

20-4274

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

BRIAN KOLFAGE, AKA SEALED DEFENDANT, STEPHEN BANNON,
AKA SEALED DEFENDANT 2, ANDREW BADOLATO, AKA SEALED DEFENDANT 3,
TIMOTHY SHEA, AKA SEALED DEFENDANT 4,

Defendants,

WE BUILD THE WALL, INC., KRIS KOBACH,

Interested-Party-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR INTERESTED-PARTY-APPELLANTS
WE BUILD THE WALL, INC. AND KRIS KOBACH**

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RULE 26.1 DISCLOSURE STATEMENT

Interested-Party-Appellant We Build the Wall, Inc. is a Florida not-for-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

In this case, the government has wielded a pretrial restraint—what “the Supreme Court has dubbed” “a ‘nuclear weapon’ of the law,” *United States v. Razmilovic*, 419 F.3d 134, 137 (2d Cir. 2005) (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999))—against the bank accounts of We Build the Wall, Inc., which are not, and never have been, owned by any charged criminal defendant, and which, according to the allegations of the government’s own Indictment against those defendants, can have no logical or legal nexus to the charged crime. The government did this based on an *ex parte* sealed application for a restraining order, which the District Court entered. The government then took the position, adopted by the District Court, that the forfeiture laws preclude a non-party, such as We Build the Wall, from *any opportunity* to be heard about the restraint of its assets except in an ancillary proceeding that will not even begin until after the prosecution’s criminal case has run its course.

This result is contrary to the plain terms of the applicable statutes, applicable case law, the Constitution, and common sense. Indeed, it violates the Department of Justice’s own published manual on Asset

Forfeiture, which states: “because only property of the defendant can be forfeited in a criminal case, *the prosecutor should make reasonable efforts to establish that any property alleged to be forfeitable, and particularly property sought to be restrained as forfeitable, is property of the defendants within the meaning of the applicable forfeiture statutes,*” Department of Justice, *Asset Forfeiture Policy Manual*, Chap. 6, Sec. B.4 (p.114) (2019) (emphasis added). The prosecutors here did the opposite.

The interlocking forfeiture statutes enacted by Congress are complex, but like other statutes, they must be applied according to their terms, and they cannot be applied where doing so would violate fundamental rights guaranteed by the Constitution. Accordingly, this Court should vacate the order below and direct the release of We Build the Wall’s property, or in the alternative, direct that We Build the Wall be afforded Constitutional due process in the form of a hearing on the nexus (or not) between the defendants’ alleged crimes and accounts belonging to We Build the Wall.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because this is an appeal from an order refusing to modify a restraining order.

This Court also has jurisdiction under 28 U.S.C. § 1291 because the order was final as to the Appellants, who are non-parties to the criminal case. The District Court has jurisdiction over the defendants pursuant to 18 U.S.C. § 3231. The order appealed from was entered on December 14, 2020. The notice of appeal was timely filed on December 27, 2020.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erroneously and in violation of the Constitution and applicable statutes (i) issued an *ex parte* restraining order against the accounts of We Build the Wall—a non-party to a criminal fraud prosecution involving defendants who never have had any ownership interest in the accounts restrained—that contained funds donated well after the defendants’ alleged fraudulent conduct terminated, and (ii) refused any timely opportunity for We Build the Wall to be heard and challenge the restraint of its property.

2. Whether the District Court erroneously failed to address the government’s extrajudicial attempts to restrain property by threat in violation of the Fourth Amendment.

STATEMENT OF THE CASE

We Build the Wall appeals from a December 14, 2020 order of the United States District Court for the Southern District of New York (Torres, J.), refusing to dissolve or modify an August 24, 2020 order restraining its bank accounts.¹

On August 20, 2020, the District Court unsealed an Indictment of the defendants for conspiracy to commit wire fraud and conspiracy to commit money laundering. (A.67, 71-74).² The gravamen of the Indictment is that the defendants defrauded donors to We Build the Wall, a non-profit entity dedicated to advocating for and privately funding and building wall sections securing the southern border of the United States. (A.11-12). As has been widely publicized, We Build the Wall (together with others) has successfully built two sections of wall on private property in Sundland Park, New Mexico and Mission, Texas. The

¹ Although Kris Kobach, the general counsel of We Build the Wall, was a movant below and joined in the notice of appeal, because the assets and accounts at issue belong to We Build the Wall, We Build the Wall is the proper Interested-Party-Appellant to pursue this appeal.

² Citations to “A.” refer to the Appendix filed herewith; citations to “ECF” refer to the numbered items on the District Court’s docket. (A.1-10).

Indictment alleges that the defendants falsely stated that no donated money would go to We Build the Wall's founder and CEO, Brian Kolfage, and then they allegedly orchestrated a diversion of funds from We Build the Wall, some of which was allegedly funneled to Mr. Kolfage. (*Id.*).

Specifically, the Indictment alleges that, during 2019, We Build the Wall raised more than \$25 million, purportedly based on the allegedly false claim that Mr. Kolfage would not be compensated, and that the defendants diverted some of the donated money for the personal benefit of the defendants. (*Id.*). The Indictment does not allege a total amount of money diverted from We Build the Wall, but it appears to be less than \$1.5 million, all of which was allegedly diverted before November 2019. (A.21-25).

The Indictment also alleges that in late 2019, We Build the Wall specifically and publicly disclosed on its website that Mr. Kolfage would be compensated for his work starting in January 2020. (A.26). In other words, the false information upon which the alleged scheme rests was publicly corrected in late 2019. The Indictment alleges that the conspiracy continued until the date the Indictment was returned (in August 2020), but contains no allegations of alleged fraudulent conduct

(or additional proceeds of fraudulent conduct) occurring after the website was updated in late 2019.

In addition to its allegations of the charged crime, the Indictment also provided notice of the government's intent to require *the defendants* to forfeit all of *the defendants'* interests in certain identified property, including "[a]ny and all funds contained in" three separate bank accounts of We Build the Wall. (A.30-33). The Indictment does not reflect any finding by the Grand Jury that the defendants had or have any ownership interest in We Build the Wall's bank accounts, or that the funds contained in those bank accounts have any nexus with the fraud alleged against the defendants. Nor did the government below make any claim that the Grand Jury had been requested to find, or had found, any such ownership by the defendants of We Build the Wall's accounts, or any such nexus between the alleged fraud and the funds contained in We Build the Wall's bank accounts. Instead, the government below specifically disclaimed any such argument, stating instead that evidence of any such nexus was supplied only by the government's *ex parte* sealed application for a restraining order. (ECF 42 at 11).

On August 21, 2020, (the day after the Indictment was unsealed), counsel spoke with the prosecutors about the forfeiture allegations in the Indictment—inquiring particularly about the amount of money in We Build the Wall’s bank accounts that the prosecutors believed to be the proceeds of the alleged fraud. (A.68). Nearly all of the money then contained in We Build the Wall’s bank accounts was donated well after the website’s disclosure of Mr. Kolfage’s compensation and thus, logically and legally, was not donated as a result of any alleged fraud. (A.43-44). And, necessarily, the funds in We Build the Wall’s bank accounts (and thus not in any defendant’s bank account), were not funds that had been diverted as part of any fraud or money laundering conspiracy. Nor were those accounts property *of the defendants*, and thus any forfeiture *of the defendants’* interests in those accounts amounted to nothing—the defendants had and have no ownership interest in We Build the Wall’s accounts.

Nevertheless, the prosecutors asserted that *all money* donated to We Build the Wall was the proceeds of the fraud. (A.68). The prosecutors stated they could not comment on whether there was any formal court process freezing or restraining assets. (*Id.*). Nevertheless, in light of the

prosecutors' intimation that any movement of funds might be treated as a money laundering offense, We Build the Wall refrained from making any payments from its bank accounts. (*Id.*).

Three days later, without any notice to We Build the Wall, Mr. Kobach, or counsel, the government submitted to the District Court an *ex parte* and sealed application for an order restraining We Build the Wall's bank accounts. According to the District Court's sealed order, entered the same day, the application was made pursuant to "Title 18, United States Code, Sections 981, 982, and Title 21, United States Code, Section 853 [and] based on the Affidavit of U.S. Postal Inspector Troy Pittenger." (A.35). The Order purported to bind "all persons or entities having knowledge of this Order," regardless of whether those persons were defendants, agents of the defendants, or acting in concert with the defendants. (*Id.*). Compare the Order with Fed. R. Civ. P. 65(d)(2) (granting district courts the power to issue injunctions (only on notice to the adverse party) and temporary restraining orders (lasting no longer than 14 days), but providing that such orders only bind the parties, the parties' agents, or persons in active concert with parties and agents, and only if those persons have actual notice of the order).

The Order delegated to the United States Attorney's Office the authority to release any assets restrained by the Order "in its discretion" and delegated to a named Assistant United States Attorney the power to "clarify the scope of the Order." (A.37). The Order also stated that it, and the papers submitted therewith, "shall be maintained under seal until further notice of the Court," but the Order authorized the United States Attorney's Office or its designee(s) to provide copies of the Order to "any person in order to facilitate" its execution. (*Id.*).

Over the course of the ensuing month, counsel sought to reach agreement with the prosecutors that the funds in We Build the Wall's accounts are not the proceeds of the fraud alleged in the Indictment, or to obtain the prosecutors' agreement that certain specified expenditures (such as outstanding invoices for services rendered and ongoing work in pursuit of We Build the Wall's mission) were permissible. (A.68-69, 80-95). In those multiple communications, the prosecutors did not disclose the sealed restraining order or agree to the expenditure of any of the funds; the prosecutors instead continued to prevent any expenditure by means of the intimation that any expenditure might result in a criminal investigation for engaging in financial transactions with funds that

prosecutors stated were proceeds of fraud. Indeed, the prosecutors claimed that *all* money donated to We Build the Wall constituted the proceeds of the charged crimes. (A.68, 81, 87).

