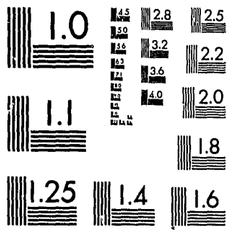

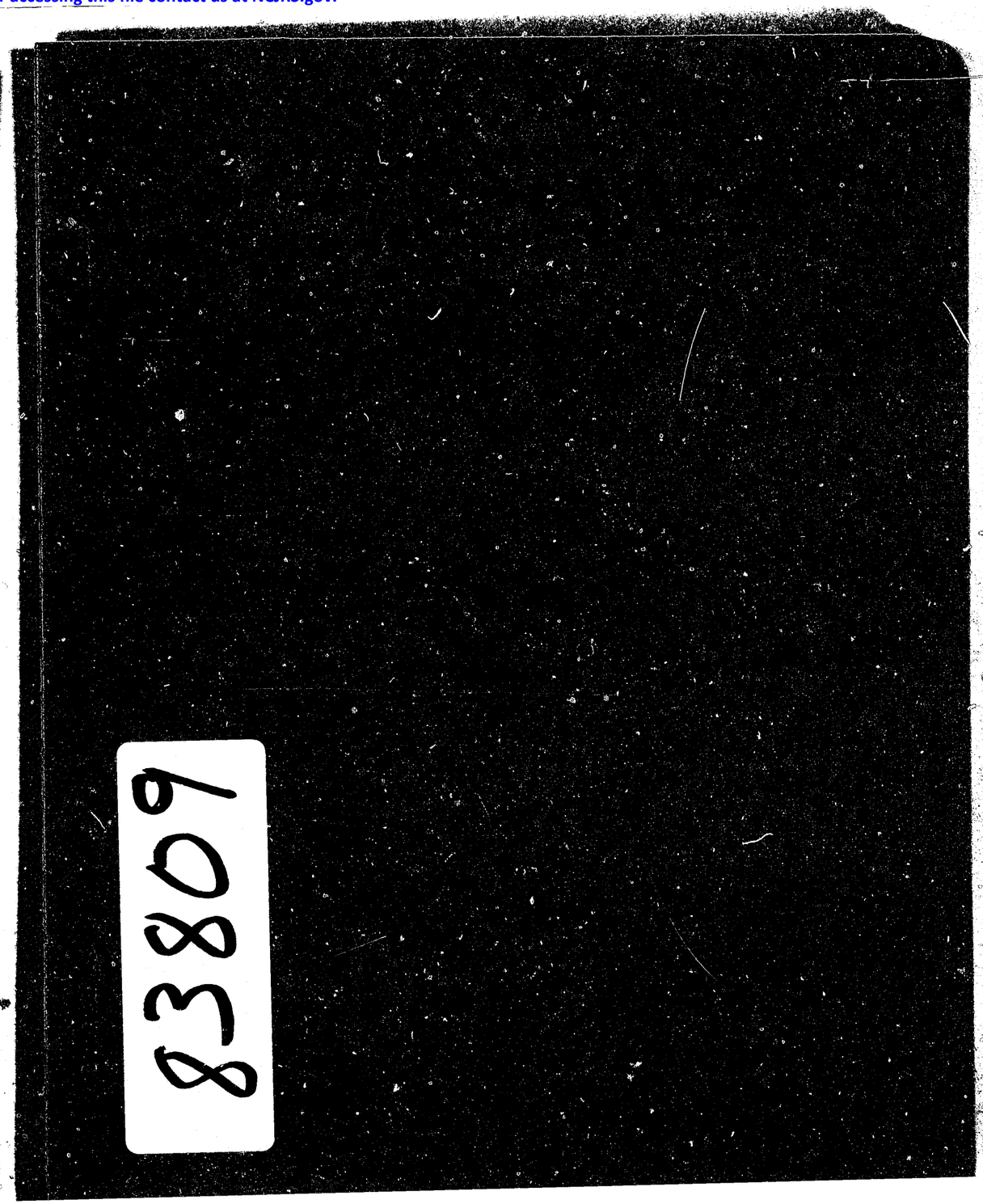

Department of Justice

STATEMENT

OF

JEFFREY HARRIS, DEPUTY
ASSOCIATE ATTORNEY GENERAL

UNITED STATES
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

S. 2320

CRIMINAL FORFEITURE

APRIL 23, 1982

Mr. Chairman and Members of the Committee:

