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LECTURE: ASSET FORFEITURE IN THE UNITED STATES

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I. INTRODUCTION

I have been asked to provide an overview of the recovery of criminal assets in the United States, but first I must provide some context by answering a few questions:

How does the criminal justice system work in the United States, and how does asset recovery fit into it?

Are we talking about a federal program? A state program? Is this something that is always done in criminal court? Are there separate civil courts?

And what is the scope of the program? What types of property can be recovered? In what kinds of cases? How much money is recovered and where does it go?

Then I should talk about goals:

What is the objective of asset recovery? Is it punishment, deterrence, or something else?

And I should talk about procedure:

How does a typical case develop?

What are the roles of the investigators, prosecutors and the courts?

When would we try to recover the property as part of a criminal case, and when would we begin a separate civil (or NCB) action?

That last point will bring me to some examples of asset recovery in the international context.

Can we use asset forfeiture to recover property in the US that was derived from a foreign crime?

Can we recover property in a foreign country that was derived from a crime that occurred in the US?

Can we recover property if the defendant has fled and is now a fugitive in another country?

Can we enforce a forfeiture judgment issued by a foreign court, and can foreign courts enforce our judgments?

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Finally, I would like to discuss how we have addressed some constitutional issues that arise in asset recovery cases. For example:

Who has the burden of proof?

Is there a right to assert an innocent owner defense?

Can criminal proceeds be used to pay for a lawyer?

Does the forfeiture have to be proportional to the offense?

II. STRUCTURE OF CRIMINAL JUSTICE IN THE U.S.

Let me start with some context: how does the criminal justice system work in the United States.

We are a federal system with a national government and 50 separate state Governments. So, we have a federal criminal justice system, and 50 separate state criminal justice systems. That means that we have federal asset forfeiture laws and federal prosecutors who enforce them in federal courts, and state asset forfeiture laws with state prosecutors who enforce them in state courts.

The state laws vary from state to state in terms of how frequently they are used, what resources are devoted to them, what procedures are employed, and how much property is recovered. One big variable is the size of the state: Forfeiture under state law in a large state like California might be very different from forfeiture in a smaller state like Alaska or New Hampshire.

2.1 The federal forfeiture program

My focus, however, is on the federal system. All of the major cases –the huge drug cases, the huge fraud cases, the major public corruption cases, the international cases (including the allegation of Russian tampering in the US elections), and the cases involving the proceeds of foreign crime laundered in the US– are all federal cases. And the federal forfeiture program is very large and robust: In a typical year we recover over $2 billion in criminal assets: about half in drug cases and half in cases involving fraud, corruption and other sophisticated crimes.

I was a federal prosecutor for 30 years, specializing in money laundering and asset recovery. I worked out of the Department of Justice in Washington, which is the national headquarters of the federal asset forfeiture program, and I also worked out of two of our regional offices. The Department of Justice has 93 district or regional federal offices in the U.S. and I ended my career a few years ago as the Chief of the Money Laundering and Forfeiture Section of the federal prosecutor's office in Baltimore, MD, which is one of the 93 offices.

So, what I am talking about today is forfeiture in the US in the federal system.

2.2 Where does the money go?

Now I've said that we recover more than $2 billion per year in the federal asset forfeiture program. In some years, when there has been a recovery in a major fraud case, it is much more. I had a case many years ago in which we recovered $1.2 billion in a single case. But where does the money go?

In short, victims always come first: If there are victims, the forfeited money goes to reimburse the victims, unless the defendant has enough money to pay victims himself.

If there are no victims, or if the defendant is able to pay them himself, the money goes into an Assets Forfeiture Fund where it is used to pay for training, equipment and other law enforcement activities. In many cases, the money may be shared with state and local police departments that helped to develop the federal case. And in international cases, if there is a bilateral agreement with another country to share forfeited assets, the US will share the assets with that country.

