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BY THE COMPTROLLER GENERAL
To The Honorable Joseph R. Biden
United States Senate

OF THE UNITED STATES

Asset Forfeiture--A Seldom Used Tool In Combatting Drug Trafficking

Billions of dollars of profits are generated by organized crime; drug trafficking revenues alone are estimated at \$60 billion annually. Even though legislation designed to attack these profits through asset forfeiture was enacted more than a decade ago, forfeiture of criminal assets has been miniscule.

The primary reason for the limited use of asset forfeiture has been the lack of leadership by the Department of Justice. The Department has not given investigators and prosecutors guidance and incentives to pursue forfeiture. Also, emerging case law indicates the statutes may be flawed. GAO recommends that the Congress clarify and broaden the scope of the criminal forfeiture statutes and that the Attorney General improve forfeiture program management.





COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-198049

The Honorable Joseph R. Biden
United States Senate

Dear Senator Biden:

As you requested in your December 27, 1979, letter--as Chairman of the Subcommittee on Criminal Justice--we reviewed the Department of Justice's asset forfeiture program. The report describes the extent forfeiture has been employed in narcotics cases and discusses some of the problems limiting greater forfeiture use. We recommend that the Congress strengthen the criminal forfeiture statutes and that the Attorney General improve forfeiture program management.

The Department of Justice was provided a copy of the draft on February 9, 1981, for their comments. The Department did not respond within the required 30 days as is stipulated in Public Law 96-226. Their comments were received on March 19, 1981. Because of the late submission by Justice and the report issue date you requested, we could not evaluate the comments in detail. We have, however, appended the comments to the report and made some general observations about them in the report.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time we will send copies to the Attorney General and other interested parties. Copies will be made available to others upon request.

Sincerely yours,

A handwritten signature in black ink that reads "Milton J. Fowler".

Acting Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE HONORABLE
JOSEPH R. BIDEN
UNITED STATES SENATE

ASSET FORFEITURE--A SELDOM
USED TOOL IN COMBATTING
DRUG TRAFFICKING

D I G E S T

The Federal Government's record in taking the profit out of crime is not good. Billions of dollars are generated annually by organized crime; drug trafficking alone is estimated at \$60 billion annually. These illicit profits and the assets acquired with them were the target of legislation passed nearly 10 years ago to combat organized crime through forfeiture of assets. However, assets obtained through forfeiture have been minuscule.

The Government has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique. The Department of Justice has not given investigators or prosecutors the incentive or guidance to go after criminal assets. Steps are now underway to do more, but emerging case law indicates legislative changes are also needed if investigators and prosecutors are to make meaningful attacks on the economic base of organized crime.

Whether or not an improved asset forfeiture program will make a sizeable dent in drug trafficking is uncertain. The almost insatiable demand for drugs and the huge dollar amounts involved may be obstacles too great for law enforcement alone to overcome. But a successful forfeiture program could provide an additional dimension in the war on drugs by attacking the primary motive for such crimes--monetary gain.

FEW ASSETS HAVE BEEN FORFEITED

Simply put, neither the dollar value nor the type of assets forfeited to the Government

by criminal organizations has been impressive compared to the billions generated annually through drug trafficking.

--Since enactment in 1970 through March 1980, the Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise statutes (acts authorizing criminal forfeiture) have been used in 98 narcotics cases. Assets forfeited and potential forfeitures in those cases amounted to only \$2 million. (See pp. 10 and 11.)

--Since enactment in November 1978 of the Psychotropic Substance Act amendments (providing for civil forfeiture) through March 1980, the Drug Enforcement Administration has seized \$7.1 million in currency involved in drug transactions. Of that amount only \$234,000 had been forfeited; cases involving \$6.8 million of the \$7.1 million were pending. Seizures or forfeitures of other types of assets have been minimal. (See p. 12.)

--Most forfeitures have been accomplished under various civil authorizations by the Drug Enforcement Administration and the U.S. Customs Service. However, these forfeitures have been primarily the vehicles and cash used in drug trafficking and represent mere incidental operating expenses for large narcotics organizations. Total civil forfeitures from 1976 through 1979 were \$29.9 million. (See pp. 12 and 13.)

Equally disturbing are the kinds of assets forfeited. The Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise statutes were intended to destroy the economic base of criminal organizations and to combat organized crime's infiltration into commercial enterprise. The Department of Justice has estimated that

700 legitimate businesses in this country have been infiltrated by organized crime, yet no significant business interests acquired with illicit drug funds or profits from other criminal activity have been forfeited. (See p. 11.)

WHY MORE FORFEITURES HAVE NOT BEEN REALIZED

The reasons why the forfeiture statutes have not been used more extend across the legal, investigative, and prosecutive areas.

--Emerging case law indicates the forfeiture statutes are ambiguous in some areas or incomplete and deficient in others.

(See pp. 30 to 42.)

--Investigators and prosecutors were not given the guidance and incentive for pursuing forfeiture. (See pp. 19 to 24.)

--Access to financial information may be limited. (See pp. 25 to 29.)

But the primary reason has been the lack of leadership by the Department of Justice. Nearly 10 years after the forfeiture statutes were enacted the Government lacked the most rudimentary information needed to manage the forfeiture effort. No one knew how many narcotics cases had been attempted using the Racketeer Influenced and Corrupt Organization or Continuing Criminal Enterprise statutes, the disposition of all the cases, how many cases involved forfeiture attempts, and why those attempts either failed or succeeded. (See pp. 16 to 18.)

Efforts are being made to remedy the matter. The Department of Justice has (1) issued guidance on the use of forfeiture statutes, (2) is analyzing in detail all narcotics Racketeer Influenced and Corrupt Organization and Continuing Criminal Enterprise cases prosecuted since 1970, and (3) is preparing a manual on how to

conduct financial investigations in drug cases. Also, the Drug Enforcement Administration has made forfeiture a goal of all major trafficker investigations. These initial efforts must be continued and implementation monitored if the Government is going to improve its forfeiture law enforcement effort.

RECOMMENDATIONS TO THE CONGRESS

GAO recommends that the Congress amend the criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organizations statute to:

- Make explicit provision for the forfeiture of profits and proceeds that are (1) acquired, derived, used, or maintained in violation of the statute or (2) acquired or derived as a result of a violation of the statute.
- Authorize forfeiture of substitute assets, to the extent that assets forfeitable under the statute: (1) cannot be located, (2) have been transferred, sold to, or deposited with third parties, or (3) have been placed beyond the general territorial jurisdiction of the United States. This authorization would be limited to the value of the assets described in (1), (2), and (3), above.

GAO recommends that the Congress amend the criminal forfeiture provisions of the Continuing Criminal Enterprise statute to:

- Clarify that assets forfeitable under the statute include the gross proceeds of controlled substance transactions.
- Authorize forfeiture of substitute assets, but only to the extent that assets forfeitable under the statute (1) cannot be located, (2) have been transferred or sold to, or deposited with third parties, or (3) placed beyond the general territorial jurisdiction of the United States. (See pp. 41 and 42;

proposed criminal forfeiture legislation is shown in app. V.)

RECOMMENDATIONS TO THE
ATTORNEY GENERAL

Although statutes authorizing the forfeiture of criminal assets are 10 years old, the Government has used them sparingly. Starting in 1980, the Department of Justice began various corrective actions to increase the use of statutes authorizing forfeiture of criminal assets. These initial efforts must be supplemented if forfeiture cases are to increase. Accordingly, GAO recommends that the Attorney General

--direct the Department of Justice's Criminal Division to analyze on a continuing basis the extent to which forfeiture statutes are used and the reasons for the success or failure of their application, and

--evaluate the workability of current forfeiture procedures and take the appropriate steps to effect any necessary revisions. (See p. 29 and p. 42.)

