



COAST GUARD DRUG ENFORCEMENT ACT OF 1988

AUGUST 3, 1988.—Ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant
Marine and Fisheries, submitted the following

REPORT

NCJRS

together with

SEP. 13 1988

DISSENTING VIEWS

ACQUISITIONS

[To accompany H.R. 4658]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 4658) to provide for more effective Coast Guard enforcement of laws relating to drug abuse, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Coast Guard Drug Enforcement Act of 1988".

SEC. 2. AUTHORITY AND PROTECTION OF COMMANDING OFFICERS ON NAVAL VESSELS TO WHICH COAST GUARD PERSONNEL ARE ASSIGNED.

(a) IN GENERAL.—Section 637 of title 14, United States Code, is amended to read as follows:

"§ 637. Stopping vessels; immunity for firing at or into vessel

"(a) Whenever any vessel liable to seizure or examination does not stop on being ordered to do so or on being pursued by an authorized vessel or authorized aircraft which has displayed the ensign, pennant, or other identifying insignia prescribed for an authorized vessel or authorized aircraft, the person in command or in charge of the authorized vessel or authorized aircraft may, after a gun has been fired by the authorized vessel or authorized aircraft as a warning signal, fire at or into the vessel which does not stop.

"(b) The person in command of an authorized vessel or authorized aircraft and all persons acting under that person's direction shall be indemnified from any penalties

or actions for damages for firing at or into a vessel pursuant to subsection (a). If any person is killed or wounded by the firing, and the person in command of the authorized vessel or authorized aircraft or any person acting pursuant to their orders is prosecuted or arrested therefor, they shall be forthwith admitted to bail.

"(c) A vessel or aircraft is an authorized vessel or authorized aircraft for purposes of this section if—

"(1) it is a Coast Guard vessel or aircraft; or

"(2) it is a surface naval vessel on which one or more members of the Coast Guard are assigned pursuant to section 379 of title 10, United States Code."

(b) CONFORMING AMENDMENT.—The item relating to section 637 in the table of sections at the beginning of chapter 17 of title 14, United States Code, is amended to read as follows:

"637. Stopping vessels; immunity for firing at or into vessel."

SEC. 3. AMENDMENTS TO CUSTOMS FORFEITURE FUND.

Section 613A of the Tariff Act of 1930 (19 U.S.C. 1613b) is amended as follows:

(1) USES OF FUND.—Subsection (a) is amended to read as follows:

"(a) There is established in the Treasury of the United States a fund to be known as the Customs Forfeiture Fund (hereinafter in this section referred to as the 'fund'), which shall be available to the United States Customs Service and the United States Coast Guard, subject to appropriation, with respect to seizures and forfeitures by the United States Customs Service and by the United States Coast Guard under any law enforced or administered by the Customs Service or the Coast Guard for payment (to the extent that the payment is not reimbursed under section 524 of this Act)—

"(1) of all proper expenses of the seizure (including investigative costs leading to seizures) or the proceedings of forfeiture and sale (not otherwise recovered under section 613(a) of this Act), including, but not limited to, expenses of inventory, security, maintaining the custody of the property, advertising and sale, and if condemned by the court and a bond for the costs was not given, the costs as taxed by the court;

"(2) of awards of compensation to informers under section 619 of this Act;

"(3) for satisfaction of—

"(A) liens for freight, charges, and contributions in general average, notice of which has been filed with the appropriate customs officer according to law; and

"(B) other liens against forfeited property;

"(4) of amounts authorized by law with respect to remission and mitigation;

"(5) of claims of parties in interest to property disposed of under section 612(b) of this Act, in the amounts applicable to the claims at the time of seizure;

"(6) of expenses incurred in bringing vessels into compliance with applicable environmental laws before disposing of the vessels by sinking.

In addition to the purposes described in paragraphs (1) through (6), the fund is available for—

"(i) purchases by the Customs Service of evidence of—

"(I) smuggling of controlled substances, and

"(II) violations of the currency and foreign transaction reporting requirements of chapter 51 of title 31, United States Code, if there is a substantial probability that the violations of these requirements are related to the smuggling of controlled substances;

"(ii) the equipping for law enforcement functions of any vessel, vehicle, aircraft, or structure available for official use by the Customs Service or the Coast Guard;

"(iii) the reimbursement, at the discretion of the Secretary, of private citizens for expenses incurred by them in cooperating with the Customs Service in investigations and undercover law enforcement operations; and

"(iv) the publicizing of the availability of rewards under section 619 of this Act."

(2) PAYMENTS TO COAST GUARD.—Subsection (b)(2) is amended to read as follows:

"(2)(A) Payments to the Coast Guard under this section shall be made by the Commissioner of Customs to reimburse the applicable appropriation of the Coast Guard.

"(B) Payments to the Coast Guard for a fiscal year under subsection (a)(1)—

"(i) shall not exceed the value of the property seized by the Coast Guard during that fiscal year, as the value is determined at the time of the seizure; and

"(ii) shall have priority over and shall not be affected by other payments for the fiscal year made under subsection (a).

"(C) For each fiscal year for which the total amount appropriated from the fund is less than the total amount of expenses which are authorized by subsection (a)(1) to be paid from the fund, the amount of payment to the Coast Guard pursuant to subsection (a)(1) shall bear the same proportion to the total amount appropriated from the fund for the fiscal year as the total amount of expenses of the Coast Guard which are authorized by subsection (a)(1) to be paid from the fund for the fiscal year bears to the total amount of expenses of the Coast Guard and the Customs Service which are authorized by subsection (a)(1) to be paid for the fiscal year.

"(D) In each fiscal year for which the total amount appropriated from the fund is greater than the total amount of expenses which are authorized by subsection (a)(1) to be paid, the Commissioner of Customs shall pay to the Coast Guard, in addition to amounts paid to the Coast Guard pursuant to subsection (a)(1), an amount equal to one half of the remainder of the total amount appropriated from the fund for the fiscal year after the payment of expenses under subsection (a)(1)."

(3) DEPOSITS INTO FUND.—Subsection (c) is amended—

(A) by striking "during the period beginning on the date of the enactment of this section, and ending on September 30, 1987,"; and

(B) by striking "administered by the United States Customs Service," and inserting in lieu thereof "administered by the United States Customs Service or the United States Coast Guard".

SEC. 4. MARITIME DRUG LAW ENFORCEMENT ACT AMENDMENTS.

(a) SECTION 3(a) AMENDMENT.—Section 3(a) of the Act entitled "An Act to facilitate increased enforcement by the Coast Guard of laws relating to the importation of controlled substances, and for other purposes", approved September 15, 1980 (46 U.S.C. App. 1903(a)), is amended by inserting after "jurisdiction of the United States," the following: "or who is a citizen of the United States or a resident alien of the United States on board any vessel,".

(b) SECTION 3(b) AMENDMENT.—Section 3(b)(2) of such Act (46 U.S.C. App. 1903(b)(2)) is amended by inserting after "High Seas" the following: "and a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States authorized to enforce applicable provisions of United States law".

SEC. 5. INDEMNIFICATION OF COAST GUARD MEMBERS AND EMPLOYEES.

(a) IN GENERAL.—Title 14, United States Code, is amended by inserting after section 644 the following:

"§ 645. Indemnification of Coast Guard members and employees.

"The Commandant may indemnify any member or employee of the Coast Guard against any claim or judgment against the member or employee if the claim or judgment arises out of an act committed, as determined by the Commandant, within the scope of the official duties of the member or employee in carrying out law enforcement activities."

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 17 of title 14, United States Code, is amended by inserting after the item relating to section 644 the following:

"645. Indemnification of Coast Guard members and employees."

SEC. 6. AMENDMENTS TO SUITS IN ADMIRALTY ACT AND PUBLIC VESSELS ACT.

(a) AMENDMENT TO SUITS IN ADMIRALTY ACT.—Section 2 of the Act of March 9, 1920 (46 U.S.C. App. 742; commonly known as the Suits in Admiralty Act) is amended—

(1) in the first sentence by striking "In cases" and inserting in lieu thereof

"(a) Subject to subsection (b), in cases"; and

(2) by adding at the end of the following:

"(b) No proceeding may be brought under this section against the United States, and no proceeding may be brought under any law against an employee of the United States, for an act or omission of the employee while acting in the scope of employment, with respect to the following claims:

"(1) Any claim based on an act or omission of an employee of the United States Government exercising due care in executing a statute or regulation, whether or not the statute or regulation is valid.

"(2) Any claim based on the exercise or performance or a failure to exercise or perform, a discretionary function or duty by a Federal agency or an employ-

ee of the United States Government, whether or not involving an abuse of discretion by the agency or employee.

"(3) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

"(4) Any claim arising out of the assessment or collection of any tax or customs duty, the detention of any goods or merchandise, by any officer of the customs or by any other investigative or law enforcement officer.

"(5) Any claim arising out of an act or omission of any employee of the United States in administering the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.).

"(6) Any claim for damages arising out of the imposition or establishment of a quarantine by the United States.

"(7) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. With regard to acts or omissions of investigative or law enforcement officers of the United States Government, this Act shall apply to any claim arising on or after the date of the enactment of this subsection, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

"(8) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

"(9) Any claim arising out of the combatant activities of the military or naval forces (including the Coast Guard) during time of war.

"(c) In this section, the term 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of United States law."

(b) AMENDMENT TO PUBLIC VESSELS ACT.—Section 1 of the Act of March 3, 1925 (46 U.S.C. App. 781; commonly known as the Public Vessel Act) is amended—

(1) by striking "A libel" and inserting in lieu thereof "(a) Subject to subsection (b), a libel"; and

(2) by adding at the end the following:

"(b) No libel or petition may be brought under this section for any claim described in section 2(b) of the Act of March 9, 1920 (46 U.S.C. App. 742(b)(1); commonly known as the Suits in Admiralty Act)."

SEC. 7. SEIZURES AND FORFEITURES OF CONVEYANCES.

(a) AMENDMENTS TO CONTROLLED SUBSTANCES ACT.—Section 511(a)(4) of the Controlled Substances Act (21 U.S.C. 881(a)(4)) is amended—

(1) by striking "and" at the end of subparagraph (A);

(2) by striking the period at the end of subparagraph (B) and inserting in lieu thereof ", and "; and

(3) by adding at the end the following:

"(C) no conveyance shall be forfeited under this section for possession of a controlled substance in violation of section 404 or 1005 unless the violation appears to have been committed with the knowledge or consent of the owner or other person in charge of the conveyance."

(b) AMENDMENTS TO TARIFF ACT OF 1930.—Section 594(b) of the Tariff Act of 1930 (19 U.S.C. 1594(b)) is amended—

(1) by inserting "(1)" after "(b)";

(2) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively; and

(3) by adding at the end the following:

"(2) Except as provided in paragraph (1) or subsection (c), no vessel, vehicle, or aircraft is subject to seizure and forfeiture for possession of a controlled substance in violation of section 404 or 1005 of the Controlled Substances Act (21 U.S.C. 844 or 955) unless the owner or operator, or the master, pilot, conductor, driver, or other person in charge participated in or had knowledge of or was grossly negligent in preventing or discovering the violation."

(c) AMENDMENTS TO ACT OF AUGUST 9, 1939.—Section 2 of the Act of August 9, 1939 (chapter 618, 53 Stat. 1291; 49 U.S.C. App. 782) is amended by adding at the end the following: "No vessel, vehicle, or aircraft shall be forfeited under this section for possession of a narcotic drug in violation of section 1 (49 U.S.C. App. 781) unless it shall appear that the owner or master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto."

SEC. 8 FORFEITURE PROCEDURES.

Section 511 of the Controlled Substances Act (21 U.S.C. 881) is amended by adding at the end the following:

"(k) FORFEITURE PROCEDURES.—

"(1) COVERED SEIZURES.—This subsection applies to a seizure under subsection (b) of a conveyance which is subject to forfeiture under subsection (a)(1) for possession of a controlled substance in violation of section 404 or 1005.

"(2) NOTICE REQUIREMENTS.—An officer making a seizure to which this subsection applies—

"(A) shall, prior to the seizure, make a preliminary assessment of whether the circumstances justifying forfeiture are present; and

"(B) shall, at the time of seizure, deliver to the person in charge of the conveyance a written notice of the charges supporting the seizure and of the hearing rights provided by this section.

The officer or other competent authority shall determine whether the person owns or claims any ownership interest in the conveyance and, if they do not, shall make all reasonable efforts to ascertain the identity and location of the owner and to provide immediate notice thereto.