2.3 Who investigates the cases? What court do they go to?

The US is a common law country, which means that unlike the system in civil law jurisdictions, our courts and judges take no part in the investigation and prosecution of criminal cases. The cases are investigated by law enforcement agencies and presented in court by federal prosecutors. The courts are purely arbiters, deciding what evidence is admissible, what law and procedures apply, whether the Government has proven its case, and in criminal cases, what the sentence should be.

We have no distinction between criminal and civil courts. There are civil and criminal *cases*, but not civil and criminal courts. All federal judges can and do hear both criminal and civil cases, including both criminal and civil asset recovery cases. With respect to the latter, it is the prosecutor who decides whether to bring an asset forfeiture case as part of a criminal prosecution or as a separate non-conviction-based (NCB) forfeiture action. Whichever choice is made, the case goes to the same court.

Forfeiture, in other words, is a tool of the prosecutor: The prosecutor gets to decide which tool to use; the court decides if it is being used properly, and if the Government has proven that it is entitled to recover the criminally-tainted property. I will discuss in a moment about how the prosecutor decides to recover the property criminally or in a separate NCB forfeiture action, but first, let me talk about the process: who investigates the cases?

We have many federal law enforcement agencies in the United States, and they have different areas of responsibility. For example, the FBI (the Federal Bureau of Investigation) investigates fraud and corruption cases, the IRS (the Internal Revenue Service) investigates tax and money laundering cases, the DEA (the Drug Enforcement Administration) investigates drug cases, HSI (Homeland Security Investigations) investigates smuggling cases, and so forth.

Typically, then, a case goes like this: One of the agencies opens an investigation into an alleged crime; for example, the FBI might open an investigation of a corrupt public official or a sophisticated fraud scheme. When the agency feels that the investigation has reached a certain point, the agents present it to a federal prosecutor, who may say that the case is ready to go, or may suggest additional investigation.

It is the agency's responsibility not only to investigate the crime and to gather the evidence needed to prove it, but also to locate the assets that were derived from the crime or that were used to commit it. That way, when the case is ready to go, the Government is ready to seize the assets.

If the prosecutor decides the case is ready, he or she must decide if the Government will attempt to recover the assets as part of a criminal case, or as an NCB action to recover the money without any criminal conviction. Either way, the case goes to the same federal court where the Government must prove two things: that a crime was committed, and that the property that the Government wants to recover was derived from or was used to commit that crime.

Either way, the accused –or the property owner– has the right to have these questions determined by the court or by a jury, but in the end, if the Government is successful, the court will make an order forfeiting title to the property to the United States.

There are always exceptions, of course –some cases are more complicated than others– but typically, an asset forfeiture case can be resolved in about a year.

III. WHY DO FORFEITURE

I said I would talk about what we see as the purpose of trying to recover assets: What are the goals of an asset forfeiture program, and why do we devote so much time and energy to it?

These purposes were set forth by Justice Elena Kagan for the Supreme Court in *Kaley v. United States*[1] and may be summarized as follows.

1. Punish the wrongdoer

Many criminals care more about keeping their money than they do about serving time in jail. So, to punish the defendant, the prosecutor seeks not just to put him jail, but to take away the fruits of the crime. That may mean making him pay a judgment equal to the proceeds he received, even if he has spent the money, and even if he has reimbursed the victim.[2]

2. Deter other wrongdoers

In most cases, the point of committing the crime was to make money. If the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense.[3]

1 *Kaley v. United States* (2014), forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training.

2 *United States v. Peters* (2013), the purpose of forfeiture is punishment; that is what distinguishes forfeiture from restitution and other remedial tools; restitution puts the defendant and the victim back in the position they were in before the crime occurred; forfeiture punishes the defendant by forcing him to pay the gross receipts of the crime, not just his net profit.

3 *United States v. Martin* (2011), criminal forfeiture is part of the defendant's sentence; its purpose is "to deprive criminals of the fruits of their illegal acts and deter future crimes".