AGENCY COMMENTS

The Department of Justice was provided a draft of this report on February 9, 1981, for its comments. The Department did not respond within the required 30 days as is stipulated in Public Law 96-226. The comments were received on March 19, 1981. (See app. VI.) Because of the late submission by Justice and the report issue date set by the requestor, GAO could not evaluate the comments in detail. In general, however, the agency concurs with the findings but points out the need to clarify certain matters. (See p. 43.)

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ABBREVIATIONS

CCE	Continuing Criminal Enterprise
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
IRS	Internal Revenue Service
RICO	Racketeer Influenced and Corrupt Organization
U.S.C.	United States Code

CHAPTER 1

ATTACKING CRIMINAL ASSETS

Racketeers are motivated by a common desire for financial gain and the power it commands. Law enforcement agencies have traditionally attempted to deter or prevent the perpetration of crime through prosecutions leading to fines and imprisonment. As long as the flow of money continues, however, such traditional measures ordinarily result in a compulsory retirement and promotion system for criminal organizations rather than their elimination. In 1969, the President of the United States put the situation into perspective, stating "* * * as long as the property of organized crime remains, new leaders will step forward to take the place of those we jail."

Traditional measures not only have had limited success in eliminating criminal organizations, but they have rarely been effective in disrupting their leadership. The leaders of criminal organizations, such as narcotics trafficking networks, infrequently have direct contact with illicit substances or the cash used to acquire them, but they participate in any profits derived. However, traditional measures are aimed primarily at individuals participating in transactions involving the illicit substances rather than those who participate exclusively in the derived profits.

Recognizing the deficiencies of traditional measures in attacking organized crime, the Congress enacted new statutes in 1970 dealing not only with individuals, but also with the economic base through which they operate.

MONIES DERIVED FROM CRIMINAL ACTIVITIES ARE ASTOUNDING

The amount of money derived from criminal activities is astounding. Billions of dollars are generated through gambling, prostitution, narcotics trafficking, and other illegal activities. Revenues generated through narcotics trafficking alone are estimated in excess of \$60 billion annually. For example, a 1980 study conducted by the National Narcotics Intelligence Consumers Committee estimated that the retail value of narcotics supplied

to the illicit U.S. market during 1979 ranged between \$55 and \$73 billion.

Such enormous amounts of illegal money can adversely affect the banking system and the economy. Additionally, the criminal organizations generating these enormous revenues often invest their illicit profits in legitimate businesses and real estate. The Department of Justice estimates that over 700 legitimate U.S. businesses have been infiltrated by organized crime. In hearings before the Senate Permanent Subcommittee on Investigations during December 1979, a real estate economist testified that in the state of Florida, estimated real estate investments resulting from narcotics trafficking totalled \$1 billion in 1977 and 1978.

AVAILABLE FORFEITURE AUTHORIZATIONS

Forfeiture means a judicially required divestiture of property without compensation. Legal title cannot be forfeited to the Federal Government until a legal determination on the propriety of forfeiture is made. Forfeitures may be accomplished either criminally or civilly, depending upon the circumstances of each case, the statute under which the Government proceeds, and the nature of the property involved. On the other hand, seizure, as distinguished from forfeiture, is normally defined as the physical securing of property by law enforcement personnel. Also excluded from the definition of forfeiture are fines, bail, and bond forfeitures, and the imposition of civil damages resulting from a lawsuit.

Classes of property subject to forfeiture

There are important legal distinctions among the classes of property: organized crime basically uses four of them. The first class, contraband, describes property which is deemed inherently dangerous by statute and the possession or distribution of which is itself usually a crime. Certain types of guns, controlled substances, liquor, and gambling devices qualify as contraband. The second class, derivative contraband, describes property such as boats, airplanes, and cars which serve the function of warehousing, conveying, transporting, or facilitating the exchange of contraband. The third class, direct proceeds, describes

property such as cash that is received in exchange or as payment for any of a variety of transactions involving contraband. The fourth class, secondary or derivative proceeds, describes property such as corporate stock, real estate, legitimate businesses, and the like that is purchased, maintained, or acquired, indirectly or directly, with the direct proceeds of an illegal transaction. This latter class of property consists almost entirely of profits.

The level of expertise required to obtain forfeiture is directly related to the class of property subject to forfeiture. Contraband, for example, generally requires no traceable connection to the illegal activity subjecting it to forfeiture, because its possession or distribution is decreed illegal by statute or regulation. The other classes of property, however, all require a connection to the illegal activities to subject them to forfeiture. The degree of financial expertise needed to establish the traceable connection varies directly with the class of property involved and, in some cases, by the statute under which the Government proceeds to accomplish forfeiture.

Derivative contraband, such as automobiles, boats, and aircraft used to facilitate an exchange of contraband, is ordinarily seized at the time of arrest along with the contraband exchanged. As a consequence, extensive financial expertise is not required to establish a connection to the illegal activity. Direct proceeds, however, may require a greater degree of financial expertise unless the actual exchange of proceeds for contraband is observed. For example, even though illegal drugs and cash are found in the same location, forfeiture of the cash cannot be realized unless a connection to the drugs can be established. The final class of property, derivative proceeds, requires extensive financial expertise to show the relationship between the property and the illegal activity. Most major organization assets are included in this final category; therefore, the Government must focus on this property if it is going to make inroads on the economic base of criminal activity.

The Federal Government has obtained forfeiture of properties falling within the first two classes--contraband and derivative contraband--for nearly two centuries.

However, prior to 1970, the Government had no authority to forfeit direct and derivative proceeds.

Criminal forfeiture

In common law England, forfeiture of property to the Crown, without regard to the property's relationship to the crime of conviction, automatically followed most felony convictions. Widespread abuses of this authority account for the historical aversion to criminal forfeitures in the United States. This aversion is reflected in Article III of the Constitution, which provides that while Congress has the power to declare the punishment of treason, "[no] attainder of treason shall work * * * [a] forfeiture, except during the life of the person attainted." The First Congress enacted a statute that some courts believe codifies the negative implication of Article III, namely, that no forfeitures of estate be allowed except in cases of treason. This statute, which has never been expressly repealed, provides:

"No conviction or judgment for any of the aforesaid offenses [criminal offenses now codified in title 18] shall work * * * [a] forfeiture of estate." 18 U.S.C. §3563.

With the exception of the Confiscation Act of 1862, which authorized the President to forfeit the property of Confederate sympathizers, all forms of criminal forfeiture are believed to have been unknown in U.S. jurisprudence until 1970.

In that year, the Congress enacted two statutes providing the Government criminal forfeiture authority. Title IX of the Organized Crime Control Act, entitled the Racketeer Influenced and Corrupt Organization Act (RICO), provided that upon conviction for racketeering involvement in an enterprise, the offender shall forfeit all interests in the enterprise (18 U.S.C. 1961-64). The Comprehensive Drug Prevention and Control Act provided for criminal forfeiture of, among other things, profits derived through a Continuing Criminal Enterprise (CCE) that traffics in controlled substances (21 U.S.C. 848). The forfeiture provisions of these two statutes show the significance of the historical aversion to criminal forfeiture as described above. Neither statute revives the functional equivalent of forfeiture of estate, as that penalty was

known in common law England. Both adopt a substantially narrower or milder form of criminal forfeiture in that there must be some connection between the property to be forfeited and the criminal activity in which the offender engaged. In common law England, no such connection was required. A more complete description of these statutes is contained in appendix II.