I would like to thank you for this opportunity to describe to the Committee the major features of S. 2320, the Administration's legislative proposal to enhance the use of forfeiture in racketeering and drug trafficking cases which was introduced last month by Chairman Thurmond.

In his testimony before this Committee's Subcommittee on Criminal Law in October of last year, the Attorney General discussed the contours of the Administration's legislative program for improving the ability of federal law enforcement to fight the growing problems of crime and corruption that are plaguing our country. Criminal forfeiture was among the subjects cited by Attorney General Smith as being in need of major statutory modifications and as to which the Department would undertake the development of a comprehensive legislative proposal to facilitate the use of forfeiture in narcotics and racketeering cases and thereby deprive criminals in their highly lucrative pursuits of their ill-gotten gains. I would like to present to the Subcommittee today the major elements of that proposal, S. 2320.

At the outset I shall first describe briefly why we view forfeiture as an important and necessary tool in the fight against drug trafficking and racketeering. I will then turn to a discussion of the primary aspects of S. 2320, which is designed to make forfeiture the powerful weapon that we believe it can and should be in government's efforts to combat such criminal activity.

The concept of the civil forfeiture of crime-related property through an in rem proceeding is one that has long been a part of federal law. Criminal forfeiture differs in that it is a sanction directly imposed upon a defendant following his conviction. Criminal forfeiture, although having its origins in ancient English common law, is relatively new to federal criminal law. Congress first acted to provide for criminal forfeiture in 1970, when it passed the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. 1961 et seq.) and the Continuing Criminal Enterprise (CCE) statute (21 U.S.C. 848). These statutes address, respectively, the conduct, acquisition, and control of enterprises through patterns of racketeering activity, and the operation of groups involved in patterns of serious drug offenses. Congress's inclusion of the penalty of criminal forfeiture in both these statutes reflected an understanding of the importance of the economic aspects of these crimes and the valid conclusion that with respect to these types of offenses, the traditional penalties of fine and imprisonment were not sufficient to fulfill the goals of deterrence and punishment, but that effective tools to remove the wealth generated by, and used to maintain, racketeering and drug trafficking were also necessary. The Department shares this view that forfeiture can be a powerful tool in separating racketeers and drug traffickers from their sources of economic power.

In the extensive hearings that preceded the enactment of the RICO and Continuing Criminal Enterprise statutes, the Congress focused on the economics of organized group criminal activity. As was made clear in those hearings, not only does this type of crime generate considerable economic gain, but the wealth so generated is used, in turn, to finance continued patterns of crime and to obtain and corrupt other organizations and enterprises. Hence the focus of the RICO statute included criminal forfeiture as a measure to deprive racketeers of the property they acquired and controlled through patterns of serious criminal activity.

In more recent years, both the Congress and the law enforcement community have given similar attention to the economic aspects of drug trafficking. Quite simply, drug trafficking is enormously profitable. While it is difficult to measure the extent of illicit income produced by illegal distribution and importation of controlled substances, it is clear that these profits run in the billions, or more likely tens of billions, of dollars annually. These huge profits are a compelling index of extraordinary growth in drug trafficking, and many believe that the influx of these illicit funds has reached such a level in certain parts of the country that the stability of the legitimate economies of these regions is being seriously disrupted.

