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Under Advisement: Attorney Fee Forfeiture and the Supreme Court

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COMMENTARY

UNDER ADVISEMENT: ATTORNEY FEE FORFEITURE AND THE SUPREME COURT

*Stacy Caplow**

INTRODUCTION

This term the Supreme Court will resolve the debate over whether legitimate attorneys' fees are included within the forfeiture provisions of the Continuing Criminal Enterprise¹ (CCE) and Racketeer Influenced and Corrupt Organization² (RICO) statutes.³ Having granting certiorari in two cases, decided en

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¹ 21 U.S.C. § 848 (1982 & Supp. IV 1986).

² 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986). In both cases charges were brought under the CCE statute. However, the terms of the forfeiture provisions of the statutes are identical so that the court's ruling will apply to RICO as well.

³ On the eve of the final printing of this Article, the Supreme Court decided two cases. *United States v. Monsanto*, 57 U.S.L.W. 4826 (U.S. June 22, 1989); *Caplin & Drysdale, Chartered v. United States*, 57 U.S.L.W. 4836 (U.S. June 22, 1989). Both 5-4 decisions, written by an identical lineup of justices, essentially held that no interpretation of the statute nor constitutional right prevented the pretrial restraint or post-conviction forfeiture of assets needed by a defendant to pay attorney's fees. Neither of the majority opinions, authored by Justice White, contained any real surprises; rather they mirrored the arguments and basic structure of the pro-forfeiture circuit court decisions. *United States v. Bisell*, 866 F.2d 1343 (11th Cir. 1989); *United States v. Moya-Gomez*, 860 F.2d 706, *reh'g denied*, No. 87-1670 (7th Cir. 1988); *United States v. Nichols*, 841 F.2d 1988 (10th Cir. 1988); *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988). Right up to this last, narrowly divided decision, fee forfeiture has evoked strong emotions and bold rhetoric from the jurists who have analyzed its implications.

On the statutory claim, the majority opinion in *Monsanto* memorably stated: "In enacting § 853, Congress decided to give force to the old adage that 'crime does not pay.'"

banc in their respective circuits, *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*⁴ and *United States v. Monsanto*,⁵ the Court should have the opportunity to consider a range of statutory and constitutional issues raised by this controversial application of an otherwise sensible and powerful statutory innovation. Attention to the concerns raised by these cases has been substantial, not only among criminal defense lawyers, who naturally feel quite affected by what they perceive to be an attack by the government on the right to counsel and the attorney-client relationship,⁶ but also from the legislature,⁷ established professional organizations,⁸ and legal scholars.⁹ Despite

We find no evidence that Congress intended to modify that nostrum to read, 'crime does not pay, except for attorney's fees.' " 57 U.S.L.W. at 4829. Both majority opinions rather cursorily repudiated the equitable discretion interpretation of the statute. *Id.*; *Caplin & Drysdale*, 57 U.S.L.W. at 4837. See text accompanying notes 130-36 and 149-53 *infra*. Furthermore, having found no statutory exemption, the Court repudiated claims raising the denial of counsel of choice under the sixth amendment. *Monsanto*, 57 U.S.L.W. at 4830; *Caplin & Drysdale*, 57 U.S.L.W. at 4838-40. See text accompanying notes 54-97 *infra*. Nor did the Court credit the fifth amendment fundamental fairness due process claim. *Monsanto*, 57 U.S.L.W. at 4830; *Caplin & Drysdale*, 57 U.S.L.W. at 4840. See text accompanying notes 137-42. Finally, in *Monsanto*, the Court additionally rejected the argument that pre-trial restraint of forfeitable property was tantamount to the imposition of punishment before conviction. *Monsanto*, 57 U.S.L.W. at 4830. Only the question such as the one fashioned by the circuit court in *Monsanto*, of whether the absence of a post-indictment hearing violates procedural due process was unresolved. *Monsanto*, 57 U.S.L.W. at 4830 n.10. See text accompanying notes 98-111 and 167-74 *infra*.

⁴ 109 S. Ct. 363, *granting cert.*, 837 F.2d 637 (4th Cir. 1988), *rev'g in part on reh'g en banc sub nom.*, *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987). These two cases were argued before the Supreme Court on March 21, 1989. 57 U.S.L.W. 3631 (Mar. 28, 1989).

⁵ 109 S. Ct. 363, *granting cert.*, 852 F.2d 1400 (2d Cir. 1988), *vacating on reh'g en banc*, 836 F.2d 74 (2d Cir. 1987).

⁶ The most prolific critic of these practices is Professor William J. Genego. See Genego, *The New Adversary*, 54 BROOKLYN L. REV. 781 (1988) [hereinafter *New Adversary*]; Genego, *The Legal and Practical Implications of Forfeiture of Attorneys' Fees*, 36 EMORY L.J. 837 (1987) [hereinafter Genego, *Implications*]; Genego, *Prosecutorial Control Over a Defendant's Choice of Counsel*, 27 SANTA CLARA L. REV. 17 (1987) [hereinafter Genego, *Prosecutorial Control*]; Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 A.B.A. CRIM. JUST. 2 (1986) [hereinafter Genego, *Risky Business*]. See also Kadish, *The Attorney-Client Privilege: Can it Stand its Ground Against New Government Intrusions*, 36 EMORY L.J. 793 (1987); Krieger & Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737 (1984); Margolin, *Musings on Mega Trials and Mega Bucks*, 36 EMORY L.J. 811 (1987); Robinson, *Targeting Lawyers*, Nat'l L.J., Jan. 21, 1985, at 1, col. 2.

⁷ See *Attorneys' Fees Forfeiture, Hearing before the Committee of the Judiciary*, 99th Cong., 2d Sess 1 (May 13, 1986) [hereinafter *Forfeiture Hearings*].

⁸ *The Committee on Criminal Advocacy, The Forfeiture of Attorney Fees in Criminal Cases: A Call for Immediate Remedial Action*, 41 REC. A.B. N.Y. 469 (1986). In July

the relatively sparse number of cases in which fee forfeiture has

1985, the American Bar Association approved a resolution disapproving "of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 . . . in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a few as a fraud or sham to protect illegal activity of a client." *Forfeiture Hearings*, *supra* note 7, at 93 (reproducing ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES). See also *Lawyers Concerns over Government Tactics Aired at ABA Convention*, [Aug.] *Crim. L. Rep.* (BNA) No. 21, at 2400-02 (Aug. 27, 1986).

* Blakey, *Forfeiture of Legal Fees: Who Stands to Lose?*, 36 *EMORY L.J.* 781 (1987); Bonner, *A Balanced Perspective on Attorney Subpoenas*, 36 *EMORY L.J.* 803 (1987); Brickey, *Attorneys' Fee Forfeitures: On Defining "What" and "When" and Distinguishing "Ought" from "Is"*, 36 *EMORY L.J.* 761 (1987); Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 *VA. L. REV.* 493 (1986) [hereinafter Brickey, *Impact*]; Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 *Wis. L. REV.* 1 (1987) [hereinafter Cloud, *Forfeiting*]; Cloud, *Government Intrusions into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 *EMORY L.J.* 817 (1987); Fossum, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up for Grabs*, 39 *Sw. L.J.* 1067 (1986); Genego, *Implications*, *supra* note 6; Genego, *Prosecutorial Control*, *supra* note 6; Genego, *Risky Business*, *supra* note 6; Kadish, *supra* note 6; Krieger & Van Dusen, *supra* note 6; Margolin, *supra* note 6; Markus, *Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 *TEMP. L.Q.* 1097 (1986); Mass, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 *STAN. L. REV.* 663 (1987); Morgan, *An Introduction to the Debate Over Fee Forfeitures*, 36 *EMORY L.J.* 755 (1987); Morris, *Attorney Fee Forfeiture*, 86 *COLUM. L. REV.* 1021 (1986); Pate, *Payment of Attorneys' Fees with Potentially Forfeitable Assets*, 22 *CRIM. L. BULL.* 326 (1986); Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 *AM. CRIM. L. REV.* 747 (1987); Uelmen, *Converting Retained Lawyers into Appointed Lawyers: The Ethical and Tactical Implications*, 27 *SANTA CLARA L. REV.* 1 (1987); Viles, *Criminal Procedure IV: Attorney's Fees Forfeiture and Subpoenaing Defendants' Attorneys*, 1986 *ANN. SURV. AM. L.* 335; Note, *Forfeiture of Attorneys' Fees Under the Comprehensive Forfeiture Act of 1984: Not What Congress Ordered*, 16 *BALTIMORE L. REV.* 120 (1986); Note, *Today's R.I.C.O. and Your Disappearing Legal Fee*, 15 *CAP. U.L. REV.* 59 (1985); Note, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 *DICK. L. REV.* 461 (1988); Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 *DUKE L.J.* 145; Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 *FORDHAM L. REV.* 1171 (1986); Note, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 *HARV. L. REV.* 1929 (1984); Note, *United States v. Harvey: Are Criminal Defense Fees More Vulnerable than Necessary?*, 47 *MD. L. REV.* 322 (1987); Note, *Attorneys' Fees Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?*, 62 *NOTRE DAME L. REV.* 734 (1987); Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 *N.Y.U. L. REV.* 124 (1986); Note, *Criminal Law: Criminal Forfeiture of Attorneys' Fees Under RICO*, 40 *OKLA. L. REV.* 268 (1987); Note, *Forfeiture of Attorney Fees Under RICO's New Amendments*, 32 *ST. LOUIS U.L.J.* 199 (1987); Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary*, 88 *W. VA. L. REV.* 825 (1986); Note, *RICO and the Forfeiture of Attorneys'*

been contested, indicating some voluntary restraint by the government,¹⁰ the potential impact of attorney fee forfeiture on the traditional roles and balance of power in the adversary system is profound.¹¹

This Commentary will trace the background of the problem and explore the possible statutory or constitutional justifications available to the Supreme Court in the context of the two cases, which taken together articulate most of the arguments that have evolved since the passage of the Comprehensive Forfeiture Act of 1984 (CFA).¹² *Caplin & Drysdale* represents a prototypical analysis of the position that neither the statute nor the Constitution require exclusion of fees from the reach of forfeiture. The *Monsanto* decision, a sprawling collection of concurring opinions, suggests several possible approaches which, if fully developed by the Court, supply principled reasons for excluding fees despite the extremely persuasive argument that tainted assets should not be available to a defendant for any use, even payment to a lawyer. Next, this Commentary will venture into the treacherous territory of fortunetelling by attempting to preview the Supreme Court's decisions of the two cases. In the last part of the Commentary, specific statutory revisions designed to exempt fees from the reach of forfeiture will be proposed because on the eve of these decisions, however the court rules, one outcome is inescapable: legislative reform is imperative.¹³ Congress should amend the statute to clearly express the view that legitimate, reasonable attorneys' fees are not forfeitable and that lawyers are not subject to the provisions that apply to other third parties. Even if the Court finds no statutory or constitutional

Fees: Removing the Adversary from the Adversarial System?, 62 WASH. L. REV. 201 (1987); Note, *Forfeitable of Attorneys' Fees Traceable As Proceeds from a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499 (1986).

¹⁰ *Guidelines on Forfeiture of Attorneys' Fees*, U.S. ATTORNEYS MANUAL § 9-111.000 (1988) [hereinafter *Guidelines*].

¹¹ One judge has colorfully described fee forfeiture as "[a] statutory scheme that sacrifices the relationship between client and attorney, that invites the prosecutor to undermine the adversarial process, and that imposes sentence before trial (not to mention that denies a defendant his right to counsel of choice)." *United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir. 1988) (Oakes, J., concurring).

¹² Pub. L. No. 98-473, § 413, 98 Stat. 1976, 2049 (1984).

¹³ Although the Senate held a hearing in 1986 on fee forfeiture, the record of which amply sets forth the positions of the government and both the private and public defense bar, no action was taken. See *generally Forfeiture Hearings*, *supra* note 7.

basis for insulating fees and distinguishing between lawyers and other third parties, the statute should be amended in order to avoid abuse and even the appearance of a challenge to the traditional attorney-client relationship that has so stirred the critics of fee forfeiture.¹⁴ The widely held views of the many courts, attorneys, and bar groups opposing forfeiture highlight the sound public policy that should impel a legislative response.

I. BACKGROUND

A. *The Statutes*¹⁵

Civil forfeiture of the instrumentalities or contraband seized during the commission of the crime has been an available tool for a long time. However, its comparatively limited reach to only specific property used in connection with narcotics activities¹⁶

¹⁴ A call for legislative reform was expressed forcefully in the dissent filed jointly in both cases: "That a majority of this Court has upheld the constitutionality of the Act as so interpreted will not deter Congress, I hope, from amending the Act to make clear that Congress did not intend this result." *Caplin & Drysdale*, 57 U.S.L.W. at 4836 (Blackmun, J., dissenting). With somewhat more restraint consistent with its deference to the preservation of the legislative function, even the majority concedes the possibility that the result reached in these cases might not be what Congress intended, or at least not what they ever contemplated: "If . . . we are mistaken as to Congress' intent, that body can amend this statute to otherwise provide." *Monsanto*, 57 U.S.L.W. at 4829.

¹⁵ This background will be very brief to enable a reader unfamiliar with the nature of the problem to quickly grasp its dimensions and to avoid repeating an in depth analysis of the issues for those who have read the literature. Anything previously written about fee forfeiture thoroughly discusses the causes of the problem and analyzes or proposes solutions. For the most thoughtful articles, see Brickey, *Impact*, *supra* note 9, at 497-503 (supporting fee forfeiture on statutory and constitutional grounds); Cloud, *Forfeiting*, *supra* note 9, at 15-23 (arguing that an analysis of fee forfeiture must address not only individual rights but also its impact on the adversary system). Yet, even the most comprehensive recent articles are insufficiently current because the most significant cases all have been decided within the past year. *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989); *United States v. Unit 7 & Unit 8 (Kiser)*, 853 F.2d 1445 (8th Cir. 1989); *United States v. Moya-Gomez*, 860 F.2d 706, *reh'g denied*, No. 87-1670 (7th Cir. 1989); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988); *United States v. Jones*, 837 F.2d 1332, *reh'g granted*, 844 F.2d 215 (5th Cir. 1988); *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. Monsanto*, 836 F.2d 74 (1987), *vacated on reh'g en banc*, 852 F.2d 1400 (2d Cir.), *cert. granted*, 109 S. Ct. 363 (1988). The only circuit court cases decided before 1988 were *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd in part on reh'g en banc sub nom. In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), and *United States v. Thier*, 801 F.2d 1463 (1986), *modified on denial of reh'g*, 809 F.2d 249 (5th Cir. 1987).

¹⁶ 21 U.S.C. § 881(a) (1982 & Supp. IV 1986) (controlled substances used or intended to be used in manufacturing, compounding, processing, importing, or exporting

also limited its effectiveness since the true wealth in the form of illicit profits of racketeers and drug traffickers remained beyond reach. In 1970, when the RICO and CCE legislation authorized the first in personam forfeiture punishment, its purpose was to strip the economic power of individuals and organizations, and to destroy their ability to continue their criminal activities after conviction.¹⁷ In addition, forfeiture has the poetic justice of depriving convicted defendants of all their ill-gotten gains, thus indirectly redressing the social harm committed even if not directly compensating the actual or secondary victims of the criminal acts.¹⁸

When Congress passed amendments to the forfeiture provisions in the Comprehensive Crime Control Act of 1984,¹⁹ it intended to "eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies."²⁰ In order to increase its potency as a

shall be subject to forfeiture).