Not until September 30, 2020 did the prosecutors reveal the existence of the August 24, 2020 Order. On that date, the prosecutors sent the order to counsel together with the “request that you treat this document as confidential and do not share it with anyone aside from your client, who should not distribute it further.” (A.97). In a series of communications, the prosecutors pointedly refused to agree that funds received *even after the Indictment was unsealed* were untainted. (A.93-95 (specifically requesting confirmation that accessing these funds would not be treated as a money laundering offense); A.97 (prosecutors’ response refusing to provide that confirmation, instead stating “we take no position on whether funds raised by We Build the Wall after the Indictment was unsealed are crime proceeds.”)).

After obtaining permission from the District Court (ECF 65), on October 13, 2020, non-parties We Build the Wall and Mr. Kobach filed a sealed motion requesting that the sealed restraining order be modified to release any donations received on or after February 1, 2020 (i.e., well

after Mr. Kolfage's compensation was disclosed and thus after any alleged misinformation in the donor community had dissipated). (A.38-66). In the alternative, the motion sought access to the sealed application, and a hearing at which We Build the Wall and Mr. Kobach could be heard on whether there was any nexus between the funds restrained and the alleged fraud. (*Id.*). We Build the Wall and Mr. Kobach did not seek to intervene in the criminal case or to challenge whether there was probable cause to believe the crimes alleged had been committed. (*Id.*; see ECF 52 at 11-12).

On October 27, 2020, the government publicly filed its opposition to the sealed motion to modify the sealed restraining order. (ECF 42). In that opposition, the government principally argued that the motion should be denied because it was barred by a narcotics forfeiture statute—Title 21, United States Code, Section 853(k). (*Id.*). The government also embraced its extrajudicial attempts to restrain property by fiat, by claiming that every dollar donated to We Build the Wall was the proceeds of crime, and informing counsel that any transaction might be a money laundering crime. (*Id.* at 14).

On November 2, 2020, We Build the Wall and Kris Kobach submitted their reply brief in further support of the motion to modify the sealed restraining order, which was filed publicly based on guidance from the District Court. (ECF 52). Among other things, based on cited controlling Second Circuit authority, the reply brief stated that the prosecutors’ extrajudicial attempt to chill the use of funds is a clear violation of the Fourth Amendment. (*Id.* at 13-14). The prosecutors did nothing to retract their extrajudicial statements or otherwise mitigate or eliminate their Fourth Amendment violation.

On December 14, 2020, the District Court denied the motion. (A.114). The District Court “construe[d] the motion . . . as in effect requesting to intervene in this case to object to the Restraining Order, on the ground that it encompasses funds not subject to forfeiture.” (A.126). Based on that interpretation, the District Court held that “third parties are statutorily barred from intervention in a criminal case to challenge a forfeiture order.” (*Id.*). The District Court did not address the Fourth Amendment issue raised by the government’s extrajudicial attempts to chill the use of funds. On December 27, 2020, We Build the Wall and Mr. Kobach timely filed a notice of appeal. (A.139).

Not until February 18, 2021, in an opposition brief filed by the government in response to a different motion filed in the District Court (Mr. Kolfage’s motion to modify the restraining order), did the prosecutors finally confirm what they had repeatedly refused to confirm since August 21, 2020—that “We Build the Wall is entirely free to use any funds not in the three restrained bank accounts identified in the Restraining Order.”³ (ECF 80 at 7-8). In other words, the prosecutors enjoyed their extrajudicial restraint for three additional months, even after being advised in public filings that, in violation of the Fourth Amendment, their threats successfully chilled We Build the Wall from accessing even its mail received after the Indictment.

Contemporaneous with filing this brief, We Build the Wall is filing a motion, on consent of the government, to expedite the briefing and consideration of this appeal. That motion is based on the continuing harm

³ We Build the Wall has no bank accounts other than the accounts subject to the District Court’s restraining order. In the months after the Indictment was unsealed, We Build the Wall has received thousands of pieces of mail, most of which likely contain donations. (A.81, 84). Until the government finally confirmed that We Build the Wall was free to access these donations, We Build the Wall refrained from asking its vendor to open this mail and process donations.

suffered by We Build the Wall, which has been unable to access any of its funds in the six months since the Indictment was unsealed. In that period of time, We Build the Wall has continued to attempt to pursue its mission, including by coordinating the proposed donation of a section of border wall to the Department of Homeland Security. (A.69, 80-85). On October 8, 2020, We Build the Wall learned that it had been administratively dissolved for failing to pay an annual fee. (A.69).

SUMMARY OF ARGUMENT

The District Court's order denying We Build the Wall's request to modify the *ex parte* restraining order against its bank accounts was erroneous, and it, and the underlying restraining order, should be vacated.

First, the statutes invoked by the District Court do not authorize it to issue a restraining order. Title 28, United States Code, Section 2461(c) permits the government to merge a civil forfeiture statute's remedy against a defendant's property with the criminal prosecution of that defendant, but it does not permit the invocation of the cross-referenced procedures of Section 853 (such as the authority to enter a restraining order) unless there is an applicable "*criminal forfeiture proceeding*." The

simple wire fraud charged against the defendants is not a predicate for any *criminal* forfeiture statute; it is only a predicate for a *civil* forfeiture statute. Thus, there is no “criminal forfeiture proceeding” and Section 2461’s reference to Section 853 is inapplicable. Accordingly, neither Section 853’s bar on intervention (Section 853(k)), nor its authorization of “Protective Orders” or seizure warrants (Section 853(e) and (f)) applies here.

Second, even if Section 853 applied in the abstract, Section 853 does not apply unless the property at issue is subject to forfeiture *by the defendants*. This Court’s and the Supreme Court’s controlling authority, together with the statutory language, demonstrate that the defendants cannot be ordered to forfeit property they do not and never have owned. Accordingly, Section 853 does not authorize the restraint of We Build the Wall’s bank accounts, nor does it bar We Build the Wall’s motion.

Third, Section 853 sets forth a series of specific requirements that must be met before a restraining order is issued and before its bar on intervention applies. None of those requirements are met, and We Build the Wall never sought to litigate the merits of the criminal case.

Fourth, even if Section 853 applied *and* purported to bar We Build the Wall from a timely opportunity to be heard about the restraint of its accounts, the Constitution would require that We Build the Wall be afforded due process. And, if it did not, equitable relief permitted by Fed. R. Crim. P. 41 would be available to We Build the Wall.

Finally, the government's efforts to restrain property by means of extrajudicial threats is in plain violation of We Build the Wall's Fourth Amendment rights, as established by this Court in *United States v. Cosme*, 796 F.3d 226, 235 (2d Cir. 2015), and is inconsistent with Congress's calibrated requirements in the various forfeiture statutes.

STANDARD OF REVIEW

This appeal presents legal issues that this Court reviews *de novo*. See *United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005).

ARGUMENT

The District Court erred in deciding that the government could restrain accounts belonging to We Build the Wall (accounts that never have belonged to any charged defendant) based on an *ex parte* sealed application issued in a criminal case that provided no due process for non-party We Build the Wall. The applicable statutes and controlling

authority do not provide for such a draconian outcome, and if they did, the Constitution or equity would require relief. The District Court also failed to address the government’s extrajudicial efforts to restrain property by fiat, which plainly violated the Fourth Amendment. The decision below should be reversed.

I. SECTION 2461’S CROSS-REFERENCE TO SECTION 853 DOES NOT PERMIT THE RESTRAINT OF ASSETS SUBJECT ONLY TO A CIVIL FORFEITURE STATUTE

The District Court incorrectly purported to restrain non-party We Build the Wall’s accounts and to bar We Build the Wall from being heard based on Title 28, United States Code, Section 2461’s reference to Title 21, United States Code, Section 853. Section 2461’s reference to Section 853 is inapplicable because the crime at issue is only covered by a civil, not a criminal, forfeiture statute.

A. Criminal Versus Civil Forfeiture Statutes

Congress has enacted a number of *criminal* forfeiture provisions that apply to various predicate crimes. *See, e.g.*, 18 U.S.C. § 982 (entitled “Criminal Forfeiture” and applying to enumerated felonies, not including wire fraud unless certain specific characteristics (not present here) are also involved); 18 U.S.C. § 1963 (entitled “Criminal Penalties” and

relating to RICO crimes); 21 U.S.C. § 853 (entitled “Criminal Forfeitures” and relating to narcotics crimes).

Congress has also enacted *civil* forfeiture provisions that apply to some of the same predicates that trigger criminal forfeiture, as well as additional predicates that are not covered by any criminal forfeiture statute. The wire fraud charged in this case is not a predicate for any *criminal* forfeiture statute, and therefore is only an enumerated predicate in a *civil* forfeiture statute—Title 18, United States Code, Section 981. While some criminal forfeiture statutes, such as Section 982 cross-reference Title 21, United States Code, Section 853, *see* 18 U.S.C. § 982(b), the Section 981 civil forfeiture statute does not.

B. The Statutes Invoked by the District Court Do Not Permit Pretrial Restraint of Property Subject Only to Civil Forfeiture Statutes

According to the District Court’s restraining order, it was issued upon the government’s application “pursuant to Title 18, United States Code, Sections 981, 982 and Title 21, United States Code, Section 853.” (ECF 64 at 1). Neither Section 982 nor Section 853 apply, by their terms, to We Build the Wall’s funds, *even if they are assumed to be the proceeds of the charged wire fraud*. Section 853 directly applies only to narcotics

offense proceeds, not fraud proceeds. In addition, although certain types of fraud are predicates listed in the Section 982 criminal forfeiture statute, the charged wire fraud is not one of them.⁴ Finally, although the Section 981 civil forfeiture statute includes wire fraud as a predicate, that section neither cross-references Section 853 nor authorizes the issuance of a restraining order (except to restrain property of a person charged in a foreign country with predicate criminal conduct, *see* 18 U.S.C. § 981(b)(4)).⁵

⁴ While the Indictment also charges a money laundering conspiracy and generally invokes criminal forfeiture provisions relating to money laundering, *see* 18 U.S.C. § 982(a)(1), the funds in We Build the Wall's accounts are necessarily and logically *not* funds involved in the laundering of diverted funds—they have not been diverted at all, but remain in the accounts. Thus, as to We Build the Wall's funds, the District Court's restraining order logically cannot rest on the money laundering charge, and neither the District Court nor the government below claimed that it does.