The tremendously lucrative nature of drug trafficking makes it all the more difficult a problem for federal law enforcement officers to address. First, only the naive would fail to recognize

that the punitive and deterrent effects of conviction are often outweighed by the prospect of huge profits to be reaped through the importation and distribution of dangerous drugs. Second, these huge profits are used to finance ever larger and more sophisticated drug trafficking rings complete with fleets of ships and airplanes, secluded stash pads, and ample funds to bribe public officials, pay hit men and enforcers, and to acquire, corrupt, and influence legitimate businesses and organizations. In sum, the huge profits produced through drug trafficking provide criminals with an attractive incentive for engaging in such crime and an economic power base through which drug trafficking operations can flourish and grow.

Although we do not suggest that forfeiture of drug related assets alone is a sufficient mechanism to eradicate drug trafficking, we believe that if the government were able to deprive narcotics dealers of significant portions of the illegal gain they realize, this would have an important deterrent effect and would stem the growth of drug trafficking. Futhermore, it is the Department's view, and a view which I believe is shared by the members of this Committee, that it is only appropriate that persons convicted of serious drug crimes and racketeering bear the penalty of forfeiting to the United States the property they have amassed through, or used to facilitate, the commission of these crimes.

Both the criminal forfeiture provisions of RICO and the Continuing Criminal Enterprise statute and section 881 of Title 21, which provides for the civil forfeiture of the proceeds of,

and property used in, drug crimes, give the government the authority to seek forfeiture of assets related to drug trafficking and racketeering. However, both the limitations of current law, and its failure to address some major practical problems have kept forfeiture from being as effective a law enforcement tool as it can be. The introduction of several bills in both the House and Senate including S. 1126, sponsored by Senator Biden and S. 2196, sponsored by Senator Humphrey, reflect a welcome interest in the Congress to cure some of the deficiencies of current forfeiture statutes. In the development of the legislation which I would like to outline for you now, the Administration has drawn on the experience and expertise of those who have dealt with forfeitures in drug and racketeering cases to identify the problems posed by current law, and to formulate some workable solutions to these problems.

The primary problems we have encountered in achieving substantial forfeitures in RICO and narcotics cases fall into three categories. First, we have had difficulty in obtaining the forfeiture of two important types of property: (1) the proceeds of racketeering activity punishable under the RICO statute and (2) real property used in drug crimes, for example, as stash pads or to cultivate marihuana for distribution. (The domestic cultivation of large amounts of marihuana is a relatively recent problem.) Second, our ability to use the criminal forfeiture provisions of the RICO and CCE statutes has been hampered by those statutes' failure to address the practical problems that have arisen in actually reaching property that is subject to forfeiture. These

problems arise most frequently when defendants are successful in concealing, transferring, or removing from the jurisdiction of the courts, forfeitable assets. Third, we have in many instances found proceedings under the civil forfeiture provisions of Title 21 -- presently the only means of achieving forfeiture in the vast majority of drug cases -- to be cumbersome and inefficient proceedings when the same elements of proof relating to forfeiture are also central to parallel criminal prosecutions of drug offenses.

S. 2320 is designed to address these and other problems we have met in obtaining forfeitures. Part A of the bill is an amendment of 18 U.S.C. 1963, the provision of current law that governs criminal forfeitures in RICO cases. Part B amends the Comprehensive Drug Abuse Prevention and Control Act of 1970, creating a new criminal forfeiture statute that would be applicable in all major drug prosecutions and improving some of the provisions of 21 U.S.C. 881, which governs civil forfeitures and certain matters arising in both civil and criminal forfeitures of drug related assets. The final part establishes, for a two-year trial period, a program under which twenty-five percent of the amounts realized from drug related forfeitures would be set aside and made available to pay awards to persons providing information or other assistance that lead to forfeitures.

