

IF IT WEREN'T FOR THE FLIP SIDE—
CAN THE USA PATRIOT ACT HELP THE U.S.
PURSUE DRUG DEALERS AND TERRORISTS OVERSEAS,
WITHOUT OVERSTEPPING CONSTITUTIONAL
BOUNDARIES AT HOME?

Anne C. Pogue†

INTRODUCTION	477
I. BACKGROUND	479
II. DISCUSSION	482
A. ASSET FORFEITURE LAW PRIOR TO THE PATRIOT ACT	482
1. <i>Drug Trafficking</i>	482
2. <i>Organized Crime</i>	484
3. <i>Money Laundering</i>	485
B. EFFICACY OF THE PRE-PATRIOT ACT ASSET FORFEITURE LAWS	485
C. HOW THE PATRIOT ACT CHANGES ASSET FORFEITURE AND THE CURRENT STATE OF ASSET FORFEITURE LAW	486
D. TO WHAT CRIMES THE PATRIOT ACT FORFEITURE APPLIES	490
E. WHETHER THE PATRIOT ACT CAN OR SHOULD ACHIEVE ITS GOAL IN IMPROVING EFFICIENCY OF INTERNATIONAL ASSET FORFEITURE	492
1. <i>How the Patriot Act “Improves” Asset Forfeiture</i>	492
2. <i>Practical Problems</i>	493
3. <i>Legal/Theoretical Consequences</i>	495
CONCLUSION	498

INTRODUCTION

Most Americans do not know what asset forfeiture is, nor have even heard of the concept. Few know that there is a special Department of Justice unit devoted to developing asset forfeiture policy, there is an asset forfeiture officer or unit in every United States Attorney’s Office in the country, or that asset forfeiture is an important duty for many federal law enforcement agencies, such as the Federal Bureau of Investigation, the

† J.D., Cornell Law School, 2005; BA Hollins University, 2002.

Drug Enforcement Administration, the Bureau of Immigration Affairs (formerly known as Immigration and Naturalization Services), and the United States Marshal's Service. Information about asset forfeiture rarely trickles down to the public; to the extent that it does, the public is usually unaware of it. Each time the government seizes large amounts of money from drug dealers is one example of the early steps of asset forfeiture.

Asset forfeiture is the process by which the government seizes and takes ownership of real and personal property that an individual unlawfully obtained. Law enforcement employs this tool against individual criminals as well as organized crime syndicates. There are a number of federal statutes that govern the practice of asset forfeiture—one of the most famous is the Racketeer Influenced and Corrupt Organizations Act (RICO).¹ Asset forfeiture, thanks to RICO and other federal statutes, has become an effective tool in combating crime. However, asset forfeiture has been more difficult to apply overseas, especially against the activities of internationally-based organized crime groups.

Following the tragedy of September 11, 2001, Congress promulgated another well-known set of statutes dedicated to controlling crime. These laws were entitled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," more commonly known as the USA PATRIOT Act (Patriot Act).² The Patriot Act was designed specifically to target terrorist groups, both domestic and international, and it also contains numerous provisions relating to asset forfeiture.

One area of organized crime that has proved particularly difficult to enforce has been international organized crime, such as money laundering and drug trafficking. In considering whether the Patriot Act's asset forfeiture provisions will be more effective than the old asset forfeiture statutes to combat international organized crime, one should examine several issues. This note will first discuss the prior state of domestic and international asset forfeiture law, specifically as it applies to three main areas of international crime—drug trade, organized crime, and money laundering—and the problems and issues that arise in enforcing international asset forfeiture. Then, this note will examine how the Patriot Act changes asset forfeiture law and to which crimes the Patriot Act asset forfeiture provisions apply. Finally, this note will analyze the legal and practical problems with the new asset forfeiture provisions to explain why the Patriot Act, although making some useful changes to law enforcement of asset forfeiture, fails to substantially improve the government's ability to combat international organized crime syndicates.

¹ 18 U.S.C. §§ 1961-1968 (2000).

² Pub. L. No. 107-56, § 302, 115 Stat. 272, 296-98 (2001).

Before addressing these complicated questions, it will be beneficial to first engage in a general discussion of asset forfeiture law, focusing particularly on its history, evolution, and policy goals.

I. BACKGROUND

Asset forfeiture is a process by which the government takes possession of property that was connected with criminal activity. The roots of modern asset forfeiture lay in English common law, which allowed for three different kinds of forfeiture: deodand, felony conviction, and statutory forfeitures.³ The deodand is a traditional form of forfeiture mentioned in the Bible and stretching back to ancient Greek and Roman times.⁴ Under English common law, a piece of property or chattel that caused a person's death went to the Crown.⁵

Forfeiture under English common law could also result from a conviction for felony or treason.⁶ If a person was convicted of treason, he forfeited all his real and personal property to the Crown.⁷ On the other hand, if a person was convicted of a felony, he forfeited his personal property to the Crown, but his land escheated back to his lord.⁸

The remaining type of forfeiture under English history is forfeiture pursuant to specific statutes. Most of the forfeiture statutes were part of the Navigation Acts of 1600 or the various laws designed to regulate mercantile traffic.⁹ It is important to note a historic nexus requirement: It was necessary for the state to prove a connection between either the crime or the person, and the asset to be forfeited.

Deodand forfeiture was never practiced in America.¹⁰ The earliest American forfeiture practices were similar to the British Navigation Acts, under statutes allowing forfeiture of ships engaging in piracy, smuggling, and other maritime offenses in an effort to police trade.¹¹

Other early American forfeiture practices concerned customs, aiding the rebellion, and "Prohibition" era forfeitures.¹² Customs forfeitures happened when the government forfeited goods on which duties had not been paid.¹³ During the Civil War, Congress passed legislation allowing

³ JIMMY GURULÉ & SANDRA GUERRA, *THE LAW OF ASSET FORFEITURE* 3 (1998).

⁴ *Id.* at 4 (citing O. HOLMES, *THE COMMON LAW* 10 (1881); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 180 (1973)).

⁵ GURULÉ & GUERRA, *supra* note 3, at 5 (citing HOLMES, *supra* note 4, at 9).

⁶ *Id.* at 9 (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* 132 n.12 (1861)).

⁷ *Id.*

⁸ *Id.* at 10 (citing *MAGNA CARTA*, 1215 ch. 22; 9 Hen. 3, ch. 22 (1225)).

