congress pursuant to federal statute, the public has no detailed information on the sources of forfeited property and most importantly on what impact the seizure and forfeiture of private property is having on local communities.

Similarly, there are only minimal reporting requirements for assets forfeited under state forfeiture laws. For example, under Pennsylvania law, every county is required to provide an annual audit to the state attorney general of all forfeited property and proceeds.⁷⁴ However, this audit is not to be made public.⁷⁵ The state attorney general is then required to submit an annual report to the appropriations and judiciary committees of both houses of the legislature on the proceeds derived from the sale of forfeited property and the use made of unsold forfeited property.⁷⁶ But once again, the public is not given a detailed report of the sources of these funds, nor, more importantly, a demographic summary of citizens⁷⁷ adversely affected by forfeitures or an assessment of the impact of forfeited real property on local communities.⁷⁸

Detailed, public auditing on all levels will focus increased national attention on the vast amounts of private property forfeited each year to law enforcement agencies. While law enforcement activities are an obvious

figures for FY 1997 were \$110 million. *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary*, 105th Cong. 116 (1997).

73. Cassella's testimony reports that payments made to state and local agencies amounted to \$175 million (projected) in FY 1996, \$228.7 million in FY 1995, and \$228.9 million in FY 1994, \$224.5 million in FY 1993, and \$246.6 million in FY 1992. See *Hearing on H.R. 1916, supra* note 71. On June 11, 1997, Mr. Cassella reported to the House Committee on the Judiciary that final figures for FY 1996 amounted to \$163.4 million and that first quarter figures for FY 1997 were 35.1 million. See *Hearing on H.R. 1835, supra* note 71.

74. See 42 PA. CONS. STAT. ANN. § 6801(i) (West 1997).

75. See *id.*

76. See 42 PA. CONS. STAT. ANN. § 6801(j) (West 1997). The attorney general is required to adopt procedures and guidelines governing the release of information by local counties to protect the confidentiality of forfeited property or proceeds used in ongoing drug enforcement by authorities.

77. Questions have been raised as to whether the civil forfeiture program uses racially based profiling and disproportionately seizes property from racial minorities. See, e.g., Solomon, *supra* note 24, at 1185; *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Committee on the Judiciary*, 104th Cong. 290-291 (1996).

78. In cases that involve the seizure of a low-income family's house, it appears that the building may then be boarded up for long periods of time, thereby further contributing to urban blight and high vacancy rates in low-income neighborhoods. It may also become the subject of break-ins, vandalism, and even illegal drug activity by individuals unconnected to the house. Local prosecutors concede that asset forfeitures convey to them a small empire of modest properties which prove very difficult to dispose of. See Craig R. McCoy, *Seized Houses Tough to Unload*, PHILA. INQUIRER, Jan. 17, 1992, at B1. The public should know what properties are within the inventory of law enforcement authorities and what steps are being taken in a timely manner to return those properties to productive use. See, e.g., Barbara Barret, *Drug Task Force's Records Covered by Veil of Secrecy*, YORK DAILY RECORD, Dec. 27, 1997, at A1, 1997 WL 14353291 (reporting on the need for public auditing of state forfeiture funds).

priority for the use of forfeited assets, they should no longer be the only priority.⁷⁹ The current mandate to give virtually all forfeited assets to law enforcement agencies evidences an ill-conceived, legislative choice that emphasizes apprehension and punishment of drug activity to the virtual exclusion of prevention of drug use. The time has come to acknowledge that reducing the demand for drugs, especially among young Americans, is as important to the war against drugs as prosecuting offenders who violate state and federal drug laws.⁸⁰

III. REDIRECTION OF FORFEITED ASSET FUNDS

Current legislative reform efforts in Congress focus primarily on procedural changes needed to improve the fairness of the forfeiture process. They do not, however, propose to reallocate forfeiture funds.⁸¹ As procedural reform remains on the horizon,⁸² hundreds of millions of forfeiture dollars continue to flow almost exclusively to law enforcement agencies.