The first substantial amendment to the RICO criminal forfeiture statute set out in S. 2320 is to specifically provide that the proceeds of racketeering activity are subject to an order of forfeiture. While the government has consistently argued that such profits can constitute a forfeitable "interest" in a RICO

enterprise, several appellate courts have held the opposite. This problem is well illustrated in the case of United States v. Martino. 1/ Martino involved the prosecution of a number of defendants for violations of mail fraud and RICO statutes arising out of an arson for profit ring. Three of the defendants, including Martino, were ordered to forfeit the insurance proceeds they had obtained from the burning of their properties, and Martino was also ordered to forfeit his interest in two companies through which funds were provided for the arson and fraud scheme. While a panel of the Fifth Circuit affirmed the order of forfeiture of Martino's interest in his two companies, it reversed the order of forfeiture of the insurance proceeds, determining that these profits of the arson scheme did not constitute an "interest in an enterprise." The Fifth Circuit has on its own motion ordered an en banc rehearing on this issue, and we are now awaiting its decision. Regardless of the outcome of this case, it is our view that the purpose of the RICO forfeiture statute -- to deprive racketeers of their sources of economic power -- cannot be fully realized if the profits gained through racketeering activity are beyond the reach of the statute. Therefore, it is essential that this provision be amended to remove any ambiguity about the forfeitability of such assets, and S. 2320 achieves this goal.

In addition to including the proceeds of racketeering activity among the property subject to criminal forfeiture, we have also attempted in S. 2320 to provide a fuller description of

---

1/ 648 F.2d 367 (5th Cir. 1981)(vacated in part, rehearing en banc pending).

the types of property that are now clearly within the scope of 18 U.S.C. 1963. But no matter how thoroughly or how expansively we may define property forfeitable under the RICO statute, it will avail us little if we are unable in fact to reach this property. It is with a view towards this problem that the majority of S. 2320's other amendments to the RICO forfeiture provisions were designed. These amendments are also to be included in the portion of the bill concerning criminal forfeitures in narcotics cases.

It is not uncommon for sophisticated criminals routinely to take measures to conceal their ownership and transfers of property, for financial transactions often provide important evidence of criminal activity, not the least of which are banking and tax law violations. Understandably, this practice makes the tracing of forfeitable assets all the more difficult. In addition, however, we increasingly encounter instances in which transfers of assets out of the country or to other persons (often with no apparent consideration) appear to be made not as a matter of routine, but rather as a criminal's specific reaction to the prospect of forfeiture. To the extent that forfeitable assets are easily transferred or removed from the country or are highly liquid, this phenomenon becomes more problematic. Thus, it presents particular difficulties when we seek the forfeiture of the assets of drug traffickers, who often deal in large amounts of cash, precious metals and gems.

Three of S. 2320's substantive amendments to the RICO statute are designed to address these difficulties. First, the bill would codify the concept that the United States' interest in

forfeitable property vests at the time of the commission of the criminal acts giving rise to the forfeiture, and that thus a subsequent transfer will not bar a forfeiture order. This is in essence the same "taint" theory that has long been recognized in civil forfeiture proceedings and which has more recently been applied in the context of criminal forfeiture as well. 2/ This provision should discourage the practice of defendants engineering sham transfers of their property to associates and relatives in an attempt to defeat forfeiture.

Another way in which the government can prevent transfers of forfeitable property and other actions designed to defeat forfeitures, is by obtaining appropriate protective orders from the courts. Both the RICO and CCE statute now give the courts the authority to enter restraining orders, require the execution of performance bonds, or take other actions to preserve property subject to forfeiture pending resolution of the criminal case. However, under current law, this statutory authority may be invoked only after the filing of an indictment or information. This limitation ignores the fact that defendants in such cases are often aware of the government's investigation prior to the filing of formal charges. Indeed, it is the Department's policy generally to inform the subjects or _____

2/ See United States v. Long, 654 F.2d 911 (3rd Cir. 1981), in which it was held that property derived from proceeds of a violation of 21 U.S.C. 848 could be subject to forfeiture although transferred to the defendant's attorneys more than six months prior to indictment, and that an order restraining the attorneys from transferring or selling the property was properly entered.

targets of a grand jury investigation so that they may have an opportunity to appear before the grand jury. Obviously, such knowledge will often motivate these persons to move quickly to shield their assets from forfeiture, and the government is powerless to prevent them from doing so.