"(3) PRELIMINARY HEARING.—In the case of a seizure to which this subsection applies, the Attorney General shall request a hearing before the nearest available Federal magistrate or, in the event that a Federal magistrate is not reasonably available, before a State or local judicial officer authorized by section 3041 of title 18, United States Code, within 72 hours after receiving a written request for the preliminary hearing from the owner or other person in charge of the conveyance. The court shall enter an order continuing the seizure in effect until the final disposition of forfeiture proceedings under this subchapter if the court finds that—

"(A) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the conveyance being destroyed, concealed, transferred, or otherwise made unavailable for forfeiture; and

"(B) the need to preserve the availability of the conveyance for evidentiary or other purposes through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

Any order issued by the court under this paragraph shall remain in effect until the final disposition of the forfeiture.

"(4) POSTING BOND.—If the court makes the findings under paragraph (2), a person claiming an ownership interest in the conveyance may post a bond in an amount equal to the value of the conveyance, whereupon the court shall suspend the order pending final disposition of the forfeiture proceedings. The suspension shall not apply to any case where seizure is necessary for evidentiary purposes.

"(5) FINAL HEARING.—The Attorney General shall commence judicial proceedings for forfeiture of a conveyance the seizure of which was subject to this subsection by filing with the appropriate district court a complaint seeking the forfeiture and stating the reasons therefor within 90 days after the preliminary hearing, except for excusable delay or by agreement of the parties. If the Attorney General fails to file the complaint within 90 days without sufficient excuse, the appropriate district court may, on its own motion or at the request of the owner or person in charge of the conveyance, vacate the order under paragraph (2) and order the return of the conveyance to the owner or person in charge."

SEC. 9. CLAIMS FOR REIMBURSEMENT.

(a) IN GENERAL.—Section 617 of the Tariff Act of 1930 (19 U.S.C. 1617) is amended—

"(1) by designating the text of such section as subsection (a); and

"(2) by adding at the end the following:

"(b) CLAIMS OF INNOCENT VESSEL OWNERS.—The Secretary shall pay an owner or person in charge of a vessel engaged in trade, business, or scientific research for claims for losses resulting from a seizure or forfeiture for possession of a controlled substance in violation of section 404 or 1005 of the Controlled Substances Act (21 U.S.C. 844 or 955), including legal expenses and lost income, unless it appears that the owner or other person in charge of the vessel was a consenting party or privy to the violation."

(b) CONFORMING AMENDMENT.—The section heading for such section is amended by inserting "PAYMENT OF CLAIMS OF INNOCENT VESSEL OWNERS" after "TREASURY".

SEC. 10. ANNUAL REPORT ON FEDERAL DRUG ENFORCEMENT EXPENDITURES.

The President shall include with each budget for the United States Government submitted to the Congress pursuant to section 1105(a) of title 31, United States Code, a report describing in detail--

- (1) the total amount of spending by each agency of the United States for illegal drug enforcement programs during the fiscal year preceding the fiscal year for which the budget is submitted; and
- (2) the total amount of spending proposed by the budget for each agency of the United States for illegal drug enforcement programs for the following fiscal year.

SEC. 11. COAST GUARD LAW ENFORCEMENT DUTIES.

Section 2 of title 14, United States Code, is amended--

- (1) by striking "on and under" the first time it appears and inserting in lieu thereof "on, under, and over"; and
- (2) by striking "United States;" the first place it appears and inserting in lieu thereof "United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States;"

SEC. 12. GREAT LAKES DRUG INTERDICTION.

(a) INTERAGENCY AGREEMENT.--The Secretary of Transportation and the Secretary of the Treasury shall enter into an agreement for the purpose of increasing the effectiveness of maritime drug interdiction activities of the Coast Guard and the Customs Service in the Great Lakes area.

(b) NEGOTIATIONS WITH CANADA ON DRUG ENFORCEMENT COOPERATION.--The Secretary of State is encouraged to enter into negotiations with appropriate officials of the Government of Canada for the purpose of establishing an agreement between the United States and Canada which provides for increased cooperation and sharing of information between United States and Canadian law enforcement officials with respect to law enforcement efforts conducted on the Great Lakes between the United States and Canada.

SEC. 13. AVAILABILITY TO DOT OF NAVAL RADAR SURVEILLANCE AIRCRAFT.

(a) AIRCRAFT TO BE MADE AVAILABLE.--The Secretary of the Navy shall make available to the Secretary of Transportation on a continuing basis three E-2C Hawkeye radar surveillance aircraft of the Navy. The aircraft to be made available shall be from among those which at any time are rated as capable of operating from land but not capable of operating from aircraft carriers. If the Secretary of the Navy determines at any time that there are insufficient aircraft described in the preceding sentence to be made available pursuant to this subsection without affecting missions or readiness of the Navy, the Secretary may reduce the number of aircraft to be made available under this subsection until there are sufficient aircraft.

(b) LAW ENFORCEMENT USE.--Aircraft made available under subsection (a) shall be used by the Secretary of Transportation for law enforcement activities of the Coast Guard.

(c) PILOTS AND FLIGHT CREWS.--The Secretary of the Navy shall assign to the Secretary of Transportation qualified pilots and flight crews to operate aircraft made available pursuant to subsection (a), until such time as qualified Coast Guard personnel are available to perform that function.

(d) APPLICABLE LAW.--This section shall be carried out subject to chapter 18 of title 10, United States Code, except that the Secretary of Defense may not require reimbursement--

- (1) for the assistance provided in making aircraft available pursuant to that subsection;
- (2) for operating expenses associated with use of those aircraft by the Coast Guard; or
- (3) for pilots and flight crews assigned to the Secretary of Transportation pursuant to subsection (c).

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

(a) ADDITIONAL AUTHORIZATION OF APPROPRIATIONS FOR THE COAST GUARD.--

(1) ACQUISITION, CONSTRUCTION, AND IMPROVEMENTS.--There are authorized to be appropriated for acquisition, construction, and improvements of the Coast Guard \$264,000,000 for fiscal year 1989, to remain available until expended.

(2) OPERATING EXPENSES.--There are authorized to be appropriated for operating expenses of the Coast Guard \$82,000,000 for fiscal year 1989 and \$30,000,000 for each of fiscal years 1990, 1991, and 1992, to remain available until expended. Amounts appropriated pursuant to this paragraph shall be used to increase by 500 the full-time equivalent strength level for the Coast Guard for active duty

personnel for fiscal years 1989, 1990, 1991, and 1992, and to procure, enhance, relocate, operate, and maintain vessels, aircraft, radar, equipment, and structures by the Coast Guard for drug interdiction purposes.

(b) **AUTHORIZATION ENHANCEMENT.**—Amounts and personnel authorized by this section are in addition to any other amounts or personnel strengths authorized for the Coast Guard for any fiscal year.

PURPOSE OF THE BILL

The purpose of this legislation is to provide for more effective Coast Guard enforcement of laws relating to drug trafficking. This goal is addressed through two avenues. First, this legislation clarifies several legal questions which have arisen since the enactment of the Anti-Drug Abuse Act of 1986. Second, the legislation authorizes additional appropriations for Coast Guard operations and the purchase of equipment for Fiscal Years 1989 through 1992.

BACKGROUND AND NEED FOR LEGISLATION

In 1986, Congress increased this country's efforts to combat drug abuse with the passage of the Anti-Drug Abuse Act of 1986, (Public Law 99-570). Since the passage of this Act, several legal questions have arisen which have the potential to adversely affect the Coast Guard's drug interdiction efforts. These include: 1) personal liability exposure of Naval commanding officers involved in drug interdiction activities; 2) Coast Guard access to the Customs Forfeiture Fund; 3) enforcement problems related to difficulties in determining the flag status of vessels; and 4) liability exposure of the Coast Guard and its employees.

The Anti-Drug Abuse Act of 1986 authorized Coast Guard Law Enforcement Detachments [LEDETs] to engage in drug interdiction activities from Navy vessels. Under current law, Coast Guard commanding officers are protected from personal liability for damages resulting from firing into a vessel. Liability problems may occur when Naval vessels have to fire into a vessel suspected of drug smuggling which refuses to stop.

On two occasions Navy ships with Coast Guard LEDETs aboard have had to fire into suspect vessels that refused to stop. On both occasions the vessels contained large amounts of drugs (29 and 10 tons of marijuana respectively). In one instance, one person was injured; fortunately, no one was killed. Given the continued escalation of drug smuggling and the associated violence, the frequency of these types of events will likely increase, thereby exposing Naval personnel to increased opportunities for personal liability claims.

The Customs Forfeiture Fund receives the proceeds from property forfeited for a violation of United States law. The U.S. Customs Service, which conducts the forfeiture proceedings and administers the Fund, is authorized to deduct its expenses before the proceeds of the forfeiture are deposited in the Fund. Appropriations from the Fund are available to the Customs Service for the purchase of new equipment, to pay informers, to purchase evidence, and other expenses related to its operations. The Coast Guard is authorized access to appropriations from the Fund for expenses it incurs during the seizure of vessels; however, reimbursements are at the discretion of the Customs Commissioner. While the Coast Guard

contributes an average of \$33 million to the Fund each year, it has not received any reimbursements since 1986.

The Coast Guard has encountered two cases where it has had difficulty in enforcing the Maritime Drug Law Enforcement Act of 1980 because of problems related to determination of the flag status of a vessel. The first case occurs when drug smugglers sink their vessel to avoid detection during the boarding. A related situation occurs when the occupants of a vessel, the registry of which can not be determined at the time of the boarding, later raise a valid foreign registry as a defense in court. The second case occurs when the vessel's flag state retains jurisdiction but shows little interest in prosecuting U.S. citizens or resident aliens. Current law does not allow the Coast guard to proceed against U.S. citizens or resident aliens in either of these cases.

The Coast Guard's increased emphasis on drug interdiction has also led to increased exposure of Coast Guard employees and the Coast Guard itself to lawsuits. Currently, Coast Guard employees are liable for actions undertaken in the performance of their duties. This exposure has resulted in 32 suits being filed against Coast Guard personnel. The Coast Guard itself is also subject to suits for all of its maritime activities under the authority of the Suits in Admiralty Act. On land, however, it is protected from common law torts by the Federal Tort Claims Act (FTCA). This has the anomalous effect of exposing the Coast Guard to a variety of suits for actions taken at sea which would be protected by FTCA if they were carried out on land.

Finally, a perennial Coast Guard problem is the lack of adequate funding. These problems are evidenced by the fact that over the past five years, in constant dollar terms, the Coast Guard has received level funding. In an effort to alleviate the Coast Guard's funding problems, Congress has periodically provided the Coast Guard with additional funds for the purchase of new equipment through the Department of Defense budget, but has provided very little additional funds for operations. The Coast Guard's operating expenses problems reached the breaking point in Fiscal Year 1988 when it suffered a \$103 million funding shortfall. This resulted in actions to close a number of units, to reduce law enforcement efforts by 55 percent, and to cease performing discretionary search and rescue patrols.

COMMITTEE ACTION

HEARINGS

On June 15, 1988, the Subcommittee on Coast Guard and Navigation held a hearing on general oversight of the Coast Guard drug interdiction mission, as well as consideration of provisions in H.R. 4658, H.R. 4608, H.R. 4230, H.R. 4446, and H.R. 4770. Each of these bills contains provisions affecting Coast Guard drug interdiction efforts. Admiral Paul A. Yost, Jr., Commandant of the Coast Guard, was the principal witness, accompanied by members of his staff.

The morning session of the hearing was devoted to oversight of current drug interdiction activities, while the afternoon session was directed more toward specific provisions of the various bills.

In his remarks, the Commandant provided a brief overview of significant changes over the past few years in the Coast Guard's drug interdiction mission. These included the amount of the Coast Guard's Operating Expenses (OE) budget devoted to drug interdiction increasing from 7 percent in 1980 to nearly 24 percent currently, changing narcotics traffic patterns, and the adoption of more complex tactics by drug traffickers, particularly through increasing use of aircraft by drug smugglers. Admiral Yost also discussed the adverse effect of the \$103 million shortfall in Coast Guard's FY 1988 OE account, which resulted in, among other things, a 55 percent reduction in routine law enforcement patrols. In addition, the Commandant discussed sophisticated equipment being installed on eight of the Coast Guard's HU-25 Falcon jets to upgrade their ability for air interdiction. Three of these "Nightstalker" aircraft had been delivered at the time of the hearing.

