ANALYSIS OF H.R. 1795 (THE "DUE PROCESS ACT")

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Overview

H.R. 1795 (the "Due Process Act of 2017") was introduced on March 29, 2017 by Rep. Sensenbrenner with a number of co-sponsors. It purports to respond to media reports of abuse of the civil forfeiture laws by state and local police departments by making changes to the federal forfeiture laws. In large part, the changes would increase the procedural and legal burdens on the Government to make it more difficult for the Government to prevail in civil forfeiture cases under federal law.

The assumption underlying H.R. 1795 is that because state and local seizures are often adopted by federal law enforcement agencies for forfeiture under federal law, the way to address the reported abuses is to amend the federal forfeiture statutes. The provisions of H.R. 1795 are not limited, however, to cases brought by state and local police departments that are processed under federal law. To the contrary, the changes envisioned by the bill would apply across the board to all federal civil forfeiture cases, including cases involving international money laundering and terrorism, kleptocracy, major frauds against governments and private victims, human and wildlife trafficking, the preservation of cultural property, and a host of other cases in which civil forfeiture is the only tool available to recover the proceeds of serious domestic and foreign crimes.

A list of cases illustrating the scope of federal civil forfeiture actions and the reasons why such cases must be brought civilly and not criminally appear in the two appendices to this analysis. In short, cases adopted by federal law enforcement agencies from state and local police departments – the cases that have generated virtually all of the criticism of the civil forfeiture laws – constitute a small part of use of the civil forfeiture laws. As illustrated by the examples given in the appendices, those laws are routinely used to recover cultural artifacts, interrupt the flow of money to sanctioned countries, recover fraud proceeds for the benefit of victims, protect endangered species, recover property used to launder the proceeds of Russian organized crime or money stolen by foreign dictators, and staunch the flow of assets to international terrorists.

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Moreover, for a variety of reasons, the Government has no choice but to bring those cases as civil forfeiture actions. Criminal forfeitures require a criminal conviction, and no conviction is possible if the perpetrator is a fugitive, a foreign national resistant to extradition, or simply unknown – an anonymous person hiding behind the secrecy provided by foreign bank secrecy laws or the use of shell corporations formed in jurisdictions that protect the identity of the beneficial owners. Nor is a conviction possible if the crime occurred overseas, even if the proceeds of that crime are located in the US.

The changes made by H.R.1795, however well-intentioned when viewed as a response to alleged abuses by state and local police departments in adoptive forfeiture cases, would have a devastating effect on the Government's ability to use civil forfeiture in a vast array of serious domestic and international cases in which civil forfeiture is the only viable remedy. In short, the bill suffers from an enormous "baby and bathwater" problem, severely limiting if not destroying the Government's most effective tool against international money laundering and drug trafficking and other serious financial crimes in the name of addressing a narrow problem involving state and local law enforcement. A better approach would be to focus on the problem at hand – the adoption of state and local seizures for forfeiture under federal law – and not to reduce the effectiveness of the law in cases that have not aroused any criticism or cry for reform, but instead demand the most robust application of the laws designed to recover the proceeds of crime and to protect the integrity of our financial institutions.

The following analysis discusses the most problematic provisions of H.R. 1795 in detail, followed by a more limited discussion of a few of the other provisions that would be detrimental to the interests of victims, law enforcement, taxpayers and others while primarily serving the interests of criminal defense attorneys.

The Burden of Proof

Section 4 of H.R. 1795 would raise the burden of proof in all civil forfeiture cases from "preponderance of the evidence" to "clear and convincing evidence."[2]

[2] Historically, the burden on the Government in civil forfeiture cases was to establish probable cause to believe that the property was subject to forfeiture. The burden then shifted to the property owner to prove by a preponderance of the evidence that it was not. The principal reform in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) was to place the burden of proof on the Government by a preponderance of the evidence, thus conforming the burden in civil forfeiture cases to the burden on the Government in virtually all other civil enforcement actions including false claims, civil RICO, and civil money laundering.

The change would make it extremely difficult if not virtually impossible for the Government to prevail in international money laundering cases filed as civil forfeiture actions.

In every civil forfeiture case, the Government must prove two things: that a crime occurred and that the property to be forfeited is traceable to that crime. In cases based on violations of foreign law – such as Russian organized crime, or the theft of money by foreign kleptocrats – proof of the foreign crime, which depends on foreign evidence and foreign witnesses – is already difficult under the preponderance standard. Raising the threshold to "clear and convincing evidence" – a standard applied in only the most extraordinary circumstances in federal law – would force the Government to abandon many such cases, even though the proceeds of the crime were found in the US.