⁵ Importantly, there are alternative mechanisms available under the civil forfeiture statute to seize funds, which immediately (and appropriately) trigger due process protections for the owner. Thus, the government could have commenced an *in rem* civil forfeiture action against the funds in We Build the Wall's accounts pursuant to Section 981. Doing so would have required the government to provide notice to We Build the Wall and would have provided immediate due process to We Build the Wall to contest the forfeiture action. *See* 18 U.S.C. § 983. As part of such a

The District Court’s decision denying the motion to modify the restraining order also invoked Title 28, United States Code, Section 2461 as a basis for the restraining order. (ECF 63 at 2). Section 2461(c) (the only subsection that is potentially applicable) contains a cross-reference to Section 853, but not one that applies here, since the applicable forfeiture provision is a civil, not a criminal, forfeiture statute.

1. The Plain Language of Section 2461(c) Does Not Permit Pretrial Restraints of Property Subject Only to Civil Forfeiture Statutes

Title 28, United States Code, Section 2461(c) provides that whenever civil forfeiture is authorized, the government may include a forfeiture notice provision in the indictment, and the court, as part of sentencing, may enter a forfeiture order against the defendant. The statute reads:

proceeding, the government could have sought provisional seizure of the accounts either with a warrant issued pursuant to Fed. R. Crim. P. 41, or (after complaint) with an arrest warrant issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. *See* 18 U.S.C. § 981(b)(2). In other words, proceeding by these methods would have fully protected the government’s interests and afforded due process to We Build the Wall.

If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

28 U.S.C. § 2461(c).

A plain reading of this statute, together with this Court's analysis of a predecessor version, demonstrates that neither it nor its cross-reference to the Controlled Substances Act permits any pre-conviction restraint of alleged fraud proceeds in this case *at all*, because that forfeiture is purely civil, and is not part of any "criminal forfeiture proceeding" as to which Section 853 "applies to all stages."

In 2005, this Court carefully analyzed the then-current version of Section 2461 and held that it *did not* authorize the pretrial restraint of assets alleged to be the proceeds of wire fraud. *United States v. Razmilovic*, 419 F.3d 134, 136-37 (2d Cir. 2005). Prior to amendment, Section 2461(c) provided:

If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in [21 U.S.C. § 853], other than subsection (d) of that section.

Razmilovic, 419 F.3d at 136. This Court stated: “The distinction between forfeiture and pretrial restraint is no technical play on words. Pretrial restraint is a severe remedy independent of a right to damages or property following a finding of liability. Indeed, the Supreme Court has dubbed pretrial restraint as a “nuclear weapon of the law.” *Id.* at 137 (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*,

Inc., 527 U.S. 308, 332 (1999)). This Court found that Section 2461(c)'s reference to Section 853 “permits two things: inclusion of forfeiture allegations in certain criminal indictments . . . and ‘forfeiture . . . upon conviction . . . in accordance with’ the procedures of Section 853.” *Id.* (quoting Section 2461(c)) (second and third ellipses in original). Thus, this Court held that the plain terms of the statute *did not* permit pretrial restraints because the reference to Section 353 was triggered “upon conviction” and not before.

The statute was amended in 2006, but not in a manner that would undermine *Razmilovic*'s holding in this case, which involves the attempt to forfeit wire fraud proceeds pursuant to a *civil* forfeiture statute.⁶ The statute still permits a notice provision to be included in a criminal indictment where civil or criminal forfeiture is authorized. The statute then adds a new power—it authorizes the court at sentencing to order that forfeiture. Finally, the amended statute (like its predecessor)

⁶ In an unpublished 2014 decision, this Court declined to decide the impact of the 2006 statutory amendment on *Razmilovic*. *United States v. LaVilla*, 553 F. App'x 45, 46 n.1 (2d Cir. Jan. 29, 2014).

contains a limited cross-references Section 853. Instead of applying “upon conviction,” the cross-reference to Section 853 now states that it applies only to “a *criminal* forfeiture proceeding” “at all stages” of that proceeding. Thus, by its terms, the distinction between civil and criminal forfeiture proceedings is maintained, and the cross-reference to Section 853’s procedures applies only where there is a “criminal forfeiture proceeding.”

In other words, the statute nowhere purports to erase the distinction between civil and criminal forfeiture proceedings. On the contrary, it treats them the same for some purposes (i.e., in giving the government power to include a notice provision in an indictment, and in authorizing the court to enter an order of forfeiture at a defendant’s sentencing), but its cross-reference to Section 853 is limited to a “criminal forfeiture proceeding.” Nor does the statute purport to declare that if a civil forfeiture notice is included in an indictment, the civil forfeiture predicate is thereby converted to a “criminal forfeiture proceeding.” Indeed, if that had been the intent of Congress, it could have simply stated: “The procedures in section 413 of the Controlled Substances Act

(21 U.S.C. § 853) apply to all stages of such a ~~criminal~~ forfeiture proceeding.” It did not.

Because the plain language of the statute provides no cross-reference to Section 853 for cases involving *civil* forfeiture statutes, neither Section 853(e)’s or Section 853(f)’s provisions for restraining orders or seizure warrants, nor Section 853(k)’s bar on intervention, is applicable. Accordingly, the District Court’s restraining order, and its order denying We Build the Wall’s motion, are without legal basis and should be vacated. No restraining order against alleged proceeds of wire fraud was properly authorized, and no bar to intervention applied. *See United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1988) (“where a statute is plain on its face, the court does not resort to legislative history or to the purpose of the statute to discern its meaning.”).

2. Legislative History Does Not Indicate Any Effort to Undermine *Razmilovic*

Even if there were some ambiguity in the statutory language to warrant this Court resorting to other sources, such as legislative history, those sources provide no grounds to undermine *Razmilovic*’s holding in a case involving a civil forfeiture predicate, such as this one. That is because the legislative history sheds little light on the reason for the 2006

amendment, and the likely reason is unrelated to *Razmilovic's* holding, which reflects a healthy reluctance to arm the government with nuclear weapons in cases involving civil forfeiture statutes. As explained by the Congressional Research Service:

The Conference bill contains an amendment to 28 U.S.C. 2461(c), for which there is no explanation in the conference report. Nor does the amendment appear in either of the two versions of H.R. 3199 sent to conference. Nor does the amendment appear to have been included in other legislative proposals and thus has not heretofore been the beneficiary of examination in committee or on the floor. The change is captioned “uniform procedures for criminal forfeitures,” but it is not facially apparent precisely how the procedures for various criminal forfeitures are disparate or how the amendment makes them more uniform. Part of the difficulty flows from the fact that both the [sic] section 2461(c) and the Conference bill amendment are somewhat cryptic. Nevertheless, it seems crafted to make a default procedure into an exclusive procedure.

Brian T. Yeh & Charles Doyle, “USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): A Legal Analysis of the Conference Bill,” Congressional Research Service Order Code RL 33239, p. CRS-46 (Jan. 17, 2006).

In the face of this dearth of guidance, the Congressional Research Service explained that the change was designed to clarify that Section 2461(c) permitted the incorporation of forfeiture notice provisions in a criminal indictment in all cases involving civil and criminal forfeiture, and not just those as to which “no specific statutory provision is made for criminal forfeiture upon conviction,” as the pre-2006 statute provided. In other words:

On its face, [the pre-2006 Section 2461(c)] does not allow the government to merge every civil forfeiture with the criminal prosecution of the property owner. In its present form [i.e., its form prior to its 2006 amendment], section 2461(c) is only available if there is no other criminal forfeiture counterpart for the civil forfeiture. Under the Conference bill the distinction no longer exists.

Id. at CRS-47. To illustrate the point, the Congressional Research Service cited two district court cases specifically interpreting Section 2461(c) as inapplicable where a specific criminal forfeiture provision applied; those courts did not permit the merger of civil and criminal forfeiture provisions and instead required the separate application of the specific civil and criminal procedures. *Id.* at CRS-47 n.144.

The Congressional Research Service also cited *Razmilovic*, and noted that the amended language was decidedly unclear about any effect on *Razmilovic*:

It is unclear whether the conferees intended the bill [to] change this result as well. On one hand, the language of conviction still remains. On the other hand, the description of the role of 21 U.S.C. 853 (which authorizes pretrial restraining orders) may signal a different result. The current [i.e., pre-2006] language is fairly clear, the procedures of section 853 come into play after conviction: “upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853),” 28 U.S.C. 2461(c). The statement in the Conference bill is less conclusive: “The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding,” proposed 28 U.S.C. 2461(c). The change in language suggests that a change in construction may have been intended.

Critics might suggest that a more thorough consideration or at least more complete explanation of the full ramifications of the proposal would have been preferable.

Id. at CRS-47 & n.145. In other words, the legislative history is silent on the intent behind the amendment, but the most natural reading is that it was intended to broaden Section 2461(c)'s cross-reference to Section 853 in order to clarify that Section 2461(c)'s reach was not excluded where another criminal forfeiture statute also applied. Even if the amendment was intended to change the timing of when the cross-reference to Section 853 is triggered (i.e., to “all stages” instead of “upon conviction”), by its terms it did not do so for civil forfeiture proceedings, but only for criminal forfeiture proceedings. In other words, neither Congressional intent that may have motivated the amendment has application here, and *Razmilovic*'s bar on pretrial restraint of assets alleged to be the proceeds of wire fraud undermines the District Court's Order.

C. The District Court's Analysis Was Incorrect

The District Court rejected *Razmilovic* based on its interpretation of “the plain language of amended § 2461(c),” as well as its reliance on one in-Circuit and three out-of-Circuit district court decisions. As explained above, the “plain language of amended” Section 2461(c) cross-references Section 853 only in the context of a “criminal forfeiture

proceeding,” but the alleged wire fraud proceeds in this case are not subject to any criminal forfeiture statute or proceeding. Accordingly, the District Court’s “plain language” reading is incorrect.