To address this problem, S. 2320 would amend 18 U.S.C. 1963 to expand current protective order authority to give the courts the discretion to enter such orders in the pre-indictment stage, if the government can present sufficient evidence to establish probable cause to believe that a RICO violation has been committed and that the property for which the order is sought is subject to forfeiture as a result. The term of such an order would be limited to ninety days, unless extended for good cause by the court. Further, the court would be required to deny the government's request for the pre-indictment order if it determined that it would work an irreparable harm to the affected parties that is not outweighed by the need to preserve the availability of the property in question.

A further aspect of S. 2320's amended protective order provision would be to specify the circumstances in which the initial entry of such an order may be made pursuant to an ex parte proceeding. Where forfeitable property is in a form that makes it easily concealed, removed, or transferred, notice to the defendant of the government's intent to seek a restraining order or other protective measure may provide an opportunity for him to dispose of the property, and thus preclude any opportunity for

the government to obtain a forfeiture order. Such ex parte orders now are obtained, although more frequently in CCE cases which involve cash or other easily movable assets than in RICO cases which often involve assets such as interests in businesses. Under S. 2320, a protective order granted without notice to defendant or other adverse parties (for example, a bank in which the defendant's funds are deposited) would be limited to a term of only ten days, and could be granted only upon a showing of probable cause and a determination that the nature of the property was such that it could be concealed or moved before an adversary hearing could be held. After the entry of the initial order, the affected parties would then be given notice and an opportunity to contest the order in the context of an adversary hearing.

While this improved restraining order provision should enhance our ability to preserve forfeitable property pending a defendant's conviction and the entry of the order of forfeiture, there will continue to be instances where a defendant will be successful in concealing, removing, or transferring forfeitable property either by acting before the government can obtain a protective order, or, where the financial incentive is great, by defying a protective order. To address this problem, S. 2320 would provide for the forfeiture of substitute assets of the defendant where property which has been found during trial to be subject to criminal forfeiture is no longer available at the time of conviction. I note that Senator Biden's bill, S.1126, contains a similar substitute assets provision. The purpose of a substitute assets provision is straightforward -- it prevents a

defendant from escaping the economic impact of a forfeiture order by disposing of his property prior to conviction.

No such provision exists in present law, but it is, in our view, a necessary component of an effective criminal forfeiture statute. Absent a substitute assets provision, defendants will continue to have a strong incentive to conceal their assets, or move them out of the country, so as to defeat the possibility of their forfeiture. Therefore, S. 2320's amendments to 18 U.S.C. 1963 include authority for the court to order the defendant to forfeit substitute assets up to the value of forfeitable property that can no longer be located, has been transferred to or deposited with third parties, has been placed beyond the jurisdiction of the trial court, has been substantially diminished in value by the acts of the defendant or has been commingled with other property that cannot be divided without difficulty.

Under current 18 U.S.C. 1963 the disposition of property ordered forfeited is governed by provisions of the customs laws. It has been our experience, however, that the customs laws often do not adequately provide for the more complex issues that arise with respect to RICO forfeitures, particularly where the forfeited property is an interest in an ongoing business. Therefore, S. 2320 would require the development of Department of Justice regulations to govern these matters. However, the bill would continue to emphasize, as does current law, the responsibility of the Attorney General to protect the rights of innocent persons and to grant, in appropriate cases, petitions of innocent parties

for remission or mitigation of forfeiture, and to provide for the return of forfeited property that was obtained from victims of a RICO offense.