⁹ *Id.* at 10.

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² *Id.* at 14–17.

¹³ *Id.* at 14.

the government to forfeit property used to support the rebellion and later mandated the forfeiture of all property belonging to high-ranking officials of the Confederacy.¹⁴ During the Prohibition, the government forfeited distilleries in which intoxicating liquors were made¹⁵ and conveyances to transport such liquors.¹⁶ Modern American asset forfeiture law since the 1970's has been geared towards controlling the illegal narcotics trade.¹⁷ The traditional nexus requirement appears here as well—the state must prove a distinct connection between a criminal or crime—piracy, rebellion, bootlegging, etc.—and the asset to be forfeited.

Today, the government can enforce asset forfeiture by local, state, or federal law enforcement agencies.¹⁸ Typically, the asset forfeiture process begins during a law enforcement investigation when officers initially identify those assets which may be subject to forfeiture.¹⁹ At a later point, often in conjunction with, or shortly after an arrest, law enforcement agents seize those assets, be it bank accounts, cash, cars, or houses.²⁰ The law enforcement officers can take possession of either real or personal property.²¹ For example, if the police arrest someone who has been selling drugs out of his car, they may seize the car. If the law enforcement officers can prove that the drug dealer deposited his proceeds into a particular bank account, then the officers may seize the money as well. If law enforcement authorities can track the proceeds from illegal activities, like drug dealing, then law enforcement may also confiscate anything that was purchased with those proceeds, such as the house or car that a drug dealer buys with the proceeds from his illegal drug transactions.²²

A particular agency, like the U.S. Marshal's Service in the case of federal forfeitures, is responsible for holding a defendant's confiscated assets during trial.²³ After trial, if the defendant is acquitted, then the assets are returned to him. If the defendant is convicted and there is sufficient proof to indicate that the seized assets were either used or purchased in conjunction with the criminal activities, then the court will issue an order of forfeiture. Subsequently, ownership interest in the as-

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 16.

¹⁶ *Id.* (citing *United States v. Stowell*, 133 U.S. 1 (1890) and *Coffey v. United States*, 116 U.S. 436 (1885)).

¹⁷ *See id.* at 19-20 (citing *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993)); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

¹⁸ *See id.* at 26-27.

¹⁹ MARY B. TROLAND, 1 ASSET FORFEITURE: LAW, PRACTICE, AND POLICY 29 (1986).

²⁰ *See id.* at 10-24.

²¹ *See id.*

²² GURULÉ & GUERRA, *supra* note 3, at 20.

²³ TROLAND, *supra* note 19, at 204.

sets shifts to the government. Orders of forfeiture can be administrative, civil, or criminal.²⁴

Asset forfeiture becomes complicated when multiple jurisdictions must work together. Seizure may require the cooperation of multiple domestic jurisdictional authorities and international law enforcement.²⁵ Beginning with the inception of the Drug Enforcement Administration State and Local Task Forces in 1973, the federal government created a number of programs aimed at fostering multi-jurisdictional domestic cooperation in the drug war.²⁶ These programs have been fairly successful in streamlining the asset forfeiture process by making it easier to transfer seized assets from the criminal defendants to the federal, state, or local law enforcement agencies.²⁷

Cooperation among international law enforcement agencies to utilize asset forfeiture against the drug trade has also improved over the last few decades thanks to the proactive efforts of the U.S. government and other authorities.²⁸ The United Nations (U.N.) took a progressive step in 1988 with the Vienna Convention, when the U.N. provided worldwide model rules for asset forfeiture.²⁹ Subsequently, as many as thirty-four Western democracies have entered into multilateral and/or bilateral agreements to facilitate international cooperation in asset forfeiture.³⁰ In addition to participating in these agreements, the United States allows foreign governments who cooperate with asset forfeiture goals to join in equitable sharing of the proceeds. Despite these advances, international cooperation remains a difficult and elusive goal.

The modern American asset forfeiture scheme has several policy goals. The primary goal is to deter crime through the imposition of severe economic penalties since profit in crime is "the force that sustains criminal enterprise."³¹ Another important goal is victim restitution, which is achieved by distributing forfeited assets among the innocent victims of the crimes having led to the forfeiture. Sometimes the government, in the absence of such victims, is able to keep the forfeited assets and use them to further future law enforcement activities. Occasionally, the government will donate real property to charitable organizations.³²

²⁴ *See id.* at 2, 43.

²⁵ GURULÉ & GUERRA, *supra* note 3, at 26.

²⁶ *Id.* (citing JAN CHAIKEN ET. AL., U.S. DEP'T OF JUSTICE, MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND (1990)).

²⁷ *Id.* at 28-29.

²⁸ *Id.* at 31.

²⁹ *Id.* at 32 (citing OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFF. OF THE PRES., REPORT TO CONGRESS (vol. 1) (Sept. 1997)).

³⁰ *Id.*

³¹ TROLAND, *supra* note 19, at Preface.

³² *See generally* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE LAW AND PRACTICE MANUAL ch. 10 (1998) (discussing disposition of forfeited property).

Such donations almost always carry a requirement that the land be used for some purpose that benefits the community, such as an after-school center for children or a drug or alcohol rehabilitation center.³³

II. DISCUSSION

A. ASSET FORFEITURE LAW PRIOR TO THE PATRIOT ACT

Although the government uses asset forfeiture against a multitude of criminals, this note will primarily discuss how asset forfeiture is used against large, highly structured, and widespread criminal organizations that engage in activities such as drug trafficking, racketeering, and money laundering. There are both criminal and civil forfeiture statutes in this area and the primary difference is the standard of proof to forfeit the asset.³⁴ For the government to proceed with a civil forfeiture, it need only show probable cause that the property was involved in a criminal offense.³⁵

1. *Drug Trafficking*

Although there are hundreds of federal criminal and civil asset forfeiture statutes, only two deal directly with the drug trade. Title 21, U.S.C. § 881 is the federal statute authorizing civil forfeiture for violations of federal drug laws, and 21 U.S.C. § 853 is the federal statute authorizing criminal forfeiture for violations of federal drug laws. Additionally, there are also pertinent statutes and laws governing international asset forfeiture for drug-related offenses.³⁶

Section 881 is somewhat far-reaching in that it includes money and other assets that were intended to be used in illegal drug transactions, not just those assets that were actually used in such transactions. This is a disturbing relaxation of the traditional nexus requirement. Historically, the state had to prove that the car was actually used in a drug transaction in order to seize it, but under § 881, the government need only say someone intended to use the car for a crime.³⁷ Consider the ramifications: a drug dealer might plan on stealing a car and then selling drugs. The government could, under this relaxed nexus requirement, confiscate the car on the grounds that the dealer intended to use it in an illegal drug

³³ *Id.*

³⁴ See GURULÉ & GUERRA, *supra* note 3, at 21.