What is more, the tracing of the proceeds of the crime through the financial labyrinth typically employed in international money laundering cases would not be possible under the higher standard. Indeed, raising the burden of proof on the tracing requirement might be the greatest gift that the United States could convey to the foreign oligarchs, drug dealers, fraudsters and terrorist financiers who exploit our financial system for their personal gain or political objectives.

A few recent cases illustrate the problem. In *United States v. Prevezon Holdings, Ltd.*, 251 F. Supp.3d 684 (S.D.N.Y. 2017), the Government filed a civil forfeiture action to recover a portion of the proceeds of $230 million stolen by Russian criminals and laundered in the United States through what the court called "a Byzantine web of conduit accounts" and ultimately used to purchase apartments in Manhattan.

In *United States v. $70,990,605,* 2017 WL 573499 (D.D.C. Feb. 13, 2017), the Government used civil forfeiture to attempt to recover more than $70 million in Government money paid to a contractor who was supposed to provide transportation for military supplies in Afghanistan but did not do so, and who laundered the proceeds of his crime through bank accounts in the Middle East.

In *United States v. $1,879,991.64 Previously Contained in Sberbank of Russia's Interbank or Correspondent Bank Account,* 2017 WL 396542 (D.N.J. Jan. 30, 2017), the Government filed a civil forfeiture action to recover $1.8 million derived from the exportation of restricted items to Russian purchasers in violation of sanctions imposed under the International Emergency Economic Powers Act (IEEPA) and with laundering the proceeds through shell companies.

And in *United States v. All Assets Held at Bank Julius Baer & Co.*, 251 F. Supp.3d 82 (D.D.C. 2017), the Government brought a civil forfeiture action to

recover over $250 million stolen by former Ukrainian Prime Minister Pavel Lazarenko, laundered through financial institutions in the US, and deposited in bank accounts in Guernsey, Liechtenstein, Lithuania, Switzerland and Antigua and Barbuda.

In all of these cases and countless others where a criminal prosecution is an impossibility given the status of the perpetrators– *e.g.*, the theft of billions of dollars in Nigeria by Gen. Abacha and laundering in the United States,[3] the alleged theft of nearly $1.7 billion obtained from corruption involving the Malaysian Sovereign Wealth Fund,[4] and the recent forfeiture of 650 Park Avenue, a New York skyscraper which a jury found was owned by a shell corporation on behalf of Iran and involved in money laundering[5] – cases in which the criminal proceeds bounce like a pinball through a maze of shell corporations and bank accounts in secrecy jurisdictions while being commingled with funds from other sources, the raising of the burden of proof contemplated by H.R. 1795 would be the death knell for the Government's efforts to prevent our financial institutions from being used as the repositories for the world's corrupt proceeds or the vehicles for their concealment. It is not an overstatement to say that the government likely would not even have filed the three cases referenced above were the burden of proof raised because of the already formidable burden of proving civil forfeiture under the current preponderance standard when corrupt individuals and governments have the assistance of complicit bankers, lawyers and escrow agents.[6]

Making criminal proceeds difficult to trace is what money launderers do. Raising the burden of proof on the tracing issue would simply reward them for

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[3] https://www.justice.gov/opa/pr/us-forfeits-over-480-million-stolen-former-nigerian-dictator-largest-forfeiture-ever-obtained

[4] https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign

[5] https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-historic-jury-verdict-finding-forfeiture-midtown

[6] The Senate Permanent Subcommittee on Investigations issued a report in 2010 entitled "Keeping Foreign Corruption out of the United States." The report examined "how politically powerful foreign officials, their relatives, and close associates – referred to in international agreements as Politically Exposed Persons (PEPs) – have used the services of U.S. professionals and financial institutions to bring large amounts of suspect funds into the United States to advance their interests." http://www.hsgac.senate.gov/download/psi-staff-report-keeping-foreign-corruption-out-of-the-us. Civil forfeiture, as utilized in the cases cited above, is currently the only mechanisms to address this type of corruption.

doing it well, and make the United States an even more attractive safe haven for international criminals, corrupt officials and terrorists to hide their assets.