Civil forfeiture

Numerous statutes in the United States Code provide civil forfeiture authority; however, there are fundamental legal differences between civil and criminal forfeiture. Criminal forfeiture is based on a determination of personal guilt; the right of the government in the property subject to forfeiture stems from an in personum criminal judgment against the offender. Almost all other forfeitures are considered civil forfeitures. Civil forfeiture cases usually arise incident to violations of the customs, revenue, and navigation laws; the property subject to civil forfeiture is considered "tainted." The legal proceeding in such cases is theoretically against the property itself; the forfeiture stems from the guilt of the property, or the property's use in or relationship to illegal activity. The rights of the government in the property derive from an in rem judgment against the offending articles of property. Conviction of the property holder for a crime is rarely a prerequisite for the imposition of civil forfeiture. As a general proposition, the innocence of the property's owner is legally irrelevant. If the taint in the property exists, the rights of the property holder are extinguished.

Approximately 90 percent of all civil forfeitures resulting from criminal activity are accomplished under Drug Enforcement Administration (DEA) and U.S. Customs Service authorizations. The Drug Enforcement Administration's civil forfeiture authority is in Section 881 of Title 21, United States Code. Historically, the most frequent applications of this statute have been against contraband (e.g., drugs) and derivative contraband (e.g., vehicles used to convey drugs), not against proceeds of controlled substance transactions. This statute was amended by the Psychotropic Substance Act in November 1978 to cover proceeds and derivative proceeds. If read literally, it seems to have at

least the same reach in terms of classes of property subject to forfeiture as the RICO and CCE criminal forfeiture authorizations.

The U.S. Customs Service has numerous statutes that give forfeiture authority. However, many of these statutes involve importation or other violations related primarily to failure to pay tariffs. Those forfeiture statutes most often used in connection with violations of the drug laws are:

- 21 U.S.C. 881: Controlled Substance Act violations,
- 49 U.S.C. 781-4: unlawful use of vessels, vehicles, and aircraft involving contraband,
- 31 U.S.C. 1102: cash and monetary instruments in violation of currency laws,
- 19 U.S.C. 1703: vessels used in smuggling,
- 19 U.S.C. 1595a: conveyances used to transport contraband.

OBJECTIVES, SCOPE, AND METHODOLOGY

This report identifies the various statutes providing civil and criminal forfeiture authority, their substantive dimensions; the extent to which the authority has been successfully employed by law enforcement agencies, particularly in narcotics trafficking prosecutions; and points out several reasons why so few forfeitures have been realized.

We conducted our review at DEA headquarters in Washington, D.C.; DEA regional and district offices in Detroit, Indianapolis, Miami, Los Angeles, and New York; Department of Justice's Criminal Division, in Washington, D.C.; and U.S. Attorney Offices in the Eastern District of Michigan, Southern District of Indiana, Southern District of Florida, Central District of California, and Southern District of New York. Some limited work was also conducted at headquarters offices of the FBI and the U.S. Customs Service. Our work included:

- analysis of DEA criminal investigative files and U.S. Attorney criminal prosecutive files;
- discussions with special agents, group supervisors, and other DEA officials;
- discussions with U.S. attorneys; and
- discussions with Department of Justice and other agency officials in Washington, D.C.

In the area of civil forfeitures, we concentrated our work on DEA and Customs because Department of Justice officials informed us that nearly 90 percent of all civil forfeitures resulting from criminal activity involved those agencies. In the criminal forfeiture area, we developed a comprehensive record for all 98 cases in which indictments were returned under RICO and CCE, from their adoption in 1970 through March 1980.

We developed the comprehensive record of RICO and CCE cases because no single source within the Federal Government maintained such a record or could provide us that information. Several sources were used. Legal reference documents, including the United States Code, Federal Supplement, Federal Reporter, and the Supreme Court Reporter were reviewed. We had discussions with Criminal Division officials in the Organized Crime and Racketeering and the Narcotics and Dangerous Drugs Sections who are responsible for approving potential RICO and CCE cases, respectively.

From these sources, we developed our record of 98 CCE and RICO narcotics cases, their disposition, and data on Department of Justice's success in obtaining asset forfeitures. From this universe, we selected for more detailed analysis 31 cases originating in those judicial districts listed above because they had the most concentrated activity of CCE and RICO cases involving forfeiture attempts. This detailed analysis involved studying the objectives and methods of the investigations and prosecutions to determine the reasons for forfeiture success or failure.

We also drew from the experience gained in our other efforts, particularly:

- "The Drug Enforcement Administration's CENTAC Program--
An Effective Approach to Investigating Major Traf-
fickers That Needs To Be Expanded" (GGD-80-52,
March 27, 1980);
- "Gains Made in Controlling Illegal Drugs, Yet the
Drug Trade Flourishes" (GGD-80-4, October 25, 1979);
- "Disclosure and Summons Provisions of the 1976 Tax
Reform Act--An Analysis of Proposed Legislative
Changes" (GGD-80-76, June 17, 1980);
- "Federal Agencies' Initial Problems with the Right to
Financial Privacy Act of 1978" (GGD-80-54, May 29,
1980).

Additionally, we testified on this topic on July 23,
1980, before the Senate Judiciary Subcommittee on Criminal
Justice.

CHAPTER 2

FORFEITURE--A PROMISING

STRATEGY NOT REALIZED

Although attacking the financial resources of criminal organizations through forfeiture of their assets has been discussed for several years, little has been done. Forfeitures to date have consisted primarily of the vehicles used to smuggle drugs and the cash used in drug transactions. Compared to the profits realized, these forfeitures have amounted to little more than incidental operating expenses. The illicit profits themselves and the assets acquired with them have remained virtually untouched.

When enacted more than a decade ago, the RICO and CCE statutes were envisioned as a major new law enforcement remedy directed at the financial resources of organized crime. For example, drug trafficking organizations were to be more completely immobilized by not only jailing their key people, but also obtaining forfeiture of their assets. Unfortunately, the potential effectiveness of forfeiture in combatting drug trafficking cannot yet be assessed, because the key statutes authorizing forfeiture have not received extensive use.

VERY FEW ASSETS FORFEITED

Neither the dollar value nor the type of assets forfeited to the Government from criminal organizations has been impressive.

- Even though enacted more than 10 years ago, the RICO and CCE statutes have been applied in only 98 drug cases. Assets forfeited and potential forfeitures in those cases amounted to only \$2 million.
- The 1978 Psychotropic Substance Act amendment to DEA's civil forfeiture authorization has been used predominately to forfeit cash directly involved in drug transactions, not to forfeit major assets derived from drug profits. Although \$7.1 million in

cash has been seized under this provision, only \$234,000 has actually been forfeited as of March 1980; cases involving \$6.8 million of the \$7.1 were pending.

--Most forfeitures have been accomplished under various civil authorizations by DEA and the U.S. Customs Service. However, these have primarily been the vehicles and cash used in drug trafficking and represent mere incidental operating expenses for large narcotics organizations. Total civil forfeitures from 1976 through 1979 were \$29.9 million.

Compared to the astounding profits of narcotics organizations, the amount extracted through criminal and civil forfeitures is indeed small.

RICO and CCE statutes infrequently applied

From 1970 through March 1980, 98 CCE and RICO indictments involving 258 defendants had been returned in narcotics cases. Yet there were more than 5,000 Class I violators arrested by DEA during this period. ^{1/} A Class I trafficker, DEA's highest classification level, indicates the individual or organization is capable of trafficking in large amounts of drugs. The criteria have changed over the years, but since 1977 they have provided that a Class I violator is a person that must deal in a minimum of \$4 million a month in heroin or \$2.8 million a month in cocaine.

The RICO and CCE statutes have been applied in only 98 cases. The total value of actual and potential forfeitures for the 10-year period is only \$2.0 million, less revenue than one Class I heroin trafficker generates in a month. This forfeiture total consists of \$659,000 in

^{1/}DEA has arrested approximately 5,000 Class I violators from June 1972 through March 1980. Prior to June 1972, violators were not classified.