In response to questions about the use of funding received in the 1986 Anti-Drug Abuse Act, the Commandant stated that not all of the equipment authorized in that legislation has been acquired, although the remainder should be received within the next nine months. Admiral Yost also pointed out that additional funding to operate the new equipment has not been forthcoming. As a result, new assets are being operated at the expense of existing ones, as evidenced by the closure of stations announced earlier this year.

The Commandant was asked how the \$60 million reprogramming request by the Administration would affect Coast Guard operations. Admiral Yost stated that the full amount could be put to good use, no matter when it is appropriated within the current fiscal year. When received, the Coast Guard will use what is needed for fuel to restore its routine law enforcement patrols to 100 percent of normal operations for the remainder of FY 1988; the balance will be applied toward reducing a backlog of spare parts purchases.

When asked about the funds for drug interdiction included in the FY 1989 Defense Authorization bill passed by the House, including funding for equipment and operating expenses for the Coast Guard, the Commandant stressed that the Conferees on the Defense bill may not retain this language. The Committee notes, however, that the Defense bill language would restrict expenditures to drug enforcement and military readiness only and that absent that language no restriction would be placed on Coast Guard funds in a DOD appropriation bill.

The Admiral also was asked about the possibility of an increased role in the drug war for the Department of the Defense. The Commandant said he believed that, while the support currently supplied by the other military services is significant, it could be increased. However, he stated he does not believe that DOD should be designated as lead agency for air interdiction, nor should the Posse Comitatus prohibitions be relaxed to give DOD military personnel arrest authority.

When asked about measures of effectiveness in the drug interdiction effort, the Commandant testified that there currently are no measures of effectiveness that are considered reliable. The National Drug Policy Board is proceeding with a study of this subject in an effort to determine the best expenditure of limited funds.

The Commandant was asked whether he would support provision of additional E-2Cs for the Coast Guard to use in drug interdiction efforts. Specific reference was made to H.R. 4770, which would provide three more E-2Cs on loan from the Navy. The Commandant stated that the E-2Cs are very effective aircraft and would greatly increase Coast Guard capability. However, the planes also are very expensive to operate.

Also discussed were the wing problems of the Navy's fleet of E-2C aircraft. The two E-2Cs on loan to the Coast Guard will be grounded in August until the wing cracks can be repaired. The Commandant does not know how long the planes will be grounded, and there is no indication that other E-2Cs will be available from the Navy.

In response to questions about reported problems with the Falcon jet engines, the Commandant stated that he believes they have resolved a majority of the problems, although the aircraft will be more expensive to maintain than originally estimated.

With regard to the HH-65 Dolphin helicopter, the Commandant stated that there will be a longer term for maturation of the aircraft because it is not one that has been tested by nor is supportable through the DOD maintenance program.

Admiral Yost stated that the \$11 million provided for communications equipment in the 1986 omnibus drug legislation has greatly improved the ability of the Coast Guard to communicate with other law enforcement agencies. However, the procurement of compatible equipment is a long-term problem that must be addressed by all law enforcement agencies.

The decommissioning of 16 Navy frigates, 8 of which had been used extensively to carry Coast Guard LEDETs, will have an adverse effect on that successful program. Although "ships of opportunity" will still be available, they are not as effective as the frigates that were dedicated to drug patrols.

With regard to Operation Bahamas, Turks and Caicos (OPBAT), the Commandant stated that cooperation with the Bahamian government is good and the joint program has been very effective. An operations center is located in the American Embassy, and some of the money from the 1986 omnibus drug bill has been used for communications equipment for OPBAT. In addition, funds provided for a permanent docking facility in the Bahamas are being used to establish a mobile basing facility that can be moved to the areas where it is most needed.

Admiral Yost also discussed problems that resulted from funds for the U.S.-Bahamas Task Force being appropriated to the Customs Service in 1986. The Admiral believes that Congress should stipulate that any funds for the task force should be allocated by the National Drug Policy Board to avoid inter-agency disputes over who receives the money.

In commenting on H.R. 4658, the Commandant stated that the Coast Guard strongly supports the bill as introduced. Several sections of the bill would clarify a number of legal questions relating to Coast Guard drug enforcement activities and should help the Coast Guard to do its job more effectively.

Admiral Yost stated that if the money provided by the bill were appropriated over and above the Administration's FY 1988 budget

request for the Coast Guard, he could use the funding for such equipment as additional HH-60 helicopters, Island-class patrol boats, secure communications, and forward-looking radar for Coast Guard C-130 aircraft. If there is sufficient funding, another project that might be considered would be to put 360-degree radar on C-130 aircraft.

Admiral Yost stated that he is opposed to several sections in H.R. 4608 and H.R. 4230, including a provision in the latter that would give the Customs Service authority on the high seas. The Admiral says that he and the Commissioner of Customs have agreed they both will oppose this provision in any legislation considered by the Congress. The Admiral noted that he wished to work with the Committee on the sections in H.R. 4608 that he had problems with so that any differences could be resolved.

In responding to questions about a proposal in H.R. 5230 that would transfer the Coast Guard to the Treasury Department, the Commandant stated that he opposed such a move. When asked about a survey reported in Navy Times that a large percentage of enlisted personnel in the Coast Guard favor a transfer to another department—either Treasury or Defense—Admiral Yost said that there is a high level of frustration among Coast Guard personnel because of continuing budget problems. He believes the results of the poll reflect that frustration more than a well-thought-out desire to actually move to another department.

FULL COMMITTEE ACTION

On June 21, 1988, The Merchant Marine and Fisheries Committee met and approved H.R. 4658, with amendments, by unanimous voice vote.

The first two amendments to the bill were offered by Mr. Hutto. The first was technical in nature and corrected a drafting oversight. The second increased the full-time equivalent personnel strength by 500 and added out-year funding in the amount of \$30 million for each of fiscal years 1990, 1991, and 1992, to the Coast Guard's Operating Expense account to ensure that it would have the necessary funding to operate and man the new equipment being provided to the Coast Guard under the legislation. Both amendments were approved by a voice vote.

The next amendment was offered by Mr. Studds and Mr. Young of Alaska. Its purpose was to restrict the ability of the Coast Guard and the Customs Service to seize and forfeit vessels upon which they find "personal use" quantities of controlled substances where there is no evidence of wrongdoing on the part of the owners or operators. The amendment also set up a procedure to hold timely hearings after property has been seized and allows innocent property owners to file claims for reimbursement of lost earnings and legal expenses. Mr. Hutto offered an amendment to the Studds/Young amendment which would have removed the words "seizure or" from Section 7(b)(3) of the amendment. Mr. Hutto argued that his amendment would serve to ensure that the Agencies could still seize vessels and thus preserve the deterrent effect of the "zero tolerance" policy. Both Mr. Studds and Mr. Young stated that the change sought by Mr. Hutto was unnecessary and contrary to the

intent of their amendment. The Hutto amendment to the Studds/Young amendment failed by a show of hands. The Studds/Young amendment then passed by a voice vote.

Mr. Hutto then offered an amendment which would have required either the Coast Guard or the Customs Service to use constructive seizures to avoid having to physically seize vessels when carrying out drug enforcement activities involving small amounts of controlled substances located in or on the vessel if three conditions were met, namely: (1) If physical seizure of the vessel would have a substantial and adverse economic effect on the vessel owner or other whose livelihood depends on the use of the property, and (2) If physical seizure pending final disposition of the forfeiture would not advance any compelling governmental interest in preserving evidence or ensuring that the property remains subject to the jurisdiction and control of the United States, and (3) If there is no basis to believe that the owner or person in custody of the property was a consenting party or privy to a violation of law with respect to the property which is subject to forfeiture. Mr. Young offered an amendment to the Hutto amendment which would have made the linkage between items 2 and 3 "or" instead of "and". After further debate as to the relationship between the Hutto amendment and the just accepted Studds/Young amendment, Mr. Hutto requested and received unanimous consent to withdraw his amendment. The Committee notes that the Coast Guard and Customs Service already have authority to use the concept of "constructive seizure" if they choose to use it.

Mr. Davis then offered an amendment. It dealt with three separate issues, namely: (1) Requiring that the President include in his annual budget submission a report describing the total amount of funds spent by each agency on drug enforcement programs during the preceding fiscal year and the amount proposed to be spent in the fiscal year for which the budget was being submitted, (2) Specifying that the Coast Guard has jurisdiction on, over, and under the high seas and navigable water of the United States and that it is also authorized to engage in maritime air surveillance and interdiction, and (3) Requiring the Secretary of the Treasury and the Secretary of Transportation to enter into an agreement to increase the effectiveness of maritime drug interdiction on the Great Lakes and to encourage the Secretary of State to enter into negotiations with the government of Canada regarding drug interdiction on the Great Lakes. The amendment was approved by a voice vote.

Mr. Hochbrueckner then offered an amendment which would have the Secretary of the Navy make three Navy-manned-and-maintained E-2C Hawkeye radar surveillance aircraft available, on a continuing basis, to the Secretary of Transportation for drug interdiction. Mr. Young of Alaska offered an amendment to the amendment which would make the planes available for use in law enforcement including drug interdiction. The Young amendment was accepted by voice vote, and then the Hochbrueckner amendment was agreed to by voice vote.

Lastly, Mr. Clement offered an amendment to Section 5 of the bill to provide that the indemnification afforded Coast Guard Members and employees should apply not only during drug enforcement

activities but during all law enforcement activities. The amendment by Mr. Clement was accepted by voice vote.

Mr. Jones moved to strike all after the enacting clause and to substitute the text of the bill as amended to that point. The Committee agreed to the motion by voice vote. The Committee by voice vote then ordered the bill as amended reported favorably to the House.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section provides that the Act may be known as the Coast Guard Drug Enforcement Act of 1988.

SECTION 2. AUTHORITY AND PROTECTION OF COMMANDING OFFICERS ON NAVAL VESSELS TO WHICH COAST GUARD PERSONNEL ARE ASSIGNED

Under section 637 of title 14, United States Code, commanding officers of Coast Guard vessels and persons acting under their orders are indemnified from penalties or damages when a Coast Guard vessel fires at or into another vessel that does not stop following an order to do so.

Section 2 extends this indemnification protection to Naval commanding officers and personnel acting under their orders aboard Navy vessels on which Coast Guard Law Enforcement Detachments are assigned pursuant to section 379 of title 14 United States Code.

SECTION 3. AMENDMENTS TO CUSTOMS FORFEITURE FUND

Section 3 of the bill amends section 613A of the Tariff Act of 1930 to require the Commissioner of Customs to reimburse the Coast Guard from the amount appropriated from the Customs Forfeiture Fund in a particular year on the following basis:

(1) If appropriations from the Fund are less than the total expenses claimed by the Customs Service and the Coast Guard for reimbursement in a given year, the Coast Guard will receive a share of the total appropriation proportionate to the amount of its operating expenses relative to the total operating expenses the Coast Guard and Customs Service claimed for reimbursement that year. The expenses claimed by Customs shall include those amounts withheld pursuant to 19 U.S.C. 1609(a) before the proceeds of forfeitures are deposited into the Fund, as well as any additional amounts claimed for reimbursement from the Fund.

(2) If appropriations from the Fund are greater than the expenses claimed by Customs and the Coast Guard in a given year, the Coast Guard will receive half of the moneys remaining after reimbursement for expenses for both the Coast Guard and the Customs Service have been made.

Section 3 also expands the uses of monies appropriated from the Fund to include expenses for bringing seized vessels which have no value into compliance with environmental laws before disposing of them by sinking. This section also allows the Coast Guard to use moneys appropriated from the Fund to equip vessels, vehicles, aircraft, and structures for law enforcement functions. Currently, the

Customs Service is allowed to spend Fund monies on all of these items except structures. By expanding the acceptable uses to include structures, the Committee recognizes their importance in providing support for the equipment which is actually used to interdict drug smugglers.

Due to a drafting error, existing paragraphs (v) and (vi) of subsection (a) of section 613A were omitted from this bill. These paragraphs authorize certain expenditures from the Fund for state and local law enforcement officials operating jointly with the Customs Service. The Committee supports expenditures from the Fund for these purposes and did not intend to repeal these paragraphs.