In a recent press release accompanying the introduction of a bill entitled the Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2017, Sens. Grassley and Feinstein observed that "going after the profits of crime that are also used to fuel [the] diabolical enterprises" of terrorist organizations, drug cartels and other criminals is an effective way of disrupting these organizations and preventing crime and terrorism.[7] Federal law enforcement professionals would unanimously agree. But raising the burden of proof in such cases would have precisely the opposite of the desired effect, turning the US into a jurisdiction where the world's criminal proceeds could be laundered with impunity.

The Innocent Owner Defense

Section 9 of H.R. 1795 would fundamentally change the nature of the innocent owner defense. Instead of requiring third parties to establish their innocent ownership as an affirmative defense after the Government has established that the property is subject to forfeiture, the bill would to place the burden on the Government to *disprove* the innocent owner defense by clear and convincing evidence as part of the Government's case in chief. The change would be a windfall to criminals who hide their ownership of property behind nominees and shell corporations, and to persons who acquire criminal proceeds through the black market.[8]

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[7] https://www.grassley.senate.gov/news/news-releases/money-laundering-bill-targets-terrorists-tax-evaders-cartels-crooks

[8] Historically, there was no innocent owner defense to civil forfeiture. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974), Justice Brennan suggested that perhaps there should be protection for an owner who showed that he took all reasonable steps to prevent the illegal use of his property. But in *Bennis v. Michigan*, 516 U.S. 442, 446 (1996), the Supreme Court held that the innocent owner defense is not required by the Due Process Clause of the Fifth Amendment, and that therefore there is no such defense unless Congress enacts one.

In response to *Bennis*, Congress chose to codify Justice Brennan's suggestion and enacted a uniform innocent owner defense as one of the key reforms in the Civil Forfeiture Reform Act of 2000 (CAFRA). Under that provision, once the Government establishes that a crime was committed and that the property was derived from or was used to commit that crime, the burden shifts to the claimant to establish, as an affirmative defense, that he was the owner of the property and that he either did not know that it was being used to commit a crime or that he acquired it as a bona fide purchaser for value. 18 U.S.C. § 983(d). *United States v. Ferro,* 681 F.3d 1105, 1109 (9th Cir. 2012); *United States v. 15 Bosworth Street*, 236 F.3d 50, 55-56 (1st Cir. 2001).

Because civil forfeiture cases are *in* rem proceedings in which anyone with knowledge of the case may seek to intervene, there is a constant danger that third parties with no true interest in the property will attempt to contest the forfeiture by falsely asserting that the property belongs to them instead of to the wrongdoer. Indeed, criminals who have no hope of establishing an innocent owner defense themselves frequently call upon third parties – including spouses, parents, girlfriends and adult children – to lay claim to property even though they have no true interest in it.

Accordingly, the first element of the innocent owner defense is ownership: to establish the defense, the claimant must show that he is the owner of the property (as that term is defined in 18 U.S.C. § 983(d)(6)) and not merely a nominee or straw owner. Indeed, there are legions of cases in which a claim was filed by a relative or associate of the wrongdoer and the key issue was whether that person was really the owner of the property.

For example, in *United States v. 2009 Dodge Challenger,* 2015 WL 6829084 (D. Neb. Nov. 5, 2015), police officers obtained a search warrant for a drug dealer's residence and found $31,000 in cash, 17 pounds of marijuana and a firearm. In the garage, they found another 50 pounds of marijuana in the trunk of a 2009 Dodge Challenger registered to the drug dealer's grandmother, who resided elsewhere. Also in the car were accounting records listing names and dollar amounts (documents known as "owe-sheets").

When the drug dealer was convicted in state court of an unrelated robbery, the Government filed a federal civil forfeiture action against the Challenger, alleging that it was used to commit a drug offense. Given the facts of the case, the Government had no difficulty in proving that the vehicle was subject to forfeiture; but the grandmother filed a claim asserting that the vehicle belonged to her and that she was an innocent owner.