CCE forfeitures and \$1.3 million in RICO forfeitures; however, \$900,000 of the RICO forfeitures are being appealed. Data as of September 1980 indicates that the forfeiture provisions of the RICO and CCE statutes continue to be used infrequently in narcotics cases. Fiscal year 1980 forfeitures totalled only \$135,000 under CCE and \$522,000 under RICO.

The kinds of assets forfeited are equally disturbing. The RICO and CCE statutes were intended to, among other things, attack the economic base of organized crime and combat its infiltration into commercial enterprise. However, we found no forfeiture of significant derivative proceeds or business interests acquired with illicit funds. Criminal forfeitures in narcotics cases have included such things as automobiles, boats, and personal residences, but they have not included the types of property that would affect the economic base of criminal organizations.

The chart below summarizes the results of the RICO and CCE narcotics cases and appendix IV gives individual case descriptions.

Total Narcotic Cases
Charged Under RICO And CCE
(For the period 1970 through March 1980)
(note a)

	<u>CCE</u>	<u>RICO</u> <u>(Narcotics)</u>	<u>CCE and</u> <u>RICO</u> <u>Narcotics</u>	<u>TOTAL</u>
Number of cases	73	16	9	98
Amount of forfeitures (thousands) <u>a/</u>	\$659	\$1,305	(b)	\$1,964

a/The litigation status of forfeiture cases indicted as of March 1980 are updated through September 1980.

b/Forfeitures in this case totalled \$187,000 and are included in the RICO and CCE totals as follows: \$65,000-CCE, \$122,000-RICO.

Psychotropic Substance Act
amendment used to seize cash

DEA has made only limited use of its civil forfeiture authority granted by the November 1978 Psychotropic Substance Act amendment to 21 U.S.C 881. This law, which gave DEA the authority to forfeit assets traceable to narcotics transactions (derivative proceeds) and the cash involved in narcotics dealings (direct proceeds), previously only provided for forfeiture of contraband and derivative contraband.

For the most part, the 1978 law has only been used to seize cash directly involved in drug transactions. Cash seizures under the new provisions totalled \$7.1 million from enactment of the statute through March 1980. Of that amount only \$234,000 had been actually forfeited by March 30, 1980; cases involving \$6.8 million of the \$7.1 million were still pending. Recently, a few narcotics cases have included derivative proceeds pursuant to the new provisions of 21 U.S.C. 881. Currently, three cases involving \$1.4 million of derivative proceeds seizures are pending. However, as of March 1981, no forfeitures of derivative proceeds under this provision had been realized.

Civil statutes used to forfeit
cash and vehicles

About 90 percent of seizures related to criminal activity are made by the U.S. Customs Service and the Drug Enforcement Administration under civil forfeiture statutes. From 1976 through 1979, these two agencies seized more than \$194 million worth of property consisting mostly of vehicles and cash. However, only \$29.9 million of this property was ultimately forfeited to the U.S. Government.

Most seized property is not forfeited because

- the seized property is returned to the owner because he was an innocent third party (i.e. the vehicle was stolen or leased),
- the seized property is turned over to a bank which holds a lien against it, or
- the property is seized for a minor violation and is returned to the owner upon payment of a small fine.

Customs and DEA maintain only limited data on the disposition of seized property. In addition, disposition of civil seizures often takes several years. The data below shows the disposition of DEA and Customs seizures for 1976 through 1979.

Disposition Of Seized Property-1976-1979

	Customs (<u>note a</u>)	DEA (<u>note b</u>)	<u>TOTAL</u>
	----- (in thousands) -----		
Total value of seizures	\$172,030	\$22,019	\$194,049
Value pending disposition	18,333	14,462	32,795
Value disposed of	153,697	7,557	161,254
Value returned to owner or lien-holder	128,817	2,526	131,343
Value forfeited to Government	24,880	5,030	29,910
Percent of seized property from closed cases that was forfeited	16.2%	66.6%	18.5%

a/Represents seizures by Customs under selected civil statutes related to criminal activity most closely associated with drug trafficking. See list of statutes on page 6.

b/Represents seizures by DEA under 21 U.S.C 881.

As the chart above indicates, reporting DEA and Customs seizures without corresponding data on how much is forfeited overstates the effect the civil statutes have on the economic base of criminal organizations.

Total civil seizures by DEA under 21 U.S.C. 881 increased in fiscal year 1980 to \$31.3 million; however, total civil forfeitures for the same period were only \$5.5 million.

Limited amount taken through
fines and taxes

In addition to forfeitures, assets can also be taken through fines and Internal Revenue Service (IRS) tax assessments and penalties. Under most Federal criminal statutes convicted violators can be fined, and to the extent illegal income has not been reported, IRS can assess taxes. However, fines and taxes are not a substitute for forfeiture. There is no necessary correlation between the amounts of a fine or tax liability to the amount of ill-gotten gain. Fines are determined by the court on the basis of their punitive value and are not designed to recover illegally derived profits. Tax liability is determined on the basis of income whether derived legally or illegally and is not designed to recover illicit profits.

Violators of drug laws can be fined up to \$25,000 for trafficking or up to \$100,000 for conducting a Continuing Criminal Enterprise. Court disposition data for the past 2 years shows that about 12 percent of defendants convicted for drug violations were fined.

Narcotics Defendant Dispositions Data

	<u>7/1/77 to 6/30/78</u>	<u>7/1/78 to 6/30/79</u>
Total number of defendants convicted	5768	5064
Total number of defendants fined	655	638
Percent of defendants fined	11.4	12.6
Total amount of fines	\$9.9 million	\$4.4 million

Fines are often not collected. Although data on fine collections is very limited, several of the DEA and U.S. attorney officials we talked to cited specific instances of uncollected fines in major narcotics cases. For example, in San Diego during September 1979 key members of a major trafficking organization dealing in \$330 million worth

of amphetamines were convicted. Fines imposed on organization members totalled \$167,000. However, as of June 1980, only \$5,330 of these fines had been collected.

Similarly, although data on tax assessments and penalties imposed on narcotics violators is limited, some information on a specific IRS program directed against narcotics violators is available. In accordance with a 1976 DEA/IRS agreement, DEA provides IRS with names and background information on high-level (Class I) drug traffickers. Data for fiscal years 1978 and 1979 indicate that \$15.9 million and \$13.9 million, respectively, in additional tax and penalties were assessed individuals under this program.

CONCLUSIONS

The traditional law enforcement remedy, incarceration of drug dealers, has not made much of an impact on drug trafficking. Despite years of law enforcement efforts, the drug problem has continued.

The potential effectiveness of forfeiture in combatting the domestic drug problem cannot be projected with any degree of precision, because the statutes authorizing forfeiture remain largely unused. Although an effective forfeiture program may not be a significant factor in curtailing drug trafficking, greater use of forfeiture can provide law enforcement more opportunities to disrupt trafficking activities and diminish the disruptive effect of illegal monies on the economy.

CHAPTER 3
FORFEITURE EFFORT MUST
BE BETTER MANAGED

Even though attacking drug traffickers' finances has been a major component of the Government's drug law enforcement policy for several years, it has not been effectively integrated into DEA or U.S. attorney operations. The Department of Justice has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique. Nearly 10 years after the forfeiture statutes were enacted, the Department lacked the most rudimentary information needed to manage the forfeiture effort. No one knew how many forfeiture cases were attempted and why, the disposition of the cases, or why those attempted either failed or succeeded. Investigators and prosecutors lacked incentive and expertise to pursue forfeiture in major drug cases.

Efforts are being made to remedy the lack of forfeiture cases. The Department of Justice

- issued, in November 1980, guidance to prosecutors on the use of forfeiture statutes;
- had in process, as of March 1981, a detailed analysis of all narcotic cases processed under the RICO and CCE statutes; and
- was, as of March 1981, preparing detailed guidance to prosecutors and investigators on how to conduct financial investigations in drug cases.