In addition, *none* of the cases cited by the District Court involves the application of amended Section 2461(c) to a pretrial restraint of assets forfeitable only pursuant to a civil forfeiture statute. Indeed, three of those cases’ (unpublished) comments about the amendment and *Razmilovic* were dicta because they did not involve Section 2461(c)/Section 853 restraining orders at all. *See United States v. Mann*, 140 F. Supp. 3d 513, 527 (E.D.N.C. 2015) (granting the defendant’s motion for release of seized assets based on a finding that the seizure warrants issued were unlawful, claiming in dicta (based only on a citation to the above-quoted Congressional Research Service analysis (which does not support the claim)) that the amendment to the statute was “at least partially in response to *Razmilovic*); *United States v. Capoccia*, 2011 WL 1930677, at *5 (D. Vt. May 19, 2011) (rejecting defense arguments based on *Razmilovic* because the pre-conviction restraint was accomplished by seizure warrant issued in a civil forfeiture proceeding, and was not under the authority of Section 853; also stating in dicta that the 2006

amendment undermined *Razmilovic*); *United States v. Schlotzhauer*, 2008 WL 320717, at *8-9 (W.D. Mo. Feb. 4, 2008) (dicta, because the case involved forfeiture under 18 U.S.C. § 38(d), not forfeiture under 28 U.S.C. § 2461(c)).

The fourth case involved a “criminal forfeiture proceeding” under the amended statute because it involved the direct application of Section 982’s criminal forfeiture statute to a wire fraud directed at a financial institution, not the simple wire fraud (which is not a Section 982 predicate) charged here. *See United States v. Dupree*, 781 F. Supp. 2d 115, 129-30 (E.D.N.Y. 2011) (finding that the amended version of Section 2461 permits pretrial restraint of proceeds in a case involving a criminal forfeiture predicate crime, notwithstanding *Razmilovic*).

* * * *

Invoking multiple decisions of the Supreme Court, this Court emphasized that “pretrial restraint is the exception, not the rule,” and rejected the government’s argument that “it would have made no sense for Congress to enact a statute” authorizing forfeiture but omitting a pretrial restraint provision. *Razmilovic*, 419 F.3d at 141 (citing *Grupo Mexicano*, 527 U.S. at 333; *De Beers Consol. Mines v. United States*, 325

U.S. 212, 223 (1945)). Indeed, this Court noted that Congress frequently treats different forfeiture predicates differently. *See id.* at 138-139 & nn.2-3 (illustrating Congress’s practice of treating different forfeiture predicates differently by cataloging four criminal forfeiture statutes that themselves provide for pretrial restraint (RICO, narcotics, obscenity, and child pornography), ten criminal forfeiture statutes that cross-reference Section 853; noting that “no reported case has mentioned pretrial restraint under any of the statutes listed in Note 2, with one exception,” and stating that there is ambiguity regarding the “general criminal forfeiture statute, 18 U.S.C. § 982(b)”⁷ Because the applicable civil forfeiture statute (18 U.S.C. § 981) provides no authority for the District Court’s restraining order, and Section 2461(c)’s cross-reference to Section 983 of the narcotics laws applies only to “a criminal forfeiture

⁷ Notably, in the very chapter in which the wire fraud statute appears, there is a provision permitting the court to enter an injunction against fraud for any violation “of this chapter,” and also permitting the court to enter a restraining order against property (under certain circumstances), but only where the offense is a “banking law violation” or a “health care offense.” 18 U.S.C. § 1345. In other words, while Congress expressly granted the power to enjoin wire fraud (along with mail fraud, bank fraud, and health care fraud), in the very same statute it *did not* grant the power to restrain property relating to a wire fraud.

proceeding,” the logic and reasoning of *Razmilovic* precludes any pretrial restraint of even a defendant’s assets based on the alleged civil forfeitability of wire fraud proceeds. The restraint of non-party We Build the Wall’s assets is even more lawless because the assets are not, and have never been, the *defendants’* assets. The District Court’s order should be vacated.

II. SECTION 853 NEITHER BARS WE BUILD THE WALL’S REQUESTED RELIEF NOR AUTHORIZES THE RESTRAINING ORDER

Even if Section 853 was properly invoked here, an application of the plain language of the statute demonstrates that neither Section 853(k)’s bar on intervention nor Section 853(e)’s authorization of orders restraining property apply here. *See Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017) (stating that although Section 853 directs that it should be “liberally construed to effectuate its remedial purposes,” the “Court cannot construe a statute in a way that negates its plain text”); *Gotti*, 155 F.3d at 149 (noting that “while the statute commanded a liberal interpretation, it did not authorize amendment by interpretation” (internal quotation marks omitted)).

A. Section 853’s Provisions Do Not Apply Because We Build the Wall’s Accounts Were Never Owned or Obtained by Defendants

Even where Section 853 applies directly or by cross-reference, the pertinent provisions (Section 853(e) and Section 853(k)) only apply where certain property is “subject to forfeiture under this section.” Here, under this Court’s and the Supreme Court’s binding precedents, as well as the plain language of Section 853, only property owned or obtained *by the defendants* is “subject to forfeiture under this section.” Because no defendant ever owned or obtained We Build the Wall’s bank accounts or the funds therein, no defendant can be ordered to forfeit that restrained property, and therefore the restraining order is not permitted under Section 853(e), and Section 853(k) does not apply.

In this case, the government convinced the District Court to use an *in personam* criminal action against the defendants to restrain a non-party’s assets that the defendants never themselves owned. This Court’s and the Supreme Court’s precedents establish that no such authority exists. As this Court explained: “Forfeiture in criminal proceedings under 18 U.S.C. § 981 is an *in personam* proceeding. “The forfeiture serves no remedial purpose, is designed to punish the offender, and *cannot be*

imposed upon innocent owners.” United States v. Contorinis, 692 F.3d 136, 146 (2d Cir. 2012) (quoting *United States v. Bajakajian*, 524 U.S. 321, 332 (1998)) (emphasis added). “Thus, the calculation of a forfeiture amount in criminal cases is usually based on the defendant’s actual gain. . . . District courts in our circuit have echoed this view by concluding that a defendant may be ordered to forfeit all monies received *by him* as a result of the fraud.” *Id.* at 147 (emphasis in original) (internal quotation marks omitted).

Similarly, the Supreme Court has held that a defendant may not be ordered to forfeit property that he himself did not acquire. *Honeycutt*, 137 S. Ct. at 1631-32 (rejecting attempt to engraft joint and several liability onto forfeiture). And, in *Pacheco v. Serendensky*, 393 F.3d 348 (2d Cir. 2004), this Court invoked the constitutional avoidance doctrine to hold that in a criminal forfeiture action, where the defendant and others each have ownership interests in a property, only the forfeiture of the *defendant’s* interest is authorized. *Id.* at 355. The Court stated that to preclude such a “partial forfeiture” of property jointly owned “raises serious constitutional concerns. If partial forfeitures are forbidden, then a criminal’s activity may result in the forfeiture of an innocent third

party's interest in property. The government's acquisition of an entire tract of real property in forfeiture proceedings may thus constitute an unconstitutional taking of a third party's interest or a deprivation of that party's property without due process, in violation of the Fifth Amendment." *Id.*

If anything, the constitutional concerns presented by the District Court's Order here are even more grave than those identified in *Pacheco* because the accounts restrained belong *solely* to non-party We Build the Wall and have never been partially or jointly owned by the defendants. *Cf. id.* ("Although partial forfeitures may occasionally make for strange bedfellows—such as making the government co-owners of real property with the spouse of a criminal defendant—the alternative could give the government an undeserved windfall and deny an innocent third party her valid property interest. The purposes of the forfeiture penalty are to punish, deter and disempower criminals, aims which are not furthered by taking an innocent owner's share." (citations omitted)).

The plain language of Section 853 confirms that it only applies to property that is or was owned by the defendant. Section 853(a)'s definitions of forfeitable property all specifically reference the

defendant's ownership. Thus, Section 853(a)(1) permits the forfeiture of "any property constituting, or derived from, any proceeds *the person obtained, directly or indirectly*, as the result of such violation [i.e., a narcotics offense]." (emphasis added). No defendant ever obtained We Build the Wall's bank accounts or the money therein. Likewise, the other portions of Section 853(a) (and other criminal forfeiture statutes) apply only to property possessed by the defendant. *See* 21 U.S.C. § 853(a)(2) ("any of *the person's property* used . . . to commit . . . such violation [i.e., a narcotics offense]" (emphasis added)); *id.* § 853 (a)(3) ("in the case of a person convicted of engaging in a continuing criminal enterprise . . . *the person* shall forfeit . . . *any of his interest in* . . . the continuing criminal enterprise." (emphasis added)); *see, e.g.*, 18 U.S.C. § 982(a) (stating, repeatedly, that the court "shall order that *the person* forfeit" (emphasis added)).⁸

⁸ By contrast, the civil forfeiture statute that applies to the proceeds of simple wire fraud defines forfeitable property without reference to its owner. *See* 18 U.S.C. § 981(a)(1)(C) (by cross-reference, authorizing civil forfeiture of property that is or is derived from "proceeds" of simple wire fraud); *id.* § 981(a)(2) (defining "proceeds" without reference to anyone's (such as a defendant's) ownership or receipt of the funds). This distinction in the statutory language makes sense, because civil forfeiture

In the context of this criminal case, therefore, the defendants cannot be ordered to forfeit money that was not received by them, that instead was sent directly from donors to We Build the Wall, and that remains in the possession of We Build the Wall.⁹ Put another way, the statute invoked by the District Court applies only to “property subject to forfeiture under this section,” which defines such property as property owned or obtained by a defendant. We Build the Wall’s bank accounts fall

proceedings are *in rem* actions against the property itself, require notice to all “interested parties,” and afford due process to any person filing a claim. 18 U.S.C. § 983 (“General rules for civil forfeiture proceedings”).

