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Alternative Proposals for the Reform of State Legislation Dealing with Forfeitures for Drug Offenses

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ALTERNATIVE PROPOSALS FOR THE REFORM OF STATE LEGISLATION DEALING WITH FORFEITURES FOR DRUG OFFENSES

Raymond P. Pepe†

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I. INTRODUCTION

Alternative proposals for the reform of state legislation dealing with the forfeiture of property for drug offenses are being recommended to state legislatures by the National Conference of Commissioners on Uniform State Laws (“Conference”)¹ and the President’s Commission on Model State Drug Laws (“Commission”).² These proposals share a common origin

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1. The Conference approved the recommended revisions to the U.C.S.A. at its annual meeting in Chicago, Illinois, on August 4, 1994. The Conference previously reviewed draft amendments to the forfeiture provisions of the U.C.S.A. at its 1991 and 1993 annual meetings.

2. The President’s Commission on Model State Drug Laws, *Executive Summary*, Dec. 1993. The recommendations of the Commission are contained in five separate volumes: *Economic Remedies Against Drug Traffickers*, Dec. 1993 (hereinafter *Economic Remedies*); *Community Mobilization*, Dec. 1993; *Crimes Code Enforcement*, Dec. 1993; *Alcohol and Other Drug Treatment*, Dec. 1993; and *Drug-Free Families, Schools and Workplaces*, Dec. 1993. The forfeiture recommendations of the Commission are contained in the *Economic Remedies*, Section A. Other recommendations of the Commission relating to

and framework, as well as pursue similar goals and objectives. They differ, however, with respect to the degree of procedural and substantive protections afforded to private property interests.

This essay reviews the common features and differences between the recommendations of the Conference and the Commission and also explores their theoretical and policy differences.

II. ORIGIN OF THE PROPOSALS

The recommendations of both the Conference and the Commission arose out of efforts to draft revisions to the Uniform Controlled Substances Act of 1970 (U.C.S.A.).³ The U.C.S.A. authorized the seizure and forfeiture of: (1) controlled substances manufactured, distributed, dispensed or acquired in violation of the Act; (2) raw materials, equipment and containers used in manufacturing, compounding, processing or delivering controlled substances in violation of the Act; (3) conveyances, including aircraft, vehicles and vessels used to transport property used in violation of the Act; and (4) books, records and research materials used in violation of the Act.⁴ The original Act did not set forth administrative or judicial

economic remedies are the adoption of model acts dealing with demand reduction assessments, money laundering, financial transaction reporting, money transmission and on-going criminal conduct. *See generally Economic Remedies.*

3. U.C.S.A. §§ 101-607, 9 U.L.A. 1 (1970) (amended 1990).

4. *See* U.C.S.A. § 505(a). Forfeiture law has a lengthy history. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the U.S. Supreme Court traced forfeiture law back to the Biblical notion of the deodand. 416 U.S. 663, 681 (1974). The deodand was the notion that when an instrument caused death it was accused and atonement was required. *Id.* The instrument was forfeited to the King "in the belief that the King would provide money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses." *Id.* After the religious aspects of the deodand ceased to exist, the deodand continued to be a source of revenue for the Crown. *Id.* Forfeitures were justified because there was a breach of the King's peace and that breach justified the denial of the right to own property. *Id.* at 682. The notion of the deodand did not become part of the common law of this country, but rather statutory forms of forfeiture were enacted to achieve the same results. *Id.* at 682-83. *See also* George N. Aylesworth, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *Forfeiture of Real Property: An Overview*, (Bureau of Justice Assistance 1991) at 7 (stating that the history of forfeiture dates to Biblical times); Scott A. Nelson, Comment, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY'S L.J. 157, 161-64 (1994) (stating that historians trace the concept of forfeiture back to the Biblical laws of Exodus).

requirements for the seizure, forfeiture or release of property and did not establish detailed requirements relating to the assertion of "innocent owner" defenses or for the utilization of revenues generated through the forfeiture of property.⁵