³⁵ See Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1392 (2004).

³⁶ GURULÉ & GUERRA, *supra* note 3, at 312–47.

³⁷ See also *id.* at 424–30.

transaction. The rightful owner might lose his car even though he was completely innocent.³⁸

In addition to these civil forfeitures, there is also 21 U.S.C. § 853 for criminal forfeitures. Section 853 divides assets subject to criminal forfeiture into three categories: any real or personal property constituting proceeds from an illegal transaction; any real or personal property used or intended to be used to commit or facilitate an illegal transaction; or any interest in or property right over a continuing criminal enterprise as defined by 21 U.S.C. § 848. There is, as with civil forfeiture, a nexus requirement for assets used or intended to be used in facilitating an illegal drug transaction. However, the statute “shall be liberally construed to effectuate its remedial purposes,”³⁹ and the courts almost uniformly interpret the nexus requirement liberally.⁴⁰

There are additional pertinent provisions relating to the law of international asset forfeiture. In 1988, the United Nations under the 1988 Vienna Convention included international asset forfeiture provisions in multilateral and bilateral treaties.⁴¹ Each country that signs the agreement must promulgate legislation that allows for the forfeiture of instrumentalities used in association with narcotics and psychotropic substances, as well as proceeds from the sale of such substances.⁴² The signatories to the treaties must also offer assistance upon request to other countries in tracing and confiscating drug assets.⁴³ In addition, there are a number of Mutual Legal Assistance Treaties in place, in which countries pledge with other individual states to assist each other in a number of criminal matters including forfeiture. The United States is a party to several such treaties.

A handful of United States statutes attempt to expand the nation's reach in pursuit of forfeiture outside of U.S. borders. For example, 18 U.S.C. § 981 authorizes forfeiture of foreign drug-related assets that are found in the United States, i.e., proceeds or instrumentalities from illegal transactions that occurred in foreign countries, which are found in the

³⁸ An innocent owner, whose possessions the government seized, may petition the government to have the property returned but asserting the “innocent owner” defense is an elaborate and time-consuming process. *Id.* at 255–56.

³⁹ 21 U.S.C. § 853(o).

⁴⁰ *See* *United States v. Lewis*, 987 F.2d 1349 (8th Cir. 1993) (holding that the vehicle from which the defendant used a cellular phone to obtain cocaine price estimates was used in an illegal drug transaction and thus the vehicle was subject to forfeiture). *Cf.* *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992) (holding that the government failed to establish probable cause that the \$2,483 in cash found on person transporting heroin in balloons in stomach facilitated a drug crime).

⁴¹ *See* United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF. 82/13 (1988).

⁴² *See id.* at art. 5(4)(b).

⁴³ *Id.* at art. 7(2).

U.S.⁴⁴ However, as one might imagine, such statutes are difficult to enforce abroad without the cooperation of other foreign governments.

2. *Organized Crime*

Statutes geared at controlling organized crime are collected together in 18 U.S.C. §§ 1961–1968. These sections comprise the Racketeer Influenced and Corrupt Organizations Act (RICO), which was passed in 1970 and includes asset forfeiture provisions.⁴⁵ Unlike the asset forfeiture statutes controlling drug trafficking, which allow asset forfeiture as both a civil and a criminal penalty, asset forfeiture under RICO is a criminal penalty only.⁴⁶

Section 1963 of Title 18 provides for asset forfeiture of three categories of assets as a criminal penalty for violations of Section 1962: The first is “any interest the person has acquired or maintained in violation of section 1962,” which details a list of racketeering crimes.⁴⁷ The second category is “any interest in . . . any enterprise which the person has established . . . or participated in the conduct of, in violation of section 1962.”⁴⁸ The third category is “any property constituting . . . any proceeds which the person obtained . . . from racketeering activity or unlawful debt collection in violation of section 1962.”⁴⁹ The property subject to forfeiture for RICO violations includes both real property, and tangible and intangible personal property.⁵⁰

Section 1963 maintains the traditional nexus requirement in two ways. The three categories of forfeitable assets show that the government may only forfeit assets that are tied directly to the criminal activity, either as an interest acquired or proceeds from racketeering, or as an interest in an enterprise that engages in racketeering.⁵¹ Section 1963 also provides that, for purposes of forfeiture, the property interest vests in the United States at the time of the commission of the crime that gives rise to forfeiture, thus tying the forfeited asset directly to the crime.⁵²

⁴⁴ See 18 U.S.C. § 981(a)(1)(B) (Supp. 2002).

⁴⁵ Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (1970).

⁴⁶ On the other hand, federal district courts may, as a civil penalty, “order[*e*] any person to divest himself of any interest, direct or indirect, in any enterprise; impos[*e*] reasonable restrictions on the future activities or investments of any person “or order[] dissolution or reorganization of any enterprise” 18 U.S.C. § 1964(a).

⁴⁷ 18 U.S.C. § 1963(a)(1).

⁴⁸ *Id.* § 1963(a)(2).

⁴⁹ *Id.* § 1963(a)(3).

⁵⁰ *Id.* § 1963(b).

⁵¹ *Id.* § 1963(a)–(b).

⁵² See *id.* § 1963(c).