⁹ This case does not present a situation in which a defendant constructively owns funds that are not paid directly to the defendant but instead are directed, at the defendant’s discretion and for the defendant’s own benefit, to a third party. Here, the gravamen of the fraud is that donors’ funds were *diverted from* We Build the Wall to the personal benefit of the defendants, not that criminal proceeds belonging to the defendants were diverted by them to We Build the Wall. In other words, if donors sent funds directly to We Build the Wall on the understanding that they would be used to pursue We Build the Wall’s mission (and not diverted for the personal benefit of the defendants), and those funds were or will be so used, then those funds reflect the donors’ intent and are not the proceeds of fraud.

outside that definition of forfeitable property, and therefore neither Section 853(e) nor Section 853(k) apply.¹⁰

B. Section 853(k)'s Bar on Intervention Is Inapplicable

Although We Build the Wall and Mr. Kobach specifically disclaimed any effort to intervene in the criminal case or appeal, and never sought to litigate the merits of the criminal case (i.e., whether the government could prove its allegations of fraud against the defendants), but instead only sought due process regarding the restraint of We Build the Wall's assets and the logical and legal impossibility that those assets were the proceeds of the alleged fraud (even assuming the fraud existed), the District Court nevertheless stated that the motion was an attempt to intervene that was barred by Section 853(k). That decision was incorrect and should be vacated.

Section 853(k) provides:

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section

¹⁰ We Build the Wall is not a guarantor for any monetary sanction or restitution order that may be imposed on any defendant, and thus there is no basis for holding We Build the Wall responsible for any such sanction, let alone restraining assets to secure the future payment of any such non-existent obligation.

may—(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

21 U.S.C. § 853(k).

First, Section 853(k) does not apply because, by its terms, it applies to persons “claiming an interest in property subject to forfeiture under this section.” 21 U.S.C. § 853(k). In other words, as explained above, it applies only to property (that at some point was) owned or obtained by the defendants. And it applies to persons with competing (and perhaps superior) claims to the same property in which the government has a property interest—i.e., *tainted* property. *See Luis v. United States*, 136 S. Ct. 1083, 1092 (2016) (the government only has a present property interest in tainted property). Here, for funds donated to We Build the Wall after January 2020, the challenge is to the restraint of property that is *not tainted*, and in that respect, the challenge is not a claim that We Build the Wall (or Mr. Kobach) has a superior property interest to a defendant’s (or the government’s interest, standing in the defendants’

shoes), or that they are bona fide purchasers for value. *See* 21 U.S.C. § 853(n)(6) (listing grounds for overcoming forfeiture order and not referencing preliminary “restraining” orders).

This straightforward reading of the statute is supported by its legislative history. The Senate Report accompanying the identical provision of the RICO statute, 18 U.S.C. § 1963(i), specifically noted that its bar on intervention “is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however.” S. Rep. 98-225, 98th Cong., 2d Sess., 206 n.593 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3389 n.593.

This Court’s decision in *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988), by negative implication, confirms that the statutory bar does not apply to property not owned by the defendant. In *Regan*, in order to preserve the defendant’s assets for possible RICO forfeiture, the district court placed restrictions on the activities of a third party (Princeton/Newport, of which the defendants were part owners). *Id.* Although the applicable RICO statute contained an identical provision to the intervention bar of Section 853(k), *see* 18 U.S.C. § 1963(i), this Court

made no mention of that provision in entertaining third-party Princeton/Newport's challenge to the restrictions placed on Princeton/Newport by the district court's restraining order. In other words, if the District Court's and the government's sweeping reading of Section 853(k) were correct, Princeton/Newport would have been barred from any opportunity to be heard by the district court or this Court.

The *Regan* case is also instructive for other reasons. In *Regan*, the district court did not attempt to seize or restrain third party Princeton/Newport's assets (as the District Court did here). Rather, the district court merely restricted Princeton/Newport's ability to engage in "non-ordinary-course-of-business transactions." *Regan*, 858 F.2d at 119. Even for this limited restriction, this Court emphasized that "orders directed at third parties are strong medicine and should not be used where measures that are adequate and less burdensome on the third parties are available." *Id.* at 121. Even though the order in *Regan* was not a total restraint (like the one issued here), and even though the *Regan* order burdened property jointly owned by third parties and defendants (unlike the order here, which restrains accounts solely owned by a third party and not at all owned by defendants), this Court also stated that the

order’s “most obvious—and very serious—vulnerability, of course, is that it applies to all of the Princeton/Newport Group’s assets and not just to the partnership interests of the individual defendants.” *Id.* at 120. The District Court’s complete and indefinite restraining order against We Build the Wall’s bank accounts reflects none of this Court’s trepidation in the face of even marginal burdens on third party assets.¹¹

The District Court relied not only on an incorrect reading of Section 853(k), but also on three of this Court’s decisions referencing that provision. None of those three decisions involved challenges to *restraining orders*, and all occur in a post-conviction context. Accordingly, their comments regarding Section 853(k) are non-binding dicta, are incorrect, and should not be perpetuated. *See United States v. Watts*, 786

¹¹ *Regan* was later limited to its facts by this Court’s decision in *Gotti*, 155 F.3d at 147. *Gotti* held that, under a plain reading of the RICO forfeiture statute, 18 U.S.C. § 1963(d)(1)(a), substitute assets could not be restrained at all because the pre-trial restraint provision only applied to “subsection (a)” property “and that description does not include substitute assets.” *Id.* at 149 (quoting *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993)). As explained below, by the same logic and plain reading of Section 853, no restraining order is permitted here because Section 853(e) only permits the restraint of “subsection (a)” property—i.e., narcotics proceeds—not the wire fraud proceeds claimed here.

F.3d 152, 175 (2d Cir. 2015) (involving post-conviction forfeiture order); *DSI Assocs. LLC v. United States*, 496 F.3d 175, 183 (2d Cir. 2007) (post-conviction, post ancillary-proceeding forfeiture order; claiming (in dicta) that it is “well settled that Section 853(n) provides the exclusive means by which a third party may lay claim to forfeited assets—after the preliminary order of forfeiture has been entered”; citing *De Almeida*); *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (post-conviction and post-ancillary proceedings case, characterizing Section 853(k) in dicta).

Second, Section 853(k) is inapplicable because We Build the Wall and Mr. Kobach never sought to “intervene” as parties “claiming an interest in property subject to forfeiture under this section [i.e., Section 853].”¹² We Build the Wall and Mr. Kobach sought an opportunity to be heard relating to assets that logically and legally had no connection to the alleged fraud (even assuming the truth of the allegations of fraud and omitting the requirement that restrained assets be owned or obtained by

¹² As noted below, none of the property restrained is property subject to forfeiture “under this section” for the additional reason that Section 853 only relates to property connected to narcotics offenses.

the defendants)—funds donated to We Build the Wall well after the compensation-related disclosure alleged in the Indictment. Those funds are not “subject to forfeiture.” In other words, appellant did not claim a competing or superior interest to the defendants’ interest in tainted property; the defendants have no interest in We Build the Wall’s accounts, and at the very least, money donated into those accounts well after Mr. Kolfage’s compensation was publicly disclosed cannot be tainted property.

Thus, this request was not an effort to “intervene in a trial or appeal.” 21 U.S.C. § 853(k). In the District Court, We Build the Wall and Mr. Kobach disclaimed any interest in participating in either the trial of the charges in the Indictment, or in any appeal that may follow that trial. This is because their motion did not seek to litigate the allegations of the Indictment (i.e., whether the government could prove a fraud against the defendants). Instead, We Build the Wall and Mr. Kobach sought to be heard on the logical and factual impossibility that all of the funds restrained, including funds donated well after We Build the Wall’s website disclosed Mr. Kolfage’s compensation, could have been donated based on any alleged fraud. For this reason, as well, Section 853(k) is

inapplicable. *Cf. Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (holding that nonnamed class member who will be bound by class settlement to which he objects has “the power to bring an appeal without first intervening”).

Nor was the motion “an action at law or equity . . . concerning the validity of [the appellants’] alleged interest in the property.” 21 U.S.C. § 853(k). The motion was directed at the government’s inability to establish probable cause to believe that *all* of the funds restrained are the proceeds of the charged crimes. Again, the motion did not assert a competing or superior ownership interest in tainted property. Finally, as discussed below, the Indictment here does not purport to make a probable cause finding that the property restrained is traceable to the fraud, as the government conceded. (ECF 42 at 11). Since the Indictment here makes no such finding, Section 853(k)(2) does not apply for that reason as well.

C. Section 853(e) Does Not Authorize the Indefinite *Ex Parte* Restraint that was Ordered Here

Section 853(e) does not authorize the indefinite *ex parte* restraint of assets imposed here by the District Court. Section 853(e), which is entitled “Protective Orders,” permits the entry of a “restraining order or injunction” under certain specified conditions that do not apply here. As

always, it is critical to analyze the words of the statute. Pursuant to Section 853(e)(1)(A), such an order is permitted “to preserve the availability of property described in subsection (a) for forfeiture under this section”:

Upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section.

This language establishes five requirements for a restraining order, none of which are met here.

(1) The restraining order must be “to preserve the availability of property described in subsection (a).”

Subsection (a) specifically describes certain property, namely the proceeds of certain narcotics offenses, property used in the commission of certain narcotics offenses, and property affording control over a continuing criminal narcotics enterprise. 21 U.S.C. § 853(a). The restraining order issued here has no such purpose. There are no narcotics-offense related proceeds or property

involved here, and thus the sole statutorily authorized purpose for a restraining order does not exist. And, as discussed above in Part II.A, the property never belonged to a defendant.

(2) There must be an indictment or information “charging a violation of this subchapter or subchapter II.” “This subchapter” refers to illegal distribution of narcotics; “subchapter II” relates to illegal import and export of narcotics. The Indictment filed in this case charges no such narcotics violations. Instead, it charges a wire fraud conspiracy and a money laundering conspiracy, neither one of which is a violation of any subchapter of Title 21, let alone the particular subchapters referenced in Section 853(e).¹³

¹³ Where such an indictment has not been issued, Section 853(e) permits the issuance of a 90-day restraining order either “after notice to persons appearing to have an interest in the property and opportunity for a hearing,” 21 U.S.C. § 853(e)(1)(B), or “without notice or opportunity for a hearing,” if a particularized showing is made, the restraining order expires within fourteen days, and a hearing is held “at the earliest possible time and prior to the expiration of the temporary restraining order.” 21 U.S.C. § 853(e)(2).