These and S. 2320's other amendments to the RICO forfeiture statute would substantially improve our ability to achieve the criminal forfeiture of significant amounts of property used in, and obtained as a result of, the racketeering offenses punishable under the RICO statute.

As noted above, the second part of S. 2320 is designed to facilitate forfeitures in narcotics cases. The most important element of this portion of the bill is the creation of a new criminal forfeiture statute that could be applied in all major drug trafficking prosecutions. While drug prosecutions now comprise nearly a quarter of all cases on the federal criminal docket, only an extremely small portion of these cases may be prosecuted as violations of the Continuing Criminal Enterprise statute, and an even smaller portion are crimes prosecutable as RICO violations. As a result, the forfeiture of the vast majority of drug related property must be sought in the context of civil forfeiture proceedings under 21 U.S.C. 881.

In many respects, the civil forfeiture provision of Title 21 is an extremely useful law enforcement tool, particularly since 1978 when Congress amended this statute to provide for the forfeiture of the proceeds of illicit drug transactions. The standard of proof for a civil forfeiture is lower than that for an order of criminal forfeiture, and because civil forfeiture is an <u>in rem</u> proceeding against the property itself

and does not depend on the criminal conviction of the person owning or using the property, it may be used when a defendant is a fugitive, which is a not uncommon occurrence in narcotics cases.

However, there are also drawbacks to civil forfeiture which become apparent when the acts giving rise to civil forfeiture are also the basis for prosecution of a drug offense. Forfeiture under 21 U.S.C. 881 must be pursued as a civil suit entirely separate from any criminal prosecution, even though the evidence on which the forfeiture action is based is the very same evidence which will be at issue in the criminal trial. In addition, civil forfeiture is an in rem proceeding. As such, the government must file suit in the district in which the property is located. Therefore, if property of a defendant is located in a district different from that in which the criminal trial is held, the case must be handled by a different U.S. Attorney's Office. Furthermore, it not unusual for property relating to a single drug case to be located in a number of districts, thus necessitating the filing of separate forfeiture suits in each of these districts.

Where the issues relating to civil forfeiture are the same as or closely related to those that will arise in a prosecution of a narcotics offense, it is a waste of valuable judicial and prosecutive resources to require an entirely separate consideration of forfeiture in each district in which the property of the defendant may be located. We also anticipate that the forfeiture of significant amounts of drug related property will more likely be achieved when the judge and jury hearing the criminal case

also consider whether property of the defendant is to be forfeited to the United States, and when the prosecutor and investigative agents who prepared the criminal case can apply their enthusiasm and expertise to an aggressive pursuit of forfeiture as well.

In addition to being cumbersome and clearly inefficient, parallel criminal prosecutions and civil forfeiture actions often create such problems that we find it necessary to stay the forfeiture proceeding pending resolution of the criminal case. This step is necessary because continuing the civil forfeiture action may result in the premature disclosure of evidence in the government's criminal case, including the identity of confidential informants.

Thus, while it is clear that there will continue to be a need for civil forfeitures, the United States' ability to seek forfeiture of drug profits and other property used in drug trafficking cases would be improved if prosecutors had the opportunity in all felony drug prosecutions of seeking forfeiture of such property of the defendants in the single context of the criminal trial. For these reasons, S. 2320 amends the Comprehensive Drug Abuse Prevention and Control Act to create a new criminal forfeiture statute that could be applied in all felony prosecutions under the Act. In addition to encompassing property now subject to forfeiture under the Continuing Criminal Enterprise statute, this provision would permit the criminal forfeiture of the proceeds of all felony drug violations as well as property that is used in the commission of these crimes.