3. *Money Laundering*

The primary statute that deals with the crime of money laundering is 18 U.S.C. § 1956. Money laundering is essentially when a person takes proceeds from an illegal activity and uses it in a transaction that is designed to either hide the source of the money or avoid a reporting requirement.⁵³ The punishment for money laundering includes civil penalties equaling the greater of the amount of money involved in the financial transaction or \$10,000.⁵⁴ Prior to the Patriot Act, § 1956 applied only to U.S. persons and not to foreign persons or financial institutions. However, other statutes expanded the reach of the U.S. government, such as the Anti-Money Laundering Act of 1992, which gives *in rem* jurisdiction for property located in a foreign country to the district court for the district in which any of the acts leading to the forfeiture took place.⁵⁵ Still, these provisions maintain the traditional nexus requirement by requiring a link between the property sought and the crime that gave rise to the forfeiture.⁵⁶

B. EFFICACY OF THE PRE-PATRIOT ACT ASSET FORFEITURE LAWS

The government's success in utilizing asset forfeiture as a tool against domestic crime was not mirrored in the realm of international crime. There are several problems in dealing with international asset forfeiture. The first is determining whether a forfeiture statute may be applied internationally. In making this decision, there are the following two considerations: first, whether Congress intended the forfeiture statute to apply extraterritorially, and second, whether applying the statute extraterritorially would violate principles of international law.⁵⁷

Even if a statute may be applied internationally in theory, there are still some practical difficulties to achieve effective international asset forfeiture. The United States government cannot simply declare that it has the authority to pursue assets in a foreign jurisdiction. Some foreign countries that agree with U.S. policy on combating international crime, like drug trafficking, give their full cooperation to international asset forfeiture efforts. However, other countries are not so accommodating. Even if the U.S. government claims entitlement to assets that reside in a foreign country, the foreign country may disagree—and the United States cannot force a foreign sovereign to bow to the United States' declarations of what is binding law.

⁵³ *Id.* § 1956(a).

⁵⁴ *Id.* § 1956(b)(1).

⁵⁵ *See* 28 U.S.C. § 1355 (2002).

⁵⁶ *See id.*

⁵⁷ *See* *United States v. Bowman*, 260 U.S. 94, 98 (1922); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839–40 (9th Cir. 1994).

Of course, before U.S. law enforcement agencies can attempt to secure the cooperation of a foreign government, they must first determine which foreign government to persuade. In addition, some nations' iron-clad bank secrecy laws can make it difficult to follow assets as they leave American banks and enter foreign financial institutions. Even if U.S. law enforcement can follow funds into a particular foreign bank, it may be difficult to trace the movement of those funds afterward. Thus, while asset forfeiture has been a useful tool in controlling domestic crime, U.S. law enforcement has not been so successful in utilizing asset forfeiture internationally.

C. HOW THE PATRIOT ACT CHANGES ASSET FORFEITURE AND THE CURRENT STATE OF ASSET FORFEITURE LAW

The Patriot Act did not cause any significant changes to the civil drug forfeiture statute 21 U.S.C. § 881. It also did not affect the RICO statutes 18 U.S.C. §§ 1962-1963, although it substantially strengthened various anti-money laundering efforts.⁵⁸

The Patriot Act did, however, substantially change the criminal drug forfeiture statute 21 U.S.C. § 853. Section 853 now allows for the forfeiture of "substitute" property.⁵⁹ Thus, if a defendant has moved or concealed illicit assets, such as proceeds from an illegal drug transaction, and those assets would have been subject to forfeiture, the government may forfeit substitute property in place of the hidden, forfeitable assets.

The government's forfeiture of substitute property is a radical departure from traditional asset forfeiture law as it changes the nexus requirement. Historically, in cases relating to contraband, the only assets a government could forfeit was the contraband itself, the proceeds from its sale, or any instrumentality used in creating, selling, or transporting the contraband. Today, the U.S. government is able to forfeit assets with no direct connection to the crime. Suppose a pair of business partners or a married couple—one of whom is engaged in illegal drug transactions and the other is not—owns their business or marital property jointly. If the government learns one has engaged in illegal drug transactions and that person has hidden the transactions' proceeds, it may forfeit her substitute property. What of the innocent partner who has now lost his business or car or house?

The Patriot Act also made several important direct and indirect changes to 18 U.S.C. § 981. Unlike the prior version of § 981, the U.S. government may now forfeit funds held in a foreign bank account by forfeiting funds from a corresponding account that the foreign bank has

⁵⁸ See Crimm, *supra* note 35, at 1398-99.

⁵⁹ 21 U.S.C. § 853(p) (2001).

in a financial institution in the United States.⁶⁰ The funds are deemed to have been deposited in the U.S. account and the foreign bank is expected to recover its money by debiting the foreign account.⁶¹ Under the previous version of the statute, the foreign bank could claim an “innocent owner defense,” but it cannot under the new version of § 981.⁶² Also, under the new version of § 981 and under § 984, the U.S. government does not need to show that the funds it forfeits from the U.S. account are directly traceable to the criminal proceeds in the foreign account.⁶³

As a result of these substantial and serious changes, the nexus requirement has become so relaxed that it is virtually nonexistent. Instead of proving a distinct connection between the crimes giving rise to forfeiture and the assets that the government wishes to forfeit, now the government needs to show only a connection between a crime and a foreign or domestic bank. Since U.S. law enforcement may forfeit funds from an account in the United States in lieu of funds in a foreign account, it is possible and even likely that innocent U.S. citizens may have funds taken from them.

Section 981 contains wholly new provisions. It now allows for forfeiture of proceeds related to offenses against foreign nations for a number of crimes, including those related to trafficking controlled substances.⁶⁴ Under § 981, forfeiture is now a penalty for certain currency reporting violations under Title 31⁶⁵ or for conspiracy to commit such violations.⁶⁶ Section 981 also authorizes the forfeiture of all assets of any foreign or domestic terrorist group.⁶⁷ This is another change that relaxes nexus requirements by allowing the government to forfeit assets that may be connected to a questionable person, but are not directly connected to a particular crime.

The Patriot Act also effected some dramatic changes on § 981. Section 981 authorizes forfeiture of any property used in a transaction in violation of 18 U.S.C. § 1956, which prohibits laundering funds derived from criminal activity.⁶⁸ The Patriot Act amended § 1956 by adding

⁶⁰ 18 U.S.C. § 981(k)(1)(A) (2002).

⁶¹ See *id.*; see also Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY J. INT'L L. 123, 135 (2004).

⁶² William J. Sweet, Jr., et al., *Summary of the USA PATRIOT Act of 2001 Anti-Money Laundering Provisions*, 1289 P.L.I./Corp. 55, 78 (2002).

⁶³ 18 U.S.C. § 981(k)(2); 18 U.S.C. § 984(a)(1)(A).

⁶⁴ 18 U.S.C. § 1956(c)(7); 18 U.S.C. § 981(a)(1)(A).

⁶⁵ Title 31 is the chapter of the United States Code that deals primarily with money and finance.

⁶⁶ See 18 U.S.C. § 371.

⁶⁷ *Id.* § 981(a)(1)(G) (Supp. 2002).