¹⁷ The original version of the Racketeer Influenced Corrupt Organization (RICO) Act provided that:

Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interests he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Pub. L. No. 91-452, § 9.01(a), 84 Stat. 941, 947 (1970). Similarly, the original Continuing Criminal Enterprise (CCE) statute provided that:

Any person who is convicted . . . of engaging in a continuing criminal enterprise shall forfeit to the United States (A) the profits obtained by him in such enterprise, and (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Pub. L. No. 91-513, § 408(2)(A) & (B), 84 Stat. 1265, 1265-66 (1970).

¹⁸ The Attorney General may transfer forfeited property to another federal, state, or local agency. 21 U.S.C. § 881(e). An experimental Justice Department assets forfeiture fund was created in 1984 from which monies can be appropriated to defray the costs of the forfeiture actions, 28 U.S.C. § 524(c) (1982), as amended by the Assets Forfeiture Amendments Act of 1988 (Anti-Drug Abuse Act of 1988), Pub. L. No. 100-690, §§ 6071-6080, 102 Stat. 4320-4327. See also *Attorney General's Guidelines on Seized and Forfeited Property*, [Jan.] Crim. L. Rep. (BNA) No. 13, at 3013-19 (Jan. 6, 1988).

¹⁹ Pub. L. No. 98-473, 98 Stat. 1837 (1984).

²⁰ S. REP. NO. 225, 98th Cong., 2d Sess. 192 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3375. These revisions appear to respond to a report issued in 1981 by the United States General Accounting Office entitled *Asset Forfeiture: A Seldom Used Tool in Combatting Drug Trafficking*, which criticized federal agencies for under-

prosecutorial tool, the 1984 changes expanded the scope of forfeitable property and closed loopholes permitting preconviction transfers of assets that had been eviscerating the utility of forfeiture as a punishment.²¹

The most consequential change in the 1984 law was the adoption of the "relation back" doctrine²² and the accompanying procedures designed to protect the conditional interest of the government in the property²³ and to protect innocent third parties.²⁴ Briefly, the relation back doctrine is a legal fiction of property law that establishes that the defendant was never the lawful owner of any property or interest that is found forfeitable.²⁵ Although property is forfeited only upon conviction, the

utilizing forfeiture and enumerated limitations and ambiguities in the existing law that restricted its usefulness.

²¹ Although *Rusello v. United States*, 464 U.S. 16 (1983), had not been decided at the time that the amendments were drafted, its eventual holding that profits and proceeds constitute an "interest" within the meaning of section 1963(a)(1) of title 18 of the United States Code was reflected in the more expansive definitions and items contained in the revised version of that section.

²² The statute provides:

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

18 U.S.C. § 1963(c). The language of section 853(c) of title 21 of the United States Code is identical. Parallel amendments to the civil forfeiture statute also were adopted in 1984. "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h). The relation back doctrine had long been an accepted feature of civil forfeiture. See *United States v. Stowell*, 133 U.S. 1, 16-17 (1890).

²³ Provisions regarding protective orders are found in *e.g.*, 21 U.S.C. § 853(e); 18 U.S.C. § 1963(b).

²⁴ Provisions regarding ancillary hearings to determine rights of third parties are found in *e.g.*, 18 U.S.C. § 1963(m)(1) & (2); 21 U.S.C. 853(n).

²⁵ Forfeitable property is defined by 18 U.S.C. section 1963(a) as:

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over, any enterprise which the person has established, operated, con-

government's right, title, and interest vests as of the date of the commission of the crime giving rise to forfeiture. However, the government does not acquire actual title to the property until the defendant's conviction and a finding of forfeitability is made by the trier of fact. The government, thus, has an unperfected interest in property it specifies in the indictment as forfeitable. The effect of this doctrine is to void any interim transfer of the property to a third party occurring between the date of the commission of the crime until conviction.

In order to protect innocent third parties from losing their lawfully obtained property, the revised statute establishes a post-conviction hearing at which bona fide purchasers for value can pursue their claims.²⁶ To be successful, the claimants have to show, by a preponderance of the evidence, that they were good faith purchasers and that they had no reasonable cause to believe that the property was forfeitable at the time of the transfer.²⁷

It is precisely this requirement of lack of suspicion about the source of the property that creates the lawyer's dilemma. Unlike the storekeeper who sells goods or the dentist who provides services to the defendant, the attorney is likely to know or at least to reasonably believe that the source of the fee is illegal. In fact, the failure to ascertain this information might well be a dereliction of the lawyer's duty to represent the client competently and diligently.²⁸ Many defendants prosecuted under RICO or CCE possess few if any assets that are not forfeitable since they are basically in the business of crime. This is particularly true for the drug "kingpins" targeted under the CCE stat-

trolled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a).

Forfeitable property is defined somewhat differently in 21 U.S.C. § 853(a). Property civilly forfeitable is defined in *id.* § 881(a)(1)-(8).

²⁶ 18 U.S.C. § 1963(1); 21 U.S.C. § 853(n). Before the amendments, if property was transferred before conviction, the government had no remedy even if the transaction was designed to circumvent forfeiture. *See, e.g.,* United States v. Truglio, 660 F. Supp. 103, 105 (N.D. W. Va. 1987).

²⁷ 18 U.S.C. § 1963(1)(6)(B); 21 U.S.C. § 853(n)(6)(B).

²⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1981) (proposed final draft); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1980).

ute, because the very definition of that offense requires the defendant to occupy a supervisory or managerial position in a narcotics organization and to gain "substantial income or resources" from the violations.²⁹ To prepare an effective defense, the attorney necessarily has to become aware of the source of the income that is an element of the crime. The same is true of any defendant who is violating the RICO statute by conducting an illegal enterprise.³⁰ The attorney surely will know that the fee, just as all the rest of the client's property, is derived from criminal conduct when the defendant has no obvious or known legitimate activities.

The mere presence of a forfeiture count in the indictment would put the attorney on notice to inquire about those assets;³¹ such an inquiry most likely would reveal whether the fee is being paid from the same source.³² The failure of an attorney to inquire about the current status of the allegedly forfeitable assets would be a serious omission in preparation.

The government imagines a dialogue between lawyer and client at which the lawyer will determine that there is no reason to believe the fee is being paid from illicit funds.³³ Although it is unquestionable that legitimate funds should be consumed first for all pretrial expenses including legal fees, this conversation may reveal there will be insufficient or no untainted funds to pay the attorney's fee or that the client's explanation is not credible. Once the attorney even suspects that the fee is tainted, the attorney can no longer claim to be without cause to know that the fee was subject to forfeiture. Furthermore, the forfeiture count on the face of the indictment, the cornerstone of the attorney's file, may be sufficient by itself to establish a reasona-

²⁹ 21 U.S.C. § 848.

³⁰ 18 U.S.C. § 1962(c). See *United States v. Turkette*, 452 U.S. 576 (1981).

³¹ *United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983), cert. denied *sub nom.*, *Bello v. United States*, 469 U.S. 837 (1984). A forfeiture count alleging the extent of the interest or property must be pleaded specifically in the indictment. FED. R. CRIM. P. 7(c)(2). However, this requirement can be satisfied by several types of language: a specific description (certain numbered stock shares, a particular bank account or piece of real property), a generic description (unspecified shares of stock, a sum of money), or a broad, inclusive description ("any and all proceeds or profits of crime"). *Guidelines*, *supra* note 10, § 9-111.511.

³² 21 U.S.C. § 848(b)(2)(B).

³³ *Forfeiture Hearings*, *supra* note 7, at 41 (letter from John R. Bolton, assistant attorney general, to Sen. Patrick J. Leahy (Apr. 18, 1986)) [hereinafter Bolton Letter].

ble belief that any fee would be tainted so that a post-conviction hearing, although available, would be doomed. In contrast to other third parties, the attorney is actually disadvantaged by the professional relationship to the client.

A similar scenario at the supermarket or the dentist's office is inconceivable. Before bagging the groceries of the customer reputed in the neighborhood to be involved in crime, the clerk would have to ask where the proffered cash was earned. Or, just as a reputed narcotics kingpin actually under indictment is having root canal work, the dentist, who is aware from the newspapers that the patient is alleged to be a crime figure, would refuse to inject the novocaine until assured that the patient's assets are not subject to forfeiture. To further support the claim that lawyers are being treated more harshly than other third parties, there is no reported litigation in which other providers of goods and services have sought to protect their property from forfeiture. This absence leads to the inescapable conclusion that the government is simply not obstructing access to funds for other third parties who provide legitimate services.³⁴ Moreover, in some instances the government does not even have to seek to regain the transferred assets because substitute assets can be located. Therefore, if the defendant sells a house to an innocent third party, the government can go after the profits of the sale rather than try to seize the house and litigate with the bona fide purchaser. In contrast, no comparable tangible exchange with a lawyer has occurred so that the only recoverable asset is the fee owed or actually paid.

The problem for the lawyer is compounded by the extent of the reach back in time of the relation back doctrine. Although an indictment pleading forfeitable assets may be sufficient to put an attorney on notice of the vulnerability of the fee, the nature of the attorney-client relationship may date this suspicion even earlier than indictment. During the preindictment investigative period, an attorney may represent a client before the grand jury and at plea discussions or may simply advise the defendant more generally. This preindictment period may be ex-

³⁴ One of the few reported cases determining the claims of bona fide purchasers arose out of the original prosecution of Reckmeyer, Caplin & Drysdale's client. The case held that, after an ancillary hearing, a third party established a superior right to forfeited property. See *United States v. Reckmeyer*, 627 F. Supp. 412,414 (E.D. Va. 1986).

tensive, depending entirely on the length of time the government takes to prepare its case. Yet, any fees owed or paid for services rendered during this time can be restrained prior to, and recaptured after, conviction as long as the crimes alleged occurred prior to the services rendered.

By following its voluntary guidelines, the United States Attorney's office maintains that it has mitigated the harshness of the relation back doctrine as it applies to attorneys' fees.³⁵ Adopted in 1985, the main feature of the guidelines is their requirement of "reasonable grounds to believe that the attorney have actual knowledge" that the property was forfeitable at the time of its transfer in order to pursue forfeiture of a fee.³⁶ Civil forfeiture proceedings or a forfeiture count in the indictment naming a particular asset would provide indisputable actual knowledge of forfeitability, whereas more general pleadings such as "all profits of proceeds of the criminal activity" might be insufficient to demonstrate reason to know.³⁷ The accusatory instrument is, of course, the most direct, but not the only, means of proving knowledge.

Despite this purported restraint on the discretion of the prosecutor to seek forfeiture of attorneys' fees, the guidelines "may not be ruled on to create any rights, substantive or procedural, enforceable at law by any party . . . nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice."³⁸ More telling perhaps is that none of the major cases litigated since the adoption of the guidelines demonstrate any particular effort on the government's part to be selective about its opposition to the release of restrained funds to pay fees. All reveal an aggressive stance against applications for release of assets to pay fees, particularly in cases of defendants who are drug kingpins.³⁹

³⁵ *Forfeiture Hearings*, *supra* note 7, at 29 (statement of Stephen S. Trott, assistant attorney general).

³⁶ *Guidelines*, *supra* note 10, § 9-111.430.

³⁷ *Id.* § 9-111.520.

³⁸ *Id.* § 9-111.400.

³⁹ The majority of cases have involved prosecutions under the CCE statute and related other charges. In a few cases, charges have been brought under both CCE and RICO statutes: *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985). Only a few attorneys' fees cases arose in cases where RICO alone was charged: *United States v. Jones*, 837 F.2d 1332, *reh'g granted*, 844 F.2d 215 (5th Cir. 1988); *United States v. Ianniello*, 644 F. Supp. 452

B. *History of the Cases*

From the first, the question of whether attorneys' fees are forfeitable was destined for Supreme Court review. When the CFA was passed in 1984, Congress almost deliberately avoided creating a record about its view on the forfeitability of fees.⁴⁰ Left to the task of interpreting the statute and ruling on its constitutionality as applied to attorneys' fees, the district and circuit courts have been divided both internally and between themselves.

Although there is considerable consensus that the intent of the statute was to *not* exclude fees, impassioned and persuasive arguments have been made on both sides of the constitutional claims. The checkered history of the two cases before the Supreme Court reflect the maturation of the analysis and difficulties that the district and then the circuit courts have had in addressing this issue.

1. *Caplin & Drysdale*

Although the *Caplin & Drysdale* sequence has not been the only circuit court decision to address the various statutory and constitutional claims, it stands as a prototype of the evolution of the challenges against fee forfeiture from the initially mixed statutory-sixth amendment analysis in the district courts, to the invalidation of fee forfeiture on constitutional grounds, to the final repudiation of constitutional rule making. A review of the development, sharpening, and, in some instances, abandonment of these arguments microcosmically introduces the full range of issues. This case provides a window through which to examine the various claims.

(S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985). A possible explanation for the imbalance is that RICO defendants charged with committing business or white collar crimes are more likely to have other, untainted assets earned at noncriminal activities or even inherited or family wealth.

⁴⁰ The only direct reference to the potential problem contained in the legislative history stated: "Nothing in this section [authorizing restraining orders] is intended to interfere with a person's Sixth Amendment right to counsel. The Committee therefore does not resolve the conflict of District Court opinions on the use of restraining orders that impinge on a person's right to counsel in a criminal case." H.R. REP. NO. 845, 98th Cong., 2d Sess. 1, 19 n.1 (1984).

a. *Statutory Construction*

Caplin & Drysdale originated as three cases arising in three different fee forfeiture contexts. In the first, *United States v. Reckmeyer*,⁴¹ in which the defendant was represented by the law firm of Caplin & Drysdale, Chartered, the defense attorneys had received payment before indictment. After conviction and a judgment, they asked for the release of forfeited assets to pay additional fees owed. The trial court relied on specific passages in the legislative history to hold that Congress did not intend for legitimate attorneys' fees to be forfeitable under the CCE statute and that any such interpretation of the statute would violate the defendant's right to counsel of choice and to effective assistance of counsel.⁴²

In *United States v. Bassett*,⁴³ the second case of the trilogy, the government had notified defense counsel of its intention to pursue forfeiture of fees if the defendants were convicted. The district court construed the statute to apply only to sham or fraudulent transactions to any third parties, including attorneys. The decision avoided any direct constitutional pronouncement, yet it alluded its concern over the potential sixth amendment problems inherent in fee forfeiture.⁴⁴

Like *Reckmeyer* and *Bassett*, other district court cases have held the statute did not extend to legitimate attorneys' fees largely because to say otherwise would run afoul of the right to counsel.⁴⁵ The consistency of these decisions signaled a forceful

⁴¹ 631 F. Supp. 1191 (E.D. Va. 1986), *aff'd sub nom.* *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

⁴² 631 F. Supp. at 1195-97. "The purpose of this provision [relation back] is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions." S. REP. NO. 225, 98th Cong., 1st Sess. 200-01 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3383-84. "The provision [ancillary hearing] should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." *Id.* at 209 n.47, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3392 n.47.