(3) **The violation must be one “for which criminal forfeiture may be ordered under this section.”** Section 853(a) specifies that forfeiture is permitted only for narcotics violations “punishable by imprisonment for more than one year.” As noted above, there is no criminal forfeiture proceeding and this case charges no narcotics violations at all, so there is no applicable violation “for which *criminal* forfeiture may be ordered *under this section.*” (emphasis added).

(4) **The indictment must allege “that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture.”** As the government specifically conceded below, the restraining order was not based on any grand jury finding or allegation that any property was subject to forfeiture. (ECF 42 at 11). The Indictment made no claim that the grand jury found that any property was subject to forfeiture. Instead, as the government conceded below, the Indictment included only the government’s “notice that, upon the conviction of one or more of the defendants, the Government intends to seek forfeiture” of certain assets. (*Id.* at 1). In other

words, the Indictment does not contain the grand jury allegations or findings that are required to trigger Section 853(e). The absence is particularly striking because the Department of Justice's own Asset Forfeiture Policy Manual concedes: "If the indictment only gives notice of forfeiture rather than alleging that particular property is forfeitable, and no explicit probable cause finding is included in the notice, then arguably the filing of the indictment would not bar collateral litigation over the property." Department of Justice, *Asset Forfeiture Policy Manual*, Chap. 6, Sec. B.3 (p. 112) (2019).

(5) The indictment's allegation must be that property is subject to forfeiture "under this section." Even if the Indictment contained an allegation that property is subject to forfeiture (rather than simple notice of the government's intent to seek forfeiture in the future), it does not allege that any property is subject to forfeiture *under Section 853*. As noted above, Section 853 applies only to the proceeds of certain narcotics offenses, or property used in the commission of narcotics offenses or constituting a continuing criminal narcotics

enterprise. *See* 21 U.S.C. § 853(a). Because this case has nothing to do with any narcotics offense or a continuing criminal narcotics enterprise, there is no such allegation in the Indictment.

Put another way, Congress did not, as the government appears to contend, state that an *ex parte* indefinite restraining order may be issued upon the return of any indictment giving any kind of notice of the government’s intent to forfeit any kind of property as the proceeds of any kind of crime. Congress could have created such a regime using simpler language, such as: “upon the filing of an indictment giving notice of an intent to forfeit property as the proceeds of crime, the court may enter a restraining order against that property.” The statutory language enacted is more precise—and more demanding—than that.

This Court’s decision in *United States v. Bermudez*, 413 F.3d 304 (2d Cir. 2005), does not warrant an interpretation of Section 853 that would excise its detailed narcotics-related requirements, i.e., the requirements listed above in items 1-3 and 5 (*Bermudez* can have no effect on item 4). In *Bermudez*, a case involving the interpretation of Section 982’s cross-reference to Section 853, this Court interpreted

Section 853's references to narcotics violations and proceeds as if they instead referred to portions of *Section 982* relating to money laundering proceeds. *Id.* at 306. That is, in a money laundering case, *Bermudez* interpreted Section 983(p)'s words "any property described in subsection (a) [of Section 983 (i.e., narcotics proceeds)]" as also including any property described in Section 982(a)(1) (i.e., money involved in a money laundering offense). As noted above, Section 982 has no applicability to the alleged wire fraud proceeds at issue in We Build the Wall's application, and thus, we submit, *Bermudez* is not controlling on the correct analysis of Section 983 where it is cross-referenced (if at all) by section 2461(c), in the context of a crime that is only a civil forfeiture predicate. In addition, we respectfully submit that *Bermudez* should not be relied on by analogy, since it is difficult to see how *Bermudez* constitutes an interpretation of Section 853, rather than a re-writing of it. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 538, 542 (2004) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted," "[i]t is beyond our province to rescue Congress from its drafting errors, and to

provide for what we might think . . . is the preferred result.” (ellipses in original) (internal citation omitted)).

III. IT IS UNCONSTITUTIONAL TO DENY WE BUILD THE WALL AN OPPORTUNITY TO BE HEARD

If, as the District Court reasoned, Section 853 permits the restraint of We Build the Wall’s funds—*ex parte* and without a hearing—in a case against the defendants, and We Build the Wall must await the defendants’ sentencing before being heard, the Constitution would override Section 853 and demand that We Build the Wall be afforded due process. *United States v. Monsanto*, 924 F.2d 1186, 1193-98 (2d Cir. 1991) (en banc) (analyzing due process requirements using *Mathews v. Eldridge*, 424 U.S. 319 (1976), factors and holding that a post-seizure, pre-trial hearing is required by the Fifth and Sixth Amendments); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415, 419 (D.C. Cir. 2008) (finding that *ex parte* initial seizure was permitted, given exigencies of the particular facts, but also that due process requires a hearing to determine, pre-trial, the propriety of the initial seizure).

A. The *Mathews* Factors Demonstrate that a Non-Party Property Owner Is Entitled to Due Process

The relevant precedent—most notably the controlling authority of the Second Circuit’s *Monsanto* decision—demonstrates that, even if a pre-restraint hearing is not always required as a matter of due process (based on particular exigencies), due process requires a post-seizure hearing to *continue* a restraining order. *Monsanto*, 924 F.2d at 1193-98. Under the *Mathews* factors, the movants have a due process right to be heard because, as *Mathews* itself emphasized, “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

First, We Build the Wall’s interest in using its property in furtherance of its mission is strong—the restraint has currently led to the administrative dissolution of the entity at the same time that it is working to transfer a section of wall to the Department of Homeland Security. (A.69, 80-85).

Second, there exists a significant risk of an erroneous deprivation of property absent a hearing to test the government’s claimed probable cause establishing that the restrained funds are, in fact, the proceeds of

fraud (even assuming the existence of the fraud alleged). Indeed, nearly all of those funds were received well after, as the Indictment acknowledges, the website was updated to disclose Mr. Kolfage's compensation. There can be no logical or legal connection between donations made with knowledge of that compensation and an alleged fraud that concealed that compensation.¹⁴ Moreover, We Build the Wall's interests are not adequately protected by the defendants' trial. While an acquittal would vitiate any basis for forfeiture by demonstrating no predicate criminal conduct, beyond that overarching fact, the defendants have no particular interest in focusing on We Build the Wall's accounts as part of their defense, including whether there is any nexus between the funds in those accounts and the alleged crime. After all, the defendants have no ownership interest in We Build the Wall's accounts, and so forfeiting that (non-existent) interest is unimportant to them.

Third, the government's interest, and any burden placed upon the government, does not justify bypassing all process respecting the Order.

¹⁴ It is no answer for the government to point to the continuation of the conspiracy to the date the Indictment was returned. Even if the conspiracy continued, that does not mean that it continued to generate "proceeds" subject to forfeiture.

The challenge here is to the nexus between the restrained We Build the Wall funds and the alleged fraud, which is “a technical matter far removed from the grand jury’s core competence and traditional function.” *Kaley v. United States*, 571 U.S. 320, 331 n.9 (2014). The finding of probable cause to believe the crime has been committed is not at issue in We Build the Wall’s request for relief, and thus the risks to the prosecution from being forced to preview its case are not presented.

B. The District Court Erroneously Decided that Only a Sixth Amendment Interest Can Justify a Hearing

The District Court dismissed these constitutional concerns, incorrectly indicating that only a defendant’s Sixth Amendment right to counsel can justify a hearing. (ECF 63 at 20-21). *Monsanto* spent five pages analyzing the *due process* factors of *Mathews*, which are expressly related to a Fifth Amendment, not Sixth Amendment, right. *Monsanto*, 924 F.2d at 1193-98; *see Mathews*, 424 U.S. at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”). And, while *Monsanto* noted (under the first of those factors) that the private interest at stake in that case was particularly weighty because it involved not just

the deprivation of property, but of property necessary to retain counsel of the defendant's choice, that analysis did not erase *Monsanto's* invocation of the Fifth Amendment, or in any way denigrate a property owner's interest in using "his property in whatever manner he sees fit," free from government interference. *Id.* at 1193. That interest is not only weighty; it is fundamental.

The Supreme Court has held that seizures of property in the forfeiture context must satisfy the requirements of the Constitution, including the requirements of the Fifth Amendment. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50-52 (1993) (analyzing both the Fourth and Fifth Amendment in the context of an *ex parte* seizure of the alleged proceeds of crime; "the proper question is not which Amendment controls *but whether either Amendment is violated.*" (emphasis added)). Specifically, the Supreme Court explained that:

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. *See United States v. \$8,850 in U.S. Currency*, 461 U.S. 555, 562, n.12

(1983); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Id. at 48-49.

The statute invoked by the Order, Title 21, United States Code, Section 853, applies only to *tainted* assets—that is, assets that are the proceeds of a charged crime. *See Luis*, 136 S. Ct. at 1091. As the Court in *Luis* demonstrated, this outcome is not anomalously dependent on the Sixth Amendment right to counsel, but it is instead deeply rooted in principles of *property* law and in historical common law theories of forfeiture. *Id.* Thus, the *Luis* decision explained that, in the landmark forfeiture cases, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989), “the Government even before trial had a ‘substantial’ interest in the tainted property sufficient to justify the property’s pretrial restraint.” *Luis*, 136 S. Ct. at 1092. Distinguishing these cases, the Court also analogized to bankruptcy law and invoked its prior precedent in *Grupo Mexicano*. *Id.* The Court stated: “Here, by contrast, the Government seeks to impose restrictions upon Luis’ *untainted* property without any showing of any

equivalent governmental interest in that property. . . . At least regarding her untainted assets, Luis can at this point reasonably claim that the property is still ‘mine,’ free and clear.” *Luis*, 136 S. Ct. at 1092. *Grupo Mexicano* confirmed the established principle that, in an action at law for money damages, a district court is *without power* “to issue a preliminary injunction preventing [a] defendant from transferring assets in which no lien or equitable interest is claimed.” 527 U.S. at 308, 321.