Subsequent to the adoption of the U.C.S.A., several important federal statutes were enacted relating to the seizure and forfeiture of property associated with drug law offenses. This led to numerous non-uniform amendments to the U.C.S.A. These federal statutes included the Racketeer Influenced and Corrupt Organization Law,⁶ the Continuing Criminal Enterprise statute,⁷ amendments to the Controlled Substances Act,⁸ the Comprehensive Crime Control Act of 1984,⁹ the Anti-Drug Abuse Act of 1986,¹⁰ and the Anti-Drug Abuse Amendments Act of 1988.¹¹ In 1985, the Conference appointed a drafting committee to amend the 1970 version of the U.C.S.A.¹² The primary goal of the committee was to update and revise the forfeiture provisions of the U.C.S.A. to reflect the numerous developments in forfeiture and seizure law which have occurred since adoption of the Act.

The drafting committee prepared draft amendments for consideration by the Conference at its 1986, 1987, 1988 and 1989 annual meetings.¹³ Included in the recommended 1990 amendments was a new Article V of the U.C.S.A. providing for civil forfeiture. The 1990 amendments, including the forfeiture

5. See U.C.S.A. § 505 (1970); see also U.C.S.A. § 505 commentary to (b) and (c) (amended 1990). The 1970 U.C.S.A. was promulgated to supplant the Uniform Drug Act (1933) and the Model State Drug Abuse Control Act (1966). The 1970 version of the U.C.S.A. is the basis for legislation in approximately 48 states.

6. 18 U.S.C. §§ 1961-68 (1988).

7. 21 U.S.C. § 848 (1988).

8. *Id.* § 881.

9. 18 U.S.C. § 1 (1988).

10. 21 U.S.C. § 801 (1988).

11. *Id.*

12. The 1990 revisions to the U.C.S.A. were prepared by a Drafting Committee chaired by David A. Gibson of Brattleboro, Vermont. The Drafting Liaison and Reporter for the Committee was Jay E. Buringrud of Bismarck, North Dakota.

13. Under the rules of the Conference, drafting committees composed of members of the Conference together with official and unofficial advisors and observers prepare drafts for recommendation by the Conference. In order to take final action regarding a proposed uniform act, the proposal must be read and debated line-by-line at not less than two annual meetings of the Conference and must be adopted by a vote of the states. *1993-94 Reference Book*, National Conference of Commissioners on Uniform State Laws, Constitution and Bylaws, §§ 4.2 & 8.1.

provisions, were endorsed by the U.S. Justice Department,¹⁴ the Office of National Drug Control Policy,¹⁵ the National Association of Attorneys General¹⁶ and the National District Attorneys Association,¹⁷ as well as by numerous other advisors to the drafting committee.¹⁸

Although the committee's 1990 recommendations represented a carefully balanced compromise developed by the members, advisors and various consultants to the committee, the consensus relating to forfeiture issues proved too fragile to survive. At the 1990 annual meeting, many members of the Conference expressed disapproval of Article V's provisions dealing with the burden of proof in forfeiture actions (probable cause rather than preponderance of the evidence), the exclusive dedication of forfeiture revenues to law enforcement agencies, and the absence of measures for mitigation or remission of excessive forfeitures. The policy issues identified by members of the Conference were reflective of an emerging call for the re-evaluation of forfeiture laws by academic, media and congressional commentators.¹⁹

In spite of vigorous debate triggered by the proposed Article V of the U.C.S.A., the Conference approved the 1990 U.C.S.A. Amendments, but withheld final action on Article V. The Conference then appointed a new drafting committee and instructed it to perform a comprehensive review of forfeiture laws. In addition to representatives of the law enforcement community, the new committee added advisors and consultants

14. Letter from Dick Thornburgh, United States Attorney General, to members of the Conference (July 11, 1990).

15. Letter from William J. Bennett, Director of the Office of National Drug Control Policy, to members of the Conference (July 12, 1990).

16. Letter from Don Hanaway, Attorney General of Wisconsin, President of the National Association of Attorneys General, to members of the Conference (July 13, 1990).