⁶⁸ *Id.* § 981(a)(1)(A); 18 U.S.C. § 1956(a)(1) (2000).

new predicate crimes, new civil penalties, and long-arm jurisdiction.⁶⁹ Section 1956 now includes a civil cause of action for money laundering and makes certain foreign persons, including foreign banks, subject to forfeiture actions in U.S. federal courts.⁷⁰ In addition, an amendment adds new crimes to the predicate offense of money laundering, the proceeds of which are subject to forfeiture. Section 1956 also includes as predicate crimes bribery of a public official, smuggling or trafficking firearms, and acts of terrorism.⁷¹

The Patriot Act changed other aspects of American asset forfeiture law. The U.S. government may now better assist foreign governments seeking forfeiture because it is authorized to freeze assets in the United States that the foreign government seeks to forfeit.⁷² Section 2467 also expands domestic forfeiture judgments to include violations of foreign law that would result in forfeiture if committed under U.S. law⁷³ and allows foreign nations to forfeit U.S. assets if the foreign nation attempted proper notice, even if the defendant did not receive actual "sufficient" notice.⁷⁴

Another interesting change prompted by the Patriot Act involves the requirement that all persons report currency when leaving the United States. Previously, it was a crime to exit the United States carrying more than \$10,000 in cash without reporting it.⁷⁵ This reporting requirement applied regardless of whether the money had come from illicit or perfectly legitimate sources.⁷⁶ Originally, there was no innocent owner defense but the Civil Asset Forfeiture Reform Act of 2000 made the defense available to persons who did not know her property was being used in a manner that subjected it to forfeiture, or who took all reasonable steps to prevent that illegal use.⁷⁷ However, the Patriot Act removed that defense because it would have significantly hindered the government's ability to control bulk cash flow.⁷⁸

Violators of the reporting requirements were previously subject to penalties, such as fines up to \$5,000 under the sentencing guidelines.⁷⁹

⁶⁹ See *id.* § 1956(b)(1), (b)(2), (c)(7) (2000).

⁷⁰ *Id.* § 1956(b). The conditions upon foreign persons being subject to forfeiture are that service of process was adequate pursuant to the Federal Rules of Civil Procedure or the corresponding rules of the country where the foreign person is found. *Id.* § 1956(b)(2).

⁷¹ *Id.* § 1956(c)(7).

⁷² *Id.* § 2467(b).

⁷³ *Id.* § 2467(a)(2)(A).

⁷⁴ *Id.* § 2467(b).

⁷⁵ 31 U.S.C. §§ 5313, 5316 (2000).

⁷⁶ See *id.*

⁷⁷ Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 BUFF. CRIM. L. REV. 583, 594 (2004).

⁷⁸ *Id.* at 595.

⁷⁹ See *United States v. Bajakajian*, 524 U.S. 321, 326 (1998).

The Patriot Act changed the penalty for reporting violations by allowing the forfeiture of not only the entire amount that one transported or attempted to transport, but also any real and personal property traceable to such a crime.⁸⁰ In essence, these measures seem to make the cash itself contraband, even if it has come from a legitimate source.⁸¹

As it may be difficult to keep track of the numerous changes that the Patriot Act makes to asset forfeiture law in these areas, they are summarized in the following table:

Statute	Pre-Patriot Act	Post-Patriot Act
21 U.S.C. § 881	Makes subject to civil forfeiture all illegal drugs; any and all assets used to make, transport or sell them; and all proceeds from such sale.	No change.
21 U.S.C. § 853	Allows for criminal forfeiture of assets that are proceeds from illegal drug transactions; property used or intended to be used to facilitate an illegal drug transaction; or interest in a continuing criminal enterprise.	Government may forfeit "substitute" property if a defendant has moved or concealed assets otherwise subject to forfeiture; therefore no direct link is required between the property seized and a crime.
18 U.S.C. § 981	Allows forfeiture of foreign drug-related assets that are found in the U.S. Banks may claim innocent owner defense. To forfeit funds from a foreign bank, the government must show that funds in a U.S. account are directly traceable to criminal proceeds in a foreign account.	Banks may no longer claim innocent owner defense, and the government need not prove a link between forfeited funds and criminal activity.
18 U.S.C. § 1962	Details organized crime and racketeering felonies.	No change.
18 U.S.C. § 1963	Authorizes criminal forfeiture of proceeds from or interests in businesses operated in violation of Section 1962.	No change.
18 U.S.C. § 1956	Exempts foreign persons from civil forfeiture actions for money laundering crimes in U.S. federal courts.	District courts have jurisdiction over all foreign persons, including financial institutions, to enforce actions under this section.
28 U.S.C. § 1355	Grants <i>in rem</i> jurisdiction for property located in a foreign country to district court for district in which any act leading to forfeiture took place.	No change.

⁸⁰ 31 U.S.C. § 5317(c)(1) (2000 & Supp. I 2001); *Cf. Bajakajian*, 524 U.S. 321, 326 (1998) (holding in a Pre-Patriot case that forfeitures cannot be grossly disproportional to an offense and thus the forfeiture of the entire \$357,144 would be grossly disproportional to the reporting violation).

⁸¹ See Roger Pilon, *First Thoughts on the New Money Laundering Act*, 29 HUM. RTS. 20, 21 (Winter 2002).

Statute	Pre-Patriot Act	Post-Patriot Act
18 U.S.C. § 984	Nonexistent.	The government need not prove specific link between the property and the crime that gives rise to civil forfeiture.
31 U.S.C. § 5317	Failure to report transport of more than \$10,000 cash out of the country is a reporting violation subject to a maximum fine of \$5,000 but not subject to confiscation of the entire cash amount. ⁸²	The act of transporting bulk cash is itself a crime and subject to forfeiture of the whole amount.

The Patriot Act's most obvious and recurring changes involve the change of foreign persons' rights, especially foreign banks, and the near-elimination of the traditional nexus requirement.

D. TO WHAT CRIMES THE PATRIOT ACT FORFEITURE APPLIES

The Patriot Act undoubtedly applies to organized crime and money laundering.⁸³ However, whether the provisions of the Patriot Act can be used as a tool against foreign drug traffickers is another matter. Foreign drug cartels and traffickers may fall under the ambit of the Patriot Act in one of two ways: either through provisions containing language specifically implicating foreign persons or trafficking in controlled substances, or through the more generic and almost universally applicable provisions against terrorism.