SECTION 4. MARITIME DRUG LAW ENFORCEMENT ACT AMENDMENTS

Under section 3(a) of the Maritime Drug Enforcement Act (46 U.S.C. App. 1903(a)), it is unlawful to "knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance" on any vessel subject to the jurisdiction of the United States. Subsection 4(a) of this bill extends the application of section 3(a) of the Act to include U.S. citizens and resident aliens aboard a vessel of any nation. This section would allow the United States to try a U.S. citizen or resident alien for a violation of the Maritime Drug Enforcement Act if the flag state of the foreign vessel fails to try the individual for the offense under the law of that country. This section is not intended to limit the authority of the flag state to take custody of and proceed against the individual. It would also not change the existing requirement for consent of the flag state before the Coast Guard boards a foreign vessel on the high seas or in the territorial waters of another nation. Nor would it change international procedures and arrangements for obtaining custody of U.S. citizens through extradition proceedings.

Section (b) of the bill amends section 3(b)(2) of the Maritime Drug Enforcement Act to require that claims of vessel nationality or registry be raised at the time of boarding by the Coast Guard. This section addresses the situation in which a vessel appears to be a United States vessel at the time of the boarding, but individuals charged with a violation of the Act later raise the vessel's foreign registry as a defense to prosecution. Requiring that a claim of foreign registry be raised at the time of boarding would allow an inquiry into the vessel's registry and appropriate requests to the state of registry for a waiver of jurisdiction.

SECTION 5. INDEMNIFICATION OF COAST GUARD MEMBERS AND EMPLOYEES

This section authorizes the Commandant of the Coast Guard to indemnify and Coast Guard member or employee against personal liability for actions taken within the scope of their official law enforcement duties. It is patterned after the authority of the Federal Aviation Administrator to indemnify Federal Aviation Administration employees for damages for actions taken within the scope of their employment, found in section 205 of the Airport and Airway Improvement Amendments (Public Law 100-223).

SECTION 6. AMENDMENTS TO SUITS IN ADMIRALTY ACT AND PUBLIC VESSELS ACT

This section incorporates certain of the exceptions to suit against the United States presently contained in the Federal Tort Claims Act (28 U.S.C. 2671-2680) and is intended to clarify maritime law relating to the liability of the United States.

Prior to 1960, admiralty suits against the United States, other than those arising from the operation of certain vessels, were brought under the Federal Tort Claims Act. In 1960, Congress amended the Suits in Admiralty Act (46 U.S.C. App. 741-752) to encompass all admiralty actions, to remove uncertainty over the proper forum for certain claims against the United States.

On land, the U.S. Government and its employees are protected from common law torts by the Federal Tort Claims Act. The Federal Tort Claims Act does not apply on the navigable waters of the United States or on the high seas. On those waters the Suits in Admiralty Act applies. The Suits in Admiralty Act does not contain several of the exceptions to suit contained in the Federal Tort Claims Act. Section 6 of this bill would amend the Suits in Admiralty Act to include several exceptions currently provided under the Federal Tort Claims Act.

With respect to Coast Guard law enforcement efforts, the Federal Tort Claims Act exceptions for discretionary function and customs detention are particularly important. For example, claims frequently arise with respect to seizure of vessels during maritime law enforcement efforts. In some cases, vessels containing large quantities of illicit narcotics have been seized but have sunk before they could be returned to a U.S. port, and claims have been filed against the United States for loss of the vessel. Because the vessel is destroyed, no property is available to effect a forfeiture, and the ability of the United States to use the defense that the vessel was subject to forfeiture, and that title vested in the United States at the time of commission of the act, notwithstanding the lack of a declaration of forfeiture, is unclear. Inclusion of the Federal Tort Claims Act customs detention exception from suit within the Suits in Admiralty Act provision would insure that the United States is not liable for damage to detained property on navigable waters of the United States or the high seas under the same circumstances as is presently the case for damage to detained property that occurs ashore.

SECTION 7. SEIZURES AND FORFEITURES OR CONVEYANCES

The purpose of section 7 is to protect owners and crewmembers from the unjustified seizure and forfeiture of their conveyances by the Customs Service and the Coast Guard in those instances where they find "personal use" quantities of drugs but no evidence of wrongdoing on the part of the owners or those who are otherwise in charge of the conveyance. As a general approach, section 7 applies the limitations on forfeiture applicable to common carriers broadly to all conveyances on which personal use quantities of drugs are found.

The amendment reflects two complementary principles: that the owners and operators of vessels have an obligation to do what can

reasonably be expected to keep vessels clear of drug use when they become aware of such activities; and that innocent people should not have their property taken from them or lose their livelihood because of someone else's wrongdoing.

Subsection (a).—21 U.S.C. 881 contains the basic seizure and forfeiture authority for violations of the Controlled Substances Act of 1970, as amended. Section 881(a) lists the things that are subject to forfeiture under the subchapter and includes in paragraph (4) the authority to forfeit conveyances. Subsection (a) of section 7 of this bill proposes a new subparagraph (C) which provides that no conveyance shall be forfeited under the section for possession of a controlled substance in violation of 21 U.S.C. 844 or 955 unless the violation appears to have been committed with the knowledge or consent of the owner or other person in charge of the conveyance.

Subsection (a) of section 7 draws upon the general language describing the type of culpability of the owners that is contained in the real property forfeiture limitation in Sec. 881 (a)(7) of the Controlled Substances Act of 1970. The amendment also limits its scope to those circumstances involving the possession of controlled substances in violation of section 844 and 955 of title 21, which are the two sections prohibiting the possession of controlled substances.

The Committee intentionally limits the reach of the amendment to those circumstances involving forfeiture of conveyances for violation of the drug possession laws, and leaves unchanged the forfeiture provisions relating to other drug laws, such as the manufacture or possession with the intent to sell or distribute, as contained in 21 U.S.C. 841 or 46 U.S.C. 1903, the so-called trafficking offenses. Thus, there will be no "innocent owner" limitation on forfeiture of a conveyance where there is a violation of the laws relating to manufacture or distribution or where there is the possession of quantities which evidence an intent to manufacture or distribute.

Subsection (b).—Subsection (b) amends section 1594 of title 19, which is the main provision authorizing the seizure and forfeiture of vessels, vehicles, and aircraft in violation of the customs laws generally. The section currently has two limitations on seizure and forfeiture of common carriers, with one addressing manifested cargo and the other unmanifested cargo.

Subsection (b) of the amendment incorporates another "innocent owner" exception for vessels, vehicles, and aircraft, patterned after the existing common carrier provisions in 19 U.S.C. 1594(b). In so doing, it is limited to those circumstances where 19 U.S.C. 1594 is being used to enforce a violation of the drug possession statutes, and does not reach enforcement actions involving other drug offenses or non-drug related customs actions. The amendment also preserves existing limitations on the seizure and forfeiture authorities relating to common carriers.

Subsection (c).—Subsection (c) of the amendment proposes a similar limitation as the preceding subsections for forfeiture under section 782 of title 49, the statute authorizing the seizure and forfeiture of "contraband" articles, which is defined to include narcotics. Again, the language of the new innocent owner proviso is patterned after the existing common carrier provision in that section, and is limited to possession of contraband narcotics.

SECTION 8. FORFEITURE PROCEDURES

Section 8 contains procedural modifications to the seizure and forfeiture provisions of 21 U.S.C. 881. The purpose of these modifications is to incorporate minimal due process safeguards into the procedures governing seizure and forfeiture in that section.

The amendment is structured to add a new subsection (k) to section 881. In keeping with the scope of section 7, subsection (k)(1) of the new subsection provides that the new procedures contained in the subsection shall be used in those instances where there has been a seizure of a conveyance involving the possession of a controlled substance in violation of the possession statutes.

Subsection (k)(2) contains the notice requirements that would apply at the time of seizure. Firstly, it would require the arresting officer to make a preliminary assessment to determine if all the elements necessary to maintain a forfeiture action are present. In short, the amendment retains the requirement that an arresting officer have "probable cause" to believe that there has been a violation of law—in this instance a violation of a drug possession statute.

The arresting officer is also to make a "preliminary assessment" of whether a case forfeiture can be made, which includes assessing the culpability of the owner or other person in charge of the conveyance. Making such a preliminary assessment reflects the exercise of good enforcement discretion, as evidenced by the current practice governing seizure of common carriers. Where, for instance, there is no evidence whatsoever of knowledge of the violation on the part of the owner or person in charge of the conveyance and otherwise no reason to believe that there is any culpability on their part, then the exercise of proper enforcement discretion frequently results in a decision not to seize the conveyance.

While the Committee believes that such a preliminary assessment reflects good enforcement practice, it recognizes as well that there may be instances where firm judgments about the innocence of the owner or person in charge of the conveyance may be difficult to make at the time of seizure. The Committee has therefore not elevated the requirement for a preliminary assessment to a requirement for a formal finding of culpability, nor sought to impose a probable cause requirement relating to culpability.

Secondly, it would require at the time of seizure that the arresting officer provide clear written notice of the grounds for the seizure and the rights to hearing and other procedural safeguards in section 881. That notice should be given upon seizure to the person in charge of the conveyance—assuming that someone is present at or near the time of seizure.

Thirdly, it would require the arresting officer or other competent authority to provide swift notice to the owner of the conveyance—if different from the person in control of the conveyance—of the seizure and their rights to ask for a preliminary hearing.

The Committee recognizes that complex legal relationships may govern the ownership issue and thus inhibit the ability of the arresting officer to provide the necessary notifications at the time of seizure. The Committee therefore incorporates the requirement

that the officer or other competent authority shall make all reasonable efforts to provide the necessary notice.

Paragraph (3) would require the Attorney General to request a federal magistrate to conduct a preliminary hearing into the seizure within 72 hours of receiving a request for the hearing from the owner or person in charge of the conveyance. The purpose of the hearing would be to require the government to demonstrate that there was a substantial likelihood that it would prevail on the merits of the case. The preliminary hearing would also allow the owner or other person in charge to present evidence of their innocence and an opportunity for the government to rebut that evidence.

In requiring a showing of substantial probability, the Committee intends that the government demonstrate at the preliminary hearing stage that it is substantially likely to meet its burden of proof at the final hearing stage—that is, demonstrate that it had probable cause to believe that the conveyance is subject to forfeiture. Since these proceedings are civil in nature, the Committee intends that the rules of evidence governing civil proceedings apply. Further, in the case of a seizure of a conveyance where the arresting officer cannot attend a preliminary hearing without undue hardship or disruption of duty, the Committee intends that an affidavit attesting to the facts and circumstances of the seizures should normally suffice.

The amendment provides that the court may enter an order continuing the seizure pending the final hearing if it finds that the government has met its burden of proof, that the continued seizure is necessary to ensure that the conveyance doesn't disappear or otherwise become unavailable for the later proceedings, and the continued physical seizure justifies the hardship it may impose on owners or crew of the conveyance that may, in the interim, find themselves without their property or means of earning a livelihood.

The Committee intends that the court retain the authority to release the conveyance pending the final disposition of the forfeiture proceeding, intending as well that the court could in appropriate circumstances retain technical jurisdiction over the conveyance to satisfy any final judgment.

The standards governing the continued seizure contained in subsection (k)(3) are intended to reflect the proper balance between the government's need to provide for an appropriate remedy in the event that forfeiture is found to be justified and the interests of the vessel owner and crew in retaining their property and means of livelihood pending the final disposition of the matter. The Committee intends that the initial decision to seize a conveyance and the decision to continue the seizure at the preliminary hearing stage reflect these appropriate factors.

Paragraph (3) provides owners and operators with the right to post a bond to secure the release of the conveyance pending the final forfeiture proceedings. This bond would allow the conveyance—such as a vessel—to return to service while protecting the government's interest in ensuring an adequate remedy should forfeiture be ordered.

Paragraph (4) requires the Attorney General to file a complaint to commence a final hearing on the forfeiture before a district

court within 90 days after the preliminary hearing. Failure to file the complaint within the required time limits could result in the release of the conveyance by the court on its own motion or on the motion of the owner.

SECTION 9. CLAIMS FOR REIMBURSEMENT

Section 9 authorizes claims by owners or other persons in charge of vessels engaged in trade, business, or scientific research for losses resulting from seizure or forfeiture for a violation of the drug possession laws where the owner or other person in charge of the vessel was not consenting to or in privy with the violation.

SECTION 10. ANNUAL REPORT ON FEDERAL DRUG ENFORCEMENT

This section requires the President to submit a report on expenditures for illegal drug enforcement programs with the Administration's annual budget submission. The report should explain the expenditures made on these programs for the fiscal year immediately preceding the budget year, and the expenditures that the President recommends for the upcoming budget year. The Committee intends that this section be interpreted broadly to include all Federal programs related to illegal drug enforcement, including those programs designed to reduce the demand for illegal drugs, such as education programs. The reports should reflect spending by each agency to allow Congressional authorizing committees to scrutinize the President's recommendations for drug expenditures and target the most effective ways to combat drug abuse and interdict illegal drugs.