In addition, DEA

- made attacking the finances of drug dealers a goal of all major trafficker investigations; and
- had, as of February 1980, started to accumulate statistics on forfeitures as a measurement of investigators' performance.

These initial efforts must be continued and implementation monitored if the Government is going to improve its forfeiture law enforcement effort.

JUSTICE MUST OVERSEE
FORFEITURE EFFORTS

For several years one of the major objectives of drug law enforcement has been to attack the finances of traffickers. The 1975 White Paper on Drug Abuse prepared for the President by the Domestic Council Drug Abuse Task Force stated that because "trafficking organizations require large sums of money to conduct their business . . . [and] are vulnerable to any action that reduces their working capital," the Government should focus on the traffickers' fiscal resources. Since that time each annual Federal Strategy for Drug Abuse and Drug Traffic Prevention has stressed the importance of concentrating on drug dealers finances. For example, the 1979 Federal Strategy stressed "the importance of attacking the financial base of drug trafficking," and said that "enforcement efforts will concentrate on the assets of known suspected drug traffickers * * *"

Despite these statements of policy, Federal drug law enforcement management paid scant attention to the task of attacking criminal assets. Neither the investigators' agency (DEA) nor the prosecutors' agency (Justice's Criminal Division) compiled data on forfeiture cases.

Through the years, all CCE and RICO prosecutions required the authorization of the Criminal Division. But not until 1980 were prosecutors required to explain the intended use or non-use of the forfeiture provisions of the statutes. Hence, before 1980, little data on forfeiture cases was gathered. The 1980 information requirement concerns the intended use of forfeiture but will not provide data on how successful forfeiture attempts were and why.

Our review of the extent to which the Government uses forfeiture to take the profit out of narcotics trafficking clearly demonstrated the lack of data necessary for managing the forfeiture effort. First, no one knew how many forfeiture cases had been attempted. To determine the number of narcotics RICO and CCE cases and those which involved forfeiture, we were required to accumulate data from a

variety of sources, including: applicable case and statutory law reference documents, Department of Justice Criminal Division files, information accumulated by DEA's Office of Enforcement, and interviews with various Justice Department officials. Second, to identify reasons for the use or non-use of criminal forfeiture we examined selected case files and interviewed various investigators and prosecutors involved in the cases.

Information on the number of forfeiture cases attempted, the disposition of the cases, and the reasons for case failure or success is essential for managing the Government's forfeiture effort and should be continually updated. For example, as noted in chapter 2, we determined that there were only 98 RICO and CCE narcotics cases from inception of the statutes in 1970 through March 1980. Of the 31 we examined in detail, only 8 had forfeiture as a goal in the investigative plan.

The reasons for the little use of forfeiture are many. As discussed in subsequent sections of this chapter, investigators and prosecutors generally lacked the incentive and expertise to pursue forfeiture, and the disclosure of financial information vital to forfeiture cases is hindered by domestic and foreign laws. And, as discussed in chapter 4, the forfeiture statutes are difficult to apply, being ambiguous in some areas or incomplete and deficient in others.

Some meaningful management data is being developed by Justice. For example, in June 1980, DEA and the Criminal Division began an in-depth analysis of all prosecuted RICO and CCE drug cases to determine how the forfeiture provisions can be more effectively used. In November 1980, the Criminal Division required prosecutors to provide the Division an explanation for those cases where forfeiture is not being pursued when they seek authorization to use RICO or CCE.

These and other actions being taken are steps in the right direction. However, Justice needs to continually evaluate the reasons for success or failure of CCE or RICO forfeiture. In addition, Justice's current procedures for evaluating the desirability of analyzing forfeiture are triggered only when a U.S. attorney wants to use the CCE or

RICO statute. Justice also needs to accumulate information to monitor whether U.S. attorneys could utilize the statutes more.

EXPERTISE AND INCENTIVES TO
INVESTIGATE AND PROSECUTE
FINANCIAL CASES MISSING

Even though attacking the assets of major narcotics organizations has been a stated objective of drug law enforcement for several years, most of the investigations we studied did not have forfeiture of the trafficker's assets as a goal. We reviewed 31 of 98 narcotics cases indicted under the RICO and CCE statutes since their enactment in 1970 through March 1980. Only eight cases had an investigative plan to identify assets for forfeiture purposes. In four of the eight cases where this was done, a forfeiture verdict was returned.

For the most part, forfeiture goals had not been established because investigators were not trained for financial investigations, particularly those involving derivative proceeds; investigators were rewarded on the basis of arrests of major violators rather than forfeiture of their assets; and prosecutors have not been given the challenge or the guidance to pursue forfeiture cases.

DEA does not have financial
experts

Most DEA agents do not have sufficient financial expertise to conduct the sophisticated financial investigations required to obtain forfeiture of derivative proceeds. Although about 200 of the 2,000 DEA agents have backgrounds in accounting or business management, DEA does not have any positions classified as financial investigator or agent/accountant. All agents, including those with financial backgrounds, are assigned to general investigative duties rather than to specialized functions. DEA officials say their limited resources do not permit such specialization. Instead of specialization, DEA relies on a short in-house training program to provide a general overview of financial investigative techniques and the cooperation of other agencies to provide specialized financial expertise.

The Financial Investigations Training course represents the principal financial training offered DEA agents. The overall objective of this course is to give special agents and supervisors a thorough understanding of DEA's primary civil statute authorizing forfeiture (21 U.S.C 881), and an introduction to RICO and CCE, the criminal forfeiture statutes. Nearly one-half of DEA's 2,000 agents received this training by the end of fiscal year 1980, with the remainder scheduled for fiscal year 1981.

Although this course is a step in the right direction, it is doubtful that it will enable agents to conduct complex investigations of sufficient scope to obtain forfeiture of significant assets, such as derivative proceeds. The course is of insufficient length to provide extensive training on complex financial analyses, particularly for agents without financial backgrounds. The course for supervisors is 5 days in length; for special agents, it is shortened to 3 days.

Considering the number of topics covered and their complexity, it is unrealistic to expect that more than an introduction to the various techniques can be covered in a week. Topics covered include: history of banking and the Federal Reserve System, 2 hours; Financial Privacy and Bank Secrecy Act, 3 hours; civil statute (21 U.S.C 881), 6 hours; RICO and CCE, 3 hours; and net worth and concealed income analysis, 8 hours.

As one DEA official explained, Financial Investigations Training is still in the "awareness" phase rather than the "how to" phase. Recognizing this, DEA management relies on other law enforcement agencies having financial investigative experience, particularly in complicated financial cases.

The use of other agencies' financial experts, particularly those from IRS, may provide needed expertise on a short-term basis but seems an unlikely long-term solution to the expertise problem. For example, an IRS/DEA memorandum of understanding provides that although the two agencies agree to share certain data on drug cases, IRS will concentrate on the tax aspects of high-level traffickers. Only on a temporary basis will IRS detail personnel to DEA for analyzing financial information other than tax-related information.

Whether or not DEA's in-house financial training and reliance on other agencies' financial experts will result in the types of significant forfeiture cases needed to make inroads on the economic base of drug trafficking organizations is uncertain. The Attorney General's budget guidelines for fiscal year 1982 said that DEA needs to enhance the financial investigative expertise of its agent force by

--the "recruitment of new agents . . . with special knowledge and skills that can be used particularly for financial investigations," and

--the training of DEA special agents in financial investigations utilizing courses sponsored by the FBI and Treasury Department.

We agree with the need for these actions.

Forfeiture data should be used
in evaluating agent performance

DEA's performance measurement system has historically been based on arrests of major violators, not forfeitures of their assets. In addition, cases involving forfeitures are complicated, time consuming, and require extensive investigative resources. As a consequence, agents have had little incentive to develop a case for forfeiture of illicitly derived assets before arresting violators.