The case went to trial with the outcome turning on whether the grandmother, as the party bearing the burden of proof, could show that that she exercised dominion and control over the vehicle and was not merely a nominee. The court found that she did not carry her burden, noting among other things that she did not keep the vehicle at her residence and did not have a plausible explanation for having the vehicle titled in her name. *See also United States v. Carrell*, 252 F.3d 1193, 1204-05 (11th Cir. 2001) (innocent owner claim fails if claimant cannot prove that he and his mother, whose names were on the title to property purchased by drug-dealer father, were other than straw owners); *United States v. 2007 Honda Civic EX Sedan,* 2014 WL 4211203 (W.D. Wis. Aug. 25, 2014) (mother of wrongdoer was only a nominee); *United States v. $2,106.00*

More or Less, 2014 WL 29610, *3 (W.D. Tex. Jan. 3, 2014) (rejecting claim of drug dealer's daughter who could not show that she exercised dominion and control over the defendant property). In contrast, under the innocent owner defense proposed by H.R. 1795, the grandmother would have been far more likely to prevail: simply by asserting that she owned the car, she would have forced the government to prove the negative – *i.e.,* that she did not really own the car even though her name was on the title.

It is critical to the outcome of such cases that the burden of establishing ownership of the property be on the third party who is attempting to intervene and establish an innocent owner defense after the Government has established that the property is subject to forfeiture. The critical evidence – who paid for the property and maintained it, who exercised control over the property on a daily basis, who was typically on the premises or who used it for routine business – is generally within the control of the claimant (and the wrongdoer), not the Government.[9] Placing the burden on the Government to prove that the third party was *not the owner* of the property when the evidence is all in the possession of the third party would give an enormous (and unnecessary) advantage to drug dealers and other criminals who conceal their ownership of their property by titling it in the names of nominees.

Moreover, many innocent owner cases involve third parties who claim that they acquired the property as bona fide purchasers for value. If property has been stolen from its rightful owner – be it a person's wedding ring or a painting stolen by the Nazis from a Jewish family during the Holocaust that shows up in a New York auction house – the Government should be able to use the forfeiture laws to recover it for the victim, and not have to return it to a third party who claims to be a BFP unless the third party is able to show that he gave fair market value for the property and was without reason to know that it was subject to forfeiture when he did so. The reverse situation contemplated by H.R. 1795, where the Government would have the burden of showing that the third party *did not* give fair market value, would be an underserved boon to third parties at the expenses of the victims of the crime. *See United States v. Eighteenth Century Peruvian Oil on Canvas,* 597 F. Supp.2d 618, 625 (E.D. Va. 2009) (rejecting claim of art dealer to paintings stolen from churches in Peru and Bolivia); *United States v. 5910 South Ogden Court,* 2012 WL 6634793 (D. Col. Dec. 20, 2012)

[9] Courts have repeatedly held that such burden shifting, where one party has superior access to evidence, is compatible with due process. *See United States v. One Parcel...194 Quaker Farms Road*, 85 F.3d 985, 989 (2d Cir. 1996); *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984, 994 (E.D.N.Y. 1992) (citing cases), *aff'd sub nom., United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

(drug dealer's wife, who obtains her interest in his property by quit-claim deed for no consideration after it was purchased with drug proceeds, is not a bona fide purchaser for value); *United States v. 1309 Fourth Street,* 2015 WL 670572 (D. Or. Feb. 17, 2015) (rejecting claim by deceased drug dealer's sister that she purchased the property where he sold drugs in an arm's-length transaction for fair market value).

Most important, the claimant's ability to establish a bona fide purchaser defense is the key issue in Black Market Peso Exchange and other international money laundering cases in which the claimant alleges that he had no idea that he was getting paid with drug proceeds when he exported goods from the United States to Mexico or South America, or that he was acquiring drug proceeds when he purchased black market dollars to pay for goods coming from the US. *See United States v. $77,670.00 Previously Contained in Bank of America Account,* 2014 WL 1669929 (D.N.J. Apr. 28, 2014) (jewelry exporter based in Los Angeles paid by third parties who deposited drug proceeds in amounts under $10,000 into his bank account at locations throughout the US)*; United States v. Cuartes*, 155 F. Supp. 2d 1338, 1344 (S.D. Fla. 2001) (Colombian businessman purchasing drug dollars from a broker without concern for the source of the money). Putting the burden of proof on the Government in such cases would put most Black Market Peso Exchange cases beyond the reach of law enforcement.

Appointment of Counsel

Under current law, the claimant in a civil forfeiture case is entitled to the appointment of counsel at Government expense if the property subject to forfeiture is his residence, and he cannot afford to pay for counsel out of his own funds. 18 U.S.C. § 983(b). Section 3 of H.R. 1795 would vastly expand the right to counsel to apply in *all* civil forfeiture cases regardless of the nature or the value of the property, and without regard to the merits of the claim. The provision is impractical and would be an enormous drain on taxpayer funds.