3. Take away the tools of the trade and the economic resources

Asset forfeiture is also a form of incapacitation: we do not want drug dealers to keep the airplane that they used to smuggle drugs so that they can use it again. And figuring out how terrorism is financed and taking away the money before it can be used, is a critical part of the anti-terrorism effort. Most important with respect to the subject of this seminar, we do not want to allow the corrupt leaders of other countries to use the US financial system to loot their treasuries and create a nest egg to draw upon when they have to go into exile. To prevent that, the money must be confiscated.

4. Disrupt the organization

Money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the enterprise going. This gives Governments the opportunity to disrupt the organization by seizing its assets.

For example, it is harder for a drug organization to replace the money derived from selling drugs than to replace the drugs themselves. Thus, taking the money does more to interrupt the cycle than any number of buy/bust arrests. The same is true for persons engaged in wildlife trafficking: seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the poacher with the truck and the gun in Africa. Similarly, seizing money destined for sanctioned countries like North Korea and Iran disrupts their ability to evade those sanctions.

5. Get money back to the victim

Asset forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution. As one appellate court has explained, "The Government's ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim's hope of getting paid may rest on the Government's superior ability to collect and liquidate a defendant's assets" under the forfeiture laws.[4]

6. Protect the community

Recovering money from corrupt public officials gives law enforcement the opportunity to demonstrate to the population at large that wrongdoers will not be allowed to profit from their crimes, that the law treats everyone equally, and that public officials cannot act with impunity. Moreover, it ensures that the playing field is level, so that people trying to run businesses honestly do not have to compete with capital from illegal sources.

7. Recycle the money

Forfeited funds can be shared with state and local law enforcement and used to fund law enforcement programs, and some forfeited property can be put into official use or handed over to community organizations. This is the controversial is-

4 *United States v. Blackman* (2014).

sue or side of the asset recovery program, however, and must be administered with care. When law enforcement agencies are allowed to retain the property that they recovered, they may be accused of "policing for profit" instead of enforcing the law to achieve a legitimate law enforcement goal.

IV. WHAT CAN YOU FORFEIT?

So, what kinds of property are subject to forfeiture? Are we talking about money, houses, cars, boats and airplanes? Are we talking about the proceeds of the crime, or something more?

4.1 Proceeds

Generally, under federal law, the United States can recover the proceeds of the crime. That is, it can recover any property that the defendant would not have but for having committed the offense.

In most cases, what property constitutes the proceeds of the offense is fairly obvious. If the defendant sold drugs, the money he received for the drugs is the proceeds. If he robbed a bank, committed fraud, or took a bribe, the money from the bank or from the fraud victim or the bribe payment would be the proceeds. Usually that is expressed in terms of the defendant's gross receipts without any reduction for costs. The drug dealer, for example, does not get to deduct the cost of the drugs.[5]

In some cases, however, what constitutes the proceeds can be a little more difficult to answer. If a contractor obtains a contract by paying a bribe, is all the money he receives on the contract the proceeds? Or does he get credit for the cost of the work that he actually performs?[6]

That issue aside, the scope of the term "proceeds" can actually be quite broad: "proceeds" includes any property traceable to the proceeds, including any appreciation in the value of that property.7 Moreover, under the "but for" test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.[8]

5 *United States v. Peters* (2013), forfeiting defendant's profits is not punishment because it merely returns him to the economic position he occupied before he committed the offense; therefore, defendant must forfeit the gross receipts; *United States v. McHan* (1996), gross proceeds forfeitable in drug case; *United States v. Keeling* (2000), same; *United States v. Colon* (2013), same; *United States v. Heilman* (2010), same; following *McHan*. But see *United States v. Jarrett* (1998), affirming calculation that gave defendants credit for cost of heroin.

6 *See United States v. Martin* (2014), contractor who obtains a Government contract by falsely claiming eligibility for a program for disadvantaged businesses must forfeit the net profits, not the gross proceeds, of the fraudulently-obtained contracts.

7 *United States v. Betancourt* (2005), if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number.