Several of the changes to §§ 981 and 1956 will be facially applicable to foreign drug cartels. For example, when an individual deposits illicit funds into a foreign bank account, § 981 allows the government to confiscate funds from the foreign bank if the bank has an interbank account in the United States even if the individual does not have a U.S. bank account.⁸⁴ There is no language limiting the use of this provision against terrorist activities so there is no reason why it may not be applied to foreign drug cartels. Section 1956 also extends civil forfeiture jurisdiction of foreign individuals and banks to domestic federal courts,⁸⁵ and since that provision is not limited to any particular predicate crime, it may presumably be used against foreign drug cartels.

The language of 18 U.S.C. § 981, which allows for the forfeiture of assets for drug trafficking offenses committed against a foreign state, specifically allows its use against foreign drug cartels,⁸⁶ as does the language of § 853 of Title 21. Title 21 encompasses violations involving

⁸² See *Bajakajian*, 524 U.S. 321, 326 (1998).

⁸³ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, § 302, 115 Stat. 272, 296-98 (2001).

⁸⁴ 18 U.S.C. § 981(k)(1)(A).

⁸⁵ 18 U.S.C. § 1956(b)(2).

⁸⁶ 18 U.S.C. § 981(a)(1)(A) (2000).

controlled substances and does not limit itself to domestic transactions.⁸⁷ Portions of the Patriot Act may also be used against foreign drug cartels when foreign governments pursue drug trafficking assets for forfeiture in the United States.⁸⁸ Because the statutory language of 18 U.S.C. § 981 and 21 U.S.C. § 843 specifically mention either foreign individuals or drug trafficking, both seem to apply to foreign drug cartels.

What is more difficult is determining whether the many other Patriot Act provisions which are labeled as applying to terrorists and terrorist activities also apply to the trafficking activities of foreign drug cartels. This is an important question because the asset forfeiture provisions discussed above depend on a criminal defendant committing specific acts—the proceeds or instrumentalities of which may later be forfeited to the government—thus limiting the assets that are subject to forfeiture to those traceable to the particular crime which the government prosecutes. However, the revised version of 18 U.S.C. § 981 allows the government to forfeit all assets of any individual or organization engaged in planning or perpetrating any act of terrorism against the United States.⁸⁹ This is an important distinction because it allows the government to confiscate and forfeit any assets in the possession of such individuals or organizations, regardless of whether the government can connect it as either proceeds from or an instrumentality in furtherance of a particular activity. This is again a departure from the traditional asset forfeiture doctrine; the nexus requirement is again relaxed so that a connection is not required between an asset and a crime but simply between an individual and a crime.

Title 18 U.S.C. § 2331 defines terrorism for the purposes of § 981. Section 2331 lays out a three-prong definition for international terrorism which is: (1) activities that involve violent acts or acts that are dangerous to human life and are a violation of the criminal laws of the United States; (2) acts intended to either coerce the civilian population, influence government policy through coercion, or affect governmental conduct by assassination or kidnapping; and (3) acts that occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries by means through which they are accomplished.⁹⁰

Drug trafficking easily meets the first and third prongs of this definition. Drug trafficking involves a large component of activities done outside of the United States and transcends national boundaries since the majority of drugs in the United States comes from foreign sources. In

⁸⁷ See 18 U.S.C. § 981(a)(1)(A); 21 U.S.C. § 853(p).

⁸⁸ See 28 U.S.C. § 2467(a), (b).

⁸⁹ See 18 U.S.C. § 981(a)(1)(G).

⁹⁰ 18 U.S.C. § 2331(1) (2000). There are cases pending in the federal courts challenging the constitutionality of this determination.

addition, illegal drugs themselves are arguably dangerous to human life since use of many illegal drugs—cocaine, heroine, amphetamines, etc.—often lead to death, such as from overdose, driving while intoxicated, or suicide. Drug trafficking, in addition to violating U.S. laws, is itself arguably dangerous to human life, such as when rival gangs shoot each other on the street, human mules die when the bags they carry burst in their stomachs, police are sometimes killed in the line of duty, and are sometimes forced to kill dealers.

The step on which the application of this definition to drug cartels stumbles is the intent-to-coerce prong. On one hand, it might seem likely that the intent of the cartels is to sell drugs and make money and therefore their activities are not intended to coerce civilians or influence governmental policy and conduct. On the other hand, the cartels probably have used tactics on independent occasions to persuade governmental policy and conduct, such as bribery or intimidation of public or government officials. Furthermore, many people have reported the coercive pressure by neighborhood dealers to buy and use drugs, especially in inner cities. Thus, there is also a reasonable argument that the activities of drug cartels are in fact intended to coerce civilians into buying and using drugs and influence governments into allowing such pressure.

E. WHETHER THE PATRIOT ACT CAN OR SHOULD ACHIEVE ITS GOAL IN IMPROVING EFFICIENCY OF INTERNATIONAL ASSET FORFEITURE

Assuming *arguendo* that the asset forfeiture provisions of the Patriot Act discussed above may be used in the international criminal syndicate settings already discussed, the next question is whether the changes in the Patriot Act can or should achieve what they set out to do, namely, to increase the effectiveness of the U.S. government in pursuing the forfeiture of international assets from both domestic and international criminal activities. This breaks down into two sub-questions: whether the Patriot Act's provisions can help the government's cause in theory; and whether the changes will have any practical effect. It will be clear that although some of the Patriot Act provisions will make it easier for the U.S. government to obtain assets that it could not have forfeited before, it will not make the advances that its drafters purport. Because of legal and practical problems, the Patriot Act goes too far, but at the same time it cannot ever go far enough.

1. *How the Patriot Act "Improves" Asset Forfeiture*

Many of the provisions discussed above, when applied in the international setting, will certainly have the potential to be helpful for the U.S. government. For example, the changes to § 981 have not only al-

lowed the U.S. government to forfeit funds that were deposited domestically, it also granted the government a very low standard to meet to forfeit the domestic funds. In addition, the government need not prove a link between the assets it seeks to forfeit and the allegedly criminal funds that were deposited in another country.⁹¹ The bank account from which the government will forfeit funds need not be connected to the criminal defendant directly, but only to the foreign bank, which may no longer claim an innocent owner defense to prohibit the government from forfeiting its funds.⁹² These changes will undoubtedly make it easier for the U.S. government to forfeit assets from drug-trafficking foreign cartels.