In contrast to the federal model, a handful of states have allocated some or all of their state forfeiture funds to purposes other than law enforcement. California, for example, directs that fifteen percent of forfeiture funds go to combat drug abuse and to divert gang activity while twenty-four percent of the funds are deposited in the state's general fund.⁸³ Indiana places control of forfeited goods in the hands of the state board of pharmacy and directs that net funds from their sale go to the

79. In fact, some commentators argue quite persuasively that no funds should go to law enforcement agencies and that all funds should go into the general treasury, thereby eliminating any conflict of interest created by law enforcement's pecuniary interest in civil forfeitures. See, e.g., Blumenson & Nilsen, *supra* note 32. However, the chances of such drastic change in the allocation of forfeiture funds are, at best, extremely remote. Even the more modest concept, suggested by this article, of sharing forfeiture funds was previously proposed in The Asset Forfeiture Justice Act introduced by Representative Conyers in 1993 but it, too, failed to win sufficient legislative support at that time. See H.R. 3347, 103d Cong., § 15 (1993).

80. See Melody M. Heaps & James A. Schwartz, *Toward a Rational Drug Policy: Setting New Priorities*, 1994 U. CHI. LEG. F. 175 (emphasizing the need to treat the demand for drugs through aggressive and focused treatment, education and prevention programs).

81. The Civil Asset Forfeiture Reform Act proposes important procedural changes (appointment of counsel, reasonable notice to property owners, increase in the government's burden of proof, etc.) but does not address a reallocation of forfeiture funds. Under pressure from the White House and the Department of Justice, the Civil Asset Forfeiture Reform Act (H.R. 1835) was reworked and introduced on June 19, 1997 as H.R. 1965. The newly revised bill attracted only three cosponsors (as opposed to 29 cosponsors on H.R. 1835) and has gathered considerable opposition from previous supporters, such as the ACLU and the NRA, because it attempts to expand the reach of forfeiture law. See Blumenson & Nilsen, *supra* note 32, at 106 n.273; Editorial, *A Botched Reform*, ORANGE COUNTY REGISTER, October 27, 1997, at B6.

82. On June 19, 1997 the Civil Asset Forfeiture Reform Act (H.R. 1965) was referred to the House Committees on Commerce, Ways and Means and the Judiciary. The referrals to Committees on Ways and Means and Commerce were extended for a period to end not later than August 7, 1998.

83. See CAL. HEALTH & SAFETY CODE, § 11489(a)(2)(A) (West 1997).

common school funds of the state.⁸⁴ Under Missouri's state constitution, forfeiture proceeds go to public schools.⁸⁵ Wisconsin, as well, uses some of its proceeds for the state school fund.⁸⁶ New Jersey directed 10% and 5% of forfeited funds in the first two years, respectively, of the law's application to the Hepatitis Inoculation fund.⁸⁷ Georgia authorizes some proceeds to go to victim-witness assistance programs and the representation of indigents in criminal cases.⁸⁸

Pennsylvania is typical of many states,⁸⁹ however, in that it directs that forfeited property or proceeds be utilized almost exclusively for law enforcement purposes.⁹⁰ In 1994, Pennsylvania amended its Controlled Substance Forfeiture Act to provide that "in appropriate cases, the district attorney and the attorney general may designate proceeds from forfeited property to be utilized by community-based drug and crime fighting programs and for relocation and protection of witnesses in criminal cases."⁹¹ However, legislative history reveals that the only apparent purpose of this amendment was to clarify conflicting law enforcement interpretations of whether district attorneys were authorized to convey drug forfeiture funds to local D.A.R.E. projects.⁹² Occasional news accounts reveal that only token grants are given to drug prevention groups by law enforcement authorities. These small amounts are more likely intended to curry political favor than to make a meaningful impact on drug prevention.⁹³

The nation may be in danger of losing the war on drugs.⁹⁴ The key to winning at least some decisive battles in the near future may hinge upon the development of innovative and aggressive strategies that seek to stabilize the high-poverty communities most victimized by drug activity and that offer intensive treatment, education and prevention services.⁹⁵ In short, the demand for drugs must be curtailed.

84. See IND. CODE ANN. § 16-42-20-5 (e) (1) (West 1997).

85. MO. CONST, art IX, § 7. See, also, MO. ANN. STAT § 513.623 (West 1998).

86. See WISC. STAT § 961.55 (1997).

87. See NJ STAT ANN. § 2C:64-6(a) (West 1995).

88. See GA. CODE ANN. § 16-13-49 (1997).

89. See Blumenson & Nilsen, *supra* note 32, at 52 n.66.

90. Forfeiture funds are to be used for the purposes of enforcing the provisions of the state Controlled Substance, Drug, Device and Cosmetic Act. See 42 PA. CONS. STAT. ANN. § 6801(f) (West 1997).