Civil forfeiture cases are actions *in rem* in which the property subject to forfeiture may be claimed by any person who claims to have an interest in it. Frequently, there are multiple claims to the same property.

For example, in *United States v. $73,844.00 in U.S Currency,* 2016 WL 3165626 (E.D. Mich. June 7, 2016), federal agents executing a warrant found $73,844 in a locked safe in a drug dealer's bedroom. The drug dealer contested the forfeiture of the money, asserting that most of it comprised donations from his church to be sent to Albania for charitable purposes, and that the rest comprised savings from his construction business. When the Government commenced its forfeiture action in court, however, the drug dealer's wife, parents, children, and

brother, all of whom lived in Claimant's residence, filed claims to various portions of the currency, and alleged that they kept the funds in Claimant's safe for safekeeping. If H.R. 1795 were enacted, which of those people would be entitled to the appointment of counsel at the Government's expense? The answer appears to be all of them.

In another case, *United States v. $4,224,958.57*, 379 F.3d 1146 (9th Cir. 2004) (*Boylan*), the Government filed a civil forfeiture action against $4.2 million in fraud proceeds that had been transferred by the wrongdoers to bank accounts in Liechtenstein. The Government's intent was to use the forfeiture case as a means of recovering the funds and distributing them to the 78 fraud victims on a *pro rata* basis. A minority of the victims did not like this plan, however, and filed claims seeking to recover a greater share of the fraud proceeds for themselves. Which of those people would be entitled to the appointment of counsel under H.R. 1795? Again, the answer appears to be all of them, assuming that they were determined not to be able to afford counsel on their own. Indeed, the answer would be the same in an even larger case with hundreds or thousands of potential claimant-victims.

Providing for the appointment of an attorney at Government expense for every claimant in every one of the 20,000 civil forfeiture cases commenced every year by federal law enforcement agencies would be an enormous expense even if all of the claims were non-frivolous. But H.R. 1795 would provide counsel even for frivolous claims filed by persons with no connection whatsoever to the property, or who assert claims that cannot possibly have any merit. *See, e.g., United States v. Real Property Located at 20 Kassing Drive,* 2014 WL 509358 (S.D. Ill. Feb. 10, 2014) (one of many claims filed by a federal prisoner in civil forfeiture cases to which he had no connection whatsoever); *United States v. FIE Titan Tiger Revolver,* 2016 WL 1638786 (N.D. Ohio Apr. 21, 2016) (rejecting claim of convicted felon asserting that his firearm could not be forfeited because Pope Francis had assumed command of the US military and domestic police forces, leaving the Government without authority to enforce the forfeiture laws).

There is no reason why the taxpayers should be required to provide counsel in such cases.

Other Provisions

H.R. 1795 contains numerous other provisions comprising the "wish list" of criminal defense attorneys. These included the following.

Filing Deadlines

The Civil Asset Forfeiture Reform Act (CAFRA) set out a comprehensive set of filing deadlines applicable to both the Government and private parties. The deadlines imposed on the Government reflected a well-considered balance between the Government's need to have sufficient time to evaluate the merits of a case before filing a formal forfeiture action, and the property owner's right to a speedy resolution of the case. Likewise, the deadlines imposed on claimants reflected the balance between the property owner's need for sufficient time to consider his defenses and retain counsel and the judicial system's need to manage the judicial caseload efficiently. *See United States v. $29,540.00 in U.S. Currency,* 2013 WL 783052, *5 (D. Mass. Feb. 28, 2013) (noting that strict adherence to the procedural requirements in the Supplemental Rules "play an important role in structuring forfeiture suits and ensuring that they proceed efficiently").

Section 2 of H.R. 1795 upsets this balance by shortening the deadlines imposed on the Government by as much as 50 percent, and by extending the deadlines imposed on the claimants by as much as 100 percent. Among other things, forcing the Government to commence a civil forfeiture action before it has had time to gather the evidence and determine if the case has merit is unlikely to lead to more expeditious resolution of cases. Rather, it will likely lead to more litigation as seizing agencies and prosecutors feel compelled to protect the Government's interests by commencing cases that might otherwise have been disposed of in other ways.