* * * *

Because the movants are not defendants, and because the defendants are not the owners of the restrained funds, the private interest in using property free of government interference is *greater*, not less, than it would be where a defendant’s funds are restrained. As this Court has stated, “orders directed at third parties are strong medicine,” *Regan*, 858 F.2d at 121, that “raise[] serious constitutional concerns,” *Pacheco*, 393 F.3d at 355. Due process requires a hearing to continue the restraint regardless of any need to show that the restrained funds are necessary to retain counsel under the Sixth Amendment. Accordingly, the District Court’s Order denying any timely opportunity to be heard should be vacated.

IV. IF NOT LAW THEN EQUITY PROVIDES RELIEF

As set forth above, the District Court's order mis-applied Section 853 in barring We Build the Wall from challenging the pretrial restraint of We Build the Wall's property. But, if Section 853 closed the door to legal relief, this Court's precedent would open the door to equitable relief in the form of return of property pursuant to Federal Rule of Criminal Procedure 41(g). This Court has recognized that:

A Rule 41(g) motion is an equitable remedy that is available only when there is no adequate remedy at law and the equities favor the exercise of jurisdiction. Jurisdiction under Rule 41 is to be exercised with great restraint and caution since it rests upon the court's supervisory power over the actions of federal law enforcement officials.

De Almeida v. United States, 459 F.3d 377, 382 (2d Cir. 2006) (internal citations and quotation marks omitted). Thus, the Second Circuit noted that it had upheld dismissal of such an action "where the government had commenced a civil forfeiture proceeding," and thus the claimant would be "afforded the opportunity to test the legality of the seizure in the forfeiture proceeding." *Id.* The Court noted, however, that "[a] third-party claimant contesting a criminal forfeiture may lack an adequate

remedy at law if the claimant faces months or years of delay before the claimant may seek an ancillary proceeding in the criminal forfeiture action.” *Id.* In *De Almeida*, however, that “potential inadequacy [was] not present [then and there] . . . because there [had] been a conviction and an ancillary proceeding [had] been conducted (and concluded).” *Id.* Here, We Build the Wall’s assets have been restrained for six months, and although the defendants’ criminal trial is scheduled for May, any sentencing and ancillary proceeding are many months away. Thus, in the present context, jurisdiction pursuant to Federal Rule of Criminal Procedure 41(g) would be appropriate, absent another remedy.

V. THE GOVERNMENT’S EXTRA-JUDICIAL ATTEMPTS TO RESTRAIN PROPERTY BY FIAT VIOLATE THE FOURTH AMENDMENT

As noted above, in addition to seeking the judicial restraint of We Build the Wall’s bank accounts, the government attempted to restrain *all funds* donated to We Build the Wall by threat—stating to counsel and in filings that property never subjected to any court order is the proceeds of crime and threatening criminal investigation or prosecution for any movement of that property. (A.68, 93-97; ECF 42 at 14). If this extrajudicial restraint by threat were permitted, the government would have no need of any court-issued restraining orders at all; it could simply

“regulate by prosecution” and investigate or charge (or threaten to do so) anyone who made use of or transacted in property the government declared to be tainted. This type of unilateral, draconian action is inconsistent with Congress’s intricately calibrated forfeiture statutes and their procedures. Moreover, it violates not only the Fifth Amendment, but also the Fourth Amendment.

This Court confronted just such informal, extra-judicial attempts at seizing funds in *United States v. Cosme*, 796 F.3d 226 (2d Cir. 2015), and found a clear violation of the Fourth Amendment. In *Cosme*, as here, the government sought a judicial restraining order, but it also sought to restrain property—two bank accounts belonging to the defendant—extrajudicially and by fiat: “The government delivered letters to Scottrade and Sterling National Bank requesting that they freeze Cosme’s accounts, believed to contain proceeds of unlawful activity.” *Id.* at 229. In its letters to the banks, the government claimed it had “probable cause” to believe the accounts were subject to forfeiture and claimed to be “in the process of obtaining a seizure warrant.” *Id.* The government was not, in fact, “in the process of” obtaining a warrant, and indeed, never sought a warrant. *Id.* at 230. The Second Circuit held that

this informal, extrajudicial attempt to restrain assets amounted to an unconstitutional, warrantless seizure in violation of the Fourth Amendment. *Id.* at 235.

The government's threats and intimations, designed to chill counsel and We Build the Wall from utilizing donated funds that were intended to support the organization and its mission, are no different than the extrajudicial letters at issue in *Cosme*. This Court should condemn them as unconstitutional attempts to seize property without a warrant. Although this argument was squarely presented to the District Court, and although the District Court cited *Cosme* for other reasons (ECF 63 at 20-21), the District Court's Order made no effort to address the government's Fourth Amendment violation.

The government's actions are not only unlawful, they are also detrimental to the interests of the donors. We Build the Wall's work is at a stand-still, and the organization itself is facing administrative dissolution. Donors to We Build the Wall contributed funds to the organization so that it might pursue its mission, not so that those funds would sit unused in restrained bank accounts or unopened envelopes.

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 12,939 words.
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Date: March 1, 2021

/s/ Justin S. Weddle

Justin S. Weddle

ADDENDUM

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ADD-1

United States Code Annotated

Constitution of the United States

Annotated

Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

ADD-2

Amendment V. Grand Jury Indictment for Capital Crimes;..., USCA CONST Amend. V

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ADD-3

United States Code Annotated

Constitution of the United States

Annotated

Amendment IV. Searches and Seizures; Warrants

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants

Amendment IV. Searches and Seizures; Warrants

Currentness

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants, USCA CONST Amend. IV-Search and Seizure; Warrants
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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§ 981. Civil forfeiture, 18 USCA § 981

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 46. Forfeiture (Refs & Annos)

18 U.S.C.A. § 981

§ 981. Civil forfeiture

Effective: February 18, 2016

Currentness

(a)(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

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§ 981. Civil forfeiture, 18 USCA § 981

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the the¹ Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

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§ 981. Civil forfeiture, 18 USCA § 981

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(G) All assets, foreign or domestic--

(i) of any individual, entity, or organization engaged in planning or perpetrating any any¹ Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5)² against the United States, citizens or residents of the United States, or their property;

(iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or

(iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government.³ Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

(H) Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

(I) Any property, real or personal, that is involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a prohibition imposed pursuant to section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016.

(2) For purposes of paragraph (1), the term “proceeds” is defined as follows:

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§ 981. Civil forfeiture, 18 USCA § 981

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term “proceeds” means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and--

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued

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§ 981. Civil forfeiture, 18 USCA § 981

pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may--

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property under this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

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(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or

(7) In³ the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or

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forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g)(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

(A) the claimant is the subject of a related criminal investigation or case;

(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

(4) In this subsection, the terms “related criminal case” and “related criminal investigation” mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In

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determining whether a criminal case or investigation is “related” to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

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(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section--

(1) the term “Attorney General” means the Attorney General or his delegate; and

(2) the term “Secretary of the Treasury” means the Secretary of the Treasury or his delegate.

(k) **Interbank accounts.--**

(1) **In general.--**

(A) **In general.--**For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign financial institution (as defined in section 984(c)(2)(A) of this title), and that foreign financial institution (as defined in section 984(c)(2)(A) of this title) has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be

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§ 981. Civil forfeiture, 18 USCA § 981

deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title), may be restrained, seized, or arrested.

(B) Authority to suspend.--The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign financial institution (as defined in section 984(c)(2)(A) of this title) is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

(2) No requirement for government to trace funds.--If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title), nor shall it be necessary for the Government to rely on the application of section 984.

(3) Claims brought by owner of the funds.--If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title) may contest the forfeiture by filing a claim under section 983.

(4) Definitions.--For purposes of this subsection, the following definitions shall apply:

(A) Interbank account.--The term “interbank account” has the same meaning as in section 984(c)(2)(B).

(B) Owner.--

(i) In general.--Except as provided in clause (ii), the term “owner”--

(I) means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title) at the time such funds were deposited; and

(II) does not include either the foreign financial institution (as defined in section 984(c)(2)(A) of this title) or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

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(ii) Exception.--The foreign financial institution (as defined in section 984(c)(2)(A) of this title) may be considered the “owner” of the funds (and no other person shall qualify as the owner of such funds) only if--

(I) the basis for the forfeiture action is wrongdoing committed by the foreign financial institution (as defined in section 984(c)(2)(A) of this title); or

(II) the foreign financial institution (as defined in section 984(c)(2)(A) of this title) establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign financial institution (as defined in section 984(c)(2)(A) of this title) had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign financial institution (as defined in section 984(c)(2)(A) of this title) shall be deemed the owner of the funds to the extent of such discharged obligation.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207-35; amended Pub.L. 100-690, Title VI, §§ 6463(a), (b), 6469(b), 6470(b), (e), (f), 6471(c), Nov. 18, 1988, 102 Stat. 4374, 4377, 4378; Pub.L. 101-73, Title IX, § 963(a), (b), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title I, § 103, Title XXV, §§ 2508, 2524, 2525(a), Title XXXV, § 3531, Nov. 29, 1990, 104 Stat. 4791, 4862, 4873, 4874, 4924; Pub.L. 102-393, Title VI, § 638(d), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(a), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, §§ 1525(c)(1), 1533, Oct. 28, 1992, 106 Stat. 4065, 4066; Pub.L. 103-322, Title XXXIII, § 330011(s)(2), Sept. 13, 1994, 108 Stat. 2146; Pub.L. 103-447, Title I, § 102(b), Nov. 2, 1994, 108 Stat. 4693; Pub.L. 106-185, §§ 2(c)(1), 5(a), 6, 8(a), 20, Apr. 25, 2000, 114 Stat. 210, 213 to 215, 224; Pub.L. 107-56, Title III, §§ 319(a), 320, 372(b)(1), 373(b), Title VIII, § 806, Oct. 26, 2001, 115 Stat. 311, 315, 339, 340, 378; Pub.L. 107-197, Title III, § 301(d), June 25, 2002, 116 Stat. 728; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(2), Nov. 2, 2002, 116 Stat. 1806; Pub.L. 109-177, Title I, §§ 111, 120, Title IV, §§ 404, 406(a)(3), Mar. 9, 2006, 120 Stat. 209, 221, 244; Pub.L. 111-203, Title III, § 377(3), July 21, 2010, 124 Stat. 1569; Pub.L. 112-186, § 3, Oct. 5, 2012, 126 Stat. 1428; Pub.L. 114-122, Title I, § 105(a), Feb. 18, 2016, 130 Stat. 101.)

