Department of Justice

STATEMENT

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SUBCOMMITTEE ON CRIMINAL JUSTICE
SENATE JUDICIARY COMMITTEE

ON

THE FORFEITURE OF CRIMINAL ASSETS

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Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today to discuss with you the efforts undertaken, and the difficulties faced, by the Department of Justice in obtaining forfeiture of the assets of major criminals, particularly those engaged in narcotics trafficking.

We commend the Subcommittee's interest in this area. The importance of forfeitures is readily apparent. Federal law enforcement efforts in the narcotics trafficking and organized crime fields are directed toward large-scale criminals and their organizations. We seek to prosecute the leaders and key members of criminal organizations whenever possible. However, we have learned that the incarceration of individual criminals, even those of the highest rank, is generally not sufficient to immobilize or even to reduce the incentive of entrenched criminal organizations. As long as immense criminal profits remain available as operating capital, a convicted criminal's compatriots will be able to keep the organization functioning, and the prisoner himself may be able to resume business upon or even before his release. For example, in the past five years the 25 major identified traditional organized crime groups in the country have had 75 separate changes in leadership -- 28 resulting from prosecution. Yet, to our knowledge not a single one of these

groups has broken up as a result of the change in leadership. Further, it is the attraction of quick, large illegal profits -- and this is particularly true in the narcotics field -- that encourages the formation of new criminal organizations.

For these reasons, forfeiture of assets illegally obtained by these individuals and organizations is one essential element of our overall law enforcement strategy. Depriving criminals of their illegal gains reduces the incentive to conduct criminal enterprises. Forfeiture also tends to insure that a conviction will have an adverse impact on the enterprise's financial viability. These factors have generated a firm concensus among the leaders of the federal law enforcement community concerning the importance of forfeiture.

It is important to recognize, however, that transforming a consensus among leaders into positive results in the field is a major undertaking. For almost two centuries American police and investigatory agents, prosecutors, judges and the public have viewed criminal law enforcement as a matter of identifying, apprehending, convicting and incarcerating criminals. Patterns of information, organizational activity, and individual attitudes have developed in accordance with that view. Now only very recently, since 1970 to be exact, it has been suggested that that traditional view may be significantly expanded to include identifying and removing criminal assets

as well as individuals from society. This has required and will continue to require the evolution of sophisticated investigative techniques, the resolution of unique legal issues and the formulation of new administrative and judicial procedures. There is still a great deal of uncertainty concerning these developments among the law enforcement and judicial personnel who are being called upon to implement an effective forfeiture program. The law itself is still unclear. It is going to take time and effort before forfeitures become a common, familiar and routine aspect of law enforcement.

The complexity of forfeiture can be illustrated by briefly examining the steps in the process, each of which is fraught with difficult problems of investigation and proof. The first step is to ascertain exactly what assets a potential defendant possesses. Such as asset investigation is a laborious task -- bear in mind we are dealing with sophisticated criminals who have access to the best lawyers and accountants money can buy. These professionals may be well within the law and their professional ethical responsibilities by structuring the defendant's finances in a way that make his assets difficult to trace. The personal property and residence of a successful narcotics trafficker or other criminal can usually be discovered simply by observation, but a residence may be held in the name of a third party, who could perhaps be innocent. And even if his personal property is luxurious, the items which can be

directly linked to the defendant will probably be of relatively little value compared with a trafficker's business interests or with his holdings of other forms of wealth: cash, bank accounts, stocks and bonds, precious metals, real estate. Cash and precious metals can be hidden. Stocks and bonds may be held by nominees or in bearer form. Bank accounts may be offshore. Real estate may be owned of record by dummy corporations, also frequently offshore. To link such assets to the defendant requires painstaking effort by skilled financial investigators. No one agency will have all the information or expertise required -- the Internal Revenue Service may have information on reported assets, the Securities and Exchange Commission on corporate ownership, and the Treasury Department on bank deposits. Extensive inter-agency cooperation is often required.

The next step is equally difficult. The defendant's assets cannot be forfeited simply because they are his. They must be directly connected with the criminal activity, i.e., shown to have been utilized in the crime or to have been purchased with income derived from the crime or to constitute an interest in a criminal enterprise. Establishing this direct connection between an asset and a crime, which itself is difficult to prove, can ordinarily be done only if the investigators are proficient and dedicated.