A current effort by DEA to make forfeiture data an integral part of the performance measurement system, and thereby encourage forfeiture type investigations, is a step in the right direction. DEA officials stated, however, that although asset seizures and forfeitures may eventually approach the arrests statistics in relative importance, the latter is, and will continue to be, DEA's chief performance measurement.

DEA's asset seizure performance measurement was started in February 1980. Instructions for collection of the data state that "asset seizure" be considered in the broadest sense and include not only seizures but also other revenue producing actions which can be credited to DEA, such as the following:

- Any nondrug seizure made under the civil statute (21 U.S.C. 881) or 21 U.S.C. 848 (CCE) which DEA develops unilaterally or in conjunction with another agency.
- Any seizure made under 18 U.S.C. 1961-64 (RICO) stemming from a drug-related investigation developed by DEA either unilaterally or in conjunction with another agency.
- Any assessment or levy made by IRS on the basis of information furnished by DEA ("information" as used here may consist of an investigative lead).
- Any nondrug seizure made by U.S. Customs on the basis of information furnished by DEA.
- Any nondrug seizure made by any other Federal, State, or local agency on the basis of information furnished by DEA.
- Any nondrug seizure made by a foreign government on the basis of information furnished by DEA.
- Any forfeiture of bond as a result of a defendant becoming a fugitive in any case in which a DEA case file number has been assigned.
- Any fine imposed as a result of a conviction stemming from an investigation conducted by DEA or another agency based upon information furnished by DEA.
- Any abandoned property acquired in connection with a criminal investigation and valued in excess of \$100.

Distinctions are made in recording data for RICO, CCE, and civil (21 U.S.C. 881) cases between that which is merely seized and that which is seized and forfeited to the U.S. Government.

Although some of these categories of "seizures" include significant assets requiring considerable agent effort and expertise, many do not. DEA should recognize this difference in evaluating agents' performances and give more weight to forfeitures than to seizures of significant assets of the

type required to destroy the economic base of criminal organizations.

Additional incentives and expertise
needed for Federal prosecutors

As with investigators, prosecutors have had neither the incentive nor the expertise to attempt forfeiture of criminal assets. Forty of the 42 prosecutors we held discussions with said they were inexperienced with or unsure of the specific forfeiture procedures under the RICO and CCE statutes. Not only is forfeiture complicated, but cases brought under the RICO and CCE statutes are more difficult to prosecute in that they require proof of a pattern of crime rather than one specific criminal incident. The lack of forfeiture expertise coupled with the proof burden of RICO and CCE prosecutions explains why many U.S. attorneys have been reluctant to use the criminal forfeiture authorizations.

In an earlier report, "The Drug Enforcement Administration's CENTAC--An Effective Approach to Investigating Major Traffickers That Needs to be Expanded" (GGD-80-52, March 27, 1980), we noted that many U.S. attorneys had limited knowledge of, or had a tendency not to use, the forfeiture provisions of CCE and RICO. 1/ Eight of 10 U.S. attorneys involved in the CENTAC prosecutions reviewed advised that attempting to use the forfeiture provisions in those cases could have made them much more difficult to prosecute and may have jeopardized the conviction. Citing their scarcity of resources, two attorneys in charge of Major Drug Trafficker Prosecution Units expressed concern that attempting to obtain forfeiture would not be an efficient use of their time. The U.S. Attorney in one of the primary districts prosecuting large-scale narcotics cases explained that:

"It takes considerably more time to develop a case when you're going to attempt forfeiture of a trafficker's assets. It might be more efficient to work on another case and get an additional trafficker in jail."

1/DEA's CENTAC program is the premier effort to develop conspiracy investigations of high level narcotics violators.

Prosecutors, like investigators, have traditionally defined success in terms of convictions, not forfeitures. As a consequence, once the evidence necessary to prosecute a case has been developed, the tendency has been to proceed to indictment on a case's substantive counts rather than attempt forfeiture. Twenty-five of the 42 Federal prosecutors we held discussions with said adding forfeiture to an already complicated RICO or CCE case was not worth the effort.

Justice has attempted to solve these problems by providing increased training and guidance to prosecutors as incentives for pursuing forfeitures. Justice has stated that official Department policy is to vigorously seek forfeiture in every CCE and RICO prosecution where substantial forfeitable property exists and there is a reasonable likelihood of success. Justice has also:

- Issued general guidance in November 1980, to prosecutors on the use of forfeiture statutes.
- Presented lectures on forfeiture and the forfeiture provisions of applicable Federal statutes at conferences for narcotics prosecutors and agents.
- Published summaries of the lectures in the U.S. Attorneys' Manual and U.S. Attorney's Bulletin, both of which are distributed to all U.S. attorneys.
- Initiated a study of all CCE and drug-related RICO cases brought to indictment to, among other things, identify the strengths and weaknesses in developing forfeiture cases from inception through prosecution.
- Begun compiling a manual on how to conduct financial investigations in drug cases for detailed guidance to prosecutors and investigators.

The actions taken by the Department of Justice should, in the long run, help solve these problems and change the attitude of prosecutors concerning the pursuit of forfeitures.

Other obstacles to investigating
and prosecuting financial cases

Clearly, expertise and incentive are needed to obtain forfeiture of a drug trafficker's assets. Phony names, fictitious corporations, and foreign bank accounts are just a few of the obstacles blocking the road to forfeiture. Compounding the difficulty of the task are the foreign and U.S. laws restricting access to financial information.

Obtaining forfeiture requires investigators and prosecutors to, not only identify the potential defendant's assets, but prove a connection between the assets and the crime. Although some of the defendant's assets can be identified and traced to the crime simply through observation, other types of assets can be easily hidden by the criminal. For example:

- Real estate can be held under a fictitious name or corporation.
- Cash and precious metals can be hidden.
- Stocks and bonds may be held by nominees or in bearer form.

One of the primary methods used by criminals to hide assets is the use of offshore bank accounts to "launder" the illicitly derived profits. The investigator's problem is the bank secrecy laws of some foreign countries which prohibit the disclosure of needed bank information.

In one scenario, a courier smuggles currency from the United States to a bank in the Carribean and deposits it in a bank account of a Carribean corporation used as a front. The money is then wire-transferred to the U.S. bank account of a domestic front corporation using a false loan document that not only justifies the money transfer, but also makes it appear exempt from U.S. income taxes. This money can then be used to invest in legitimate corporations or real estate. The secrecy laws of this Carribean country prevent U.S. investigators from obtaining information on bank accounts, front corporations, or money tranfers, making it difficult to trace the illegally generated profits to the legitimate assets.

The Government has tried to breach the cover that foreign banking laws provide through agreements with foreign countries. Such Mutual Judicial Assistance Treaties provide for assistance in acquiring banking and other records, locating and taking testimony from witnesses, and serving judicial and administrative documents. One such agreement with Switzerland already exists. Another treaty with Colombia was finalized in August 1980 and is waiting ratification by the Senate, and two others (with Turkey and the Netherlands) are being negotiated. Even if treaties with these countries are successfully implemented, numerous other countries with strict bank secrecy laws are more reluctant to cooperate because of their desire to protect the lucrative offshore financial business that often is a primary basis of their local economy.

Tax Reform Act of 1976 has
limited IRS' role in drug
enforcement

The Tax Reform Act of 1976 not only limited IRS' role in drug enforcement, but it also has restricted access to tax information by law enforcement agencies. In previous congressional hearings and reports, we have outlined our position on the Tax Reform Act of 1976. 1/ We supported revisions to the Tax Reform Act of 1976 aimed at striking a proper balance between privacy concerns and law enforcement needs. We were particularly concerned that the law provided no means for IRS to disclose on its own initiative the information it obtains from taxpayers regarding the commission of nontax crimes. We recommended that the Congress authorize IRS to disclose such nontax criminal information by obtaining an ex parte court order.