17. Letter from Lynn C. Slaby, President of the National District Attorneys Association, to members of the Conference (June 29, 1990).

18. Letter from George Bush, President of the United States, to members of the Conference (July 12, 1990); see also, American Prosecutors Research Institute, *Handbook: The Uniform Controlled Substances Act, Overview and Analysis of the Proposed Amendments*, 1990.

19. As illustrative of the controversy which emerged regarding forfeiture policies prior to the 1990 annual meeting of the Conference, see Michael Goldsmith and Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254.

representing various financial and commercial interests, including the American Bankers Association, the National Association of Realtors and the American College of Real Estate Lawyers.²⁰ The drafting committee met in the fall and spring of 1990 and prepared initial recommendations for consideration by the Conference in the summer of 1991.

The recommendations prepared by the drafting committee in the spring of 1991 shifted the burden of proof for in rem forfeiture to preponderance of the evidence, provided for the deposit of revenues generated by forfeitures into general operating funds, and prohibited “disproportionate” forfeitures.²¹ After reviewing these recommendations, the U.S. Department of Justice, the National Association of State Attorneys General and the National Association of District Attorneys announced a decision to withdraw as advisors to the drafting committee.²² Instead, these groups recommended that

20. In addition to the author, current and former members of the Committee include: Bryce Baggett of Oklahoma City; C. Arlen Beam of the U.S. Court of Appeals; Marion Benfield of the Wake Forest University School of Law; William Breetz of the Hartford, Connecticut, law firm of Rogin, Nassau, Caplan, Lassman & Hirtle; Phillip Carroll of the Rose law firm of Little Rock, Arkansas; Jack Davies of the Minnesota Court of Appeals; Sidney Eagles of the North Carolina Court of Appeals; Robinson Everett of the Military Court of Appeals and Duke Law School; David Gibson of Brattleboro, Vermont; Alvin Meiklejohn, Jr., a member of the State Senate of Colorado and the Denver law firm of Jones & Keller; Donald E. Mielke, District Attorney of Golden, Colorado; and Fred H. Miller, Executive Director of the Conference. The Reporter for the Committee is Professor Kevin Cole of the University of San Diego School of Law. Terrance Reed of the Washington, D.C. law firm of Asbill, Junkin & Myers served as the American Bar Association Advisor to the Drafting Committee. Official observers and active participants included representatives of the American Bankers Association, the College of Real Estate Lawyers, the National Association of Realtors and the National Association of Criminal Defense Lawyers.

21. U.C.S.A. §§ 501, 520 (1991 Draft).

22. Representative of the comments made to the National Conference by the representatives of the prosecutorial community are the following extracts from a letter dated July 26, 1991, from the Honorable Ken Eikenberry, President of the National Association of Attorneys General, to Lawrence J. Bugge, the President of the National Conference:

The new drafting committee, propelled by the positions taken by some Commissioners in floor debate, has radically departed from the law of forfeiture in the state and federal systems. It has produced a set of provisions that would introduce concepts found in no state or federal statute. Quite apart from the lack of merit of these provisions, they carry a message of disdain for state legislators by proposing that the basis for uniformity is to be found in provisions never before passed in any state. . . . Moreover, these radical departures completely ignore the impracticality of training law enforcement officers in the application of two widely divergent

the Conference endorse a Model Asset Seizure and Forfeiture Act ("M.A.S.F.A."), which was prepared by the American Prosecutors Research Institute under contract to the U.S. Department of Justice.²³ The provisions of M.A.S.F.A. closely parallel provisions of Article V of the proposed 1990 Amendments to the U.C.S.A. recommended earlier to the Conference.²⁴

Although the Conference made numerous requests that representatives of the law enforcement community rejoin discussions regarding amendments to the U.C.S.A., these overtures were not successful.²⁵ In November 1993, U.S. Attorney General Janet Reno declined a request to appoint an advisor or observer to work with the Conference based on the representation that the Justice Department was internally preparing recommendations for the reform of federal forfeiture laws.²⁶

statutes. Since virtually all state narcotics officers participate in federal forfeiture activities, a uniform state statute must be at least compatible with federal forfeiture law. The proposed draft is not.