The third step is the indictment, in which the property subject to forfeiture must be alleged. This, of course, provides the defendants complete notice of what the government is up to, and they may well attempt to dissipate or conceal their assets. In fact, in many cases the defendants are able to ascertain that an indictment is in the offing and to dissipate their assets prior to its issuance. Only after the indictment is issued is the prosecutor entitled to seek a restraining order to freeze the assets. This means, of course, that a prosecutor must be heavily involved in the pre-indictment stages of every investigation with forfeiture potential so that he is prepared to seek a restraining order immediately upon indictment -- something we are working toward but which is unfortunately not yet always the case. Even if the prosecutor is prepared, the judge may be reluctant to grant such orders against defendants who at that point are presumed innocent. The defendants will make convincing arguments against a total freezing of their assets; in the mammoth "Black Tuna" case, the defendants convinced the judge to release almost all their assets in order for them to retain high-priced counsel. And finally, even a timely and tough restraining order can be enforced only by a contempt citation.

The fourth step is to prove the case at trial. If the detailed investigative work has been properly done, the forfeiture case will be based upon the evidence compiled during that process. But the length and complexity of the trial is increased thereby.

Not only does this increase the amount of scarce Assistant U.S. Attorney time consumed by the case, but the complicated financial testimony and documents may have a tendency to confuse the jury. Because of the possibility of risking the substantive conviction, prosecutors may even decide not to submit the forfeiture question to the jury.

The fifth and final step is to collect on the judgment of forfeiture. This can be done only after appeal, so once again there is the possibility of dissipation of the assets. Another problem is how to protect innocent third parties who may have an interest in the forfeited assets. Finally, there is substantial confusion and uncertainty regarding the collection and disposition of forfeited assets. The legal problems can be extensive, and the division of responsibilities for following through on forfeiture collections is unclear. Once again, significant expenditure of scarce attorney and agent resources may be required.

As a result of this series of difficulties, obtaining forfeitures consumes valuable time and resources. The decision of whether to seek forfeiture is a case-by-case one made by the local U.S. Attorney or by his Assistant trying the case. And in many cases U.S. Attorneys may well decide that the effort necessarily expended in obtaining forfeiture would be put to better use convicting another defendant. This is an important reason for the small amount of forfeitures obtained so far.

I have attempted to paint a realistic picture, but it is not a pessimistic one. We believe that a number of things can be done, some by the Department of Justice and some by the Congress, to increase the rate of forfeiture of criminal assets. First and foremost, we must improve the ability of federal enforcement personnel to conduct sophisticated financial investigations. By "financial investigations" I mean tracing a flow of illegal revenue from its source at the point where illicit goods or services are purchased or funds diverted from legal channels to its destination in the hands of the criminal leadership. This may entail following a paper trail through multiple bank accounts, shell corporations, offshore bank havens, and money laundering operations.

We view financial investigations as bearing valuable fruit in addition to forfeitures. They provide intelligence. Sometimes the only way to identify the well-insulated leaders of a criminal organization is to trace the illegal profits to their pockets. Financial investigations also produce evidence. Not only can financial data be used to prove the case in court against organization leaders, but evidence on vast illegal incomes has also helped prosecutors explain to the court the need for substantial bail and the propriety of a lengthy sentence. Finally, as noted, the accurate tracing of money flows is necessary to prove the defendant's assets are criminal and subject to forfeiture.

All federal law enforcement agencies are working to improve the ability of their agents to conduct these fruitful financial investigations. The Drug Enforcement Administration has traditionally not had extensive capabilities in this area, but DEA management has worked hard in recent years to train its agents in financial techniques. I am sure the DEA representative will discuss these efforts with you in more detail. We believe that effective drug law enforcement will require the skills of investigators with formal training in accounting.

The IRS now has by far the greatest number of experienced financial investigators. Until other agencies upgrade their financial investigative capabilities, it is important to utilize this existing IRS expertise against narcotics trafficking networks and organized crime groups.

More important, the IRS can assist drug and organized crime enforcement by focusing on the tax offenses of the criminals. Some of our most successful prosecutions -- and cases which produced extensive forfeitures -- have been joint tax/non-tax investigations involving the IRS. Last year the major heroin trafficking network operated by Jesus and Jaime Araujo was immobilized in a Continuing Criminal Enterprise

case in Los Angeles. A joint task force of agents from DEA, IRS, Customs and local agencies spent one and a half years tracing the flow of some $32 million into Mexico. Forfeiture of about $260,000 in real estate and automobiles was obtained. The court also imposed fines of $1,500,000 and a tax liability assessment of $19 million.

The Ashok Solomon case in Minnesota last year, which involved an Indian hashish smuggling organization, was another successful joint DEA/IRS effort. As the investigation was culminated and arrests made, DEA agents seized about $750,000 in currency and bank accounts. Forfeiture of these funds would have been difficult, as the connection of the money to narcotics trafficking was unclear. However, the IRS was able to prove that collection of the assessed tax was in jeopardy and to obtain the entire amount in discharge of the assessment.

The combination of IRS expertise, information, and its power to obtain tax assessments against criminal assets make IRS participation in drug investigations extremely desirable. Commissioner Kurtz agrees as to the importance of joint investigations, and the IRS recently revised and streamlined its procedure for reviewing and approving requests for such joint efforts.