1/GAO testimony before the Senate Permanent Subcommittee on Investigations, 12/13/79; GAO testimony before the Senate Appropriations Subcommittee on Treasury, Postal Service, and General Government, 4/22/80; GAO report "Disclosure and Summons Provisions of 1976 Tax Reform Act--Privacy Gains with Unknown Law Enforcement Effects," (GGD-78-110, 3/12/79); GAO report "Disclosure and Summons Provisions of 1976 Tax Reform Act--An Analysis of Proposed Legislative Changes" (GGD-80-76, June 17, 1980).

As a result of the hearings, identical bills (S.2402 and H.R. 5826) significantly revising the disclosure statute were introduced in the 96th Congress. In our June 1980 report (GGD-80-76), we said that, although we agree with the basic thrust of the proposed amendments, we believe the legislation can be further refined to authorize a more effective disclosure mechanism and to improve the balance between privacy and law enforcement concerns. Our recommended refinements include more clearly defining tax information categories and providing a court order mechanism through which IRS may unilaterally disclose information concerning nontax crimes.

Right to Financial Privacy Act of
1978 hampers law enforcement access
and use of certain financial
information

The Right to Financial Privacy Act, which became effective in March 1979, has also complicated forfeiture investigations. Among other things, the act requires that a customer be notified if his records, maintained by a financial institution, are being sought by a law enforcement agency. This provides potential defendants notice of actions the Government is planning, allowing them the time necessary to sell or conceal their assets.

In our report "Federal Agencies' Initial Problems with the Right to Financial Privacy Act of 1978" (GGD-80-54, May 29, 1980), we noted that several difficulties had occurred since the act's passage. These included:

- Controversy between some bank supervisory agencies and Federal law enforcement agencies over the interpretation of criminal referral procedures.
- Refusal by financial institutions to provide sufficient data on suspected criminal violations to law enforcement agencies.
- Refusal by financial institutions to honor the formal written requests for information by Federal law enforcement agencies.

We concluded in the report that agencies involved in implementation of the act should be given more time to work out problems before changes in the law were considered.

Currency information not being effectively used against drug traffickers

The Bank Secrecy Act passed by the Congress in 1970 furnished Federal agencies with additional tools to fight organized crime, including drug trafficking. It was felt the act's financial reporting requirements would help in investigating illicit money transactions and those persons using foreign bank accounts to conceal profits from illegal activities.

Basically, the Bank Secrecy Act regulations require three reports to be filed with the Federal agencies:

- Domestic banks and other financial institutions must report to IRS each large (more than \$10,000) and unusual transaction in any currency.
- Each person who transports or causes to transport more than \$5,000 in currency and other monetary instruments into or outside the United States must report the transaction to the U.S. Customs Service.
- Each person subject to U.S. jurisdiction must disclose interests in foreign financial accounts to the Treasury Department.

Treasury has overall responsibility for coordinating the efforts of Federal agencies and assuring compliance with the act.

Numerous problems have been identified restricting the act's effectiveness, including

- delays in implementing the act's requirements,
- slow dissemination of information,
- inconsistent compliance by banks, and
- limited analysis of reported information.

Treasury recently strengthened its regulations governing the reporting of currency transactions. However, to be useful in investigating financial transactions, these reports will have to be employed more often by criminal investigators. Of the 31 RICO and CCE cases we examined, agents used financial information available through the Bank Secrecy Act in only 4.

CONCLUSION

Statutes authorizing the forfeiture of criminal assets are 10 years old, yet the Government only recently began to use them. In 1980, the Department of Justice began various actions to encourage forfeiture cases. These initial efforts, involving both investigators and prosecutors, must be supplemented and implementation monitored if forfeiture cases are to increase.

RECOMMENDATION TO THE ATTORNEY GENERAL

We recommend that the Attorney General direct Justice's Criminal Division to analyze on a continuing basis the extent forfeiture statutes are used and the reasons for their success or failure. When problems restricting forfeiture use are identified, the Criminal Division should propose solutions, whether or not they involve administrative or legislative action.

CHAPTER 4

EMERGING RICO AND CCE CASE LAW

SUGGEST LEGISLATIVE ACTION WARRANTED

The Judiciary's views on the RICO and CCE forfeiture authorizations are only now emerging through case law. Several court decisions forebode problems and suggest that the Congress needs to strengthen the criminal forfeiture statutes. Four problems have been identified:

- The scope of the forfeiture authorizations has been narrowly defined.
- Forfeiture under RICO has been limited by some courts to interests in legal enterprises or has been construed so as not to include "profits."
- The extent to which assets must be traced to the crime of conviction is unclear.
- Transfer of assets prior to conviction limits the effectiveness of forfeiture.

In addition, the procedures necessary to accomplish a forfeiture have not been clearly defined. The Attorney General should evaluate the workability of current procedures and take the appropriate steps to affect any necessary revisions.

SCOPE OF FORFEITURE AUTHORIZATIONS NOT CLEARLY DEFINED

The scope of the RICO and CCE forfeiture authorizations were defined in general terms by the applicable statutes. The courts, in some cases, have construed the forfeiture authorizations narrowly. There also is a lack of consensus on what assets are forfeitable under present law.

The CCE authorization speaks in terms of forfeiture of, among other things, "profits"--a term commonly defined as the proceeds of a transaction less its cost. Since CCE

does not explicitly define "profit," questions have been raised whether costs, such as the cost of narcotics to the dealer, are "profits," and hence forfeitable in criminal litigation. ^{1/} RICO, on the other hand, speaks only in terms of forfeiting "interests" in an enterprise. Several courts have questioned whether profits generated by a RICO violation qualify as an interest in an enterprise, thus subjecting them to forfeiture.

For example, in a case in Los Angeles, the Government brought RICO indictments against several defendants for fraud, bribery, and racketeering in connection with a scheme to rig competitive bids involving \$8.8 million in contracts. The Government had sought forfeiture of the amounts payable to the defendants for the contracts. In January 1980, the Ninth Circuit Court of Appeals ruled that this amount was not forfeitable because it represented profits from the enterprise, not interests in the enterprise. The court ruled that unlike CCE, RICO does not provide explicit coverage of profits. Because CCE and RICO were passed by the same Congress the court said "had Congress intended forfeiture of racketeering income [profits], we believe it would have expressly so provided." ^{2/}

In addition to the case in the Ninth Circuit, decisions of courts in the Second, Third, Fourth, and Fifth Circuits indicate that assets forfeitable under RICO extend only to actual holdings of the defendant in corporate-like entities (e.g., partnership interest, union office held by defendant, stock, debt, or claim ownership). ^{3/} As a general proposition, so-called fruits--profits or distributed returns on investments--are not forfeitable under this view. Dividends or profits obtained by a criminal

^{1/}United States v. Mannino, 79 Cr. 744 (S.D.N.Y. 1980).

^{2/}United States v. Marubini, 611 F.2d 763 (9th Cir. 1980).

^{3/}United States v. Thevis, 474 F. Supp. 134 (N.D.Ga. 1979);
United States v. Mannino, 79 Cr. 744 (S.D.N.Y. 1980);
United States v. Meyers, 432 F. Supp. 456, 461 (W.D.Pa. 1971); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977); United States v. Grande, 620 F.2d 1026 (4th Cir. 1980).

and nonstock assets acquired by the criminal with the profits or dividends would therefore be immune from forfeiture, as would cash received on the sale of the interest in the enterprise.