⁴³ 632 F. Supp. 1308 (D. Md. 1986), *aff'd sub. nom.* *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

⁴⁴ 632 F. Supp. at 1315-16.

⁴⁵ *United States v. Ianniello*, 644 F. Supp. 452, 455-58 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985). None of these cases were themselves reversed. *See also United States v. Estevez*, 645 F. Supp. 869, 872 (E.D. Wis. 1986), *rev'd sub nom.* *United States v. Moya-Gomez*, 860 F.2d 706, 723-25 (7th Cir. 1988) (The Seventh Circuit

intuitive reaction by trial court judges to this perceived extension of government power interfering with the right to counsel and altering the fundamental fairness of adversarial process. Basically, those district courts exempting fees have held that to read the statute otherwise would interfere with the right of counsel of choice.⁴⁶

After this initial spate of district court cases, all circuit courts considering the question of statutory intent have concluded the provision does not necessarily exclude assets. Using traditional methods of statutory construction,⁴⁷ most courts have found no literal or historical support for exempting fees.⁴⁸

concluded that the statute as written applies to attorneys' fees. Such application does not necessarily constitute a denial of the defendant's sixth amendment right to counsel.). *But see In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985*, 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) (Defendant's sixth amendment right to counsel would not be infringed by admission at trial of information by a stipulation regarding defense counsel's fee arrangement with defendant.)

⁴⁶ *Estevez*, 645 F. Supp. at 872 ("[B]ecause of constitutional questions the statute raises, it seems reasonable to conclude that Congress intended that legitimate attorneys fees be excepted."); *Ianniello*, 644 F. Supp. at 456 ("It is a fundamental principle of statutory interpretation that in deciding among possible interpretations of a statute, the court must select an interpretation that appears to be consistent with the constitutionality of the statute."); *Bassett*, 632 F. Supp. at 1316 ("This interpretation of the statute [that only sham or fraudulent transactions are voidable] is further supported when one considers the constitutional implication of the government's position."); *Reckmeyer*, 631 F. Supp. at 1196 ("This court's finding that the forfeiture of attorney's fees violates the Sixth Amendment is therefore not inconsistent with the Congressional intent behind the Comprehensive Forfeiture Act, it appearing that it was Congress' intent all along that the courts would resolve this question."); *Badalamenti*, 614 F. Supp. at 197 ("Absent some supporting indication in the legislative history, I think it most doubtful that Congress intended by its broad language to cover a special application so clearly at odds with an accused defendant's constitutionally guaranteed right to have counsel to defend the charge."). *See also* *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985). *Contra* *United States v. Bailey*, 666 F. Supp. 1275, 1276 (E.D. Ark. 1987) (release of funds seized pursuant to civil forfeiture action not required by sixth amendment); *United States v. Draine*, 637 F. Supp. 482, 484 n.2 (S.D. Ala. 1986) (section 853 held to be constitutional), *cert. denied*, 108 S. Ct. 94 (1987).

⁴⁷ "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). *See also* *Russello v. United States*, 464 U.S. 16, 20 (1983). "[W]hen a statute is fairly susceptible to more than one interpretation, the interpretation most consistent with constitutionality should be adopted." *United States v. Harvey*, 814 F.2d 905, 917 (2d Cir. 1988).

⁴⁸ *United States v. Bissell*, 866 F.2d 1343, 1350 (11th Cir. 1989). *See* *United States v. Moya-Gomez*, 860 F.2d 706, 723 (7th Cir. 1988) (with respect to protective order entered pursuant to forfeiture count of indictment under the CCE statute, there is no exemption for attorneys' fees); *United States v. Nichols*, 814 F.2d 1485, 1496 (10th Cir.

By now, this argument has been virtually abandoned by fee forfeiture opponents in light of the unanimity among the circuit courts.⁴⁹

The view that the broad language of the statute itself includes attorneys' fees is endorsed even by those courts that ultimately have found this application to be unconstitutional.⁵⁰ For example, in the third case in the *Caplin & Drysdale* trilogy, *United States v. Harvey*, the district court had issued a restraining order barring the defendant from the use of any of his property to pay fees, holding that the legislative history of the statute did not exempt fees.⁵¹ On appeal to the Fourth Circuit, the three cases were consolidated under the name *United States v. Harvey*.⁵² The circuit court rejected the statutory grounds relied on in *Reckmeyer* and *Bassett*, holding that the statute did not contemplate any special exemption of attorneys' fees from forfeiture.⁵³ However, as a result of its clear repudiation of any statutory basis for excluding fees, *Harvey* became the first circuit court to deal directly with the constitutional issues without

1988) (neither section 853 nor the legislative history of its amendments of 1984 support a conclusion favoring exemption of attorneys' fees in the context of a Comprehensive Drug Abuse Prevention and Control Act violation). In addition, the direction by Congress that "the provisions of this section shall be liberally construed to effectuate its remedial purposes," 21 U.S.C. § 853(o), is likely to doom any efforts to read limiting language into the statute. See also Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970) (providing similar directions for the liberal construction of the RICO statute).

⁴⁹ The petitioner in *Caplin & Drysdale* does not even argue this statutory claim in his brief, although the Court will have to rule on this issue since it has been raised in *Monsanto*. See Brief for Respondent at 12-30, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (No. 88-454), cert. granted, 109 S. Ct. 363 (1988). However, in the past, whenever the RICO statute has been interpreted, the Supreme Court has followed the direction of Congress to liberally construe its provisions, thus deferring to Congress to revise the statute. Given this pattern, an interpretation of the statute by the Supreme Court that reads into the statute an exclusion for attorneys' fees seems highly unlikely.

⁵⁰ *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), modified on denial of reh'g, 809 F.2d 249 (1987).

⁵¹ *United States v. Harvey*, 814 F.2d 905, 912 (4th Cir. 1987).

⁵² 814 F.2d 905 (4th Cir. 1987). The government had appealed *Reckmeyer* and *Bassett*; the defendant appealed *Harvey*.

⁵³ The Fourth Circuit stated:

[W]e hold that the critical provisions must be interpreted according to their literal import and that this contemplates the forfeiture of attorney fees in any circumstances where the attorney cannot establish that he was "without reasonable cause to believe that the property [used to pay the fees] was subject to forfeiture."

Id. at 918.

cloaking them in statutory guise.

b. *Sixth Amendment Claims*

The only lawyer-client relationship recognized by the United States Constitution is that of the criminal defendant and the defendant's attorney. By its guarantee of counsel to all persons charged with a crime, the sixth amendment assures that at least one type of participant in the legal system always will be represented.⁵⁴ Although this right to retained or appointed counsel is absolute in any case in which the defendant is charged with an offense for which a term of imprisonment is imposed, some of the supporting pillars of the sixth amendment, the right to counsel of choice and the right to effective assistance of counsel, are qualified.⁵⁵

Immediately after the passage of the Comprehensive Crime Control Act of 1984 containing the new forfeiture provisions, the defense bar began to fashion the constitutional objections to the perceived threat to the right to counsel and the attorney-client relationship. These arguments have evolved to the point that, although they can be divided into the three categories discussed below, the denial of the right to counsel of choice has emerged as the key claim. In the *Caplin & Drysdale* sequence, the district and circuit courts examined all of these sixth amendment claims.

⁵⁴ "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel in his defense." U.S. CONST. amend. VI.

⁵⁵ *Scott v. Illinois*, 400 U.S. 367 (1979) (sixth and fourteenth amendments require that an indigent criminal defendant not be sentenced to imprisonment unless the state has afforded him right to assistance of appointed counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right of indigent criminal defendant to assistance of counsel not governed by classification of offense or by whether jury trial required); *Gideon v. Wainwright*, 372 U.S. 335 (1935) (right to appointed counsel afforded to indigent criminal defendants); *Powell v. Alabama*, 287 U.S. 45 (1932).

See, e.g., *Wheat v. United States*, 108 S. Ct. 1692 (1988) (recognition of limited sixth amendment right to choose one's own counsel); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (ineffective assistance of counsel claim requires a showing of prejudice sufficient to "undermine confidence in the outcome" of the trial); *United States v. Cronin*, 466 U.S. 648 (1984); *Morris v. Slappy*, 461 U.S. 1, 10-12 (1983); *United States v. Paone*, 782 F.2d 386 (2d Cir.), *cert. denied*, 479 U.S. 882 (1986); *United States v. Curcio*, 680 F.2d 881, 890 (2d Cir. 1982); *United States v. Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982).

i. Absolute Right to Counsel

The threat of attorney fee forfeiture affects the right to counsel in several ways. If assets have been sequestered by court order, a defendant ostensibly qualifies for appointed counsel under the Criminal Justice Act (CJA).⁵⁶ An accused whose currently unrestrained assets may be subject to forfeiture still possesses funds to hire a lawyer, but anyone taking the case in the shadow of such a threat would be "foolish, ignorant, beholden or idealistic."⁵⁷ Neither indigent nor solvent, that defendant may be unable to retain counsel or qualify for appointed counsel and, thus, be denied the basic right to counsel altogether.⁵⁸ However, most recent decisions, including *Harvey*,⁵⁹ reject or ignore the so-called absolute denial of counsel argument on the ground that the defendant is entitled to appointed counsel if unable to afford a retained lawyer. Yet, these decisions basically ignore the fact that in forfeiture cases the availability of funds to retain counsel is determined solely by the prosecutor's ability to obtain an indictment charging a sweeping forfeiture count. Furthermore, the appointment of counsel, governed by the provisions of the CJA, requires the defendant to demonstrate to the court the reasons for the defendant's inability to obtain counsel, which may require a release of confidential information.⁶⁰

This position also overlooks a few key realities. First, the right to assigned counsel only attaches at a "critical stage," which usually means the commencement of criminal proceedings.⁶¹ It is generally accepted that a defendant has no right to counsel at the investigative stage, including the grand jury investigation, at a precharging conference, or at plea negotiations which might result in a guilty plea or a cooperation agreement. Any retained attorney might be loathe to accept the case even before indictment because of the threat that payment for ser-

⁵⁶ 18 U.S.C. § 3006A (1982 & Supp. IV 1986) [hereinafter CJA].

⁵⁷ *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

⁵⁸ To qualify for appointed counsel, the defendant must satisfy the court, after inquiry, that the defendant is "financially unable" to obtain counsel. 18 U.S.C. § 3006A(b).

⁵⁹ "[T]he Act does not on its face violate the minimal right [to some counsel], nor could it by any application other than one that included a follow-up refusal to appoint any counsel." *United States v. Harvey*, 814 F.2d 905, 922 (4th Cir. 1987).

⁶⁰ 18 U.S.C. § 3006A(b).

⁶¹ *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Gouveia*, 467 U.S. 180 (1984); *United States v. Ashe*, 413 U.S. 300 (1973); *Kirby v. Illinois*, 406 U.S. 682 (1972).

vices would be forfeitable. If the answer to fears about sixth amendment protections is that the right to appointed counsel adequately protects the defendant, then the defendant whose future may rest with the success of the precharging efforts of the lawyer may have no representation in the investigation simply because the lawyer can predict that there will be a forfeiture count. It may be narrowly correct to say that the right to counsel has not been violated because the defendant has not yet been charged. However, this position ignores the nature of federal criminal practice in which some of the most effective and helpful representation is provided before charging.⁶²

Another criticism of the appointed counsel solution is the effect it will have on the entire appointed counsel system. Federal defender organizations that might be appointed as counsel have limited resources to handle the extensive investigation and trial preparation involved in a complex RICO or CCE trial.⁶³ The drain on their resources may be compounded by the reluctance of CJA panel lawyers in private practice, the other resource for appointment, to accept such cases. Most of these lawyers are performing what is, in effect, a pro bono service and will be committing significant time and effort to these often lengthy and difficult cases.⁶⁴

It is foreseeable that the future of the defense bar will be jeopardized by this solution. If attorneys see that representing their traditionally most lucrative clients may result in receiving no greater fee than those provided by CJA rates, lawyers will refuse such clients and move away from a criminal law specialization. If private attorneys are consistently forced into handling assigned cases at CJA rates, they will stop accepting assignments. If there is no future in a criminal law specialty, young lawyers will not seek admission to local panels since the experience and contacts they would get would have no usefulness to

⁶² *Forfeiture Hearings*, *supra* note 7, at 231-32 (statement of Edward F. Marek, Federal Public Defenders and Federal Community Defenders, Northern District of Ohio) [hereinafter Marek Statement]. *See also* United States v. Rogers, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985); K. MANN, DEFENDING WHITE COLLAR CRIME 14-16 (1985).

⁶³ Marek Statement, *supra* note 62, at 233-38.

⁶⁴ Current CJA rates barely compensate a private lawyer. The hourly rate is \$60 an hour for in court work and \$40 an hour for time "reasonably" spent out of court, with a cap of \$2,000 for each attorney. The court may authorize payment exceeding the statutory limit in particularly demanding cases. 18 U.S.C. § 3006A(d).

their future practice. Thus, an entire segment of the bar would vanish, leaving only publicly financed defender services.

Some courts already seem to believe the solution is to appoint, pursuant to the CJA, the same attorney who was sought to be privately retained. This effectively holds the lawyer hostage.⁶⁵ These courts do a disservice in two ways — they force a lawyer to work for inadequate compensation yet, by giving the defendant the putative counsel of choice, undercut the sixth amendment argument.⁶⁶ To force the situation this way risks creating hostility and resentment in the attorney-client relationship and may cause serious ethical dilemmas.⁶⁷

As the sixth amendment arguments have been refined, the denial of the absolute right to counsel has waned as a forceful objection to fee forfeiture. Yet as long as the supposed safety net is the appointed counsel system, a solution which fails to provide an adequate protection, that argument continues to have at least practical, if not constitutional, value.⁶⁸

ii. Effective Assistance of Counsel

The qualified right to effective assistance of counsel is grounded in a post-conviction analysis of prejudice and as such is the weakest of all the sixth amendment arguments against forfeiture.⁶⁹ After conviction, the defendant who had to settle for

⁶⁵ "A private attorney who attempts to devote a 40-hour week to CJA rates . . . to the defense of a RICO or CCE case . . . simply will not be able to meet the office payroll." *Forfeiture Hearings*, *supra* note 7, at 217 (remarks of Neal R. Sonnett, National Association of Criminal Defense Lawyers).

⁶⁶ *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984); *United States v. Figueroa*, 645 F. Supp. 453, 456 (W.D. Pa. 1986). In *Caplin & Drysdale*, in which the lawyers made a post-conviction application for release of funds, the government ironically argued that the defendant was not denied his right to counsel of choice because his lawyer took the gamble, represented him, then tried to recover his fee after conviction, exactly the course the statute mandates. Brief for Petitioner at 35, *Caplin & Drysdale, Chartered v. United States*, 837 F.2d 637 (4th Cir.) (No. 87-1729), *cert. granted*, 109 S. Ct. 363 (1988) [hereinafter *Petitioner's Brief*].

Another approach is to release frozen funds to cover CJA costs. See *United States v. Monsanto*, 852 F.2d 1400, 1401 (2d Cir. 1988).