The IRS is by no means the only other federal agency which can make an important contribution to financial investigation and forfeiture. As I indicated, the pooling of the information and expertise of a number of agencies is necessary to identify a defendant's assets and prove that they were derived from crime.

The coordination of such a multi-agency financial investigation is extremely important and is ordinarily undertaken by the Department of Justice in its prosecutorial role. To achieve smooth cooperation of federal agencies with historically competitive tendencies is never easy.

A particularly difficult problem arises when criminal assets have been laundered through sham corporations in offshore tax havens. We suspect that billions of criminal dollars move each year through banks in the Cayman Islands, the Bahamas, and Panama. An Interagency Study Group on Financial Transactions, whose formation was encouraged by the White House staff and which is now chaired by the Criminal Division, is studying this situation. The group is composed of representatives from the White House, State, Treasury and Justice Departments, DEA, FBI and Comptroller of the Currency, Federal Reserve, Securities and Exchange Commission and others. The principal focus of the study has been how money moves through the offshore banking system, what information is collected by federal agencies, and the extent to which that information is available for dissemination to law enforcement agencies conducting financial investigations of criminal activity. This group plans to develop a more detailed model of the offshore flow of money, which will assist our efforts to trace and obtain forfeiture of money involved in organized crime and narcotics cases domestically. We believe that this is a critical source of information for federal investigative agencies, particularly

the Drug Enforcement Administration. The IRS is also currently conducting a study of the tax havens that should increase our knowledge of the problem.

The ability to conduct more sophisticated financial investigations is only a first step. The federal prosecutorial community must develop both the expertise and will to convert the information produced by completed financial investigations into successful forfeitures. Speaking frankly, to date most Assistant U.S. Attorneys across the country have not aggressively pursued forfeitures. There is an understandable lack of enthusiasm for taking on the added work and legal difficulties generated by forfeiture. When the evidence has been developed to a point making prosecution possible, there is a tendency to rush to indictment without pursuing the less exciting forfeiture work. AUSA's have defined success in terms of convictions, not forfeitures. And many have simply not been familiar with the details of forfeiture proceedings.

We are attempting to address both of these problems. A guide on the use of the civil forfeiture provisions of Section 881 of Title 21 has been distributed to all U.S. Attorneys. We are also in the process of preparing a manual on the criminal forfeiture provisions of the Continuing Criminal Enterprise and the Racketeer Influenced and Corrupt Organization statutes. This manual, the impetus for which comes in part from Chairman Biden, is based upon the experiences of those prosecutors around the country who do possess experience and expertise in RICO and CCE forfeiture.

The manual is intended to explain the legal operation of the statutes and also to provide instructions for resolving the practical problems involved in their implementation. Each federal prosecutor will receive this manual along with an urging that it be put aggressively to use. We are hopeful that the manual will clear up most of the confusion still surrounding these statutes. In addition to these manuals, lectures on forfeiture are presented at each of the Justice Department's semi-annual narcotics conferences for agents and prosecutors. Finally, DEA and the Criminal Division are now concluding a study of the roughly 100 CCE and drug-related RICO cases brought to indictment so far. By indicating the reasons some of these cases produced substantial forfeitures while others did not, this study is expected to show us what procedures and techniques should be applied in all such cases.

I believe that through the training and inter-agency efforts I have mentioned, and through the work of the GAO and Congressional committees such as this, prosecutors and agents in the field are gradually becoming alert to the possibility of obtaining forfeitures in every major case. I understand that during the course of your hearings you will hear testimony from two federal prosecutors, Dana Biehl of the Criminal Division, who prosecuted the so-called "Black Tuna" case in Miami, and Kathleen March of the U.S. Attorney's office in Los Angeles, who prosecuted the Burt case. Both cases produced forfeitures, though

not without encountering the difficulties I have enumerated. I do think their testimony will illustrate for you the kind of dedication and expertise being developed among our prosecutors.

Congressional action is needed, however. To a certain extent, the decision by U.S. Attorneys not to pursue forfeitures may be a rational one -- the results may not justify the costs in prosecutors' time. If more forfeitures are desired, then that resource cost must be reduced. There are a number of ways in which Congress could readily decrease the difficulty of making a successful forfeiture.

Congress has provided us three principal forfeiture statutes for use in organized crime and narcotics cases. Civil forfeiture of vehicles used in the illegal sale of drugs is provided by the Controlled Substances Act, 21 U.S.C. 881. An important amendment to that statute in 1978 broadened its coverage to include proceeds of an illegal drug transaction. The Continuing Criminal Enterprise statute, 21 U.S.C. 848, authorizes the criminal forfeiture of the profits from and the defendant's interest in a continuing criminal enterprise, which is defined as an entity of five or more persons deriving substantial income from violation of the Controlled Substances Act. The Racketeer Influenced and Corrupt Organization statute, 18 U.S.C. 1963, provides for the criminal forfeiture of any interest acquired, maintained, or carried on through a pattern of racketeering activity such as murder, robbery, extortion, bribery, and numerous other crimes. The CCE and RICO statutes were both passed in 1970.