Authority to Extend the Deadline for "Good Cause"

Under current law, the Government is required to commence a judicial forfeiture action within 90 days of receiving a claim to the defendant property, unless the deadline is extended by the court "for good cause" or by agreement of the parties. 18 U.S.C. § 983(a)(3)(A). Courts typically grant extensions for "good cause" in extraordinary circumstances or when required by the interests of justice. For example, in *United States v. $55,140.00 in U.S. Currency*, 2005 WL 6577605 (N.D. Fla. Jan 20, 2005), the court held that the shutting down of the U.S. Attorney's Office for 2 weeks due to the effects of a hurricane constituted good cause for the extension of the 90-day deadline. *See also United States v. Funds in the Amount of Fifteen Thousand Dollars,* 2006 WL 1049663, *2 (N.D. Ill. 2006) (that there is an ongoing grand jury investigation is "good cause" for granting an extension of the 90-day deadline under section 983(a)(3)(A)); *United States v. $39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929, 932-33 (W.D. Tex. 2002) (where the Government inadvertently filed its complaint on the 91st day because of a clerical error on the date stamp, claimant suffered no prejudice, and strict enforcement of the 90-day rule would have had a "Draconian effect" on the

Government's forfeiture case, the court equitably tolled the 90-day period and deemed the complaint timely filed).

Section 2 of H.R. 1795 would take away the court's discretion to extend the deadline for "good cause;" under the bill, the only way the deadline could be extended would be with the agreement of the claimant. There is no justification whatsoever for transferring the discretion to extend a deadline to avoid an injustice from the court to one of the parties to the dispute. If the U.S. Attorney's Office is closed due to a hurricane, the court may see the extension of the deadline as a fair and appropriate response, while the claimant may see it as a fortuitous windfall. Exercising discretion in such cases is inherently a judicial authority, and should remain so.

Probable Cause Hearings

Section 2 of H.R. 1795 also provides claimants with the automatic right to post-seizure probable cause hearing in every civil forfeiture case. In cases involving sophisticated organized crime and in cases involving parallel criminal proceedings, defendants would inevitably use the right to an immediate probable cause hearing to obtain discovery in the Government's on-going investigation.

Current law balances the right of property owners to challenge the probable cause for the seizure of their property against the Government's right to avoid the premature disclosure of the evidence and witnesses in its criminal cases in several ways. Under Supplemental Rule G(8)(a), claimants in civil forfeiture cases may move to suppress evidence that was seized without probable cause. Moreover, claimants who are also defendants in parallel criminal proceedings have the right to challenge the probable cause for the Government's continued retention of their property if they show that they lack other sources of funds with which to retain their counsel of choice under the Sixth Amendment. *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001).

Claimants do not have an automatic right, however, to abuse the process by using the pre-trial seizure of property as an excuse to force the Government to reveal the details of an on-going investigation. *Cf. Kaley v. United States,* ___ U.S. ___, 134 S. Ct. 1090 (2014) (in support of its holding that the defendant has no right to a judicial redetermination of the grand jury's finding of probable cause when his property is restrained pre-trial, the Court explains that the Government should not have to choose between preserving the property and giving the defendant a "sneak preview" of its case and strategy beyond what the criminal rules or due process requires).

It does not require much imagination to see how counsel for Russian organized crime or an international money laundering operation would use the process envisioned by H.R. 1795 to delve into the details of the Government's investigation or force the Government to release the seized property to avoid the exposure of its investigative strategy and witnesses.

Recovery of Attorney's Fees

As enacted by CAFRA, current law provides that the Government must pay the attorney's fees of a claimant who prevails in a civil forfeiture proceeding. 28 U.S.C. § 2465(b). The parties, however, are permitted to compromise: in settling a civil forfeiture case, the Government and the claimant may agree that the Government will release all or part of the property in return for the claimant's agreement to waive his right to attorney's fees. Such compromises are part and parcel of civil litigation everywhere and are essential to allowing disputes to be resolved without having to go to trial.

Section 6 of H.R.1795, however, would prohibit such settlement agreements. In any case in which the Government agreed to return property without obtaining a forfeiture order, the Government would be required to pay the claimant's attorney's fees whether the claimant would have waived the fee or not. This would likely result in more trials and fewer settlements, not fewer civil forfeiture cases as the supporters of this provision apparently intend.

Moreover, the bar on settlements waiving attorney's fees would vault the interests of the defense attorney over those of his client: property owners who could have their property returned without further litigation would be forced to go to trial – and risk the forfeiture of their property – because their attorney was insisting on having the Government pay his fee.