Id.

23. The American Prosecutors Research Institute is the research, technical assistance and programs affiliate of the National Association of District Attorneys.

24. Aside from some minor reorganization, the major differences between M.A.S.F.A. and the proposed 1990 version of Article V of the U.C.S.A. deal with attorney fees, warrant requirements, cost bonds and jury trial provisions. The 1990 version of the U.C.S.A. provides an exemption from forfeiture for "good faith" payments of "reasonable" attorney's fees earned before a judicial determination that property is subject to forfeiture, while M.A.S.F.A. authorizes a limited release of seized property (upon the approval of the prosecutor) for the payment of attorney's fees when other assets are not available. U.C.S.A. § 505(a) (1990 Draft); M.A.S.F.A. § 11(e). The U.C.S.A. requires the issuance of a warrant prior to the seizure of property, except in exigent circumstances, while M.A.S.F.A. allows seizure of property other than real estate without a warrant "upon probable cause to believe [it] is subject to forfeiture." U.C.S.A. § 507(a)-(b) (1990 Draft); M.A.S.F.A. § 6(b). M.A.S.F.A. contains provisions not found in the U.C.S.A. requiring the payment of a cost bond as a prerequisite for claiming exempt interests in property and requiring the resolution of factual issues relating to forfeiture solely by a judge. M.A.S.F.A. §§ 12(e), (g).

25. Invitations to send advisors, observers or specific comments and recommendations to Committee meetings were extended by the Committee to the U.S. Justice Department, the National District Attorneys Association, the National Association of Attorneys General and the National Drug Policy Office prior to each of the six drafting committee meetings which were held between 1992 and 1994. Another invitation was extended to these organizations to submit comments to the Conference prior to the 1994 Annual Meeting.

26. Letter from Irvin B. Nathan, Principal Associate Deputy Attorney General to members of the Conference (November 13, 1993).

Instead of resuming discussions with the Conference for the purpose of developing compromise state legislation, the prosecutorial community's efforts to further improve state forfeiture law were incorporated into the work of the Commission.²⁷ The Commission modified M.A.S.F.A. in several areas and published a recommended Commission Forfeiture Reform Act ("C.F.R.A.").²⁸

During the Commission's deliberations, the Conference's drafting committee continued to develop recommendations for amendments to the U.C.S.A. It also circulated for comment six subsequent drafts of revisions and presented recommendations for discussion at the Conference's 1993 annual meeting. The final recommendations of the drafting committee were circulated for review and comment on June 1, 1994. The Conference made minor amendments to the June 1, 1994 draft and

27. Establishment of the President's Commission was authorized by Section 7604 of the Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-660, but the Commission was not appointed by former President Bush until after the November 1992 general election. The work of the Commission was assigned to various task forces. The Task Force on Economic Remedies was chaired by Kay B. Cobb, the Vice Chairman of the Mississippi Senate Judiciary Committee and formerly Senior Attorney of the Mississippi Bureau of Narcotics and Executive Director of the Mississippi State Prosecutor's Association. Other members of the task force were: Ramona L. Barnes, Speaker of the House of the State of Alaska; Keith M. Kaneshiro, Prosecuting Attorney for Honolulu, Hawaii; Daniel E. Lundgren, Attorney General of California; and Edwin L. Miller, District Attorney of San Diego, California. The Executive Director of the Commission was Gary Tennis of the Philadelphia District Attorney's Office. The Assistant Director was Sherry L. Green of the American Prosecutors Research Institute. As is evident from the membership list of the Economic Remedies Task Force, the President's Commission failed to draw upon a broad cross section of competing interests and perspectives in preparing its recommendations, but instead looked primarily to the organized prosecutorial community.