SECTION 11. COAST GUARD LAW ENFORCEMENT DUTIES

This section amends section 2 of Title 14, United States Code, to specifically authorize the Coast Guard to enforce and assist in the enforcement of all U.S. laws over, as well as on and under, water subject to the jurisdiction of the United States and the high seas. The section also adds maritime air surveillance or interdiction to the Coast Guard's primary law enforcement duties. The Committee does not intend that this section interfere with or override the provisions of the Memorandum of Understanding between the U.S. Coast Guard and the U.S. Customs Service signed May 11, 1987, and approved by the National Drug Policy Board. The Committee does believe that each law enforcement agency should have enforcement authority broad enough to respond to all situations which may reasonably arise in the usual course of law enforcement.

SECTION 12. GREAT LAKES DRUG INTERDICTION

This section requires the Secretary of Transportation and the Secretary of the Treasury to sign an agreement reflecting the most effective use of U.S. Coast Guard and U.S. Customs Service resources to interdict illegal drugs on the Great Lakes. The section also encourages the Secretary of State to begin negotiations with officials of the Canadian government on an agreement to increase cooperation between and coordination of our respective governments' efforts to interdict drugs on the Great Lakes.

The agreement and negotiations under this section will not only increase the effectiveness of drug interdiction on the Great Lakes, but will also have a deterrent effect against any increase of drug activity on the Great Lakes.

SECTION 13. AVAILABILITY TO DOT OF NAVAL RADAR SURVEILLANCE AIRCRAFT

This section directs the Secretary of the Navy to make available to the Secretary of Transportation, on a continuing basis, three additional E-2C Hawkeye radar surveillance aircraft for use by the Coast Guard in law enforcement missions. The aircraft made available must be from among those Navy aircraft awaiting wing overhaul. While not able to conduct aircraft carrier missions due to wing fatigue, the E-2Cs in this category are capable of operating for 200 flight hours each in land-based missions such as drug interdiction.

The Committee envisions an inter-agency agreement wherein the Navy will make these E-2Cs available on a rotating basis, three at a time. After each E-2C has flown for 200 hours with the Coast Guard, it will be reclaimed by the Navy for wing overhaul and returned to aircraft carrier duty. Meanwhile, another plane will be sent to the Coast Guard to take its place. If at any time less than three aircraft are available for this purpose, the Secretary of the Navy may provide the lesser number.

Under the loan agreement established under this section, the E-2Cs are to be staffed by Navy pilots and Navy flight crews until such time as there are adequate numbers of trained and qualified Coast Guard personnel to replace them. The aircraft are to be provided at no cost to the Coast Guard (including costs of Navy pilots and flight crews, fuel, spare parts, maintenance and repairs, and other expenses associated with the aircraft).

This program is similar to the Navy-Coast Guard E-2C loan program established by the Anti-Drug Abuse Act of 1986 (P.L. 99-570). It is also in conformity with the Department of Defense Authorization Act for fiscal year 1989 that was passed by the Congress on July 14, 1988, which expands the responsibilities of the Navy and requires its close cooperation with the Coast Guard in surveillance missions associated with maritime drug interdiction.

SECTION 14. AUTHORIZATION OF APPROPRIATIONS

This section authorizes appropriations for the Coast Guard, to remain available until expended, of \$264 million for Acquisition, Construction and Improvements, \$82 million for Operating Expenses for FY1989, and \$30 million per year for Operating Expenses for fiscal years 1990, 1991, and 1992. This money shall be used to provide 500 additional full-time positions, and to procure, enhance, relocate, operate and maintain additional equipment and facilities for drug interdiction activities of the Coast Guard. Amounts and personnel authorized by this section are in addition to any other amounts or personnel strengths authorized.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause a(1)(4) of rule XI of the Rules of the House of Representatives, the Committee has assessed the potential for inflationary impact and has concluded that the potential, if any, is negligible.

COMPLIANCE WITH CLAUSE 7, RULE XIII

In accordance with paragraph (d) of this clause, the provisions of this clause do not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office has been prepared and included in the report.

COMPLIANCE WITH CLAUSE 2(1)(3), RULE XI

With respect to the requirements of clause 2(1)(3) of rule XI of the Rules of the House of Representatives:

(A) A hearing was held on June 15, 1988, regarding not only the markup vehicle, H.R. 4658, but also on other drug and drug related bills before the Subcommittee on Coast Guard and Navigation. Appearing as a witness at the June 15 hearing was Admiral Paul A. Yost, Commandant of the United States Coast Guard.

(B) The requirements of section 308(a) of the Congressional Budget Act of 1974 are not applicable to this legislation.

(C) The Committee has not received a report from the Committee on Government Operations of oversight findings and recommendations arrived at pursuant to clause 2(b)(2) of Rule X.

(D) The Director of the Congressional Budget Office has furnished the Committee with an estimate and comparison of costs for H.R. 4658 as reported, pursuant to section 403 of the Congressional Report Act of 1974. That estimate follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 27, 1988.

Hon. WALTER B. JONES,
*Chairman, Committee on Merchant Marine and Fisheries, U.S.
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 4658, the Coast Guard Drug Enforcement Act of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 4658.
2. Bill title: Coast Guard Drug Enforcement Act of 1988.
3. Bill status: As ordered reported by the House Committee on Merchant Marine and Fisheries, June 21, 1988.
4. Bill purpose: H.R. 4658 would authorize additional appropriations of \$264 million for fiscal year 1989 for Coast Guard acquisi-

tion, construction, and improvements. The bill would also authorize \$82 million for fiscal year 1989 and \$30 million for each of fiscal years 1990 through 1992 for Coast Guard operating expenses. The additional funding for operating expenses would be to increase Coast Guard active duty personnel by 500 positions and other purposes.

An amendment to the statute governing the Customs Forfeiture Fund would provide that the Coast Guard, as well as the Customs Service, would receive reimbursement from the fund up to the value of property seized by the Coast Guard during the fiscal year. Further, the Secretary of the Navy would be required to provide the Secretary of Transportation with three surveillance aircraft along with qualified pilots and flight crews for drug interdiction activities of the Coast Guard. The Navy could reduce the number of aircraft provided if their missions or readiness would be affected.

H.R. 5648 would amend a number of other statutes concerning Coast Guard drug enforcement activities. The bill would bar the forfeiture of any conveyance for a drug-related violation when the owner of or other person in charge did not consent to or know of the violation. The federal government would be required to pay claims for losses arising from the seizure for forfeiture of a vessel engaged in trade, business or scientific research unless the owner or person in charge was a consenting party or privy to a violation of federal drug laws.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Authorization level.....	346	30	30	30	..
Estimated outlays.....	99	104	120	83	31

The costs of this bill fall within budget function 400.

Basis of Estimate: CBO assumed that the full amounts authorized would be appropriated. Outlay estimates are based on historical spending patterns.

Based on information provided by the Coast Guard, CBO estimates that the cost of operating the three surveillance aircraft to be made available by the Navy would be between \$15 million and \$30 million a year. H.R. 4658 provides that the Secretary of the Navy may not require reimbursement for these expenses.

The Coast Guard would be potentially liable for claims brought by owners of seized vessels as a result of this legislation. CBO cannot predict whether or how much costs would increase as a result of this provision.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Marjorie Miller.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analyses.

DEPARTMENTAL REPORTS

Although no official Departmental Reports were received, representatives of the Coast Guard were consulted with throughout the development of the legislation. The provisions as contained in H.R. 4658, as introduced, arose as a result of extensive conversations with the Coast Guard as to shortcomings in the 1986 Omnibus anti-drug legislation as well as funding requirements to better enable the Coast Guard to equip and man itself to fight this increasingly complex problem.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, as amended, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

14 U.S.C., CH. 17, TABLE OF SECTIONS

CHAPTER 17—ADMINISTRATION

Sec.

- 631. Delegation of powers by the Secretary.
- 632. Functions and powers vested in the Commandant.
- 633. Regulations.
- 634. Officers holding certain offices.
- 635. Oaths required for boards.
- 636. Administration of oaths.
- [637. Stopping vessels; immunity of Coast Guard officer.]**
- 637. Stopping vessels; immunity for firing at or into vessel.*
- 638. Coast Guard ensigns and pennants.
- 639. Penalty for unauthorized use of words "Coast Guard".
- 640. Interchange of supplies between Army, Navy, and Coast Guard.
- 641. Disposal of certain material.
- 642. Deposit of damage payments.
- 643. Rewards for apprehension of persons interfering with aids to navigation.
- 644. Payment for the apprehension of stragglers.
- [645. Settlement of claims incident to activities of the Coast Guard.]**
- 645. Indemnification of Coast Guard members and employees.*
- 646. Claims for damages occasioned by vessels.
- 647. Claims for damage to property of the United States.
- 648. Accounting for industrial work.
- 649. Supplies and equipment from stock.
- 650. Coast Guard supply fund and supply account.
- 651. Annual report.
- 652. Removing restrictions.
- 653. Employment of draftsmen and engineers.

14 U.S.C. 2

§2. Primary duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws **[on and under]** *on, under, and over* the high seas and waters subject to the jurisdiction of the **[United States;]** *United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the*

United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities.

14 U.S.C. 637

§ 637. Stopping vessels; immunity of Coast Guard officer

[(a) Whenever any vessel liable to seizure or examination does not bring-to, on being ordered to do so or on being chased by any Coast Guard vessel or aircraft which has displayed the ensign, pennant, or other identifying insignia prescribed for vessels or aircraft of the Coast Guard, the person in command or in charge of such Coast Guard vessel or such Coast Guard aircraft may, after a gun has been fired by the Coast Guard vessel or aircraft as a warning signal, fire at or into such vessel which does not bring-to.

[(b) The person in command of such Coast Guard vessel or such Coast Guard aircraft and all persons acting by or under his direction shall be indemnified from any penalties or actions for damages for so doing. If any person is killed or wounded by such firing, and the person in command of the Coast Guard vessel or aircraft or any person acting pursuant to his orders is prosecuted or arrested therefor, he shall be forthwith admitted to bail.]

§ 637. Stopping vessels; immunity for firing at or into vessel

(a) Whenever any vessel liable to seizure or examination does not stop on being ordered to do so or on being pursued by an authorized vessel or authorized aircraft which has displayed the ensign, pennant, or other identifying insignia prescribed for an authorized vessel or authorized aircraft, the person in command or in charge of the authorized vessel or authorized aircraft may, after a gun has been fired by the authorized vessel or authorized aircraft as a warning signal, fire at or into the vessel which does not stop.

(b) The person in command of an authorized vessel or authorized aircraft and all persons acting under that person's direction shall be indemnified from any penalties or actions for damages for firing at or into a vessel pursuant to subsection (a). If any person is killed or wounded by the firing, and the person in command of the authorized vessel or authorized aircraft or any person acting pursuant to

their orders is prosecuted or arrested therefor, they shall be forthwith admitted to bail.

(c) A vessel or aircraft is an authorized vessel or authorized aircraft for purposes of this section if—

(1) it is a Coast Guard vessel or aircraft; or

(2) it is a surface naval vessel on which one or more members of the Coast Guard are assigned pursuant to section 379 of title 10, United States Code.

14 U.S.C. 644-645

§ 644. Payment for the apprehension of stragglers

The Coast Guard may offer and pay rewards for the apprehension and delivery of deserters, stragglers, and prisoners.

§ 645. Indemnification of Coast Guard members and employees.

The Commandant may indemnify any member or employee of the Coast Guard against any claim or judgment against the member or employee if the claim or judgment arises out of an act committed, as determined by the Commandant, within the scope of the official duties of the member or employee in carrying out law enforcement activities.

19 U.S.C. 1594(b)

(b)(1) EXCEPTIONS.—No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to seizure and forfeiture under the customs laws for violations relating to merchandise contained—

[(1)] (A) on the person;

[(3)] (B) in baggage belonging to and accompanying a passenger being lawfully transported on such conveyance; or

[(3)] (C) in the cargo of the conveyance if the cargo is listed on the manifest and marks, numbers, weights and quantities of the outer packages or containers agree with the manifest; unless the owner or operator, or the master, pilot, conductor, driver or other person in charge participated in, or had knowledge of, the violation, or was grossly negligent in preventing or discovering the violation.