8 *United States v. Warshak* (2010), all proceeds of defendant's business are forfeitable because the busi-

Finally, the "proceeds" of an offense may comprise not only property obtained directly by the defendant as a result of the offense, but also property retained by him or obtained by a third party who acted in concert with him. For example, if the defendant owes a debt but gets the debt reduced by paying a bribe, the amount that he saves would be the proceeds of the bribe.[9]

4.2 Facilitating Property

In the United States and other countries, property that is used to commit an offense is called "facilitating property;" in other places, it is called the "instrumentality" of the crime. Whatever it is called, the term can be very broad.

In essence, facilitating property is anything that makes the crime easier to commit or harder to detect.[10] In cases stretching back over decades, courts have upheld the forfeiture of real property, vehicles, and other personal assets as facilitating property.[11] In fact, an entire business and/or all of its assets could be forfeited as facilitating property.[12]

ness was "permeated with fraud;" but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the "fraudulent beginnings" of the entire operation; United States v. Smith (2014), following *Warshak*; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds.

9 *United States v. Torres* (2012), all that is required is a "causal nexus between the wrongdoer's possession of the property and her crime"; rent money that defendant saved or retained as a consequence of the crime is proceeds obtained "indirectly"; *United States v. Peters* (2013), because the statute makes defendant liable for property obtained "directly or indirectly," he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself; *United States v. Olguin* (2011), the provision authorizing the forfeiture of funds obtained "directly or indirectly" is the statutory basis for joint and several liability, making each defendant liable for the proceeds obtained by his co-conspirators whether or not he obtained any of the funds himself.

10 *United States v. Schifferli* (1990), dentist's office "provided an air of legitimacy and protection from outside scrutiny," and thus made the crime of writing false prescriptions less difficult to commit and "more or less free from obstruction or hindrance"; *United States v. Huber* (2005), facilitating property is anything that "makes the prohibited conduct less difficult or more or less free from hindrance"; *United States v. Rivera* (1989), defining facilitating property broadly.

11 See, *e.g.*, *United States v. Diaz* (2011), real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property; *United States v. Ortiz-Cintron* (2006), residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property; *United States v. Juluke* (2005), property is subject to forfeiture as facilitating property under § 853(a) even if only a portion of it was used to facilitate the offense; defendant's residence was forfeitable even though no drugs were found in the house because he parked his car containing heroin in the driveway and kept guns and currency in the house; *United States v. Singh* (2004), a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes "rights, privileges, interests, claims, and securities"; *United States v. Harris* (1990), under section 853(a)(2), property used to facilitate a drug offense is forfeitable in its entirety, even if only a portion of the property was used for the illegal purpose.

12 *See, e.g., United States v. $7708.78 in U.S. Currency* (2011), facilitating property is anything that makes the crime "less difficult or more or less free from obstruction or hindrance"; a pharmacy used as a

V. OVERVIEW OF FORFEITURE PROCEDURE

So, what is the procedure for doing all of this? Many countries have legislation that allows the assets to be recovered in either of two ways: as part of the defendant's sentence following his conviction for a criminal offense, or in a separate non-conviction-based ("NCB" or "civil") forfeiture proceeding. In the US, we can do both.

Criminal forfeiture is familiar to most people: if the defendant is convicted, the court orders him to forfeit the proceeds of his crime and the property that he used to commit it. In the US as in most countries, if the defendant no longer has the money –because he spent it, or hid it, or sent it overseas– the court can enter a value-based judgment, ordering him to pay a sum of money equal to what he gained from the offense.[13] (There are exceptions: Guatemala and Argentina, for example, do not allow the imposition of a value-based money judgment.)

Once the court finds that the defendant obtained proceeds from his offense, the entry of a money judgment is mandatory.[14] Moreover, in many countries, including the US, the Government can enforce that value-based judgment by forfeiting something else of equal value that the defendant owns. In the US, we call that a "substitute asset."

The forfeiture of substitute assets is also mandatory, and can include any property the defendant owns, even though it is not traceable to the offense.[15]

cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales; *United States v. Segal* (2005), if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter.