⁶⁷ See generally Uelmen, *supra* note 9 (discussion of Comprehensive Forfeiture Act of 1984 in which ethical and tactical implications of appointing retained counsel pursuant to CJA were considered).

⁶⁸ "The available force of public defenders and legal aid lawyers is insufficient to provide [the] assurance of [appointed counsel]." *United States v. Harvey*, 814 F.2d 905, 921 (4th Cir. 1987).

⁶⁹ The Supreme Court has articulated the ineffective assistance of counsel test:

assigned or more modest counsel because his assets were restrained may well have been adequately represented under the prevailing standard.⁷⁰ In any event, the possibility that representation might be inadequate could not be litigated before trial.⁷¹ Therefore, this argument is not especially useful.

More substantial objections grounded in this aspect of the sixth amendment are based more on the effect of forfeiture on the attorney-client relationship. These perceived threats arise in the context of several specific potential conflicts posed by forfeiture. First, since forfeiture is conditioned upon a conviction, an attorney representing a client whose assets are in jeopardy may be in the position of negotiating with the prosecution for a plea that would salvage the fee, because only a negotiated disposition could assure the fee; after a trial conviction the forfeiture is mandatory.⁷² The prosecutor even has the authority to negotiate to exempt fees and to decide when and whose fees to forfeit.⁷³ Lawyers may find themselves negotiating on behalf of their clients against their self-interest, or worse, to protect their fee against the best interests of their clients.

Another ethical objection is the prohibition against contingency fees in criminal cases.⁷⁴ Since the attorney defending the charges is also contesting the forfeitability of the assets needed

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland v. Washington, 466 U.S. 669, 690 (1984).

⁷⁰ See, e.g., *United States v. Cronin*, 466 U.S. 648, 666 (1984).

⁷¹ *Harvey*, 814 F.2d at 922.

⁷² The court "shall" order forfeiture of any property that is the subject of a special verdict. 18 U.S.C. § 1963(c); 21 U.S.C. § 853(g). In fact, plea negotiations might even result in a waiver of any claims a lawyer would have to the fees if, as in *United States v. Pemberton*, 852 F.2d 1241, 1243 (9th Cir. 1988), a defendant entered into a plea agreement in a separate matter that provided for forfeiture of his property so that he relinquished his claim for release of assets to pay his present attorneys' fees. Indeed, in *Caplin & Drysdale* itself, the government argues that the defendant's guilty plea consented to the forfeiture of property named in the indictment so that the attorney's proper claim is against the government at an ancillary hearing. Brief for the United States at 16-18, *Caplin & Drysdale, Chartered v. United States*, 837 F.2d 637 (4th Cir.) (No. 87-1729), cert. granted, 109 S. Ct. 363 (1988).

⁷³ *Guidelines*, supra note 10, § 9-111.700.

⁷⁴ MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.5(d)(2) (1981) (proposed final draft); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1980).

to pay the fee, the attorney's payment is dependent on the outcome of the case. When advising the client, the lawyer has to explain various options, one of which inures to the pecuniary advantage of the lawyer. Unless the government agrees to waive forfeiture of a fee, a lawyer who wants to collect a fee may have to try the case, a course of action that may conflict with the client's best interests, because an acquittal is the only assurance of securing the fee.

Other ethical dilemmas arise for lawyers when the government pursues its discovery of forfeitable assets. Using subpoenas to defense counsel, the government frequently justifies its quest for information about fees paid or arranged as necessary to determine the amount of funds potentially forfeitable. Although information about fees generally is nonprivileged,⁷⁵ the position of a subpoenaed lawyer is unenviable because the attorney's testimony assists the government and potentially creates a wedge in the attorney-client relationship.

A final conflict for defense counsel occurs at the ancillary post-conviction hearing. During the hearing, attorneys would have to prove that they are bona fide purchasers with no reason to be aware of the forfeitability of the assets used to pay their fee. In order to meet this burden, attorneys may have to disclose knowledge derived from the confidences of clients.⁷⁶ Fear that such confidences will be disclosed may have a chilling effect on the willingness of clients to confide in defense counsel.⁷⁷

Although each of these claims have been echoed in critiques of fee forfeiture, no court has been persuaded that such conflicts alone impermissibly interfere with the quality or competence of counsel so severely to warrant invalidation of the statute. However, the calculus of all of the claims must consider these possible harms to the attorney-client relationship as tipping the balance against upholding fee forfeiture. All of these possible levers the government can employ to gain an even greater advantage

⁷⁵ *In re Grand Jury Subpoena Duces Tecum*, 742 F.2d 61 (2d Cir. 1984).

⁷⁶ "If [the attorney] made efforts to fight the forfeiture . . . the evidence on the issue would consist primarily of privileged matter confided to him by his client." *United States v. Badalamenti*, 614 F.2d 194, 196 (S.D.N.Y. 1985).

⁷⁷ "The threat of an attorney having to disclose information obtained from his client will chill the openness of those communications, thereby impinging on the right to counsel." *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985). See also *United States v. Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985).

over the defendant by either disqualifying or hobbling counsel combine to harm the effectiveness of representation.

Although ineffective assistance of counsel claims are generally only reviewable on appeal after conviction, the same prejudice analysis need not apply when evaluating the potential damage. Even if a particular defendant has not suffered demonstrable diminution of the quality of representation, giving the government this power impermissibly affects the structure and balance of the entire process and irreparably alters the strategies and resources of the defense.

iii. Right to Counsel of Choice

As perceptions of the issues have sharpened, most courts have identified the central sixth amendment issue to be whether or not forfeiture of attorneys' fees violates a defendant's right to retained counsel of choice, a qualified but nevertheless highly protected aspect of the sixth amendment.⁷⁸ As recently as 1988, the Supreme Court gave great deference to this qualified right, even while holding in the specific case that the right had not been violated.⁷⁹ In the past, the right has been qualified by such relatively neutral principles as administrative concerns over delay, lack of proper attorney licensing, or conflicts of interest. Although the government occasionally makes disqualification applications, fee forfeiture cases represent an extreme example of government initiated intrusion into the right of counsel of choice. However, the paternalistic justification of protecting the defendant against potential harm advanced in conflicts cases is not even being asserted.

When the government restrains assets or threatens to seek forfeiture of property otherwise available to pay attorneys' fees, it proceeds unilaterally and with total discretion. Notwithstanding careful supervision and assurances that fee forfeiture will be sought only in cases in which there are "reasonable grounds to believe the attorney had actual knowledge" that the particular asset transferred was forfeitable,⁸⁰ the effect of the decision to

⁷⁸ The right to counsel implies the right to retained counsel of choice. *See* Urquhart v. Lockart, 726 F.2d 1316 (8th Cir. 1984).

⁷⁹ *United States v. Wheat*, 108 S. Ct. 1692, 1697 (1988).

⁸⁰ *See Guidelines*, *supra* note 10, § 911.430. *See also Forfeiture Hearings*, *supra* note 7, at 29 (statement of Stephen S. Trott, assistant attorney general); *Guidelines*,

restrain substantial property is tantamount to denying the defendant the opportunity to retain any counsel, whether first or fifth choice. Few lawyers will risk undertaking a long and demanding commitment without the guarantee of payment. This result is defended with the argument that a defendant has no inherent right to use crime related assets to hire a lawyer.⁸¹ The right to retained counsel of choice, it is argued, is always limited by the ability to pay. Since forfeitable assets do not belong to the defendant, the defendant has no greater claim to counsel of choice than any other indigent individual.⁸²

The government insists that pauperizing the defendant is not improper for several reasons. First, they offer an analogy: if a lawyer received the fruits of a car theft as payment, the lawyer should not be permitted to keep them if the defendant were convicted of larceny since the lawyer's rights would not be superior to the rights of the true owners.⁸³ This analogy is flawed. First, assuming that the car is identifiable, it is, if nothing else, evidence of the crime and its very ownership is one of the elements of the charge. Until the defendant is acquitted, the car would not be at the defendant's disposal. Since the car's ownership is in dispute, the need to preserve it intact in order to resolve ownership claims and to have it available as evidence in the trial supersedes the defendant's claim at least temporarily. A conviction factually establishes that the car does not belong to the defendant. Moreover, the car is an easily traceable asset, probably stolen recently and seized as evidence immediately after arrest. In contrast, property forfeitable under RICO and CCE is not necessarily stolen, and even if criminally generated, belongs to the defendant. Furthermore, these assets include a wide variety of items that, since forfeitability dates back to the commission of the crimes charged, may have been converted, commingled, or transferred to others. In any event, locating and identifying the forfeitable property is hardly simple.⁸⁴

supra note 10, § 9-111.230.

⁸¹ Brickey, *supra* note 9, at 533; *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 646 (4th Cir. 1988).

⁸² *Morris v. Slappy*, 461 U.S. 1 (1983) (The sixth amendment does not guarantee a "meaningful relationship" between attorney and client.).

⁸³ *Forfeiture Hearings, supra* note 7, at 24.

⁸⁴ This very problem prompted Congress in 1986 to permit forfeiture of substitute assets up to the value of any forfeitable property that cannot be located, has been trans-

In fee forfeiture cases, the government has no claim to the property prior to the conviction other than one that arises by creation of the statute, the assertion of which rests totally with the government's charging discretion. Not only does the government have the exclusive power to charge a crime that carries a forfeiture penalty, it also can unilaterally decide to include a forfeiture count and determine the scope of the forfeiture sought.

The government also argues that attorneys are not being singled out; rather, any forfeitable property should be beyond the reach of the defendant for any purposes. The analogy to other economic deprivations that could be suffered by a defendant whose assets are frozen is equally fallacious. First, there is very little evidence that the government has objected to use of forfeitable assets for other necessary expenses.⁸⁵ This means either that defendants who have no lawful assets with which to hire a lawyer somehow have money to pay their other bills, or, more likely, that forcing defendants to resort to medicaid or foodstamps, as opposed to CJA counsel, is not a tactic the government ordinarily pursues.⁸⁶ Second, and more importantly, none of these other economic deprivations are constitutionally protected. Ironically, the defense attorney again is in a disadvantaged position because of the attorney's inevitable knowledge of the source of the fees.

Harvey was the first circuit court decision to focus on the right to counsel of choice as the most appropriate frame for analyzing the sixth amendment claim, moving away from the less supportable absolute right or effective assistance of counsel arguments. As such, it provides a model example of the use of a balancing test, weighing the government's articulated interests

ferred, is outside the court's jurisdiction, has been substantially diminished in value, or has been commingled with property that cannot be divided without difficulty. *See* Pub. L. No. 99-570, § 1153, 100 Stat. 3207, 3207-13 (1986); 21 U.S.C. § 853(p); 18 U.S.C. § 1963(h).

⁸⁵ In one case, the defendant was permitted to have sufficient assets unfrozen to pay his federal and state taxes and \$26,250 for living expenses despite the government's objection. *United States v. Madeoy*, 652 F. Supp. 371, 376 (D.D.C. 1987).

⁸⁶ The dissenters in the en banc *Monsanto* decision attempted to distinguish between attorneys' fees and other necessities such as a grocer's bill or the costs of a medical emergency, positing that funds would be released for medical or living expenses as a matter of course without offering any principled reasons for the distinction. *United States v. Monsanto*, 852 F.2d 1400, 1412 (2d Cir. 1988) (en banc) (Mahoney, J., dissenting).

in fee forfeiture against this qualified, yet protected right. On the government's side of the scale are its asserted interests in preserving assets for eventual forfeiture and in stripping defendants of their "economic power bases," including any economic benefit gained from their crimes such as those provided by retained counsel.⁸⁷

In brief, the *Harvey* court, agreeing with the uncontroversial proposition that only legitimate transfers of fees to lawyers would be protected, acknowledged the fundamental, firmly rooted assumption that an accused can use his property to purchase legal assistance, even if these assets may eventually prove to be the proceeds of crime.⁸⁸ Even in a RICO or CCE case, only those assets that can be connected to the crimes charged are forfeitable. A defendant may well possess other criminally derived property outside the scope of the forfeiture count which can be used to pay counsel. No one interferes with either this use of tainted assets or the use of indirect profits of crime by a defendant in a non-RICO or CCE case to hire a lawyer. The difference lies solely in the proof available to connect the assets to the crimes and to indict for a RICO or CCE offense.⁸⁹

Furthermore, the *Harvey* court acknowledged that retained counsel generally will be able to provide a more effective defense so that fee forfeiture may well affect the outcome of the case. For example, in *Harvey* itself, appointed counsel, who happened to be a partner of the original retained private attorney, attempted to hire experts with CJA funds but these efforts were largely rebuffed so that, according to their brief on appeal, "[t]he preparation for trial bore no resemblance to the preparation that normally would and should, but could not, be undertaken prior to a trial of this magnitude."⁹⁰

From the government's perspective, hiring an attorney of choice is a benefit from criminal activities, like a fancy car or house, that a defendant should not enjoy. Applying this argu-

⁸⁷ S. REP. NO. 225, 98th Cong., 2d Sess. 192 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3374, 3378-79.

⁸⁸ *United States v. Harvey*, 814 F.2d 905, 924-25 (4th Cir. 1987).

⁸⁹ RICO, which by its elements subsumes other federal offenses and a variety of serious state crimes, 18 U.S.C. § 1961(1), has vastly increased the scope and impact of forfeiture.

⁹⁰ *Harvey*, 814 F.2d at 912.

ment to a lawyer's services is flawed because an attorney in a criminal case is a necessity, not unlike food, clothing, and shelter, particularly when the attorneys' skills are the very bulwark between conviction and forfeiture on the one hand, and acquittal and the retention of assets on the other. The illogic of this position led one judge to say, "[E]quating the ability to raise a defense to a 'benefit' of crime is like considering the right to a jury trial a benefit of being accused of murder."⁹¹ To consider retained counsel a benefit undercuts the government's position that appointed counsel satisfies the sixth amendment requirement. By implication, if retained counsel is a benefit, then retained counsel is somehow better than assigned counsel. This bolsters the defense claim that because the resources and experience of assigned attorneys or public defenders are more limited than those of retained lawyers, the representation is less effective. Without question the economic limits imposed by CJA restrict the other resources available such as experts or investigators.

Unless it is sham payment, the defendant derives no actual benefit other than the skills of the lawyer which, of course, ultimately might lead to an acquittal. Presumably, the attorney keeps the fee for services rendered and the defendant has no more use of the property than if it had been forfeited. There is some evidence that the government is deliberately pursuing these claims against specific lawyers in order to dissuade particularly high-powered or successful attorneys from handling these cases.⁹² Nevertheless, none of the cases in which forfeiture has been sought contain any allegations of fraud or sham payments.⁹³ There are several possible inferences to be drawn from this pattern. First, by refusing to distinguish between legitimate

⁹¹ *United States v. Nichols*, 841 F.2d 1485, 1512 (10th Cir. 1988) (Logan, J., dissenting).

⁹² See Genego, *New Adversary*, *supra* note 6, at 809-10 tables 4 and 5 (Nationwide survey of 4,000 criminal defense attorneys revealed that attorneys in practice over ten years or whose annual incomes exceeded \$200,000 were more likely to have their fee questioned. "Fee questioned" includes prosecutorial attempts to forfeit fees already paid to an attorney as well as attempts to prevent the defendant from using assets to pay fees. *Id.* at 806.).