28. The major differences between M.A.S.F.A. and the C.F.R.A. occur in the following areas: The C.F.R.A. increases the government's initial burden of proof in forfeiture actions from probable cause to a preponderance of the evidence. M.A.S.F.A. § 12(g); Commission Forfeiture Reform Act Pub. L. § 16(g). The C.F.R.A. restricts administrative forfeitures to property valued at \$15,000 or less. M.A.S.F.A. § 15(a); C.F.R.A. § 19(a). The C.F.R.A. provides for an optional diversion of 10% of forfeiture revenues from law enforcement to drug treatment programs. M.A.S.F.A. § 16(b); C.F.R.A. § 20(b). The C.F.R.A. prohibits the forfeiture of real property for offenses relating solely to the possession of controlled substances. C.F.R.A. § 7(b)(2)(A). The C.F.R.A. eliminates an exclusion previously found in M.A.S.F.A. denying innocent owner exemptions to joint tenants and tenants in the entireties. M.A.S.F.A. § 5(b)(1); C.F.R.A. § 8(b). Finally, the C.F.R.A. adds provisions not found in M.A.S.F.A. allowing the re-opening of forfeiture judgments for up to 180 days in the event of failure to give proper notice. C.F.R.A. § 19(b).

approved the amendments at the Conference's Annual Meeting on August 4, 1994 in Chicago, Illinois.²⁹

Although the culmination of parallel drafting efforts, the recommendations of the Commission and the Conference reflect a different perspective regarding the extent to which the protection of "innocent" private property interests can be entrusted to prosecutorial discretion versus rules of law. Generally, the C.F.R.A. vests broad discretion in prosecutorial authorities in order to provide for the maximum flexibility to pursue forfeiture actions.³⁰ In contrast, the recommended amendments to the U.C.S.A. attempt to provide more extensive procedural and substantive restrictions upon forfeiture proceedings, both to prevent prosecutorial abuses and to avoid unintended restrictions upon the flow of commerce.³¹

III. DIFFERENCES BETWEEN THE U.C.S.A. AND THE C.F.R.A.

A review of the 1994 Amendments to the U.C.S.A. illustrates some of the principal areas in which the U.C.S.A. and the C.F.R.A. differ in the treatment of asset forfeitures. Significant differences between the U.C.S.A. and the C.F.R.A. exist with respect to the following: the substantive standards and procedural requirements for claiming exemptions; limitations upon excessive forfeitures; the utilization of revenues generated by forfeiture proceedings; attorney fee exemptions; cost bonds and the award of attorneys' fees and costs; the interim release of property; and administrative forfeiture procedures.

A. Exemptions

The basic exemptions of property from forfeiture provided by the U.C.S.A. and the C.F.R.A. are similar. Both acts exempt property acquired before conduct that allows forfeiture if the

29. The National Conference revised the June 1, 1994 recommendations of the Drafting Committee to: (1) require the deposit of all forfeiture revenues into state general funds for appropriation; (2) establish a 30 day time period for initiation of ancillary civil proceedings following a criminal conviction to adjudicate the claims of alleged "innocent owners;" and (3) prevent the mandatory substitution of property in criminal forfeiture proceedings when the principal property subject to forfeiture has diminished in value due to routine use or casualty loss. U.C.S.A. §§ 419(i), 514(a), 522(h). The final amendments were approved by a vote of 49 states (the sole negative vote being cast by the State of Washington).

30. See C.F.R.A. § 9.

31. U.C.S.A. § 507.

property owner did not “know” the conduct would occur or acted “reasonably” to prevent the conduct.³² Similarly, both acts exempt property interests acquired after conduct that allows forfeiture if the owner acquired the property for value and did not “know” that the conduct had occurred.³³ The proposals differ, however, with respect to the standard applied to the evaluation of “knowledge” and the type of measures required of a property owner to “reasonably” prevent conduct that allows forfeiture.