Footnotes

1
So in original.

2
So in original. A closing parenthesis probably should appear.

3
So in original. Probably should not be capitalized.

18 U.S.C.A. § 981, 18 USCA § 981

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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§ 982. Criminal forfeiture, 18 USCA § 982

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 46. Forfeiture (Refs & Annos)

18 U.S.C.A. § 982

§ 982. Criminal forfeiture

Effective: June 5, 2012

Currentness

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate--

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 555, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under--

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

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(D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the the¹ Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate--

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

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§ 982. Criminal forfeiture, 18 USCA § 982

(6)(A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or section 555, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law--

(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and

(ii) any property real or personal--

(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or

(II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

(B) The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.

(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

(8) The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325), shall order that the defendant forfeit to the United States any real or personal property--

(A) used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and

(B) constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.

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§ 982. Criminal forfeiture, 18 USCA § 982

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of \$100,000 or more in any twelve month period.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207-39; amended Pub.L. 100-690, Title VI, §§ 6463(c), 6464, Nov. 18, 1988, 102 Stat. 4374, 4375; Pub.L. 101-73, Title IX, § 963(c), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title XIV, §§ 1401, 1403, Title XXV, § 2525(b), Nov. 29, 1990, 104 Stat. 4835, 4874; Pub.L. 102-393, Title VI, § 638(e), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(b), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, § 1512(c), Oct. 28, 1992, 106 Stat. 4058; Pub.L. 103-322, Title XXXIII, § 330011(s)(1), Sept. 13, 1994, 108 Stat. 2145; Pub.L. 104-191, Title II, § 249(a), (b), Aug. 21, 1996, 110 Stat. 2020; Pub.L. 104-208, Div. C, Title II, § 217, Sept. 30, 1996, 110 Stat. 3009-573; Pub.L. 105-184, § 2, June 23, 1998, 112 Stat. 520; Pub.L. 105-318, § 6(a), Oct. 30, 1998, 112 Stat. 3010; Pub.L. 106-185, § 18(b), Apr. 25, 2000, 114 Stat. 223; Pub.L. 107-56, Title III, § 372(b)(2), Oct. 26, 2001, 115 Stat. 339; Pub.L. 107-273, Div. B, Title IV, § 4002(b)(10), Nov. 2, 2002, 116 Stat. 1808; Pub.L. 109-295, Title V, § 551(c), Oct. 4, 2006, 120 Stat. 1390; Pub.L. 110-161, Div. E, Title V, § 553(b), Dec. 26, 2007, 121 Stat. 2082; Pub.L. 111-203, Title III, § 377(4), July 21, 2010, 124 Stat. 1569; Pub.L. 112-127, § 5, June 5, 2012, 126 Stat. 371.)

Footnotes

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So in original.

18 U.S.C.A. § 982, 18 USCA § 982

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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§ 983. General rules for civil forfeiture proceedings, 18 USCA § 983

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 46. Forfeiture (Refs & Annos)

18 U.S.C.A. § 983

§ 983. General rules for civil forfeiture proceedings

Effective: February 18, 2016

Currentness

(a) Notice; claim; complaint.--

(I)(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either--

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

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§ 983. General rules for civil forfeiture proceedings, 18 USCA § 983

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including--

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

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(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall--

- (i)** identify the specific property being claimed;
- (ii)** state the claimant's interest in such property; and
- (iii)** be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not--

- (i)** file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired--

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

(b) Representation.--

(1)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as--

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(i) the person's standing to contest the forfeiture; and

(ii) whether the claim appears to be made in good faith.

(2)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B)(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

(c) Burden of proof.--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

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(d) Innocent owner defense.--

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who--

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law--

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property--

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

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(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if--

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order--

(A) severing the property;

(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

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(6) In this subsection, the term “owner”--

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

(B) does not include--

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

(e) Motion to set aside forfeiture.--

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person’s interest in the property, which motion shall be granted if--

(A) the Government knew, or reasonably should have known, of the moving party’s interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

(2)(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

(B) Any proceeding described in subparagraph (A) shall be commenced--

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(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

(f) Release of seized property.--

(1) A claimant under subsection (a) is entitled to immediate release of seized property if--

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

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(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

(3)(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(B) The petition described in subparagraph (A) shall set forth--

(i) the basis on which the requirements of paragraph (1) are met; and

(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

(6) If--

(A) a petition is filed under paragraph (3); and

(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3)--

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(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including--

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property--

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

(g) **Proportionality.--**

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

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(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(h) Civil fine.--

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than \$250 or greater than \$5,000.

(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

(i) Civil forfeiture statute defined.--In this section, the term "civil forfeiture statute"--

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include--

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

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(B) the Internal Revenue Code of 1986;

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 U.S.C. 4301 et seq.), the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), or the North Korea Sanctions Enforcement Act of 2016; or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

(j) Restraining orders; protective orders.--

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture--

(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is

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subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 14 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

CREDIT(S)

(Added and amended Pub.L. 106-185, §§ 2(a), 9, Apr. 25, 2000, 114 Stat. 202, 216; Pub.L. 106-561, § 3(a), Dec. 21, 2000, 114 Stat. 2791; Pub.L. 107-56, Title III, § 316(d), Oct. 26, 2001, 115 Stat. 310; Pub.L. 111-16, § 3(1), May 7, 2009, 123 Stat. 1607; Pub.L. 114-122, Title I, § 105(b), Feb. 18, 2016, 130 Stat. 101.)

18 U.S.C.A. § 983, 18 USCA § 983

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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§ 1963. Criminal penalties, 18 USCA § 1963

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 96. Racketeer Influenced and Corrupt Organizations (Refs & Annos)

18 U.S.C.A. § 1963

§ 1963. Criminal penalties

Effective: December 1, 2009

Currentness

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any--

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

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The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

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Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this

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chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to--

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions

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hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty

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days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

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(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

CREDIT(S)

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943; amended Pub.L. 98-473, Title II, §§ 302, 2301(a) to (c), Oct. 12, 1984, 98 Stat. 2040, 2192; Pub.L. 99-570, Title I, § 1153(a), Oct. 27, 1986, 100 Stat. 3207-13; Pub.L. 99-646, § 23, Nov. 10, 1986, 100 Stat. 3597; Pub.L. 100-690, Title VII, §§ 7034, 7058(d), Nov. 18, 1988, 102 Stat. 4398, 4403; Pub.L. 101-647, Title XXXV, § 3561, Nov. 29, 1990, 104 Stat. 4927; Pub.L. 111-16, § 3(4), May 7, 2009, 123 Stat. 1607.)

18 U.S.C.A. § 1963, 18 USCA § 1963

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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§ 853. Criminal forfeitures, 21 USCA § 853

United States Code Annotated

Title 21. Food and Drugs (Refs & Annos)

Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)

Subchapter I. Control and Enforcement

Part D. Offenses and Penalties

21 U.S.C.A. § 853

§ 853. Criminal forfeitures

Effective: December 1, 2009

Currentness

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

- (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
- (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
- (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes--

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(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit

(A) In general

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply

Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be

punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

- (1)** grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which

gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant--

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

ADD-47

§ 853. Criminal forfeitures, 21 USCA § 853

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall--

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

CREDIT(S)

(Pub.L. 91-513, Title II, § 413, as added and amended Pub.L. 98-473, Title II, §§ 303, 2301(d)-(f), Oct. 12, 1984, 98 Stat. 2044, 2192, 2193; Pub.L. 99-570, Title I, §§ 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207-13, 3207-54; Pub.L. 104-237, Title II, § 207, Oct. 3, 1996, 110 Stat. 3104; Pub.L. 106-310, Div. B, Title XXXVI, § 3613(a), Oct. 17, 2000, 114 Stat. 1229; Pub.L. 107-56, Title III, § 319(d), Oct. 26, 2001, 115 Stat. 314; Pub.L. 109-177, Title VII, § 743(a), Mar. 9, 2006, 120 Stat. 272; Pub.L. 111-16, § 5, May 7, 2009, 123 Stat. 1608.)

21 U.S.C.A. § 853, 21 USCA § 853

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

ADD-48

§ 853. Criminal forfeitures, 21 USCA § 853

ADD-49

§ 2461. Mode of recovery, 28 USCA § 2461

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part VI. Particular Proceedings

Chapter 163. Fines, Penalties and Forfeitures (Refs & Annos)

28 U.S.C.A. § 2461

§ 2461. Mode of recovery

Effective: March 9, 2006

Currentness

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 974; Pub.L. 106-185, § 16, Apr. 25, 2000, 114 Stat. 221; Pub.L. 109-177, Title IV, § 410, Mar. 9, 2006, 120 Stat. 246.)

28 U.S.C.A. § 2461, 28 USCA § 2461

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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§ 2461. Mode of recovery, 28 USCA § 2461

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part VI. Particular Proceedings

Chapter 163. Fines, Penalties and Forfeitures (Refs & Annos)

This section has been updated. [Click here for the updated version.](#)

28 U.S.C.A. § 2461

§ 2461. Mode of recovery

Effective: April 25, 2000 to March 8, 2006

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(c) If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 974; Apr. 25, 2000, Pub.L. 106-185, § 16, 114 Stat. 221.)

28 U.S.C.A. § 2461, 28 USCA § 2461

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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