Perhaps most important, Section 6 would require that any attorney's fee paid to a successful claimant be paid to the attorney directly and not to the claimant himself. The purpose of this provision is to prevent the government from deducting from the fee award amounts that the claimant may owe the Government under the Treasury Offset Program (TOP). *See* 31 U.S.C. 3716(a) (allowing administrative offset in a variety of contexts where a person owes a debt to the government and for other enumerated debts). For example, under current law, if a claimant owes money on a criminal fine, is in arrears on his taxes, has not repaid his student loan, or owes money to a former spouse for child support, such debts may be deducted before the Government reimburses the claimant for his attorney's fees. *See Astrue v. Ratliff,* 560 U.S. 586, 597 (2010) (an attorney's fee award belongs to the prevailing party, not the attorney; therefore the Government may use the TOP to take an offset against the fee

award to satisfy a debt to the Government); *United States v. $186,416.00 in U.S. Currency,* 642 F.3d 753 (9th Cir. 2011) (following *Ratliff*; the fee belongs to the claimant, not the attorney; therefore the Government may offset the fee to satisfy a debt owed to the Government if there is such a debt); *United States v. Kim,* 797 F.3d 696 (9th Cir. 2015) (the Anti-Assignment Act prevents a person with a claim against the Government for attorney's fees under CAFRA from assigning that claim to his attorney as a means of frustrating the Government's right to file a tax lien on the award payment). *Cf. United States v. Bailey,* 775 F.3d 980, 981 (8th Cir. 2014) (property Government failed to forfeit in a criminal case may be held to offset deadbeat dad's outstanding child support debt); *United States v. $37,000 in U.S. Currency*, 117 F. Supp.3d 1064 (S.D. Ind. 2015) (same; after offset for delinquent child support, claimant recovers only $1).

Under H.R. 1795, however, the right of the defense attorney to be paid would trump the rights of all other creditors, including the former spouse and her children. There is no justification for such a rule.

Proportionality

In 1993, the Supreme Court recognized that a civil forfeiture could, in some circumstances, offend the Excessive Fines Clause of the Eighth Amendment to the Constitution. *Austin v. United States*, 509 U.S. 602 (1993). Congress codified this standard as part of CAFRA at 18 U.S.C. § 983(g). A robust body of case law has developed to inform courts on when a forfeiture is excessive, permitting a court to ameliorate the sanction.

Section 10 of H.R. 1795 would create a far more expansive list of considerations which would allow a court to nullify a jury determination as to forfeiture. Section 10 adds numerous considerations which are not constitutionally required and are bound to induce confusion in the application of the constitutional standard – particularly as to those factors which courts have previously ruled should not be considered. This promises only to yield fodder for prolonged litigation and inconsistent results among the courts. Most importantly, it would allow criminals and their families to recover property at the expense of crime victims.

Under this provision, a court could reduce or completely eliminate a forfeiture upon concluding that such diminution of forfeiture was appropriate based on "the claimant's financial condition." Even if 1) the government has proven that property is the proceeds or instrumentality of a crime; 2) that the claimant himself knew or should have known the property was being used to commit the offense; and 3) that the forfeiture is not constitutionally disproportionate to the crime, the court could nonetheless conclude that "the

claimant's financial condition" allows the claimant to keep the ill-gotten gain or the means of facilitating the crime for himself. The victims of the crime giving rise to the forfeiture would not be compensated, and the government would be required to pay attorney's fees because the claimant had prevailed in obtaining return of property which the jury had concluded was the proceeds of crime.

The mere possibility that a jury determination in favor of forfeiture could be rendered meaningless by a court's decision based on the claimant's financial condition, or any of the other factors listed in Section 10, would weigh heavily against many prosecutors bringing a civil forfeiture action, regardless of the strength of the evidence. The winners under this provision would be the criminals and their family members who file claims in a civil forfeiture proceeding and have nothing to lose by doing so. The losers would be crime victims who would be victimized a second time.

Conclusion

The enactment of H.R. 1795 would eviscerate what is often the Government's only tool for combating international money laundering and serious organized crime and for recovering property for the benefit of victims. Measures intended to address alleged abuses of civil forfeiture by state and local law enforcement should be narrowly tailored to address that problem. H.R. 1795 does not do so.