This new criminal forfeiture statute for drug felonies would include provisions paralleling the bill's amendments to the

RICO forfeiture statute, including a provision for voiding third party transfers of forfeitable property, expanded authority to obtain appropriate restraining orders, and a provision for the forfeiture of substitute assets of the defendant. The bill's proposed Title 21 criminal forfeiture statute also includes two elements that are not incorporated in its RICO amendments. The first is a permissive presumption, or more correctly an inference, that property acquired during, or within a reasonable time after, the defendant's commission of the drug offense may be considered by the trier of fact to be property subject to forfeiture, if it is also found that the defendant had no legitimate sources of income to explain his acquisition of the property. Because of the considerable evidence of the profits produced through drug trafficking crimes and the fact that this provision is phrased as a permissive presumption or inference, we believe that it will clearly withstand constitutional scrutiny under the Supreme Court's decision in Ulster County Court v. Allen. 3/

The second of the provisions unique to the proposed Title 21 criminal forfeiture statute would be a provision for the issuance of a warrant of seizure upon a probable cause showing and a finding by the court that a restraining order would not suffice to preserve the availability of property subject to forfeiture. Because the proceeds of drug transactions are often in the form of highly liquid or easily movable assets, a protective order may not be sufficient to safeguard the property, and it may be

---

3/ 422 U.S. 140 (1979).

necessary to remove it from the custody of the defendant pending the disposition of the criminal case.

In addition to creating a new criminal forfeiture statute of general applicability in felony drug cases, S. 2320 would also make two substantive amendments to 21 U.S.C. 881, the provision of current law that governs the civil forfeiture of drug related property. First, as mentioned earlier, this provision does not authorize the civil forfeiture of real property, although real property is often used to a significant degree to facilitate the commission of drug trafficking crimes. Such real property includes "stash pads" or warehouses for controlled substances and equipment and vehicles use in these crimes, and also agricultural lands on which illicit drugs are cultivated. Therefore, this amendment, like S. 2196 introduced by Senator Humphrey, includes real property used in felony drug offenses among the types of property subject to civil forfeiture, with an "innocent owner" exception similar to that now included in the provision authorizing the forfeiture of drug proceeds.

The second substantive amendment to 21 U.S.C. 881 is the inclusion of language spelling out the authority to obtain a stay of civil forfeiture proceedings pending disposition of a criminal case involving the same matters. This stay could be obtained once an indictment or information in the criminal case has been filed. Currently, our prosecutors have, for the most part, been successful in obtaining such stays, but it would be preferable if there were direct statutory authority (rather than only the courts' inherent authority) to support our motions.

The final part of S. 2320 would establish a two-year trial program under which a portion of the proceeds of forfeitures of drug-related property would be available for the payment of awards to those who provide information or other assistance that lead to such forfeitures. Under section 301 of the bill, the Drug Enforcement Administration would be authorized to set aside twenty-five percent of the amounts realized by the United States in such forfeiture actions to create a fund to be used solely for the purpose of paying these awards. Payment of these awards would be discretionary, but the total amount of awards for a particular case could not exceed the lesser of $50,000 or twenty-five percent of the net amount realized by the government. We believe that the reward authority established under this trial program would, in certain cases, give us important leverage in obtaining information that would lead to the forfeiture of significant amounts of drug related assets. It also seems particularly appropriate that the funding for these awards come directly from a portion of forfeiture proceeds.

Formerly, a somewhat similar reward authority existed in 21 U.S.C. 881, which incorporated by reference the "moiety" provisions of the customs laws. However, certain aspects of the moiety provisions were so problematic that they could not be utilized as an effective rewards system in forfeiture cases, and in 1979 the reference to them was removed from section 881. The award program set out in section 301 would, in our view, represent a workable and effective system. But as a trial program with a detailed audit

requirement, it will be possible to assess the utility of the program and any problems it may present before determining whether it should be extended on a permanent basis.

These, then, are the basic elements of S. 2320. We firmly believe that enactment of S. 2320 will bring us closer to realizing the intended goals of our forfeiture laws: depriving racketeers and drug traffickers of the profits of crime and the economic power through which they continue to victimize our society.

Mr. Chairman, that concludes my prepared statement, and I would be pleased to answer any questions which the Committee may have.

END