(2) Except as provided in paragraph (1) or subsection (c), no vessel, vehicle, or aircraft is subject to seizure and forfeiture for possession of a controlled substance in violation of section 404 or 1005 of the Controlled Substances Act (21 U.S.C. 844 or 955) unless the owner or operator, or the master, pilot, conductor, driver, or other person in charge participated in or had knowledge of or was grossly negligent in preventing or discovering the violation.

19 U.S.C. 1613b

§ 1613b. Customs Forfeiture Fund

[(a) ESTABLISHMENT: PURPOSES OF FUND.—There is established in the Treasury of the United States a fund to be known as the Customs Forfeiture Fund (hereinafter in this section referred to as the “fund”), which shall be available to the United States Customs Service, subject to appropriation, during the period beginning on October 12, 1984, and ending on September 30, 1991. The fund shall be available with respect to seizures and forfeitures by the United States Customs Service under any law enforced or administered by it for payment (to the extent that such payment is not reimbursed under section 1524 of this title—

[(1) of all proper expenses of the seizure (including investigative costs leading to seizures) or the proceedings of forfeiture and sale (not otherwise recovered under section 1613(a) of this title), including, but not limited to, expenses of inventory, security, maintaining the custody of the property, advertising and sale, and if condemned by the court and a bond for such costs was not given, the costs as taxed by the court;

[(2) of awards of compensation to informers under section 1619 of this title;

[(3) for satisfaction of—

[(A) liens for freight, charges, and contributions in general average, notice of which has been filed with the appropriate customs officer according to law; and

[(B) other liens against forfeited property;

[(4) of amounts authorized by law with respect to remission and mitigation;

[(5) of claims of parties in interest to property disposed of under section 1612(b) of this title, in the amounts applicable to such claims at the time of seizure.

In addition to the purposes described in paragraphs (1) through (5), the fund is available for—

[(i) purchases by the Customs service of evidence of—

[(I) smuggling of controlled substances, and

[(II) violations of the currency and foreign transaction reporting requirements of chapter 51 of Title 31, if there is a substantial probability that the violations of these requirements are related to the smuggling of controlled substances;

[(ii) the equipping for law enforcement functions of any vessel, vehicle, or aircraft available for official use by the Customs Service;

[(iii) the reimbursement, at the discretion of the Secretary, of private citizens for expenses incurred by them in cooperating with the Customs Service in investigations and undercover law enforcement operations; and

[(iv) the publicizing of the availability of rewards under section 1619 of this title.

[(v) the equipping for law enforcement functions of any vessel, vehicle, equipment, or aircraft available for official use by a State or local law enforcement agency if the conveyance

will be used in joint law enforcement operations with the Customs Service.

[(vi) the payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of State and local law enforcement officers that are incurred in joint operations with the Customs Service.]

(a) *There is established in the Treasury of the United States a fund to be known as the Customs Forfeiture Fund (hereinafter in this section referred to as the "fund"), which shall be available to the United States Customs Service and the United States Coast Guard, subject to appropriation, with respect to seizures and forfeitures by the United States Customs Service and by the United States Coast Guard under any law enforced or administered by the Customs Service or the Coast Guard for payment (to the extent that the payment is not reimbursed under section 524 of this Act)—*

(1) *of all proper expenses of the seizure (including investigative costs leading to seizures) or the proceedings of forfeiture and sale (not otherwise recovered under section 613(a) of this Act), including, but not limited to, expenses of inventory, security, maintaining the custody of the property, advertising and sale, and if condemned by the court and a bond for the costs was not given, the costs as taxed by the court;*

(2) *of awards of compensation to informers under section 619 of this Act;*

(3) *for satisfaction of—*

(A) *liens for freight, charges, and contributions in general average, notice of which has been filed with the appropriate customs officer according to law; and*

(B) *other liens against forfeited property;*

(4) *of amounts authorized by law with respect to remission and mitigation;*

(5) *of claims of parties in interest to property disposed of under section 612(b) of this Act, in the amounts applicable to the claims at the time of seizure;*

(6) *of expenses incurred in bringing vessels into compliance with applicable environmental laws before disposing of the vessels by sinking. In addition to the purposes described in paragraphs (1) through (6), the fund is available for—*

(i) *purchases by the customs Service of evidence of—*

(I) *smuggling of controlled substances, and*

(II) *violations of the currency and foreign transaction reporting requirements of chapter 51 of title 31, United States Code, if there is a substantial probability that the violations of these requirements are related to the smuggling of controlled substances;*

(ii) *the equipment for law enforcement functions of any vessel, vehicle, aircraft, or structure available for official use by the Customs Service or the Coast Guard;*

(iii) *the reimbursement, at the discretion of the Secretary, of private citizens for expenses incurred by them in cooperating with the Customs Service in investigations and undercover law enforcement operations; and*

(iv) *the publicizing of the availability of rewards under section 619 of this Act.*

(b) PAYMENTS; REIMBURSEMENT OF COAST GUARD.—

(1) Payment under paragraphs (3) and (4) of subsection (a) of this section shall not exceed the value of the property at the time of the seizure.

[(2) Amounts under subsection (a) of this section shall be available, at the discretion of the Commissioner of Customs, to reimburse the applicable appropriation for expenses incurred by the Coast Guard for a purpose specified in such subsection.]

(2)(A) Payments to the Coast Guard under this section shall be made by the Commissioner of Customs to reimburse the applicable appropriation of the Coast Guard.

(B) Payments to the Coast Guard for a fiscal year under subsection (a)(1)—

(i) shall not exceed the value of the property seized by the Coast Guard during that fiscal year, as the value is determined at the time of the seizure; and

(ii) shall have priority over and shall not be affected by other payments for the fiscal year made under subsection (a).

(C) For each fiscal year for which the total amount appropriated from the fund is less than the total amount of expenses which are authorized by subsection (a)(1) to be paid from the fund, the amount of payment to the Coast Guard pursuant to subsection (a)(1) shall bear the same proportion to the total amount appropriated from the fund for the fiscal year as the total amount of expenses of the Coast Guard which are authorized by subsection (a)(1) to be paid from the fund for the fiscal year bears to the total amount of expenses of the Coast Guard and the Customs Service which are authorized by subsection (a)(1) to be paid for the fiscal year.

(D) In each fiscal year for which the total amount appropriated from the fund is greater than the total amount of expenses which are authorized by subsection (a)(1) to be paid, the Commissioner of Customs shall pay to the Coast Guard, in addition to amounts paid to the Coast Guard pursuant to subsection (a)(1), an amount equal to one half of the remainder of the total amount appropriated from the fund for the fiscal year after the payment of expenses under subsection (a)(1).

(c) DEPOSITS INTO FUND.—There shall be deposited in the fund [during the period beginning on the date of the enactment of this section, and ending on September 30, 1987,] all proceeds from forfeiture under any law enforced or [administered by the United States Customs Service] *administered by the United States Customs Service or the United States Coast Guard* (after reimbursement of expenses under section 1524 of this title) and all earnings on amounts invested under subsection (d) of this section.

* * * * *

19 U.S.C. 1617

§ 1617. Compromise of government claims by Secretary of Treasury; payment of claims of innocent vessel owners.

(a) Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

(b) *CLAIMS OF INNOCENT VESSEL OWNERS.*—*The Secretary shall pay an owner or person in charge of a vessel engaged in trade, business, or scientific research for claims for losses resulting from a seizure or forfeiture for possession of a controlled substance in violation of section 404 or 1005 of the Controlled Substances Act (21 U.S.C. 844 or 955), including legal expenses and lost income, unless it appears that the owner or other person in charge of the vessel was a consenting party or privy to the violation.*

21 U.S.C. 881

§ 881. Forfeitures**PROPERTY SUBJECT**

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

* * * * *

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; [and]

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State [.] ; and

(C) no conveyance shall be forfeited under this section for possession of a controlled substance in violation of section

404 or 1005 unless the violation appears to have been committed with the knowledge or consent of the owner or other person in charge of the conveyance.

* * * * *

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

(k) **FORFEITURE PROCEDURES.**—

(1) **COVERED SEIZURES.**—This subsection applies to a seizure under subsection (b) of a conveyance which is subject to forfeiture under subsection (a)(4) for possession of a controlled substance in violation of section 404 or 1005.

(2) **NOTICE REQUIREMENTS.**—An officer making a seizure to which this subsection applies—

(A) shall, prior to the seizure, make a preliminary assessment of whether the circumstances justifying forfeiture are present; and

(B) shall, at the time of seizure, deliver to the person in charge of the conveyance a written notice of the charges supporting the seizure and of the hearing rights provided by this section.

The officer or other competent authority shall determine whether the person owns or claims any ownership interest in the conveyance and, if they do not, shall make all reasonable efforts to ascertain the identity and location of the owner and to provide immediate notice thereto.

(3) **PRELIMINARY HEARING.**—In the case of a seizure to which this subsection applies, the Attorney General shall request a hearing before the nearest available Federal magistrate or, in the event that a Federal magistrate is not reasonably available, before a State or local judicial officer authorized by section 3041 of title 18, United States Code, within 72 hours after receiving a written request for the preliminary hearing from the owner or other person in charge of the conveyance. The court shall enter an order continuing the seizure in effect until the final disposition of forfeiture proceedings under this subchapter if the court finds that—

(A) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the conveyance being destroyed, concealed, transferred, or otherwise made unavailable for forfeiture; and

(B) the need to preserve the availability of the conveyance for evidentiary or other purposes through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

Any order issued by the court under this paragraph shall remain in effect until the final disposition of the forfeiture.

(4) *POSTING BOND.*—If the court makes the findings under paragraph (2), a person claiming an ownership interest in the conveyance may post a bond in an amount equal to the value of the conveyance, whereupon the court shall suspend the order pending final disposition of the forfeiture proceedings. The suspension shall not apply to any case where seizure is necessary for evidentiary purposes.

(5) *FINAL HEARING.*—The Attorney General shall commence judicial proceedings for forfeiture of a conveyance the seizure of which was subject to this subsection by filing with the appropriate district court a complaint seeking the forfeiture and stating the reasons therefore within 90 days after the preliminary hearing, except for excusable delay or by agreement of the parties. If the Attorney General fails to file the complaint within 90 days without sufficient excuse, the appropriate district court may, on its own motion or at the request of the owner or person in charge of the conveyance, vacate the order under paragraph (2) and order the return of the conveyance to the owner or person in charge.

46 U.S.C. APP. 742

§ 742. Libel in personam

[In cases] (a) *Subject to subsection (b), in cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.*

(b) *No proceeding may be brought under this section against the United States, and no proceeding may be brought under any law against an employee of the United States, for an act or omission of the employee while acting in the scope of employment, with respect to the following claims:*

(1) *Any claim based on an act or omission of an employee of the United States Government exercising due care in executing*

a statute or regulation, whether or not the statute or regulation is valid.

(2) Any claim based on the exercise or performance, or a failure to exercise or perform, a discretionary function or duty by a Federal agency or an employee of the United States Government, whether or not involving an abuse of discretion by the agency or employee.

(3) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(4) Any claim arising out of the assessment or collection of any tax or customs duty, the detention of any goods or merchandise, by an officer of the customs or by any other investigative or law enforcement officer.

(5) Any claim arising out of an act or omission of any employee of the United States in administering the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.).

(6) Any claim for damages arising out of the imposition or establishment of a quarantine by the United States.

(7) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. With regard to acts or omissions of investigative or law enforcement officers of the United States Government, this Act shall apply to any claim arising on or after the date of the enactment of this subsection, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

(8) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(9) Any claim arising out of the combatant activities of the military or naval forces (including the Coast Guard) during time of war.

(c) In this section, the term "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of United States law.

46 U.S.C. APP. 781

§ 781. Libel in admiralty against or impleader of United States

[A libel] (a) Subject to subsection (b), a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

(b) No libel or petition may be brought under this section for any claim described in section 2(b) of the Act of March 9, 1920 (46 U.S.C. App. 742(b)(1); commonly known as the Suits in Admiralty Act).