⁹³ Only in *Long v. United States*, 654 F.2d 911 (3d Cir. 1981), was there obvious evidence of a sham transfer. A fugitive defendant's airplane was sold for cash representing a retainer for unperformed services, creating the inescapable inference that in this transaction, the lawyers acted as a conduit for the defendant's money.

and sham payments, the government overidentifies criminal defense lawyers and their clients, implying that they are colluding, if not as direct participants in criminal activity, at least as knowing abettors. The lawyer hired by or on retainer to a known crime figure conjures up an image of a partner in crime rather than a detached advocate. The paucity of fee forfeiture in white collar crime cases in contrast to narcotics prosecutions attests by implication to the unstated but fairly obvious suspicions of a particular species of defense lawyer.⁹⁴ The lawyer for a drug kingpin or organized crime figure is more likely to be seen as an indispensable actor whose services are a benefit to the participants in the criminal activity. In contrast, lawyers representing clients charged with "cleaner" economic and business crimes are not viewed with the same suspicion.⁹⁵

Another inference to be drawn from the government's dissipation objection is that prominent criminal defense lawyers, by charging substantial fees, certainly greater than CJA rates, would reduce considerably the amount of assets available for forfeiture.⁹⁶ When the government speaks in terms of dissipation, it sounds like an assertion of an entitlement to the money as if it were revenue. Although various funds were established in 1984 for utilizing forfeited assets,⁹⁷ the government's attitude

⁹⁴ Recently, a small group of lawyers was called "a critical element in the life support system of organized crime." PRESIDENT'S COMMISSION ON ORGANIZED CRIME, MATERIALS ON ETHICAL ISSUES FOR LAWYERS INVOLVED WITH ORGANIZED CRIME CASES (1984). See Taylor, *Work of Lawyers of "Mob" Studied*, N.Y. Times, Mar. 12, 1985, at A24, col. 3; *Lawyers Called Organized Crime "Life" Support*, N.Y.L.J., Mar. 11, 1985, at 1, col. 2.

⁹⁵ Many lawyers who identify themselves as "white collar crime" specialists work at large firms or in smaller "boutique" practices, handling criminal legal matters of corporations or individuals in the business world. Many are former prosecutors. K. MANN, *supra* note 62, at 19-34.

⁹⁶ The example of dissipation usually invoked is described in the hearings conducted in the House of Representatives in 1984. In a highly publicized prosecution of a marijuana importation organization in Florida, which grossed approximately \$300 million dollars over a sixteen-month period, the government sought forfeiture of real property worth \$750,000, from which \$559,000 was used to pay the defendant's attorneys. After paying \$175,000 to the wife of one of the defendants, the government wound up with \$16,000. *United States v. Meinster*, No. 79-165-CR-JLK (S.D. Fla. 1979). This case, although not the facts of forfeiture, is reported at 475 F. Supp. 1093 (S.D. Fla. 1979), *aff'd sub nom.*, *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). Rather than condemning the lawyer for charging exorbitant fees, the fault in that case may have actually been the government's decision to seek forfeiture of only a minuscule amount of the tainted profits.

⁹⁷ 21 U.S.C. § 881(e) provides that proceeds of the sale of property civilly or criminally forfeited be used to defray the costs of forfeiture or pay rewards for information

suggests that paying the lawyer would deprive it of revenue on which the budget depends. Certainly the kind of dissipation the statute was intended to prevent was the transfer of assets to a third party or the purchase of extraordinary or luxury items to circumvent forfeiture. Fearing that nothing will remain after legal fees are paid is a false issue because the government's claim to the assets is not, unlike taxes, an entitlement. Rather, it depends on a legal fiction that requires a condition precedent — conviction — to be determined by the very adversary proceeding for which counsel is required.

c. *The Fifth Amendment Claim*

At the very end of its opinion, the circuit court in *Harvey* held that the procedures established by the 1984 CFA permitting ex parte post-indictment restraining orders without a further pretrial adversarial hearing violated the defendant Harvey's fifth amendment right to procedural due process.⁹⁸

The 1984 amendments created detailed proceedings for protective orders restraining potentially forfeitable assets to be issued either before or after indictment. The procedures and standards filled in a gap created by the rather vague provisions of the original RICO and CCE statutes. Prior to the 1984 CFA, these statutes had authorized restraining orders after indictment.⁹⁹ However, since no standards or controlling procedure was articulated, the statute invited procedural challenges. The Ninth Circuit, in *United States v. Crozier*, initially held that rule 65 of the Federal Rules of Civil Procedure required an immediate hearing after an ex parte order had been entered.¹⁰⁰

leading to the arrest and conviction of a person for the death or kidnapping of a federal drug enforcement agent. See 28 U.S.C. § 524(c) (1982 & Supp. IV 1986); note 18 *supra*.

⁹⁸ 814 F.2d at 929.

⁹⁹ For example, 18 U.S.C. § 1963(b) originally provided nothing other than, "In any action brought by the United States under this section, the district courts shall have jurisdiction to enter such restraining orders or prohibitions or to take such other actions, including but not limited to restraining orders . . . in connection with any property or other interest subject to forfeiture"

¹⁰⁰ 674 F.2d 1293 (9th Cir. 1982) (even with exigent circumstances, government may not wait until trial to produce adequate grounds for forfeiture of property). Other courts before the 1984 Act either followed or reached a similar conclusion to *Crozier*. *United States v. Lewis*, 759 F.2d 1316, 1325 (8th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985); *United States v. Spilotro*, 680 F.2d 612, 616-19 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911, 914 (3d Cir. 1981).

While on petition for certiorari, the Supreme Court vacated *Crozier* for reconsideration.¹⁰¹ Before *Crozier II* was decided, the 1984 amendments had been enacted and were applied to the case on remand.¹⁰²

The 1984 CFA again failed to require a hearing after an ex parte post-indictment restraining order, although the new act contained specific procedures and standards for hearings when pre-indictment protective orders issued.¹⁰³ Thus, in the case of any such order, neither a defendant's nor a third party's rights in the property would be litigated from the time of indictment until the time of an ancillary proceeding after conviction, an event that could be months away. Instead of applying rule 65 to fill the vacuum, *Crozier II* held that the new post-indictment procedure violated the due process clause of the fifth amendment because it failed to provide for a hearing "at a meaningful time" between the restraining order and the trial.¹⁰⁴

In the legislative history of the 1984 CFA, *Crozier I* was criticized for requiring the government to stage a mini-trial in order to sustain the restraining order at which it would have to prove the merits of the underlying case by bringing in witnesses and disclosing evidence.¹⁰⁵ In at least partial reaction to *Crozier I*, Congress drafted the 1984 amendments specifically to differentiate between pre- and post-indictment proceedings, requiring an adversarial hearing in the former following an ex parte order, but relying for the latter on the probable cause established by the indictment. Justifying the absence of a hearing after indictment, the senate report states that the indictment alone gives adequate notice and that the need to prevent transfer or disposition justifies the ex parte nature of the proceeding.

A pre-indictment order can be obtained either upon notice or ex parte. In the first instance, the government must later prove at an adversarial hearing that there is a substantial

¹⁰¹ 468 U.S. 1206 (1984), remanded for reconsideration on this issue in light of *United States v. \$8,850 in U.S. Currency*, 461 U.S. 555 (1983), which held that an eighteen-month delay between seizure and petition for forfeiture in a civil case was not a due process violation.

¹⁰² *United States v. Crozier (Crozier II)*, 777 F.2d 1376, 1382-83 (9th Cir. 1985).

¹⁰³ 18 U.S.C. § 1963(d)(1)(B); 21 U.S.C. § 853(e)(1)(B).

¹⁰⁴ *Crozier II*, 777 F.2d at 1383-84.

¹⁰⁵ S. REP. NO. 225, 98th Cong., 2d Sess. 196 n.20 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3379.

probability that the property will be forfeited; that the defendant will be convicted and the nexus between the criminal acts and the property will be proven.¹⁰⁶ In addition, the government must demonstrate that an order is not only necessary to preserve the property but that this need outweighs any hardship on the defendant. An *ex parte temporary* order can also be obtained before indictment on a showing of probable cause that the property would be ordered forfeited and that notice to the defendant would jeopardize its availability.¹⁰⁷ A temporary order is effective for no more than ten days and may be challenged at a hearing before its expiration.

In contrast, the restraint of property after indictment requires no notice other than an indictment and no further proof beyond the filing of the accusatory instrument.¹⁰⁸ Therefore, property alleged to be forfeitable can be restrained on a probable cause standard without any opportunity to contest the allegation. Thus, the prosecutor in the grand jury totally controls the decision of how much, if any, assets a defendant will have available to pay the attorney.

Against this background, several courts, in addition to *Harvey*, have held that this provision violates the defendant's fifth amendment due process rights.¹⁰⁹ Other courts have not found a due process violation but have read a hearing requirement into the statute when attorneys' fees are implicated, either because of the special sixth amendment concerns,¹¹⁰ or because the statute must be coupled with the standards of rule 65 of the Federal Rules of Civil Procedure in order to satisfy procedural due process concerns.¹¹¹ Whether constitutional or purely procedural,

¹⁰⁶ 18 U.S.C. § 1963(d)(1)(B) & (2). This order is effective for ninety days unless extended.

¹⁰⁷ 18 U.S.C. § 1963(d)(2); 21 U.S.C. § 853(e)(2).

¹⁰⁸ 18 U.S.C. § 1963(d)(1)(A); 21 U.S.C. § 853(d)(1)(A).

¹⁰⁹ *United States v. Moya-Gomez*, 860 F.2d 706, 729, *reh'g denied*, No. 87-1670 (7th Cir. 1988); *United States v. Unit 7 & Unit 8 (Kiser)*, 853 F.2d 1445, 1449-50 (8th Cir. 1988) (holding seizure of property needed to pay attorneys' fees pursuant to civil forfeiture action after *ex parte* finding of probable cause by a magistrate violated due process rights when no hearing held after seizure). *But see United States v. Bissell*, 866 F.2d 1343, 1354 (1989) ("There is no bright line dictating when a post-restraint hearing must occur."); *United States v. Musson*, 802 F.2d 384, 386-87 (10th Cir. 1986) (probable cause sufficient to restrain property after indictment); *United States v. Draine*, 637 F. Supp. 482, 485 (S.D. Ala. 1986) (limiting *Crozier* to its facts).

¹¹⁰ *United States v. Monsanto*, 836 F.2d 74, 82 n.7 (2d Cir. 1987).

¹¹¹ *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986), *modified on denial of*

the majority of courts have held the current version of the post-indictment restraining order, without further proceedings or higher standards, to be an inadequate basis for restraining property.

d. *The En Banc Decision*

Harvey, which had consolidated *Bassett* and *Reckmeyer*, was reheard en banc by the Fourth Circuit under the name *United States v. Caplin & Drysdale, Chartered (Reckmeyer)*.¹¹² The en banc court reversed the portion of the panel decision based on sixth amendment grounds, finding no violation of the right to counsel of choice.¹¹³ The decision dismissed cursorily any violation of the basic right to counsel,¹¹⁴ identifying the only sixth amendment right involved to be that of counsel of choice.

Limiting the right to counsel of choice to those defendants with legitimate assets, the court analyzed the forfeiture count in an indictment as "an assertion that the defendant does not have the legal assets that entitle him to a right to counsel of choice in the first place."¹¹⁵ By claiming ownership of the funds, a claim asserted merely by convincing a grand jury that there is probable cause to believe the assets are forfeitable, and seeking to restrain them prior to trial, the government effectively cuts off the defendant's use of the property for any purpose. Untroubled by this consequence, the en banc panel also refused to credit any argument that preconviction restraint of property was forbidden by the presumption of innocence.¹¹⁶

reh'g, 809 F.2d 249 (1987).

¹¹² 837 F.2d 637 (4th Cir. 1988).

¹¹³ *Id.* at 643. The en banc court affirmed the panel's holding that the statute did not exempt fees, *id.* at 641, and left undisturbed the panel's holding that the ex parte post-indictment restraining order procedure violated the fifth amendment ("No such procedural due process challenge is before us today."). *Id.* at 644.

¹¹⁴ If the defendant is made financially unable to hire a lawyer because of a restraining order, "the defendant's right to representation will be protected by the appointment of counsel." *Id.* at 643.

¹¹⁵ *Id.* at 644.

¹¹⁶ *Id.* at 643. It has always seemed excessively narrow to argue that preconviction restraint was no more than a deprivation of property, thus only subject to procedural due process analysis. If anything, the denial of counsel of choice interferes with the defendant's liberty interest since the quality of advocacy available to the defendant may well determine the outcome of the trial. Denial of counsel of choice is not the equivalent of pretrial detention, as some courts have tried to analogize, *cf.* *United States v. Nichols*, 841 F.2d 1485, 1500-01 (10th Cir. 1988) (citing *United States v. Salerno*, 481 U.S. 739

2. *United States v. Monsanto*

a. *The Panel Decision*

The evolution of the *Monsanto* case was watched attentively by the legal community since it was the first case challenging attorney fee forfeiture to be appealed to the Second Circuit. It represented a fairly typical fact pattern in one of the busiest and most influential federal prosecutor's offices in the country. In this same district, two earlier decisions had been handed down finding that, to the extent the statute could be construed to include attorneys' fees, the legislature could not have intended that result because of the obvious interference with the sixth amendment right to counsel of choice.¹¹⁷

In the district court, the government obtained a post-indictment ex parte restraining order from which the defendant sought to release some of his assets to pay the attorney of his choice because he was functionally indigent without an unfreezing of his funds. The court released only as much property as was necessary to pay his counsel of choice at prevailing CJA rates. Ultimately, he was assigned a lawyer who represented him at the trial at which he was convicted on all counts and his property was found to be the proceeds of his criminal activities.¹¹⁸

On appeal from this ruling by the trial judge, the Second Circuit agreed with *Harvey* that Congress did not intend an exemption for legitimate attorneys' fees.¹¹⁹ Again, reviewing the

(1987)), a regulatory measure of temporary duration designed to protect a public interest. Nor is it persuasive that probable cause is a sufficient standard by which to subject a defendant to restraints on liberty pending trial, see *Gerstein v. Pugh*, 420 U.S. 103, 118-19 (1975), since such restraint is temporary until final disposition. The harm done by the restraint of assets is permanent if a defendant goes to trial without the attorney of choice. Assuming the defendant is convicted, not only will the assets now belong to the government, but also they will be unavailable to the defendant for any appeal of the conviction, even one which challenges the very forfeitability of attorneys' fees or the adequacy of the trial counsel. *United States v. Friedman*, 849 F.2d 1488 (D.C. Cir. 1988). Thus, denial of the right to counsel of choice is a permanent harm that primarily affects a liberty interest, the long-term imprisonment of a defendant. The maximum imposable prison sentence for a RICO conviction is up to twenty years. 18 U.S.C. § 1963(a). For a CCE conviction, a defendant faces a minimum of ten years up to a maximum of life. 21 U.S.C. § 848(a) & (b).

¹¹⁷ *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985), and *United States v. Ianiello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

¹¹⁸ Brief for the Petitioner at 8-9, 13, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (No. 88-454), cert. granted, 109 S. Ct. 363 (1988) [hereinafter *Petitioner's Brief*].