13 *United States v. Vampire Nation* (2006), expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced; *United States v. Hampton* (2013), following all other circuits and holding that forfeiture being a mandatory part of the defendant's sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment.

14 *United States v. Blackman* (2014), § 2461(c) makes criminal forfeiture mandatory in all cases; "The word 'shall' does not convey discretion... The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing... Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error."; *United States v. Newman* (2011), "When the Government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits"; id., the district court has no discretion to reduce or eliminate mandatory criminal forfeiture; overruling district court's refusal to enter money judgment.

15 *United States v. Fleet* (2007), Congress chose broad language providing that any property of the defendant may be forfeited as a substitute asset; it is not for the courts "to strike a balance between the competing interests" or to carve out exceptions to the statute; thus, defendant's residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entireties laws; *United States v. Carroll* (2003), defendant may be ordered to forfeit "every last penny" he owns as

So, to get a forfeiture judgment as part of a criminal case, the prosecutor would take the following steps:

1. include forfeiture in the indictment;

2. preserve the property pending trial;

3. include the forfeiture order at sentencing if the defendant is convicted;

4. deal with third parties in a post-conviction ancillary proceeding.

5.1 Civil forfeiture

Non-conviction-based (NCB) forfeiture may be less familiar. NCB forfeiture cases are actions against the property; in the US, the custom is to name the property as the subject of the case, which is why our NCB cases have funny names, such as *United States v. An Assortment of Firearms,* or *United States v. $17,900 in U.S. Currency.*

Naming the property as the subject of the proceeding does not mean that the property has done something wrong; civil forfeiture is simply a procedural device designed to get everyone with an interest in the property in the courtroom at the same time.[16] So, for example, if the Government seizes a sum of money, it names the money as the subject of the forfeiture case, publishes notice, and invites anyone with an interest in contesting the forfeiture of the money to come into the court to do so.

For us in the United States, this is not a new concept. It was developed in the 18th Century as a way of recovering property from pirates and slave traffickers whose vessels and cargo could be seized, but who remained outside of the jurisdiction of the US and its courts. If we seized the pirate ship and all of its cargo but we could not lay hands on the ship owner, we just brought an NCB forfeiture action against the ship and invited the pirate to come into court to oppose the action. If he refused to come, he could not be prosecuted; we have no conviction in *abstentia*, but we could recover his property.

We now use NCB forfeiture in all manner of cases, from drugs, to fraud, to corruption, to virtually every other type of crime. And to those who ask if we still use it against pirates and slave traffickers I say, we still have pirates, we just call them terrorists; and we still have slave traffickers, we just call them human traffickers, or persons involved in the sex trade.

substitute assets to satisfy a money judgment; *United States v. Alamoudi* (2006), "Section 853(p) is not discretionary… [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property".

16 *United States v. Ursery* (1996), Kennedy, J. concurring, proceedings in rem are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time; *United States v. Real Property Located at 475 Martin Lane* (2008), "*in rem* actions are generally considered proceedings against the world" in which "the court undertakes to determine all claims that anyone has to a thing in question".

The important thing to know about civil or NCB forfeiture is this: it does not require a conviction or even a criminal case, but the Government still has to prove two things: that a crime was committed, and that the property was derived from or used to commit that crime.

In the case of facilitating property, the owner of the property does not have to be the wrongdoer; someone else may have used his property to commit the crime, but the owner can assert an innocent owner defense.

So, for example, if someone uses his wife's car to commit a crime, and the wife knew all about it and let it happen, we could forfeit the car in civil case without having to charge the wife with any crime; but if she did not know that her car was being used to commit a crime, she would have an innocent owner defense.

If civil forfeiture is so wonderful, why doesn't the Government forfeit everything civilly instead of including it as part of a criminal case? Or asked differently, how does the prosecutor decide whether to bring the case criminally as part of a criminal prosecution, or separately in an NCB forfeiture action?