46 U.S.C. APP. 1903

§ 1903. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels

(a) **VESSELS OF UNITED STATES OR VESSELS SUBJECT TO JURISDICTION OF UNITED STATES.**—It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, *or who is a citizen of the United States or a resident alien of the United States on board any vessel*, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(b) **"VESSEL OF THE UNITED STATES" Defined.**—For purposes of this section, a "vessel of the United States" means—

(1) a vessel documented under chapter 121 of Title 46 or a vessel numbered as provided in chapter 123 of that title;

(2) a vessel owned in whole or part by—

(A) the United States or a territory, commonwealth, or possession of the United States;

(B) a State or political subdivision thereof;

(C) a citizen or national of the United States; or

(D) a corporation created under the law of the United States or any State, the District of Columbia, or any territory, commonwealth, or possession of the United States;

unless the vessel has been granted the nationality of a foreign nation in accordance with article 5 of the 1958 Convention on the High Seas and a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States authorized to enforce applicable provisions of United States law; and

* * * * *

49 U.S.C. APP. 782

§ 782. Seizure and forfeiture

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, ve-

hicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. *No vessel, vehicle, or aircraft shall be forfeited under this section for possession of a narcotic drug in violation of section 1 (49 U.S.C. App. 781) unless it shall appear that the owner or master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto.*

DISSENTING VIEWS OF CONGRESSMAN EARL HUTTO ON
SECTIONS 7 THROUGH 9 OF H.R. 4658 AS REPORTED BY
THE COMMITTEE ON MERCHANT MARINE AND FISHER-
IES

First, let me state that most of the provisions of H.R. 4658 are good and are needed. As the principal sponsor of this bill when it was introduced, I am proud of what we are attempting to do to assist the Coast Guard in its effort to combat the illegal importation of drugs into our country.

However, some provisions added to the bill at the full committee markup are of great concern to me and are the reason for these dissenting views.

The widely-publicized seizure of a number of vessels has raised the question of whether implementation of the government's "Zero Tolerance" policy has been handled in a manner that demonstrates fairness and common sense. The obvious answer to that question—at least in the early days of the new policy—was a resounding "No!"

As a result of our Committee's concerns about this matter, the Subcommittee on Coast Guard and Navigation conducted a hearing on the Zero Tolerance policy on June 15, 1988. At the hearing, the possibility of using a program of "constructive seizure" was discussed for instances in which "personal use" amounts of drugs were found on board a vessel but it appeared that the owner or operator had no knowledge of the offense.

Under constructive seizure, a commercial fishing vessel or other vessel used in a business or trade would be permitted, with certain conditions, to continue operating while the Customs Service conducted an investigation to determine whether the owner was in fact innocent of any wrongdoing and the vessel should not be forfeited. The purpose of constructive seizure is to ensure that innocent people are not penalized unjustly and lose their livelihood because of the unlawful actions of one person.

Although the Customs Service testified that it already has a policy of constructive seizure in appropriate cases, it became apparent both at the hearing and in later discussions that the Coast Guard would not, because of a policy decision by higher authorities, be able to implement a program of constructive seizure when deemed appropriate.

Even before the June 15th hearing, some members of the Committee came to the conclusion that legislative direction would be necessary to force some sense of reasonableness in implementation of the Zero Tolerance policy. As a result, members of the Committee staff began work to draft legislative language to accomplish this purpose.

At the full committee markup of H.R. 4658 on June 21, 1988, an en bloc amendment was offered by Congressmen Studds and Young

to amend several sections of the U.S. Code relating to seizure and forfeiture. The provisions of the Studds-Young amendment are now incorporated as sections 7 through 9 of the bill as ordered reported by the Committee.

The stated purposes of the amendments were threefold.

First, the amendment was designed "* * *" to restrict the ability of the Customs Service and the Coast Guard to seize and forfeit vessels on which they find so-called 'personal use' quantities of drugs where there is no evidence or suspicion of wrongdoing on the part of the owner or operator."

Second, the amendment provides procedures for prompt review of a case, including a preliminary hearing before a federal magistrate within 72 hours of a request by the owner and judicial commencement of the case within 90 days.

Third, the amendment would authorize claims against the Customs Forfeiture Fund "* * *" by owners or operators of vessels engaged in commerce or trade or scientific research for losses resulting from seizure or forfeiture where the owner or operator was not consenting to or knowledgeable of the violation."

(The above quotes on the purpose of the amendment are from the transcript of the markup provided by the Official Committee Reporters.)

Although several members of the Committee staff, including my own Coast Guard Subcommittee staff, had been involved in discussions of a proposed amendment, the final version of the amendment that was offered was not available until the morning of the hearing. Regrettably, the amendment was adopted by the Committee before it had been reviewed by anyone with expertise in the fields of customs law and civil forfeiture.

Following the markup, I requested an analysis of the amendment by the Coast Guard, the Customs Service, and the American Law Division of the Library of Congress. Those analyses indicated that the amendment had ramifications far beyond the stated purposes and far beyond what I believe to have been the intent of many members of the Committee when the amendment was approved.

The Committee staff has since made a number of "technical corrections" to address some of the problems outlined in the analyses I had received. However, the amendment still will make changes in law that I believe to be detrimental to our nation's effort to combat illegal drug use.

For instance, it will require a boarding officer to make a determination about the possible innocence of the owner before a seizure can be effected. This is an unreasonable burden requiring the boarding officer to make on-scene judgments that frequently can only be established after full investigation by a Customs agent.

According to both the Customs Service and the American Law Division of the Library of Congress, Section 7 of the bill as reported will reverse two hundred years of forfeiture law by placing the burden of proof on the government to establish that the owner was a consenting party to the violation. In the case of *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1973), the Supreme Court upheld the principle that the burden of proof lies with the owner to establish that he had no knowledge of the illegal activity and that he had taken reasonable precautions to prevent the use of

his property in an illegal activity. I cannot support an amendment that will so drastically change established law as old as the United States itself.

The forfeiture procedures required by Section 8 will effectively repeal long-standing civil forfeiture provisions and will transfer cases to judicial rather than administrative proceedings. This will severely tax the judicial system and create unnecessary delays and backlogs to a degree that could have the opposite effect of that intended by the authors. In fact, the new procedures are considerably more cumbersome than those they replace, and law enforcement officials may determine it is easier to work under other authorities, such as criminal forfeiture.

Section 9 would authorize claims to be paid from the Customs Forfeiture Fund to the owner or person in charge of a vessel for monetary losses, including lost income and attorney fees, as a result of a seizure or forfeiture "unless it appears that the owner or person in charge was a consenting party or privy to the violation." Because this amendment would also shift the burden of proof to the government instead of the owner, it would invite claims that are speculative and even frivolous in cases where the evidence supported forfeiture. There are other provisions in current law for redress of grievances against the government, and I do not believe this provision is necessary.

Ironically, the problems that the Committee hoped to resolve through this amendment may actually be exacerbated. In any event, we have not assisted the commercial fisherman or other vessel used in a business to avoid physical seizure and protect their source of income until the question of owner innocence can be resolved either administratively by the Customs Service or through judicial proceedings.

The problems of the Zero Tolerance policy and use of constructive seizure can be addressed with legislation that will provide protection for innocent owners of commercial vessels but will be less onerous to the men and women who are charged with enforcing our laws against illegal narcotics. We can protect innocent owners without tying the hands of our law enforcement officials.

Because many of the provisions of H.R. 4658 are expected to be incorporated into the omnibus drug bill that is being prepared by the Democratic leadership of the House, and because that bill will be on a "fast track" to ensure its early consideration by the House, I am concerned that there will not be a proper review of the various components of the bill as reported by each committee of jurisdiction.

I do not believe that the Congress should so casually—and without due deliberation of the full ramifications of its action—possibly enact legislation that will essentially reverse centuries of law governing civil forfeiture and will severely hamper law enforcement personnel in the performance of their duties.

Therefore, based on the analyses of the amendment by others who are knowledgeable about its effect on current law, I am compelled to file these dissenting views on the provisions in sections 7 through 9 of the bill as reported by the Committee. I believe those sections of H.R. 4658, as reported by the Committee, should be stricken from any omnibus drug bill considered by the Congress.

As an addendum to these dissenting views, I am submitting comments received from the Customs Service addressing the impact of the revised amendment after the technical corrections were made.

EARL HUTTO,

Chairman, Subcommittee on Coast Guard and Navigation.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 6, 1988.

EN-88-0788.

The Honorable EARL HUTTO,
House of Representatives, Washington, DC.

DEAR MR. HUTTO: On Monday, June 27, 1988, U.S. Customs Service representatives attended a meeting convened by staff members of the Committee on Merchant Marine and Fisheries and the Subcommittee on Coast Guard and Navigation. Despite our efforts to voice the Agency's objections to the amendment to H.R. 4658 offered by Congressmen Studds and Young, no meaningful opportunity was afforded Customs representatives at that time. The meeting's participants instead focused on technical changes in an attempt to salvage the broad-sweeping and hastily drafted amendment. Accordingly, a revised version of the proposed amendment was drafted and recently transmitted to the Customs Service for our comments. The Customs Service position remains unchanged as the revised amendment would result in serious and adverse consequences to the Agency's enforcement mission to combat illegal drug transportation, possession and trafficking.

As explained to us at the June 27, 1988 meeting, the amendment seeks to satisfy the following objectives: (1) to curtail seizure and forfeiture of conveyances involved in drug possession cases; (2) to limit the amendment's provisions to nontrafficking drug circumstances; (3) to provide for expedited hearing procedures; (4) to authorize claims for reimbursement; (5) to change the burden of proof in seizure and forfeiture actions where an alleged innocent owner is involved; and (6) to leave unaltered search and boarding authority. For reasons more fully discussed below, these objectives have not been met fully in the revised amendment nor have the drafters given consideration to the adverse consequences the amendment will have on drug interdiction efforts. Additionally, the revised amendment represents a response excessively disproportionate to the Committee's perceived concerns about fishing vessel seizures and forfeitures.

The Customs Service wishes to reiterate that the more appropriate forum to address the Committee's concerns is the administrative arena. If the Committee were to examine Customs Service laws, regulations, policies, and initiatives, Committee members would be satisfied that the Customs Service has consistently employed any and all means to ensure that the Zero Tolerance program is administered in a fair and judicious manner. For example, the Customs Service enters into constructive seizure agreements in appropriate circumstances. In lieu of actual physical custody of the conveyance, Customs will allow the owner to retain control and use of the conveyance while the owner pursues his administrative op-

tions with the Agency. While the constructive seizure agreement may contain such restrictions as no removal of the conveyance beyond the jurisdiction of the United States without the consent of Customs, for example, the owner's full use of his conveyance is not hampered in any way.

While Federal law relating to seizure and forfeiture of conveyances used to transport drugs appears unduly harsh, Customs regulations and administrative procedures temper these laws and provide abundant due process protection to the innocent owner. Under Customs law, if the value of the seized conveyance does not exceed \$100,000 or regardless of value if the seized conveyance was used to transport drugs, the seized conveyance is subject to Customs summary forfeiture proceedings pursuant to 19 U.S.C. 1607 *et seq.* (Note that in cases *not* subject to summary forfeiture proceedings, Customs law requires referral of the matter to the U.S. Attorney for institution of judicial condemnation proceedings unless the owner or interested party elects to proceed administratively which is the case in the clear majority of cases.)

Procedurally, owners and any other interested party such as lienholders receive notice of Customs seizure, and intent to summarily forfeit the conveyance. Owners and interested parties may file a claim and cost bond within 20 days from the date a notice is first published or posted. The filing of a claim and cost bond (in the sum of \$5000 or 10 percent of the conveyance's value, which ever is lower) suspends the summary forfeiture proceedings and causes the matter to be referred to the U.S. Attorney for initiation of judicial forfeiture proceedings.

Owners and any interested party may administratively petition for remission and/or mitigation of the forfeiture pursuant to 19 CFR 171.11 *et seq.* depending on the circumstances surrounding the violation. In an allegedly innocent owner situation, the owner may petition and obtain relief if he satisfies the elements enumerated in 19 CFR 171.13, Customs regulations incorporating the innocent owner defense to forfeiture.

Owners and interested parties are also advised that immediate release of the seized conveyance may be obtained by substituting the appraised domestic value of the conveyance. 19 CFR 162.44. While the preceding discussion constitutes an abbreviated summary of an owner's administrative rights, the avenues of redress are detailed in the enclosed copy of Customs regulations, 19 CFR Parts 162 and 171.