The changes to other statutes in the Patriot Act will also be useful to the U.S. government. The Patriot Act contains several long-arm jurisdiction provisions, which expand the reach of federal courts to include domestic assets of foreign nationals.⁹³ The U.S. government now has more latitude in helping foreign governments forfeit drug-related assets by honoring more foreign judgments and issuing restraining orders to freeze assets pursuant to such judgments, whether the possessor of the assets is a citizen or a foreign national, and even if service on the defendant was imperfect.⁹⁴ The U.S. government can forfeit assets that are unrelated to criminal activities if the possessor has hidden his illicit assets from the government.⁹⁵ For groups or individuals engaging in activities that fit the definition of terrorism, even if those activities are not ones that are historically thought of as terrorist activities, the government can force forfeiture of all of their assets without needing to prove any connection between the assets and the crime.⁹⁶ This is a radical departure from established asset forfeiture law. The changes in the Patriot Act allow the U.S. government to have a broader reach in pursuing and a lower standard in effecting asset forfeiture.

2. *Practical Problems*

So why are the changes not enough to turn the tide for the U.S. in the war on international crime? There are practical problems with the real-world application of the statutes that make the Patriot Act fall short of its goals. For example, the statutes are still unable to address the two most troublesome problems associated with international asset forfeiture: following the money and securing international cooperation. All of the provisions discussed above will indeed be helpful to the government, but

⁹¹ See 18 U.S.C. § 981(k)(2).

⁹² See 18 U.S.C. § 98d(k)(1)(A).

⁹³ See 18 U.S.C. § 1956(b).

⁹⁴ See 28 U.S.C. § 2467(b).

⁹⁵ See 21 U.S.C. § 853(p).

⁹⁶ See *id.*

only after the government has located the assets it wants to forfeit. Most of the revenue from selling drugs in the United States ends up in foreign bank accounts. If the assets stay here, it is easy for the U.S. government to find and forfeit them; while some assets are found here, most are not. Criminals move through countries quickly; even when U.S. law enforcement is able to track them or their money, it is often at a much slower rate than the criminals can act.⁹⁷

The problem then is one of practicality and international cooperation.⁹⁸ There are numerous mutual-assistance treaties in place with other nations for the purpose of combating the illegal drug trade, but they do not include the countries that are truly needed. There are bank secrecy laws to contend with in foreign jurisdictions as well. These are the problems that the Patriot Act still leaves unaddressed. These are very difficult issues because, while the U.S. government may know that it needs international cooperation to combat the war on drugs with asset forfeiture, it cannot force that cooperation.

Another of the practical difficulties in real-world implementation of these new asset forfeiture rules is the question of who will actually be hurt by the measures. The measures are intended to be remedial⁹⁹ and to be directed against criminals, specifically terrorists. However, it is thoroughly plausible that these measures will turn out to be punitive rather than remedial, and will harm unintended innocents. Several such possible situations have already been discussed above in Part C. Since the U.S. government in many instances no longer needs to prove a connection between a crime leading to forfeiture and the assets that the government wants to forfeit, there also may be economic repercussions both to individuals and to banking companies due to the new rules affecting banks.

As discussed above, the Patriot Act allows the U.S. government to forfeit funds from an account at a bank here in the United States in lieu of assets that the government knows have been deposited into a foreign account held by the same, that would be forfeitable if they had in fact been deposited in the domestic account.¹⁰⁰ The idea is that the foreign bank will debit the money that had been seized from the appropriate foreign account and that eventually the bank will be discouraged from engaging in shady financial transactions and taking proceeds from illicit

⁹⁷ See Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, 22 BERKLEY J. INT'L L. 98, 98-99 (2004).

⁹⁸ See generally Stefan D. Cassella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, 49-JAN FED. LAW. 25 (2002).

⁹⁹ See Pilon, *supra* note 81, at 21.

¹⁰⁰ See 18 U.S.C. § 981(k)(1)(A).

activities.¹⁰¹ But if this cost becomes too great for the foreign banks to bear, they may choose to reduce or even withdraw their business from our shores.

Furthermore, the Patriot Act greatly expands domestic jurisdiction over foreign nationals.¹⁰² Between the strict new measures, new crimes, relaxed nexus requirements, and expanded jurisdiction over foreign citizens, it is possible that enforcement of the Patriot Act provisions will discourage foreigners from traveling to the United States. If that were to happen, it would certainly be harmful to the American economy.

Furthermore, the new Patriot Act provisions place an impossible burden on innocent owners. They are forced to prove a negative, that is, their property was not involved in criminal activity.¹⁰³ While it is unlikely the drafters of the Patriot Act intended to make things so difficult for innocent owners, it is certainly a probable repercussion that will result from the Patriot Act's draconian measures.

3. *Legal/Theoretical Consequences*

The Patriot Act falls short of its goal beyond the practical problems of applying it in the real world. Application of the new asset forfeiture provisions under the Patriot Act raises important constitutional questions. The reduction of the nexus requirement and the invasion on the rights of foreign nationals and foreign banks will present substantial legal problems in enforcing these provisions of the Patriot Act.

The first potential challenge to the constitutionality of these provisions of the Patriot Act is a disproportionality argument. The new rules under the Patriot Act that allow for forfeiture of "bulk cash smuggling," i.e., transporting currency outside of the United States without reporting it, could lead to ridiculous results. For example, under the old rules, someone trying to transport \$3,000,000 cash outside of the U.S. could only be fined up to a statutory maximum, such as the \$5,000 statutory fine in *United States v. Bajakajian*, for failure to report the currency. The full sum could only be forfeited if it was later proven that the money came from illicit sources. Now, the government may take the entire \$3,000,000 at the outset, even if the money is completely untainted.

The Supreme Court faced this issue in *United States v. Bajakajian*, a pre-Patriot Act case where the defendant attempted to carry \$357,144 of legally-obtained money outside of the United States without reporting it.¹⁰⁴ U.S. Customs attempted to forfeit the entire amount, and the Supreme Court found for the defendant, citing the Eighth Amendment to

¹⁰¹ See also Sweet, et al., *supra* note 62, at 78-79.

¹⁰² See 18 U.S.C. § 1956(b).

¹⁰³ See Crimm, *supra* note 35, at 1394.