¹¹⁹ *United States v. Monsanto*, 836 F.2d 74, 78 (2d Cir. 1987) (citing *United States v.*

available legislative history, the court not only refused to read between the lines of the plain language of the statute, but also chastised the earlier efforts of those district courts that had avoided the constitutional issues by reading the statute to exempt fees. The panel also considered and rejected the sixth amendment right to counsel of choice claim, disagreeing with the existing decisions.¹²⁰ In language very similar to the later Fourth Circuit en banc decision in *Caplin & Drysdale*, the court refused to substitute "judicial policy for Congressional policy."¹²¹

The *Monsanto* panel forged a compromise. Disinclined to leave fee forfeiture entirely in the hands of the prosecutor, the majority adopted a hearing procedure to review post-indictment restraining orders that implicate attorneys' fees.¹²² At such an adversarial proceeding, quickly dubbed a *Monsanto* hearing, the government could not simply rely on the existence of the probable cause on which the indictment was based, but must establish by independent evidence the likelihood that the assets are forfeitable, in other words that the assets are the proceeds of the criminal conduct charged.¹²³

Although in *Monsanto*, no fees actually had been paid to defense counsel, the court was concerned about the effect the threat of eventual forfeiture might have on a defendant's ability to secure retained counsel.¹²⁴ Thus, the court exempted from future forfeiture any assets left unrestrained after a pretrial hearing. If an attorney feared that after conviction assets previously

Harvey, 814 F.2d 905, 913-16 (4th Cir. 1987)).

¹²⁰ *Id.* at 79-81. See *United States v. Harvey*, 814 F.2d 905, 924 (4th Cir. 1987); *United States v. Nichols*, 654 F. Supp. 1541, 1558 (D. Utah 1987). Both cases subsequently were reversed on this point. See *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988); *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (reversing *Harvey*).

¹²¹ *Monsanto*, 836 F.2d at 81.

¹²² *Id.* at 82-84. Looking for authority to cases that invalidated the procedural aspects of the post-indictment restraining order, see *Harvey*, 814 F.2d at 928-29; *Thier*, 801 F.2d at 1466-70; *United States v. Crozier (Crozier II)*, 777 F.2d 1376, 1382-84 (9th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), cert. denied sub nom. *Milburn v. United States*, 474 U.S. 994 (1985), the court expressed a clear rule in cases involving attorneys' fees that it hoped would survive any overruling of this line of cases.

¹²³ *Monsanto*, 836 F.2d at 84; see also 18 U.S.C. § 1963(a).

¹²⁴ *Monsanto*, 836 F.2d at 85. The attorney appearing for the limited purpose of challenging the fee forfeiture entered a conditional appearance. *Monsanto* was represented by assigned counsel at trial. *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc).

unrestrained and actually disbursed had to be disgorged, there would be no incentive to accept a case. This situation was not present in *Monsanto*, in contrast to *Caplin & Drysdale*, in which the government was seeking to recapture fees paid before the entry of any restraining order. Nonetheless, the Second Circuit addressed this highly possible hypothetical problem.

The court perceived that the greatest danger posed by forfeiture is not the restraining order itself but the threat of forfeiture. Even if the government fails to meet its burden at the adversarial hearing, an attorney fearful of possible conviction and consequential forfeiture might well be deterred from handling the case because of the uncertainty of any fee even if, pending trial, the defendant has sufficient unfrozen assets.¹²⁵ The court apparently saw this more generalized threat to the right to counsel as greater than the risk in a case in which the government has met its pretrial burden and the attorney, aware that the assets are frozen, can judge the risks. This distinction, of course, works to the advantage of the few defendants in the rare situation when the government's proof on the issue of forfeitability cannot even meet a preponderance standard at an early point in the proceeding but is sufficiently strengthened by the time of trial to result in a conviction.

b. *The En Banc Decision*

The circuit remanded the case to the district court to hold a hearing. At this hearing, the trial court ruled that the government had met its burden of proving the likelihood that the assets were forfeitable and left undisturbed the earlier restraining order. The trial began with the defendant represented by appointed counsel.¹²⁶

After a highly publicized and relatively rare en banc review,¹²⁷ a brief per curiam decision ordered that the restraining

¹²⁵ *Monsanto*, 836 F.2d at 84.

¹²⁶ All of the eighteen other defendants prosecuted by this indictment were represented by assigned counsel. The case lasted over one year from the date of the indictment, July 8, 1987, to the date of entry of the judgment of conviction and sentence, October 26, 1988. Petitioner's Brief, *supra* note 118, at 2, 13.

¹²⁷ Frost, *Defense Bar Hails Monsanto Ruling*, *Manhattan Law.*, July 18, 1988, at 1, col. 4; Sherman, *Forfeiture Issue Still Unresolved*, *Nat'l L.J.*, July 18, 1988, at 1, col. 1. See Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 *BROOKLYN L. REV.* (1989) (forthcoming).

order be modified to provide the defendant access to funds to pay legitimate fees and held that to the extent that assets used to pay fees are subsequently found forfeitable, they are forever exempt.¹²⁸ If *Caplin & Drysdale* epitomizes a structured linear analysis of the statutory and constitutional issues, *Monsanto* is actually three opinions¹²⁹ arriving at the confluence of the per curiam holding. Each of the concurring opinions is based on a different premise, yet each is informed by the same concern: the impact of fee forfeiture on individual rights and the institutions that protect them. This fragmentation unfortunately leaves the Supreme Court without a forceful counterpoint to *Caplin & Drysdale*. Despite the decision's lack of a uniform alternative theory, its three approaches, in combination, provide powerful reasons to invalidate this application of the statute.

i. The Statutory Rationale: Judge Winter

Until *Monsanto*, the standard statutory approach to fee forfeiture analyzed the language of the statute and attempted to determine the intent of the legislature regarding the exemption of fees. Virtually every case, particularly circuit court cases decided recently, have found no special exception for lawyers intended by Congress.¹³⁰

Judge Winter looked at the statute itself from a totally new perspective, supplying a fresh approach to argue for exclusion of legitimate fees based on the equitable power of the trial court.¹³¹

¹²⁸ *Monsanto*, 852 F.2d at 1402.

¹²⁹ *Id.* (Feinberg, C.J., concurring); *id.* at 1404 (Oakes, J., concurring); *id.* at 1405 (Winter, J., concurring). There is a fourth, more narrowly reasoned rationale for reversal. Judge Miner's separate concurring opinion, in which he was joined by Judge Altamari, expressed his view that while fifth amendment due process requires an adversary hearing procedure, the creation of such safeguards is properly a matter for legislative rather than judicial action, especially in light of strongly worded legislative history to the contrary. *Id.* at 1411 (Miner, J., concurring) (citing S. REP. NO. 225, 98th Cong., 2d Sess. 195-96 (1984)).

¹³⁰ See, e.g., *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988); *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988).

¹³¹ 852 F.2d at 1405 (Winter, J., concurring). The appeal of this approach to the statute was recognized by the petitioner in *Caplin & Drysdale*. Restructuring its statutory claim, the brief argues for an interpretation of the statute that exempts attorneys fees because the trial court has inherent equitable powers. Petitioner's Brief, *supra* note 66, at 11-33.

In *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified on denial of reh'g*,

Referring to the very section of the senate report commonly cited in support of the abandonment of a pretrial hearing if the restraining order is obtained after indictment,¹³² Judge Winter found support for his view that the discretionary language of the statute permits the court to modify or vacate a restraining order.¹³³ As long as the hearing is not conducted to contest the merits of underlying indictment, the court has the power to balance the interests raised by continued restraint. Thus, the court has the authority to release restrained assets to pay attorneys' fees, even if such an order depletes the total amount of assets available for forfeiture after conviction.

Since the third party protections were designed to avoid hardship to innocent purchasers, the statute clearly contemplates at least the possibility that on occasion fewer assets eventually will belong to the government after conviction. Legitimate payments to attorneys are simply another example of a possible reduction of the full forfeitable amount.

Judge Winter's approach provides a convincing rationale for exempting fees. Presumably, any exercise of the court's discretion would require a hearing, whether formal or informal, at which the interests of each side would be presented and weighed. A particular case might present compelling reasons why assets needed to pay counsel should remain frozen (the fees are fraudulent, the fees are incontestably excessive), but the government's typical blanket justifications for opposing the release of fees (fear of dissipation of assets and prevention of economic benefit) would probably be insufficient without more specific allegations of harm to justify withholding funds to pay fees.

809 F.2d 249 (1987), the Fifth Circuit also found that the trial court had discretion to decide whether and to what extent assets should be excluded from a restraining order so that the defendant can pay living expenses, and reasonable attorneys' fees. 801 F.2d at 1470-71. Without directly construing the statute as Judge Winters did, the Fifth Circuit remanded the case to the trial court to evaluate interests of the respective parties. *Id.* at 1475.

¹³² "In contrast to the pre-indictment restraining order authority . . . the post-indictment restraining order provision does not require prior notice and opportunity for a hearing. The indictment or information itself gives notice of the government's intent to seek forfeiture of the property This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order . . ." S. REP. NO. 225, 98th Cong., 2d Sess. 203 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3586.

¹³³ *United States v. Monsanto*, 852 F.2d 1400, 1406 (2d Cir. 1988) (en banc) (Winter, J., concurring).

Although a case-by-case determination may not be highly efficient, the comparatively small cost to judicial administration is worth the assurance of a fair trial.

If the fees are being paid for legitimate services, they are not being "dissipated." Congress sought to avoid sham transactions, not arms length transactions, when it enacted the relation back provision to prevent the transfer of funds that would otherwise defeat forfeiture.¹³⁴ Nor is the defendant gaining a benefit since the defendant is not keeping the assets. Instead, the lawyer (or for that matter the grocer or dentist) is receiving remuneration for services rendered. The only benefit a defendant is likely to receive is more effective representation. If fee forfeiture is permitted, the government may well face less expert or prepared adversaries while destroying any incentives for lawyers to engage in criminal defense work.¹³⁵ Needless to say, these are not legitimate arguments.

In contrast, the restraint of a defendant's assets needed to pay a lawyer, or for other necessities as well, "irreparably imposes the economic impact of forfeiture before conviction."¹³⁶ Although Judge Winter deftly avoided a constitutional analysis, his worry about the irreparable harm of imposing a punishment before conviction echoes the systemic concerns voiced by Judge Oakes, while his reasoning and methodology resemble the balancing test promulgated by Chief Judge Feinberg.

ii. The Interplay of the Fifth and Sixth Amendments: Judge Oakes

In Judge Oakes's dissent in the original panel, he alluded to, but did not develop, his particular constitutional analysis.¹³⁷ Although he signed the concurring opinion of Judges Feinberg and

¹³⁴ S. REP. NO. 225, 98th Cong., 2d Sess. 195 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3378. The relation back provision was targeted to attempts to "shield [assets] from any possibility of forfeiture." *Id.*

¹³⁵ Fee forfeiture is not the only disincentive to accepting such cases. The increasing use of "mega-trials" in which large numbers of defendants are charged in a single indictment and which may last as long as a year also deters many practitioners. Rosenwein, *Testa Case Marks First Anniversary*, Manhattan Law., Feb. 27, 1989, at 6, col. 1.

¹³⁶ *Monsanto*, 852 F.2d at 1408 (Winter, J., concurring).

¹³⁷ "The forfeiture statute, which permits the Government to recapture attorneys' fees paid before conviction, is unconstitutional at least on Sixth Amendment, and possibly Fifth Amendment due process, grounds." *United States v. Monsanto*, 836 F.2d 74, 87 (2d Cir. 1987) (Oakes, J., dissenting).

Kearse, which is considered the "sixth amendment" view of the case, in a separate dissenting opinion, Judge Oakes looked at forfeiture as a systemic problem which "shakes the very foundations of our criminal justice system."¹³⁸

Although most opponents to fee forfeiture would argue their points in the most neutrally legitimate terms, it is the powerful, intuitive reaction to the threat posed to the whole criminal adversary process that has been so disturbing from the first. Rather than focus on the defendant's individual sixth amendment rights, Judge Oakes argues institutional consequences.¹³⁹ He reasons that the main role of defense counsel in the criminal justice system — to provide vigorous representation¹⁴⁰ — is altered permanently and irremediably when the prosecution is permitted such a degree of control over the nature and quality of the defense, essentially a fifth amendment concern.

Although it is doubtful that Judge Oakes's interweaving of the two constitutional rights will explicitly influence the Supreme Court's consideration, this theme is heard repeatedly.¹⁴¹ And, because it goes to the heart of our assumptions about the protections afforded by our system of criminal representation, it will surely inform the Court. The Court should at least be impressed by Judge Oakes's colorful allusion to Lewis Carroll, "Pre-trial forfeiture . . . too closely resembles the Alice-in-Wonderland queen's 'sentence first, verdict afterward' mode of Justice."¹⁴²

¹³⁸ *Id.*

¹³⁹ *Id.* at 86-87. For the most comprehensive and well-reasoned examination of this view, see Cloud, *Forfeiting*, *supra* note 9, at 3.

¹⁴⁰ *Monsanto*, 852 F.2d at 1404-05 (Oakes, J., concurring). See *Penson v. Ohio*, 109 S. Ct. 346, 352 (1988) (importance of vigorous representation to adversarial system).

¹⁴¹ *United States v. Thier*, 801 F.2d 1463, 1477 (5th Cir. 1986) (Rubin, J., concurring) ("The Government should not be permitted to cripple the defendant at the outset of the struggle by depriving him of the funds he needs to retain counsel . . ."), *modified*, 809 F.2d 249 (1987); *United States v. Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986) ("[T]o allow the government the power to force all drug defendants to have court appointed lawyers gives the government unseemly control over who its adversaries will be."), *rev'd sub nom.*, *United States v. Moya-Gomez*, 860 F.2d 706, *reh'g denied*, No. 87-1670 (7th Cir. 1988); *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985) ("The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment . . . the prosecutor could exclude those defense counsel which he felt to be skilled adversaries."). See also *United States v. Nichols*, 654 F. Supp. 1541, 1559 n.23 (D. Utah 1987), *rev'd*, 841 F.2d 1485 (10th Cir. 1988). See generally Genego, *Prosecutorial Control*, *supra* note 6.

iii. The Sixth Amendment Violation: Chief Judge Feinberg

A three-judge concurring opinion, authored by Chief Judge Feinberg, applied a balancing test to determine if the government's interest in fee forfeiture outweighs the right to counsel of choice, "a fundamental right that serves to protect other constitutional rights."¹⁴³

Rather than conclude that a defendant's right to counsel of choice is coterminous with the defendant's legitimate assets, thus necessitating no weighing of comparative harms, this balancing test assumes the right to hire counsel of choice even with tainted assets if the government's interests do not outweigh sixth amendment guarantees. The factors weighed on either side of the scale were quite similar to those assessed by Judge Winter in his equitable power analysis. On the government's side are the three goals frequently cited: the preservation of assets for forfeiture, the destruction of the economic base of the criminal, and deterrence. Each of these claims individually or in combination is insufficient, according to Chief Judge Feinberg. Although it may be valid to attempt to thwart transfers intended to circumvent forfeiture, payment of legitimate fees has no such motive. The economic resources of the defendant required to secure retained counsel is a minor aspect of the presumed interests accumulated from criminal activity. In any event, the defendant does not have the benefit of his assets after conviction whether they are simply turned over to the government or they are paid to counsel. Finally, deterrence is served by the general and substantial threat posed by forfeiture as punishment.