Finally, before presenting a detailed analysis of the amendment as revised, the Customs Service wishes to advise the Committee of our cooperative efforts with the North Carolina Fisheries Association. As a result of several discussions with the North Carolina Fisheries Association through which the parties sought to identify practical measures the Association's members could implement to prevent proscribed use of their vessels and to avoid possible entanglements with Customs, a draft Fisheries Association Initiative Agreement has been negotiated. Subject to final approval and signature by the Association and the Agency, we intend to promote this model agreement among fisheries associations and entities nationwide. Not only with owners' or members' participation assist the Customs Service in preventing illegal drug use on and trans-

portation by their vessels, but such measures will significantly reduce the number of fishing vessel seizures by Customs. A preliminary draft of this Agreement is enclosed for your information and as evidence of Customs ability to address the fishery industry's concerns in a constructive, prompt, and administrative manner.

The following is a section-by-section discussion of the Customs Service's objections and comments to the revised amendment. While several points have been made in previous correspondence and at the June 27, 1988 meeting, we believe they bear repeating.

SECTION 7. SEIZURES AND FORFEITURES OF CONVEYANCES

This section proposes to amend three general forfeiture statutes, 21 U.S.C. 881(a)(4), 19 U.S.C. 1594(b), and 49 U.S.C. App. 782. Specifically, the revised amendment places the burden of proof on the government to establish that the owner was a consenting party to the violation (e.g., possession of a controlled substance).

Shifting the burden of proof to the government would reverse two hundred years of forfeiture law. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1973). Since the Act of July 31, 1789, 1 Stat. 39, conveyances used in violation of the Customs laws have been subject to seizure and forfeiture in *in rem* proceedings. Moreover, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.*, citing *The Palmyra*, 12 Wheat. 1 (1827). The rationale underlying this principle is that the conveyance is the offender and the owner's innocence is irrelevant.

Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.

Id., at 686–687 (citations omitted). Additionally, forfeiture laws as applied to innocent parties serve an important public policy by "inducing them to exercise greater care in transferring possession of their property." *Id.*, at 688.

With these principles in mind, the Supreme Court *in dicta* did recognize, however, an innocent owner defense to forfeiture:

* * * [I]t would be difficult to reject the constitutional claim of an owner whose property had been *taken* from him without his privity or consent * * * Similarly, the same might be said of an owner who *proved* not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property * * *

Id., at 689 (Emphasis added). It should be noted that the Supreme Court's analysis of forfeiture law and principles arose out of a case upholding the forfeiture of a leased vessel upon which only one marihuana cigarette was found. *Id.*, at 693. Thus, the Supreme Court recognized not only that forfeiture is applicable in drug possession cases, but that any possible defense by an innocent owner

to the forfeiture places the burden of proof on the owner to establish that the conveyance was taken without his consent or that he had no knowledge of the illegal activity and had done all that could reasonably be expected to prevent the proscribed use of his property.

The revised amendment would *de facto* reverse the *Calero-Toledo* decision and the deep-seated jurisprudence referenced therein. More importantly, by shifting the burden of proof to the government in these forfeiture cases, the Customs Service would be severely hampered in its law enforcement mission. Not only are alleged innocent owners in a better position to prove that they meet the *Calero-Toledo* defense, but owners in general are in a better position to control the use of their conveyances and monitor the actions of those in possession of their conveyances. Shifting the burden of proof to the government will only foster laissez-faire attitudes and incidents of willful blindness by owners. Owners would no longer be encouraged to exercise greater vigilance and responsibility with regard to the illegal use of their conveyances.

This section also proposes inconsistent treatment of alleged innocent owners under 21 U.S.C. 881(a)(4). Pursuant to 21 U.S.C. 881(a)(4)(B), the owner has the burden of proving as a defense to forfeiture that the conveyance was unlawfully in the possession of another, whereas the proposed amendment seeks to add a new subsection placing the burden on the government to establish that the owner was a consenting party. If the government were unable to establish the owner's culpability, the forfeiture action would be defeated. This would be the result in many cases where the owner merely kept silent or failed to take any steps at all to prevent the illegal use of his conveyance.

The Customs Service's primary objection to this section is the proposed amendment to 19 U.S.C. 1594(b) which would prohibit the seizure of any conveyance transporting drugs unless the owner or other person in charge participated in or had knowledge of or was grossly negligent in preventing or discovering the violation. Currently, if the Customs Service has probable cause to believe a violation of law has occurred, the agency may seize the conveyance used in the illegal act. It is essential to the mission of the Customs Service that this seizure authority be preserved for several reasons.

First, if Customs were unable to seize, constructively or otherwise, the conveyance could be easily removed from the jurisdiction of the United States and, consequently, be placed beyond the reach of the Agency and the judicial system. Thus, any possible enforcement action would be prematurely frustrated by this amendment.

Secondly, and more importantly, it is only after seizure that Customs can conduct a thorough and necessary investigation to determine whether an owner (and even ownership must be determined after seizure) is innocent, *i.e.*, did not participate in or have knowledge of or was not grossly negligent in preventing or discovering the violation. The seizing officer is not in a position to know who the owner is and whether he is innocent prior to seizure. A Customs agent subsequently investigates the case to determine whether the owner, master, or person in charge is culpable or negligent. For example, a mothership having off-loaded 10,000 pounds of cocaine would not be subject to seizure under the provisions of this amendment if the seizing officer only found sweepings or a small

amount on deck and he were unable to establish at the time of the discovery of the violation that the owner, master or person in charge was grossly negligent or participated in the violation. Alternatively, if the mothership were owned by a complex corporate structure designed to conceal drug trafficking operations and the crew were involved in a conspiracy to smuggle the drugs into the United States, such information could only be uncovered by a thorough investigation after seizure. Thus, this amendment would allow major drug traffickers to escape civil and criminal sanctions as well as completely frustrate Customs investigative and enforcement efforts, especially in cases which at first glance appear to involve simple possession violations.

Third, as noted earlier, the innocent owner is currently afforded protection and due process under the Customs laws, regulations and administrative procedures. For example, Customs regulations, 19 CFR 171.13, allow an innocent owner to file a petition for relief and obtain mitigation by establishing his lack of knowledge and identifying reasonable steps taken to prevent the proscribed use of his conveyance. Alternatively, an alleged innocent owner may file a claim and cost bond which suspends the administrative forfeiture proceedings and causes the matter to be referred to the U.S. Attorney for institution of judicial forfeiture proceedings, giving the owner the opportunity to be heard in a judicial forum.

SECTION 8. FORFEITURE PROCEDURES

This section contemplates amending 21 U.S.C. 881 to add provisions relating to notice and preliminary hearing requirements, cost bonds, and final judicial hearings. While the Committee apparently believes that these forfeiture procedures would guarantee an expedited review process, past Customs experience indicates that the opposite would be true.

By eliminating the opportunity to proceed administratively under Customs procedures, each case would be processed in an already overburdened judicial system. The requirement that a complaint be filed in court within 90 days of the preliminary hearing guarantees at a minimum a three year court case in the Southern District of Florida, for example. If the case is handled administratively, the average time in which a case is resolved is less than 1 year.

The revised amendment also requires the seizing officer "*prior to seizure*" to make a preliminary determination as to whether circumstances justifying forfeiture are present. Customs seizing officers are not in a position "*prior to seizure*" to have all the necessary and relevant facts to render a decision as to whether forfeiture is warranted. Only after seizure and investigation can the owner and interested parties be identified. Only after an appropriate investigation and the submission and review of a petition for relief can it be determined whether the parties are innocent or culpable. The 72 hour preliminary hearing requirement would undoubtedly frustrate Customs ability to conduct the necessary investigation.

Clearly, these proposed procedures are unnecessary and unwarranted in light of the Customs administrative procedures discussed

earlier. As previously noted, Customs regulations already provide that owners and interested parties receive seizure notices informing them of their rights such as petitioning for relief, filing a claim and cost bond to force the matter into court, or substituting the value of the conveyance to secure its immediate release (assuming an owner is not already in possession of the conveyance via a constructive seizure agreement). Adequate protection for innocent owners is provided for in Customs regulations and procedures and in a more efficient and timely manner than contemplated by this section to the revised amendment.

SECTION 9. CLAIMS FOR REIMBURSEMENT

This revised section proposes amending 19 U.S.C. 1617 to allow for claims for reimbursement from owners or persons in charge of a seized conveyance unless the government can show that the claimants consented or were privy to the violation. Again, our objection to this provision is that it would open a floodgate of speculative claims. Customs would need to divert resources from enforcement to verify such claims. Obviously, the government would be better served if Customs resources were devoted to its law enforcement mission.

This proposed section, which again places the burden of proof on the government to demonstrate the culpability of the owner or person in charge, could result in cases and claims verging on the absurd. For example, if *all* crew members were found to be in possession of illegal drugs, the Customs Service would arrest the violators and seize the vessel. Under this section, the Customs Service would be liable to a claim for reimbursement unless it could prove that the owner or person in charge was a consenting party or privy to the violation. On the other hand, this section could in this situation encourage Customs to arrest the violators and leave the vessel in open waters unmanned (except for possibly the master). It is evident that this section would adversely impact the law enforcement procedures of the customs Service.

Finally, with regard to the Section 7 constructive seizure provision offered as a substitute to the revised Studts/Young amendment, the customs Service has no objection to that section. Our comments and objections, however, to the proposed Sections 8 and 9 are identical to those discussed above relating to Section 7 and 9 of the revised Studts/Young amendment.

If you have any additional questions, please do not hesitate to contact me. Of course, we would appreciate an opportunity to discuss our concerns with you at a meeting at your convenience.

Sincerely,

CHARLES R. PARKINSON,
Associate Commissioner,
Congressional and Public Affairs.

SUPPLEMENTAL DISSENTING VIEWS OF HON. BOB
CLEMENT ON SECTIONS 7 THROUGH 9 OF H.R. 4658

Like Chairman Earl Hutto, I too believe the Committee's adoption of the amendment offered by Representatives Studds and Young detracts from what is otherwise a strong bill in support of the Coast Guard's efforts to stop the importation of drugs into our country.

While I do not subscribe entirely to the dissenting views of Chairman Hutto, I do believe that the practical effect of the Studds-Young language will make the Coast Guard's enforcement efforts more difficult, not less.

Underlying the Studds-Young amendment is the view that seizure of a vessel is inappropriate when "personal use" quantities of drugs are discovered aboard the vessel. I disagree with the Studds-Young point of view and I do not believe there is a consensus sharing it. If our nation is serious in solving the drug problem, we have to realize that the problem is not composed solely of drug sales between dealers, but is in fact composed of the hundreds of thousands of individual "personal use" sales which take place in many of our nation's homes, offices, bars and restaurants, as well as on our nation's streets.

To me the real issue is not seizure, whether real or constructive, but the due process which follows. How quickly can the owner of the vessel recover it? Must a bond be posted? How quickly can judicial proceedings be initiated?

The Studds-Young amendment stands due process on its head. In effect, the Studds-Young language will require a Coast Guard officer to make a determination about the guilt or innocence of an owner before effecting a seizure of the vessel. Such a requirement calls for a conclusion before an investigation. It also reverses burden of proof principles that have worked in seizure and forfeiture cases for more than 200 years and which have been upheld as valid by the Supreme Court. As the Customs Service points out in the memorandum to Chairman Hutto which accompanies his dissenting views, the rationale underlying the historic principle reversed by Studds-Young is that the conveyance is the offender and the owner's innocence is irrelevant to the initial seizure.

As the Supreme Court has said, "forfeiture of conveyance that has been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance, and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 686-687 (1973).

Additionally, seizure and forfeiture laws serve an important public policy by inducing vessel owners to exercise greater care before exposing their property to those who use drugs. In fact, forc-

ing owners to be responsible for those they allow on their vessels is one of the steps our nation must take if we are to bring drug use under control.

To be sure, the Court has recognized an innocent owner defense to forfeiture, but has placed the burden of proof on the owner to establish that the conveyance was taken without his consent or that he had no knowledge of the illegal activity and had done all that could reasonably be expected to prevent the proscribed use of his property. In my view, this is sufficient protection.

The "constructive seizure" proposal offered during the Committee mark-up by Chairman Hutto was an appropriate compromise between the Studds-Young position and current law. Chairman Hutto's dissenting view clearly states some of the reasons for supporting constructive seizure and I will not repeat them here.

Regrettably, the Committee has recommended a change in law which will hamper the Coast Guard's ability to interdict drug users and dealers. Consequently, I will join Chairman Hutto and many of my other colleagues in working to strike the Studds-Young provisions and either continuing current law or substituting a constructive seizure provision which does not tie the hands of our law enforcement officers.

BOB CLEMENT.