First, it may be a lot of extra work to do the case separately if it can be done easily if there is a criminal case – assuming the criminal case is going to move quickly. But also, NCB forfeiture has a serious limitation.

Recall the second requirement: that the Government must prove the property was derived from or used to commit the crime. Because it is an action against specific property, there are no substitute assets or value-based judgments in civil forfeiture cases. So, if the Government cannot establish the connection between the particular asset and the underlying crime, there can be no forfeiture. This can be problematic in any case, but particularly in cases involving sophisticated money laundering schemes where hiding the connection between the money and the underlying crime was the object of the entire exercise.

For those reasons, NCB forfeiture is generally reserved for cases where criminal forfeiture is not possible, where a criminal conviction would be inappropriate, or where the related criminal case is not ready to indict.

5.2 When would you use civil forfeiture?

Here is a short list of the instances in which a prosecutor in the US might elect to seek the recovery of tainted property in an NCB forfeiture action instead of as part of a criminal prosecution:

1. when the property is seized but the forfeiture is unopposed;
2. when the wrongdoer is dead or is incompetent to stand trial;
3. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States; *e.g.,* he commits a crime in the US and flees to another country leaving his money behind, or he commits a crime in another country and puts the money in the US;

4. when the statute of limitations has run on the criminal case;

5. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture; this is a frequent issue in cases where currency is carried by a courier, or when arms or money intended for terrorists is intercepted in transit;

6. when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture; this is necessary because we do not have the concept of "extended confiscation" in the US that would permit the forfeiture of the proceeds of "other crimes" once a defendant has been convicted;

7. when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court and there is no reason to prosecute him another time;

8. when there is no criminal case because the interests of justice do not require a conviction;

9. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;

10. when the defendant uses someone else's property to commit the crime and that person is not an innocent owner;

11. when the criminal case is not ready to take to trial but there is a danger that the property will disappear.

The procedure for forfeiting property in an NCB case works like this:

1. The Government seizes the property, usually with a warrant issued by a judge, and sends notice of the forfeiture action to the property owner;

2. Anyone with an interest in the property may file a claim;

3. If someone files a claim, the Government has to prove that a crime was committed and that the property was derived from or used to commit the crime;

4. If it does, the property owner has the chance to assert an innocent owner defense — *i.e.,* asserting that he did not know that his property was tainted by crime;

5. If, at the end of the day, the Government prevails, the court makes a forfeiture order conveying title to the property to the United States.

VI. CASE EXAMPLES

Very briefly, let me give some examples of cases in which the United States has used NCB forfeiture in the international context. These are cases where we used NCB forfeiture because the crime occurred in the U.S., but the defendant was in another country, or where the crime occurred in another country, but the assets were found in the United States.

In the MegaUpload case, a defendant in New Zealand used the internet to steal copyrighted intellectual property from artists and motion picture producers in the

United States. So, because the computers that the defendant accessed via the internet were in the US, the US had jurisdiction to prosecute the crime, but because the defendant was a fugitive resisting extradition, we could not recover the property through criminal forfeiture. Instead, we were able to obtain an NCB forfeiture judgment against his money and ask that it be enforced by courts in New Zealand and Hong Kong.[17]

In the Abacha case, the military ruler of Nigeria, General Abacha, stole $4 billion from his country, laundered it through the US, and attempted to hide it in bank accounts in Western Europe. Again, although the money laundering crime occurred in the US, we could not prosecute the defendant criminally, but we were able to obtain NCB forfeiture orders against the stolen property that are being enforced by other countries, including Jersey in the Channel Islands, where the property is located.[18]

In the Prevezon case, criminals in Russia stole $230 million from the Russian treasury, laundered it through banks in Eastern Europe, and used part of the money to buy real estate in New York. In that case, the crime occurred in a multitude of foreign countries and we could not identify or lay hands on the Russian criminals, but we were able to bring an NCB forfeiture action to recover the property because it was located in New York.[19]