To the concurring judges, the true harm is the preconviction deprivation of funds with which to contest the very charges that may cost defendants their freedom and their forfeitable assets. Calling the government's interest "not all that compelling,"¹⁴⁴ Chief Judge Feinberg finds the cost to the defendant and the adversarial system far surpasses the "small societal cost" of allowing a defendant to use tainted assets to mount a defense.¹⁴⁵

¹⁴² 852 F.2d at 1404 (Oakes, J., concurring).

¹⁴³ *Id.* at 1402 (Feinberg, C.J., with whom Oakes & Kearse, JJ., join, concurring).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1403.

iv. Some Agreement Among the Concurring Opinions

The original panel decision established a post-conviction exemption for fees actually paid to a lawyer when the government had failed to sustain its burden at a pretrial adversarial hearing.¹⁴⁶ This view was expanded by the per curiam decision to protect an attorney from disgorging *any* fees actually paid out of unrestrained or released assets for that purpose even if, after conviction, they are ordered forfeited.¹⁴⁷ The panel referred only to assets about which the government failed to sustain its burden at a pretrial hearing, while the per curiam decision refers to any unrestrained assets. The slight difference between these two positions is procedural, not philosophical, since both recognize how the threat of post-conviction forfeiture requiring the recapture of fees already paid could deter the most dedicated defense counsel. Despite this procedural distinction, a majority of the en banc court, including the dissenters, agree in principle that the threat of post-trial recapture of fees actually paid from unrestrained assets later ordered forfeited would limit the right to counsel of choice even more harshly than the initial refusal to release funds altogether.¹⁴⁸

II. WHAT WILL THE SUPREME COURT DECIDE?

Caplin & Drysdale and *Monsanto* call for the Supreme Court to be not only principled but also pragmatic. The two cases, in combination, provide the Court with every factual permutation as well as the panoply of statutory and constitutional challenges. In *Caplin & Drysdale*, the lawyers were actually paid a portion of their fee before the assets were restrained and, after conviction, were attempting to retain that amount as well as release forfeited assets in payment for the rest of their services. In *Monsanto*, the post-indictment protective order withheld from the defendant all of his available property. Given these different settings, the Court will be able to consider the factual variations of pretrial restraint as well as post-conviction disgorgement and claims for fees.

¹⁴⁶ 836 F.2d at 84.

¹⁴⁷ 852 F.2d at 1402.

¹⁴⁸ Judge Pratt believed that this particular issue was not ripe for review in this case because *Monsanto* had no unrestrained funds to use to pay a lawyer. *Id.* at 1420-21 (Pratt, J., concurring in part and dissenting in part).

Although attempting to predict the decisions of the Supreme Court is risky business indeed, one way to avoid the stigma of an incorrect prophecy is to foretell one result while wishing and providing arguments in support of another.

A. *Statutory Construction*

The legislative history of RICO and CCE direct that the statutes be "liberally construed to effectuate [their] remedial purposes."¹⁴⁹ In order to find an exemption for fees, the Supreme Court would have to read into the language of the statute a specific intent to treat fees differently from other payments to third parties. Since the forfeiture penalty is one of the most powerful and innovative tools of these statutes, and the relation back doctrine was added in 1984 to strengthen this remedy, it is almost unthinkable that the Supreme Court will construe the statute to add language that does not appear on its face.¹⁵⁰

Judge Winter's concurring opinion in *Monsanto* offers an elegantly simple solution for the Court to interpret the statute broadly as creating no special treatment for lawyers while essentially acknowledging and even deferring to the compelling equitable and practical arguments against fee forfeiture. The "equitable discretion" approach avoids constitutional pronouncement and does not alter the structure of the statute at all. By finding in the very language of the statute the authority to release assets before trial to pay legitimate, and presumably reasonable, lawyers' fees, Judge Winter's equitable approach nevertheless measures the relative harms to both sides on a case-by-case basis. Actually, his view suggests that assets required for fees generally will be released because preconviction restraint on a defendant's access to funds to pay for legal representation on a criminal

¹⁴⁹ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970); 21 U.S.C. § 853(o).

¹⁵⁰ This conclusion is supported by the Court's unwillingness in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), to read into the civil remedy available under RICO, 18 U.S.C. § 1964, a requirement that a private plaintiff may only proceed against a defendant who has previously been convicted.

Furthermore, in 1988 Congress failed to enact an attorneys' fees exception to these statutes when it added language to the money-laundering statute, 18 U.S.C. § 1957(f)(1) (Supp. IV 1986), to exclude from the definition of monetary transaction "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6182, 102 Stat. 4181, 4354 (1988).

matter, an "ordinary lawful expenditure," is imposing a punishment.¹⁵¹ This creates a functional exception for fees unless the government can raise a particularized objection to the release of assets.

Although forfeiture after conviction is mandatory, the government's title to the property is conditional until a special verdict of forfeiture is entered. Even if a pretrial hearing were to establish a substantial probability of forfeitability, the outcome of the trial is still speculative. A reading of the protective order provisions of the statutes to authorize the court to evaluate the competing claims of the defendant and the government to the funds needed for ordinary, reasonable expenses, including fees, does not unduly interfere with the government's right to its potentially forfeitable property. Flexibility and sensitivity to both parties can hardly be condemned as an undesirable outcome. Prohibiting a balancing of the equities, especially in light of the government's merely qualified claim, interferes with the fundamentally fair proceeding that is the basic guarantee of the sixth and fifth amendments.¹⁵²

By construing the statute to give the trial court the power to release funds from pretrial restraint and, by implication, from post-conviction forfeiture, the Supreme Court could establish a de facto method for supervising fees so that excessive expenditures will not unduly deplete the assets available for forfeiture. The absolutist interpretation by some courts of this discretionary pretrial power will cease if a standard of necessity and reasonableness is applied by the trial court. The court's view of the market place will undoubtedly be informed by the legal community's norms for handling cases of comparable complexity and duration.

This position is a compromise between an unfettered free market approach to the determination of a fee by the lawyer and client and a uniform cap on fees limited to the current CJA rates.¹⁵³ The term "legitimate fees" implies more than non-

¹⁵¹ *United States v. Monsanto*, 852 F.2d 1400, 1408 (2d Cir. 1988) (Winter, J., concurring).

¹⁵² "[T]he purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial.'" *Wheat v. United States*, 108 S. Ct. 1692, 1696-97 (1988) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

¹⁵³ In an interesting commentary, Professor G. Robert Blakey posed the question about attorney fee forfeiture in a very different form: "How shall legal fees be deter-

fraudulent; it means reasonable and for genuine value. Judge Winter's approach permits greater judicial oversight than presently takes place over fee arrangements and their relationship to the total amount of forfeitable property while fairly balancing the competing interests without requiring a pronouncement of a constitutional role.

B. *Right to Counsel of Choice*

As these two cases ascended to the Supreme Court, the need for a constitutional pronouncement has been largely assumed in light of the almost universal refusal to exempt fees on statutory grounds.¹⁵⁴ The very organization of most cases has evolved so that first the legislative history is examined and then, having declined to read the statute as requiring an exemption, the constitutional claims are examined. After the early cases which blended a statutory and constitutional analysis, the right to counsel of choice has emerged as the key potential constitutional violation.

To find that fee forfeiture violates this right, the Supreme Court would have to repudiate the logic that "[t]he right to counsel of choice belongs only to those with legitimate assets"¹⁵⁵ and further find that the relation back doctrine creates an impermissible preconception interference with the right to counsel because it effectively determines the defendant's punishment, deprivation of his assets, before trial. Furthermore, the creation of an exemption in RICO and CCE cases would have the appearance of creating a special category of defendant with perhaps even greater entitlements than others, an ironic result considering the magnitude and antisocial nature of the crimes charged.¹⁵⁶

mined in our society?" He suggests three possibilities: the free market, political decision (appointed counsel or public defenders), or the judiciary. Blakey, *supra* note 9, at 781-82.

¹⁵⁴ Cf. *United States v. Bissell*, 866 F.2d 1343, 1350 (11th Cir. 1989); *United States v. Nichols*, 841 F.2d 1485, 1496 (10th Cir. 1988); *United States v. Harvey*, 814 F.2d 905, 918 (4th Cir. 1987).

¹⁵⁵ *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 645 (4th Cir. 1988).

¹⁵⁶ "It is hard to conceive of a legal system in which appointed counsel is routinely adequate in a death penalty case, but is somehow inadequate in a case involving 'the career criminal millionaire who purchases cars, businesses, and real estate with cash delivered to banks in suitcases.'" *Nichols*, 841 F.2d at 1507 (quoting *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 96th Cong., 2d Sess. 1 (1980) (statement of Sen. Biden)).

Traditional analysis dismissing the claim that fee forfeiture violates the defendant's right to retained counsel of choice simply concludes that this right is limited by the economic purchasing power of the defendant's legitimate assets. In contrast, courts holding that fee forfeiture violates this right tend to employ a balancing test instead.¹⁵⁷ Once such a test is the basis for deciding the validity of fee forfeiture, the government's justifications do not prevail. The Supreme Court has the *Monsanto* concurring opinion authored by Chief Judge Feinberg as well as the *Harvey* and *Thier* circuit court decisions for support if it chooses to reach the same result.

However, these decisions really do no more than state the conclusion of their weighing process. To fortify this methodology, the Supreme Court should examine the gestalt of the opposition to fee forfeiture, as articulated by Judge Oakes's concerns about the aggregate affect fee forfeiture has on the established order of conducting the criminal trial process.

First, in making its decision the Court must not ignore the impact its decision will have on the criminal justice system. If the Court upholds fee forfeiture, concluding that nothing in the Constitution gives special protection to the proceeds of criminal activities, the result will deal a serious blow to entrenched perceptions of the role of defense counsel and will cause chaos to the administration of the criminal justice system. By effectively dragooning lawyers into appointments on lengthy trials and inevitably restructuring the appointed private counsel and public defender systems, this decision could dramatically alter existing institutions.¹⁵⁸ This prediction is controversial: claims that for-

¹⁵⁷ "We do not believe that these powerful, constitutionally secured individual interests — grounded in root assumptions of our adversarial system — are outweighed in the constitutional balance by the asserted governmental interests in deterrence, in preserving property for forfeiture, and in depriving convicted persons of their economic bases for further criminal activity." *Harvey*, 841 F.2d at 925. See also *Monsanto*, 852 F.2d at 1402 (Feinberg, C.J., concurring).

¹⁵⁸ Most appointed lawyers are either experienced private counsel who title some of their time to a certain number of cases a year or are novices seeking to acquire experience and earn reputations that will bring them business. Neither group will have any incentive to take these cases or, for that matter, to continue to specialize in criminal defense. Furthermore, the situation is compounded by the complexity of RICO and CCE cases, often requiring so-called "mega-trials" that drain the time and resources of retained lawyers. Margolin, *supra* note 6, at 812; Lefcourt & Horwitz, *The RICO Era: Megatrials, Megaproblems and Megabucks*, N.Y.L.J., Jan. 21, 1988, at 1, col. 3.

feiture as well as other practices have deterred lawyers from accepting retained cases have been asserted,¹⁵⁹ as well as repudiated,¹⁶⁰ while concerns over the abilities and resources of federal public defender services have been expressed¹⁶¹ and dismissed as unjustified or insulting.¹⁶²

This systemic threat is a very real consequence of a decision upholding the constitutionality of fee forfeiture. No doubt many lawyers who have been active in litigating these issues¹⁶³ or who have represented clients despite personal financial hardships¹⁶⁴ may well discontinue their involvement in such cases after a definitive ruling giving the government almost unsupervised power to seek restraint of assets otherwise needed for fees.

The fundamental, and at times almost inarticulable,¹⁶⁵ over-all objection to fee forfeiture is really the sum of its pieces. By interfering with choice of counsel, by impinging on the strategies of the defense and limiting its resources, by permitting the consequences of the sentence to occur before a conviction, and most of all, by allowing all of this to happen as a result of a unilateral exercise of power by the prosecutor at such an early stage of the proceedings, the statute impermissibly alters the contours of the adversarial process.¹⁶⁶ Even if narcotics traffickers and racke-

¹⁵⁹ Genego, *New Adversary*, *supra* note 6, at 804-15; Genego, *Risky Business*, *supra* note 6, at 7.

¹⁶⁰ *Forfeiture Hearings*, *supra* note 7, at 64 (letter from John R. Bolton, assistant attorney general to Sen. Joseph R. Biden, Jr. (July 9, 1986)).

¹⁶¹ *Id.* at 225-41 (Marek statement).

¹⁶² *Nichols*, 841 F.2d at 1507; Bolton Letter, *supra* note 33, at 64-67; Brickey, *Impact*, *supra* note 9, at 521.

¹⁶³ For example, Edward M. Chikofsky, attorney of record for Monsanto on his appeals to the Second Circuit and the Supreme Court, presumably has been handling this case in order to fully litigate the issues since the defendant was represented by other appointed counsel at his trial. Other active amici curiae have included the National Association of Criminal Defense Lawyers, the National Network for the Right to Counsel, and the Association of the Bar of the City of New York.

¹⁶⁴ The law firm of Caplin & Drysdale has been litigating on behalf of its own fees amounting to \$195,000 (\$25,000 in fees held in escrow; \$170,000 in unpaid fees). *Caplin & Drysdale*, 837 F.2d at 641.

¹⁶⁵ As the *Harvey* court said:

Certainly this is a traditional working assumption [ill-gotten gains may be used by defendants to retain private counsel even if they are later found guilty] within the legal profession and one so firmly grounded that it may well explain the incredulity of some district judges and the organized bar that Congress could possibly have intended effectively to undercut it.

Harvey, 814 F.2d at 925.

¹⁶⁶ One court vividly characterized this scenario as a "preemptive strike." United

teers deserve no special treatment or protection, the sixth amendment's guarantees extend to the guilty as well as the innocent defendant, and to the guilty drug kingpin or organized crime figure as well as the drunk driver or thief.

A Supreme Court searching for a sixth amendment jurisprudence could easily adopt the narrow view of the right to counsel of choice exemplified by *Caplin & Drysdale*. If, instead, the Court is troubled by the harm to the individual and the criminal justice system, the justices can look to the *Monsanto* concurring opinions for support in fashioning a particularized balancing test that would assume that a defendant's right to counsel of choice outweighed the government's interests in these assets specifically, or in the forfeiture penalty generally, unless a demonstrable need to restrain the property existed in the individual case.

C. Procedural Due Process

A consensus has formed among courts considering the procedural adequacy of the post-conviction protective order provisions. These courts, including the *Monsanto* panel as well as both *Harvey* and *Caplin & Drysdale*, find the absence of a post-restraint pretrial adversary hearing to violate fifth amendment due process guarantees.¹⁶⁷

It is quite possible that this issue will be deferred by the Supreme Court because neither case actually presents this question for the Court's review.¹⁶⁸ In fact, the government opposes a hearing requirement, preferring the ex parte probable cause standard.¹⁶⁹ For the defendant, a hearing represents a position of retreat, which would be required only after a failure to prevail

States v. Unit 7 and Unit 8 (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988).