The analytical basis for these decisions is that: (1) RICO, unlike CCE, does not provide explicit coverage of profits, and (2) the "interests" forfeitable under RICO are limited strictly to the defendant's interests in an enterprise. ^{1/} These decisions thus reject the notion that all assets traceable to an ill-gotten gain are forfeitable under RICO. Courts holding this view, point to RICO's legislative history to show that forfeiture, together with a combination of other criminal and civil sanctions, was designed to rid commercial enterprises of organized crime. When, for example, a racketeer receives cash in exchange for his interest in an enterprise (e.g., cash in exchange for stock or other proprietary holding), the interest in the enterprise ceases to exist, and forfeiture can no longer serve a useful purpose within the framework of RICO's legislative scheme.

Reasoning that retention of ill-gotten gain provides the racketeer with a source of potential control or influence over an enterprise, the Justice Department has argued, to date unsuccessfully, that all interests acquired in violation of RICO are forfeitable, regardless of whether the assets involved are technically interests in an enterprise or interests derived from that enterprise.

LIMITATIONS ON INDIVIDUALS ASSOCIATED IN FACT

A related point of controversy is whether RICO can reach any of a defendant's ill-gotten gains when a de facto combination of individuals constitutes the only enterprise through which the defendant engages in racketeering activity. RICO covers forfeiture of interests in the enterprise, but a de facto enterprise lacks the attributes of

^{1/}United States v. Marubini, 611 F.2d 763 (9th Cir. 1980).

a corporate entity, and hence is not capable of owning, purchasing, holding, or transferring any property in its own right.

This raises the very troublesome issue of whether there exists any interest in a de facto enterprise which can be forfeited under RICO. If there is not, the assets of individuals informally associated to engage in narcotics trafficking or other illicit activity would be exempt from forfeiture under RICO.

Aside from coverage of the forfeiture remedy in this area, there is the more fundamental and perplexing question of whether RICO authorizes the prosecution of individuals associated in fact to engage in exclusively illegal activity unrelated to a legitimate business enterprise. To the extent RICO does not cover de facto enterprises, forfeiture clearly is not an available remedy.

In a 1980 decision, the U.S. Court of Appeals in the First Circuit said such informal de facto enterprises were not covered by the RICO statute. ^{1/} In this case the evidence established the existence of an informal criminal association which engaged in several kinds of activities including: stealing and illegally selling licit drugs, facilitating insurance frauds by arson, and bribing police officers. On appeal, the First Circuit reversed the primary defendant's RICO conviction, holding that RICO does not apply to wholly illegal enterprises such as the criminal association charged in the case. It concluded that if the Congress had intended to include "criminal enterprises" within the statute's coverage it would expressly have done so.

On the other hand, the U.S. Fifth Court of Appeals in 1978 ruled that RICO does cover an "informal de facto association." ^{2/} The case involved defendants who conducted a conspiracy engaging in such criminal activities as theft, fencing stolen property, and narcotics distribution.

^{1/}United States v. Turkette, Crim. No. 79-1545 (1st Cir. decided Sept. 23, 1980).

^{2/}United States v. Elliot, 571 F.2d 880 (5th Cir. 1978).

As of December 1980, 10 of the 11 U.S. Court of Appeals have ruled on whether the RICO statute covers de facto enterprises: generally, 2 have said no and 8 have said yes.

Questions surrounding RICO's applicability to de facto enterprises and the forfeitable status of a defendant's interest in those enterprises are of special significance in narcotics cases, in which many assets could be considered part of the de facto drug enterprise.

EXTENT OF TRACING REQUIRED FOR FORFEITURE IS UNCLEAR

A third problem area is that confusion exists about the degree to which assets must be followed to their illicit origin to be forfeited. Unlike common law forfeiture of estate, RICO requires a nexus other than mere ownership between the defendant's misconduct and the property to be forfeited.

If the forfeitable property represents immediate cash proceeds seized at the scene of an illicit transaction, there is little difficulty in showing its origin. Also, where the medium of exchange in a drug transaction is cash, and the cash is later commingled with other cash assets, some authorities believe the Government could obtain a cash forfeiture under CCE simply by showing that the defendant's net worth was swollen as a result of the trafficking.

For forfeiture of noncash assets, however, serious asset identification problems may arise if the property subject to forfeiture has changed hands in multiple transfers, changed form, or both. This is so because RICO and CCE require a relationship between the property to be forfeited and the offense of conviction. As both a legal and practical matter, this imposes an obligation on the prosecution to show, through asset identification and tracing, that the property to be forfeited was itself purchased, acquired, or maintained with illicitly derived funds.

Although RICO and CCE provide almost no guidance on the amount of tracing required to sustain a criminal forfeiture, the Justice Department is of the view that because

forfeiture under both statutes is a criminal sanction, the tie between the property and the wrong-doing must be proven beyond a reasonable doubt. For cases involving carefully hidden or laundered assets, application of the "beyond a reasonable doubt" standard would suggest that a net worth analysis would be insufficient to sustain a forfeiture, and a much more thorough and comprehensive financial investigation would be essential.

PRECONVICTION TRANSFER OF ILL-
GOTTEN GAINS LIMITS FORFEITURE

A fourth problem area deals with the uncertain status of assets that would otherwise be subject to forfeiture but which, for any of a variety of reasons, are transferred before forfeiture can be accomplished.

These transfers may occur in three basic ways. One is for the property to be transferred to a third party, with or without consideration. The difficulty with transfers of this type is that a criminal trial under RICO and CCE determines the guilt or innocence of the defendant and, by implication, the defendant's rights in the property. Once the property is transferred, there are serious conceptual and legal difficulties in requiring the defendant to forfeit property he no longer has or, alternatively, in requiring third parties to forfeit property without a trial. A second type of transfer occurs when a defendant places ill-gotten gains in foreign depositories beyond the jurisdiction of the United States, yet retains so-called "clean" money in domestic depositories and domestic investments. Neither RICO nor CCE make explicit provision for forfeiture of clean assets in substitution for illicit assets, the latter being beyond the reach of the United States. Yet a third type of transfer is for a lien to be filed against the property by, for example, the defendant's attorneys. After defense counsel's fees are deducted, the remainder of the property is forfeited to the government.

Transfer of assets by narcotics violators in a case in South Florida limited the amount of forfeitures. In this case, a Florida-based organization imported over one million pounds of Colombia marijuana and grossed about \$300 million over a 16-month period. Forfeiture was

attempted on several items, including two residences worth \$750,000. However, a \$559,000 lien was filed against the property to pay for the defendant's counsel, and \$175,000 was returned to the unindicted wife of a defendant as joint owner of one of the residences. After these liens were paid, the Government ended up with only \$16,000. Although the court in this case agreed that forfeited assets could be used to pay the defendant's attorney, other courts have ruled to the contrary. 1/

Preconviction transfers of assets raise two fundamental legal questions. The first is whether the Government may seek forfeiture of "clean" assets once a transfer has occurred. The second is whether transferred assets in the hands of a third party are forfeitable. There is very little case law on either issue.

RICO and CCE clearly require a connection between the property to be forfeited and the offense for which the defendant is convicted. Neither statute contains language, expressly or by clear implication, that authorizes the substitution of so-called clean assets. This accounts for the Department's view that remedial legislation would be a necessary precondition to a successful substitute assets forfeiture.

The legal status of assets in the possession of a transferee is considerably more confused. Justice argued in one case that property becomes tainted at the moment it is connected with or generated by illegal activity. Reasoning that RICO and CCE direct the Attorney General to make "due provision for the rights of innocent persons," Justice suggests that a third party transferee's recourse is to petition the Justice Department for mitigation/remission after he has forfeited his assets. This theory was rejected in United States v. Thevis, 474 F. Supp. 134, 145 (N.D.Ga. 1979), at least as it might apply to unindicted transferees who receive the property prior to indictment of the defendant. The result in a second case, United States v. Mannino, 79 Cr.

1/United States v. Bello, 470 F.Supp. 723 (S.D.Ca. 1979).