¹⁰⁴ *United States v. Bajakajian*, 524 U.S. 321 (1998)

the United States Constitution and its prohibition of the imposition of excessive fines. The Court held that the forfeiture of the entire amount was punitive rather than remedial.¹⁰⁵ The Court further held that it was invalid because the fine was grossly disproportional to the conduct.¹⁰⁶

One might argue, flimsily, that the Patriot Act is different because it now makes the smuggling of bulk cash itself a crime, rather than the failure to report, which was the crime in *Bajakajian*. The Patriot Act's provisions against bulk cash smuggling apply to money that comes from perfectly legal sources in addition to illicit sources, so the businessman who carries \$3,000,000 can lose it if he does not report it. Thus, it seems the Patriot Act is a thinly-veiled attempt to heighten the punishment for failing to report transport of currency and get around the Court's decision in *Bajakajian*.¹⁰⁷ The new Patriot Act provisions will cause some punishments that are grossly disproportional to the conduct they are assigned to, and thus may run afoul of the Eighth Amendment.

But there are other constitutional questions raised by the new asset forfeiture laws under the Patriot Act. Several litigants have already challenged the wording of some Patriot Act provisions on constitutional grounds. In particular, the notion of providing "material support" to terrorists has been attacked as overbroad and unconstitutionally vague.¹⁰⁸ However, these challenges have not yet been successful.¹⁰⁹

As discussed in Part C, many of the new provisions of the Patriot Act relax the traditional nexus requirement. Traditionally, for the government to forfeit an asset, whether it was real or personal, tangible or intangible, the government had to prove that a connection existed between the crime leading to the forfeiture and the asset to be forfeited. Typically, the asset would be either an instrumentality used in the commission of, proceeds from, or purchased with the proceeds from, an illegal act. Under the new provisions of the Patriot Act, in many instances the government need not prove a connection between the asset and the crime leading to forfeiture.¹¹⁰ In addition, the burden of proof shifts from obliging the government to prove that the assets came from an illicit source to requiring the defendant to prove that the assets came from an innocent source.¹¹¹ There are also new anti-bulk cash smuggling

¹⁰⁵ *Id.* at 328.

¹⁰⁶ *Id.* at 339.

¹⁰⁷ See Pilon, *supra* note 81, at 22.

¹⁰⁸ See Crimm, *supra* note 35, at 1408.

¹⁰⁹ *Id.* at 1412-14.

¹¹⁰ See 18 U.S.C. § 981 (allowing for the forfeiture of funds deposited in U.S. accounts in lieu of illicit funds deposited in foreign account held by same bank without proving connection between the forfeited domestic funds and the illegal activity); 21 U.S.C. § 853 (allowing the forfeiture of "substitute property").

¹¹¹ See 18 U.S.C. § 981(a)(1)(G); Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA PATRIOT ACT of 2001*, 34 LAW & POL'Y INT'L BUS. 7, 9-10 (2002).

laws, which render illicit perfectly legal funds once taken out of the U.S.—which become perfectly innocent again once they hit the government's coffers.¹¹²

Rather than serving any remedial or punitive purpose, the relaxed nexus requirements of the Patriot Act seem geared to gain as much money for the U.S. government as possible. If the government need not prove a link between the crime and the asset to be forfeited, serious Due Process issues may arise. Even if the government's purpose has always been to gain as much assets from criminals as possible to increase its revenues, under the previous statutes there were still legitimate justifications to forfeit property: The government could forfeit the proceeds from criminal activity and assets bought with those proceeds because the criminal had no legal right of ownership or possession to assets coming from illegal sources.

However, the same cannot be said for some of the Patriot Act provisions. The Patriot Act allows for forfeiture of substitute property¹¹³ in a blatant effort to garner as much revenue for the U.S. government as possible. Consider the ramifications of this statute: a stockbroker has taken to driving around town on his lunch hour and selling drugs to his co-workers out of his Mercedes. Law enforcement authorities learn of this and decide to take action against him, including forfeiting the Mercedes (which they are entitled to do as it was property used in the facilitation of a felony¹¹⁴). Unfortunately, the stockbroker crashes his Mercedes before the authorities come to arrest him and confiscate the car. Under the Patriot Act, the authorities may now confiscate any other piece of the stockbroker's property since the Mercedes that was subject to forfeiture has substantially diminished in value.¹¹⁵

At first, this substitution of property might seem trivial, but upon further reflection it is hard to justify on any grounds other than the government's greed. The Mercedes itself is subject to forfeiture because it was used in the commission of a felony, and that is the only reason it is subject to forfeiture. Once it has been wrecked it is no longer of any use to the stockbroker and so will no longer further his criminal activities. The government could still easily forfeit the Mercedes out of principle. Instead, the government will seek to forfeit another piece of property belonging to the stockbroker to make up for the diminished value of the Mercedes. What is the justification for forfeiting substitute property? How can the grounds for forfeiting the Mercedes, i.e., its involvement in a crime, be extended or transferred to another piece of property not used

¹¹² See Pilon, *supra* note 81, at 21.

¹¹³ See 21 U.S.C. § 853(p).

¹¹⁴ See 21 U.S.C. § 853(a)(2).

¹¹⁵ See 21 U.S.C. § 853(p)(1)(d).

in the crime? What if the only other valuable asset belonging to the stockbroker is his house? Can the government choose to seize it, sell it, keep the amount equivalent to the value of the Mercedes and give the remainder to the stockbroker's family now that they have been displaced and their home taken from them? Taking a piece of property that was not involved in a crime, where the reason for forfeiture is a piece of property's involvement in a crime is unconstitutional because it is either a deprivation of property without due process of law,¹¹⁶ or a taking without just compensation.¹¹⁷

CONCLUSION

The Patriot Act has indeed given a facelift to American asset forfeiture legislation.¹¹⁸ On its face, the law of asset forfeiture looks radically different—lowered nexus requirements between asset and crime, lower burdens of proof for the government, and less respect for the rights of foreign nationals. Underneath, however, the same practical problems remain—it is difficult for the U.S. government officials to track assets outside of the United States, and even when they are able to do so, they cannot force international cooperation in pursuit of those assets. Furthermore, the possibility that enforcement of certain Patriot Act provisions violate the Fifth and Eighth Amendment militates against its application. The problem of how to better equip American law enforcement agencies to pursue forfeiture of drug trafficking assets, money laundering assets, and terrorist funding, without trampling on the rights of citizens, remains unsolved.

¹¹⁶ See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

¹¹⁷ See U.S. CONST. amend. V.

¹¹⁸ See George A. Lyden, *The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift*, 8 FORDHAM J. CORP. & FIN. L. 201 (2003).