¹⁶⁷ See notes 98-111 and accompanying text *supra*.

¹⁶⁸ In *Caplin & Drysdale*, the Fourth Circuit did not reconsider the fifth amendment aspect of the *Harvey* holding. In *Monsanto*, the hearing procedure established by the panel was overturned by the en banc court. See *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988).

¹⁶⁹ The government stated in its brief:

There is no occasion here for the Court to consider the correctness of the panel's decision insofar as it held that an adversarial hearing is required in order to maintain a restraining order that has the effect of preventing the defendant from using the restrained assets to hire a lawyer [W]e have serious doubts that the Constitution requires an adversarial hearing. A judicial determination of probable cause . . . should be sufficient

Petitioner's Brief, *supra* note 118, at 43-44.

on the central substantive constitutional claims.¹⁷⁰

Any ruling by the Court that the statute either exempts fees or violates the sixth amendment will obviate the need to resolve whether a hearing is required, at least when attorneys' fees are implicated by the seizure of assets. Even if the Court upholds the application of the forfeiture provisions of RICO and CCE to attorneys' fees, the justices may choose to postpone consideration of the procedural due process since the issue is not directly before the Court.

If the Court decides to expand its ruling to consider the post-indictment restraining order procedures, it could comment narrowly or broadly. Rather than invalidate the existing procedures, the Court simply could express reservations about the absence of a hearing. Since the current procedures apply to all post-indictment seizures, including general funds or assets needed for other necessary expenses, the Court may resist creating a rule mandating a hearing in order to avoid a widespread rule. Or the Court could adopt the *Monsanto* panel approach requiring a hearing whenever attorneys' fees are involved, relegating the due process question with respect to other assets for later consideration. It is unlikely the Court will invalidate the statute entirely because it lacks such a hearing unless the Court embraces the view that writing a hearing requirement into the statute would be impermissible judicial activism.¹⁷¹

If the Court mandates a pretrial adversarial hearing after entry of a post-indictment restraining order, it will also have to determine a burden of proof for the government to meet since the statute is silent. Several possibilities exist. In the pre-indictment portion of the statute, the government must demonstrate the "substantial probability that the United States will prevail on the issue of forfeiture."¹⁷² The *Monsanto* panel applied a lesser standard, requiring a showing of a mere "likelihood" of

¹⁷⁰ In the district court argument, *Monsanto's* attorney pro tem argued for a hearing as a "possible solution," but the issue was not raised by this attorney on the original appeal to the Second Circuit. *Monsanto*, 836 F.2d at 82 n.6.

¹⁷¹ This was the position advanced by Judges Miner and Altamari in their dissent in *Monsanto*, 852 F.2d at 1411 (Miner, J., concurring in part and dissenting in part). See also Amicus Brief of the Committees on Criminal Advocacy and Criminal Law of the Association of the Bar of the City of New York at 19-22, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (No. 88-454), cert. granted, 109 S. Ct. 363 (1988).

¹⁷² 18 U.S.C. § 1963(d)(1)(B)(i); 21 U.S.C. § 853(e)(1)(B)(i).

success.¹⁷³ Of course, at the trial itself, the prosecution must prove beyond a reasonable doubt that the assets are forfeitable, an unjustifiably heavy burden to impose at a pretrial hearing unless the government essentially conducts a mini-trial of the case, a proceeding that is generally disfavored in other contexts.

A possible middle standard requiring clear and convincing evidence may be most appropriate since the liberty interest at stake if the defendant is convicted without representation by counsel of choice should require more than a showing of a mere preponderance of the evidence. The consequences of restraint are more closely analogous to civil commitment or deportation proceedings, which have required a clear and convincing standard.¹⁷⁴

Since none of the parties in either case have explicitly raised the hearing issue, and because the Court would have to act as a legislature in order to adopt and define such a requirement, it may well decline to speak on this issue. However, if the Court is impressed by the unanimity and consistency of the rulings of the circuit courts, it may take the initiative to "fix" the statute.

III. PROPOSED STATUTORY CHANGES

If an exemption is read into the statute or if fee forfeiture is held unconstitutional, courts presumably could administer the provisions of the statute by carving out an exception for legal fees. If no statutory exclusion or constitutional infirmity is found to exist, Congress should complete the task undertaken in 1986 and revise the statute to exclude fees.

The case for legislative reform is based on a public policy argument: fair treatment for a criminal defendant requires independent counsel to preserve the "balance of forces between the accused and his accuser."¹⁷⁵ The fundamental principle that must be articulated in any statutory revision is that legitimate reasonable attorneys' fees are not subject to forfeiture. Modifications to achieve this goal would dispel an unfortunate, destruc-

¹⁷³ *Monsanto*, 836 F.2d at 82.

¹⁷⁴ *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276 (1966) (grounds for deportation must be shown by clear and convincing evidence).

¹⁷⁵ *Wardius v. Oregon*, 412 U.S. 470 (1973).

tive development caused by this legislation that treats criminal defense attorneys and their clients as if their interests were identical, a view that erodes the fundamental moral neutrality of the sixth amendment's guarantee of counsel to any individual without regard to guilt or innocence or the character of the charge.

In order to express an exemption for legitimate reasonable attorneys' fees, the current legislation could be amended in three areas: the relation back doctrine, the protective orders, and the ancillary hearings. Each section should be changed not only to conform in principle, but to systematically establish consistent procedures.

A. *The Relation Back Doctrine*

The relation back doctrine should specifically exempt attorneys' fees in such language as "Otherwise forfeitable property which has been paid, transferred, assigned, is contracted for, or is owed to an attorney in payment for past or future legitimate, reasonable attorneys' fees in connection with a prosecution of a violation of [RICO or CCE] shall be exempt from forfeiture."

This exemption establishes that payment for any representation, even that occurring before the right to counsel has attached, is guaranteed. Thus, the fear that the threat of forfeiture will discourage lawyers from accepting employment, especially at a stage when appointed counsel is not assured, would disappear.

By limiting the exemption to reasonable attorneys' fees, the new version attempts to assuage the government's worry that fees will drain forfeitable assets. The "Rolls-Royce of [defense] attorneys"¹⁷⁶ may charge a seemingly exorbitant fee, but the services and skills may amply justify the amount. There are, in any event, several civil analogues by which the court can determine if that fee is reasonable.¹⁷⁷ By referring to customary community standards for handling cases of the complexity and duration that RICO and CCE cases command, as well as to the experience and qualifications of the particular attorney, the court should be able to supervise the fee.

¹⁷⁶ *In re Grand Jury Subpoena Duces Tecum* Dated Jan. 2, 1985, 605 F. Supp. 839, 850 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

¹⁷⁷ *See, e.g.*, 42 U.S.C. § 2000(e) (1978); 42 U.S.C. § 1988 (1982) 22 U.S.C. § 1415 (1982); (all allowing prevailing party reasonable attorney's fees for violation).

In civil settings, prevailing parties normally submit contemporaneous records of their time and expenses. Some defense attorneys might protest such record keeping, especially if the fee has been calculated for the entire case rather than on an hourly basis, arguing that the fee is a matter of private contract. However, since the government has a proprietary interest in the amount of the forfeiture, particularly after conviction, protests to such record keeping or fee review would not be very credible or very professional. The mechanisms for determining the reasonableness of a fee should largely depend on the standard practice in the community in which the lawyer practices or in which the case is being prosecuted.

B. *Protective Orders*

An explicit exemption of fees eliminates the need for complicated litigation of protective orders. This approach reforms existing law that seemingly treats attorneys' fees as any other bona fide transaction but, in fact, singles them out for harsher treatment because of the requirement of ignorance of the illicit source of the payment. Instead, release of funds for payment would be automatic after court review unless the government objects, questioning the legitimacy or reasonableness of the fees.

Naturally, nonforfeitable untainted assets must be the first source for payment of fees. Until legitimate funds are exhausted, the court should not order the release of forfeitable property. However, if the court reviews the defendant's financial situation and determines that insufficient nonforfeitable property exists from which the fee can be paid, funds should then be released promptly so that counsel can be retained as soon as possible.

Preconviction restraining orders will still be necessary to preserve the potentially forfeitable property. However, since the statute now entitles the lawyer to the fee, the court must initially or periodically release sufficient assets to compensate the attorney for services provided and expenses incurred in the preparation of the case. If the defendant is convicted, once the court has reviewed the reasonableness of the fee, the balance should be released from either the frozen assets or from other assets found forfeitable after conviction. This review should not attempt to second-guess strategical choices by the defense that may have incurred expenses. Instead, the court should give great latitude to the attorneys' claims for expenses and costs.

Since attorneys no longer have the burden of proving that they are bona fide purchasers for value, concerns about the lack of procedural due process provided in the existing statutory pre-trial hearing would be moot. Presumably, the court's determination to release assets would not even require an adversary proceeding unless the government chose to contest the reasonableness or legitimacy of the fee.

C. *Post-Conviction Review*

Following entry of an order of forfeiture under this section, a bona fide purchaser must now petition the court for a determination of rights in the property. Any third party claiming a right to forfeitable property must petition the court for a hearing to adjudicate the validity of this claim. The petition must demonstrate by a preponderance of the evidence a superior right or title to the property and, as a bona fide purchaser for value, the absence of any reasonable belief that the property was forfeitable.¹⁷⁸ Since the proposed statute exempts reasonable attorneys' fees from forfeiture, a post-conviction ancillary hearing to adjudicate attorneys' fees would largely be unnecessary except perhaps if the lawyer is trying to establish entitlement to a greater fee than the court had previously allowed.

No court or commentator has suggested that fraudulent or sham transfers of property to an attorney disguised as fees should be insulated from forfeiture. The fear that attorneys' fees will be used to launder money for its eventual return to the defendant is valid. The government, therefore, should be able to challenge the legitimacy of the fees when collusion or other impropriety is suspected. In light of the seriousness of a claim alleging criminal, quasi-criminal, or unethical misconduct by the lawyer, the government should have to meet a high standard of proof by clear and convincing evidence that the fees were illegitimate before a fee can be disgorged.¹⁷⁹ This reflects the more

¹⁷⁸ 18 U.S.C. § 1963; 21 U.S.C. § 853.

¹⁷⁹ When allegations of moral turpitude or quasi-criminal conduct are the basis of civil criminal claims, frequently a higher standard of proof is required. *Knaebel v. Heiner*, 663 P.2d 551, 553 (Alaska 1983) (breach of fiduciary duty sustained by clear and convincing evidence); *In re Swartz*, 129 Ariz. 288, 294, 630 P.2d 1020, 1025 (1981) (evidence of professional misconduct must be clear and convincing); *Medoff v. State Bar of California*, 71 Cal. 2d 535, 545, 455 P.2d 800, 807, 78 Cal. Rptr. 696, 706 (Ca. 1969) (requiring convincing proof to a reasonable certainty in attorney disciplinary proceed-

trusting belief that the attorney who engages in a sham transaction is exceptional and that such a serious allegation by the government should require proof of the attorney's actual intent to disguise fees as payments for other purposes, such as money laundering. Negligence or a failure to inquire should be an insufficient basis for losing the fee. The ancillary hearing provisions, therefore, should be revised to authorize the government to petition for the return, remission, or reduction of the fees.

CONCLUSION

Very soon the Court finally will express its views about this controversy. In the eyes of some commentators, fee forfeiture is only one of the new tools available to and used by the government to reform the core of federal criminal law at the expense of traditional, highly valued institutions. The Court's decision may establish some limits to this power or at least motivate legislative reform.

POSTSCRIPT

The portion of *Monsanto* which contains the fullest expression of the Court's statutory analysis concludes that "the language is clear and the statute comprehensive."¹⁸⁰ The plain language states no exemption, nor does the available legislative history support an alternative interpretation. Yet, the constitutional and institutional concerns identified since the statute's passage in 1984 have not gone unnoticed by Congress in other areas.¹⁸¹ The fact that Congress has yet to react to these con-

ing); *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 232 (Iowa 1977) (civil conspiracy charging appropriation of trade secrets proven by "substantial evidence").

¹⁸⁰ *United States v. Monsanto*, 57 U.S.L.W. 4826, 4829 (U.S. June 22, 1989).

¹⁸¹ Cited in support of the proposition that Congress could have, but chose not to include an exception for attorneys' fees, is the so-called "Son of Sam" statute, also passed in 1984, which exempts up to 20% of any literary profits of convicted federal criminals that are ordered paid into a Crime Victims Fund to pay for legal representation in "matters arising from the offence for which such defendant has been convicted." *Victims of Crime Act of 1984*, 98 Stat. 2175-76 (codified at 18 U.S.C. § 3681(c)(1)(B)(ii) (1982 & Supp. V 1987)). 57 U.S.L.W. at 4828. In refutation of this argument, Justice Blackmun reads that statute as excluding fees related to representation on derivative matters such as civil law suits for damages. 57 U.S.L.W. at 4832 n.10 (Blackmun, J., dissenting). The 1986 money laundering statutes also excluded attorneys' fees from its definition of "monetary transaction" if such funds are necessary to preserve sixth amendment rights. 18 U.S.C. § 1957(f)(1) (1982 & Supp. V 1987). Although this exemp-

cerns by revising the forfeiture statutes is probably attributable to its awareness that the Court was about to decide these cases and that legislative action might be unnecessary.

Caplin & Drysdale and *Monsanto* signal the end of the judicial storm surrounding the forfeitability of attorneys' fees in CCE and RICO cases.¹⁸² Justice Blackmun decries the result of these cases in words that implore Congressional action: "Had it been Congress' express aim to undermine the adversary system as we know it, it could hardly have found a better engine of destruction than attorney's-fee forfeiture."¹⁸³ These cases strike a crippling blow to the principles long assumed to be a part of the guarantee of the right to counsel; the systemic damages predicted by Justice Blackmun and others¹⁸⁴ can be alleviated by prompt legislative response.

tion could be read as an opportunity to correspondingly amend the forfeiture statutes that Congress deliberately passed by, an equally plausible explanation is that Congress simply was limiting its consideration of the issue to this major new statutory provision and any other revisions of existing statutes would have distracted from its main purpose.

¹⁸² In the absence of statutory revision creating a hearing in cases of post-indictment restraint based solely on the probable cause established at the grand jury, it is likely that the procedural due process issue will be relitigated, especially since a right to a hearing has been established in the Third, Fourth, Seventh, Eighth and Ninth Circuits. See notes 98-111 and accompanying text *supra*. It is doubtful that the Supreme Court will find a due process violation in light of the majority's view that the probable cause underlying a forfeiture count in an indictment is a sufficient basis to restrain property since an identical standard is adequate to restrain the person. *Monsanto*, 57 U.S.L.W. at 4830 (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

¹⁸³ *Monsanto*, 57 U.S.L.W. at 4834 (Blackmun, J., dissenting).

¹⁸⁴ *Id.*; Cloud, *Forfeiting*, *supra* note 9; Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 781-82 (1989); text accompanying notes 63-64 *supra*.