91. 42 PA. CONS. STAT. ANN. § 6801(h) (West 1997).

92. See Remarks of Rep. M. N. Wright on S.B. 313, Legislative Journal-House, Vol III, Nov. 21, 1994, at 1940.

93. For example, a mini-grant of \$1000 from seized assets was awarded to a high school anti-drug organization. See Whitney D. Greer, *Confiscated Drug House Offered for Sale to Public*, INTELLIGENCER JOURNAL, Lancaster, Pa., June 20, 1995, at backpage.

94. See, e.g., John Kaye, *President's Message*, 31 Mar.-Apr. PROSECUTOR 5 (1997).

95. See Heaps & Schwartz, *supra* note 80.

Drug forfeiture proceeds on all levels can help fund this needed approach. Federal and state forfeiture allocation laws⁹⁶ should be modified to provide that no less than fifty percent of all forfeited funds, net of moneys expended in providing court-appointed counsel to indigent property owners, should be made available to establish special services districts in high-poverty communities that are most adversely affected by drug activity. Special services districts have proven to be successful models for delivering intensive services to defined neighborhoods where traditional governmental services have enjoyed only minimal success.⁹⁷ Usually, special districts are established in downtown business areas or in neighborhoods that are home to large, private institutions able to afford the additional revenues needed to fund special districts.⁹⁸ For this reason, neighborhoods of concentrated poverty have great difficulty establishing and supporting effective special services districts.⁹⁹

However, forfeiture asset funds could hold the financial key to establishing joint public-private infrastructures that would allow the high-poverty neighborhoods most victimized by drug activity to become special services districts. Once established, these districts could identify the intensive services they believe to be most needed within their communities and then purchase those services from those non-profit organizations that have demonstrated real success in serving low-income communities. Priority uses of forfeiture asset funds, for example, might include general anti-poverty initiatives such as housing and community development, job

96. State legislative reform will not be effective so long as federal adoption of state forfeitures permit law enforcement authorities to bypass states allocation requirements by "federalizing" local forfeitures. Legislative reform must occur at all levels. See Blumenson & Nilsen, *supra* note 32, at 111.

97. Special service districts are organized to perform specified governmental functions and are generally governed by a board of directors which possesses administrative independence from other units of government. Such districts have financial and revenue powers and are generally separate corporate entities. See David J. Kennedy, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 286 (1996). While special service districts have enjoyed considerable success, they also present unique challenges to insure that they adhere to democratic principles in decision-making. See *id.* at 329.

98. For example, a special services district in Center City (downtown) Philadelphia levies a tax for its services while a special services district in University City, Philadelphia is paid for by voluntary payments from such large institutions as the University of Pennsylvania, Drexel University, Children's Hospital of Philadelphia, AMTRAK, and the University City Science Center. See Editorial, *Positive Steps: The New University City District is Helping to Restore the Neighborhood Feel of Philadelphia*, PHILA. INQUIRER, November 15, 1997, at A18.

99. The Center City special services district has enjoyed considerable success in meeting its overall objectives. In reflecting upon that success, State Representative Dwight Evans of Philadelphia stated in a town meeting, "The question I hear over and over again is: Why can't we take that same knowledge (referring to the Center City district's success in producing a safer downtown area) and translate it to locations all over the city?" See Howard Goodman, *Solutions to Philadelphia Crime Top Town Meeting Agenda Center City's Success is Envied*, PHILA. INQUIRER, Dec. 19, 1997, at B1.

Access to Justice and Civil Forfeiture Reform

creation, and free civil legal services to the poor, as well as specific anti-drug initiatives such as drug treatment, education and prevention services. These efforts would be aimed at stabilizing families, insuring adequate housing and educational opportunities, and offering young people productive alternatives to the attractions of the street. This infusion of much-needed capital, managed at the local level by responsive special services districts, would help to reduce the demand for drug use by strengthening neighborhoods and empowering beleaguered communities to take real control over their own destinies. If law enforcement agencies really want the civil forfeiture program to help them win the war on drugs, they must be willing to share the tools needed to get the job done.