As broad as these statutes are, they have one common limitation: the defendant's assets must somehow be directly connected to a particular crime. This creates enormous problems of investigation and proof. Section 2004 of the Senate's Criminal Code Reform Act would eliminate the necessity of proving this connection. If the amount of criminal proceeds or the value of an interest in a criminal syndicate could be ascertained, then <u>any</u> property of the defendant up to that amount would be subject to forfeiture. The bill would also make it easier to reach the assets of parent companies of criminal syndicates and to prevent the dissipation of assets. No other single action would do more to enhance our ability to obtain forfeitures than passage of this bill.

Even current law is somewhat in doubt at this point. The 9th Circuit Court of Appeals has ruled in a RICO case that income derived from a racketeering enterprise does not come within the forfeiture provision of the statute. A number of other cases raising the same issue are pending. Clearly, if this interpretation stands, the effectiveness of the RICO forfeiture provision will be greatly reduced. The Department of Justice has taken the position that the statute does reach <u>income</u> from as well as an interest in a racketeering enterprise. The statute should be amended, making explicit that income from criminal enterprises is forfeitable under RICO.

Short of changing current forfeiture law, Congress should act to improve our ability to obtain the financial information needed to apply that law. The Bank Secrecy Act of 1970, which requires reporting of large domestic cash deposits and the movement of cash into or out of the United States, is one of our most important tools for conducting financial investigations. Just this month the Treasury Department issued new regulations under the Act. The new regulations will enhance the Treasury Department's ability to enforce compliance with the Act and will broaden its coverage.

The Tax Reform Act of 1976 caused a major setback in both the interagency cooperation and the access by law enforcement to financial data that are essential to an effective forfeiture program. The Act had the laudable purpose of protecting the privacy of tax information in the hands of the IRS. Extensive substantive and procedural requirements were therefore established for the disclosure of tax information. But these requirements have proven so restrictive that the Act has gone far beyond its original purposes and severely restricted the use of tax information for legitimate law enforcement purposes. Cooperation between the Department of Justice and the IRS was seriously affected.

Commissioner Kurtz of the IRS and I recently testified before the Senate Finance Committee on the Administration's proposals to amend the Tax Reform Act. We believe the impediments to law enforcement can be eliminated while still preserving the

legitimate privacy expectations of taxpayers. We are hopeful that Congress in the near future will see fit to adopt these proposals. In the meantime, I am pleased to report that we have recently been able to improve our cooperation with the IRS under the existing statute. But I cannot overemphasize the importance of legislative action.

The Right to Financial Privacy Act of 1978 has also had an adverse impact on the ability of investigative agencies to obtain evidence of financial transactions. The Act establishes complex procedural restrictions when federal law enforcement agencies seek to obtain records from private financial institutions. Where in the past informal cooperation was possible, now the Act requires a formal written request, to which the financial institution is not required to respond. A copy of the request must be served upon the customer unless a court finds the investigation would be jeopardized thereby. Banks and other institutions which previously cooperated in providing information now resist our formal inquiries for fear of being sued. Certain investigations have been prematurely exposed when financial institutions notified the subjects of federal law enforcement inquiries. Ambiguities in the statute have created a great deal of uncertainty about the authority or obligation of financial institutions to volunteer information revealing a violation of law to the Department of Justice.

The present requirements of these two statutes exacerbate the paperwork and resource costs to obtain financial information.

As a result, the resource cost of obtaining forfeitures is extremely high. If Congress wants to see more forfeitures, it must reduce that cost to a manageable level.

We fully agree that financial and taxpayer privacy are important values, and we support their careful protection. However, in our view, the particular legislation currently providing that protection is seriously flawed. The concepts are sound, but technical revisions are needed. In our view, many of the burdens of unnecessary delay and excessive paperwork in these two statutes could be eliminated with no reduction in the privacy afforded our citizens.

While I have noted some of the difficulties in obtaining forfeitures, I think we have laid the foundation for an effective forfeiture program. We have a consensus among law enforcement officials on the importance of forfeitures. We have the interest of concerned legislators such as yourself. We have a growing number of agents and prosecutors with experience in forfeitures, and we are taking steps to communicate their knowledge to their colleagues across the country so that we can enhance the ability of the Federal Government to conduct the financial investigations that are essential predicates to forfeiture. With help from Congress in the problem areas I have mentioned and with growing experience, we are hopeful that forfeitures can become an integral part of federal law enforcement.

Thank you.

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