In another case, we intercepted millions of dollars passing through US banks on its way to a Chinese company called *Dandong Zhicheng*, which was acting as a front for North Korea. The money was destined for the North Korea weapons program in violation of international sanctions. We could not prosecute either the Chinese company or the North Koreans, but we were able to bring an NCB forfeiture action to keep the money from going to North Korea.[20]

I could give many other examples involving corrupt public officials from developing countries investing in the US, cultural property stolen in other countries and found in the US, and military equipment being sent to terrorists in the Middle East, among others.[21] The point, however, is that NCB forfeiture can be used in a

17 *United States v. All Assets Listed in Attachment A (MegaUpload, Ltd.)* (2015), funds derived from theft of U.S. intellectual property on internet website managed from New Zealand.

18 *United States v. All Assets Held in Account Number 80020796* (2015), $2 billion stolen from Nigeria by Gen. Abacha, laundered through U.S. banks, and deposited in Jersey, France and the UK.

19 *United States v. Prevezon Holdings, Ltd.* (2017), timing and pattern of transactions may serve as circumstantial evidence that the money moving through a complex series of transactions is traceable to the original SUA.

20 *United States v. All Wire Transactions Involving Dandong Zhicheng Metallic Material Co.* (2017).

21 *See United States v. One Gulfstream G-V Jet Aircraft* (2013), neither principles of comity nor the Act of State Doctrine bar the United States from using its forfeiture laws to recover property purchased in the United States with the proceeds of foreign extortion, theft or embezzlement; *United States v. Eighteenth Century Peruvian Oil on Canvas* (2009), religious oil paintings imported from Peru in violation of the Conventional on Cultural Property Implementation Act are subject to forfeiture under 19 U.S.C. § 2609; *United States v. Two General Electric Aircraft Engines* (2016), civil forfeiture action against two aircraft engines being shipped to Iran in violation of US law and were intended to be delivered to a terrorist organization: the Islamic Revolutionary Guard Corps-Qods Force.

wide variety of cases, and very often, particularly in international cases, it is the only way to recover the property that was derived from or used to commit a crime.

VII. CONSTITUTIONAL ISSUES

There are many constitutional issues that arise in asset forfeiture cases and I do not have time to discuss them in detail, but there are a few issues that are worth mentioning in passing.[22]

First, the Supreme Court has held that the forfeiture must not be grossly disproportional to the gravity of the offense. So, there is a constitutional proportionality requirement.[23]

Second, the Court has held that it is *not* constitutionally necessary to provide an innocent owner defense, but our legislature has imposed one by statute.[24]

Third, while the guilt of a criminal defendant must be established beyond a reasonable doubt, the Supreme Court has held that the forfeiture of his property –in both criminal and NCB forfeiture cases– may be established by a balance of the probabilities.[25]

Finally, the Court has held that there is no constitutional right to use tainted property to fund a criminal defense. So, if the Government makes a preliminary showing that the defendant's property is tainted, he cannot use it to retain counsel, but must accept counsel appointed to represent him at Government expense.[26]

VIII. CONCLUSION

We have found asset forfeiture to be a powerful, even essential, law enforcement tool in the United States, and it is my hope that by working together and sharing our experiences with each other we can make it work all the better for all of us.

22 For a comprehensive discussion of the development of the constitutional issues involved in asset forfeiture cases see Cassella (2013), chapter 2.

23 *United States v. Bajakajian* (1998).

24 *Bennis v. Michigan* (1996), innocent property owners have no protection from civil forfeiture under the Due Process Clause; unless the legislature enacts an innocent owner defense by statute, property may be forfeited based solely on its use in the commission of an offense; 18 U.S.C. § 983(d) (providing for a statutory innocent owner defense in civil forfeiture cases).

25 *Libretti v. United States* (1995), "criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense"; *United States v. DeFries* (1997), in light of Libretti, burden of proof in RICO case is preponderance of the evidence.

26 *United States v. Monsanto* (1989), affirming pre-trial restraint of criminal proceeds with no exemption for attorney's fees.

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