The U.C.S.A. provides that “[a] person knows a fact or acts with knowledge if the person is aware of the existence of the fact or displays willful blindness as to whether the fact exists.”³⁴ It further provides that “a person displays willful blindness as to whether a fact exists if the person is aware of a substantial probability that the fact exists and consciously avoids information corroborative of the existence of the fact.”³⁵ In contrast, the C.F.R.A. does not define the term “know” and provides that a person is only eligible for an exemption if the person “could not reasonably have known of the act or omission or that it was likely to occur.”³⁶

The U.C.S.A. strives to avoid the implication that mere negligence regarding knowledge vitiates eligibility for an exemption.³⁷ In contrast, the C.F.R.A. can be interpreted as endorsing the use of a negligence standard.³⁸ The U.C.S.A. drafting committee concluded that the use of a negligence standard is inadvisable because it would impose excessive uncertainty upon commercial transactions.³⁹ Such a standard also implies the existence of an underlying duty to be aware of potential criminal conduct of third persons.⁴⁰

The definition of “willful blindness” utilized in the U.C.S.A. is patterned on federal criminal cases declaring certain forms of avoiding knowledge — sometimes also called “deliberate

32. *Id.* § 505(b)(1), (c)(1); C.F.R.A. § 8(a)(1)(A).

33. U.C.S.A. § 505(b)(1); C.F.R.A. § 8(a)(1)(A).

34. U.C.S.A. § 501(6).

35. *Id.*

36. C.F.R.A. § 8(a)(1)(A).

37. *See* U.C.S.A. § 501 cmt.

38. *See supra* note 36. Section 8(a) of the C.F.R.A. refers to whether a person could have “reasonably known” of an act or omission.

39. U.C.S.A. § 505 cmt. (regarding subsections (c)(1)-(2)).

40. *Id.*

ignorance” or “conscious avoidance” — as adequate to satisfy a statute’s requirement of “knowledge” for conviction.⁴¹ The U.C.S.A.’s provisions in this area are consistent with prevailing interpretations of federal law, while the C.F.R.A. appears to invite a re-evaluation of established federal precedent for the purpose of expanding the scope of asset forfeitures.⁴²

The U.C.S.A. also strives to avoid the implication that negligence is the appropriate standard for the evaluation of actions undertaken to prevent conduct that allows the forfeiture of property. The U.C.S.A. conditions eligibility for an exemption upon actions that the owner reasonably believes are appropriate to prevent the conduct or assist its prosecution.⁴³ Such a standard attempts to deviate from negligence jurisprudence by focusing upon the legitimate beliefs or intentions of a person rather than upon an objective evaluation of the reasonableness of conduct.⁴⁴ The C.F.R.A., in contrast, looks to whether the person “acted reasonably.”⁴⁵

In an effort to further clarify the meaning of the “reasonable belief” standard, the U.C.S.A. contains a safe harbor provision concerning actions taken to prevent or assist in the prosecution of conduct that allows forfeiture.⁴⁶ Under this provision, a property owner will be deemed to have taken sufficient measures to qualify for an exemption from forfeiture if the owner notifies an appropriate law enforcement agency, provides the law enforcement agency with information reasonably requested to prevent or prosecute the conduct, and takes reasonable actions, in consultation with a law enforcement agency, to discourage or prevent the illegal use of the property.⁴⁷ The U.C.S.A. states that under no circumstances will a person be required to take any action that may threaten the person’s personal security or safety.⁴⁸

41. See, e.g., *United States v. Rothrock*, 806 F.2d 318, 322 (1st Cir. 1986); *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986); 1 EDWARD DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 17.09 (4th ed. supp. 1994).

42. Compare *United States v. 1980 Red Ferrari*, 827 F.2d 477, 480 (9th Cir. 1987); with *United States v. One Single Family Residence*, 933 F.2d 976 (11th Cir. 1991).

43. U.C.S.A. § 505(b)(2).

44. *Id.* § 505 cmt.

45. C.F.R.A. § 8(a)(1)(B).

46. U.C.S.A. § 505(k)(1), (2).

47. *Id.*

48. *Id.* § 505(k)(2).

The combination of the repudiation of a negligence standard and the establishment of a safe harbor for measures necessary to prevent conduct that allows forfeiture is intended to both reduce the uncertainty regarding actions needed to avoid the forfeiture of property and to provide a substantial incentive for cooperation by property owners with law enforcement agencies. Similar provisions are not found in the C.F.R.A.

In addition to clarifying the scope of the basic exemptions from forfeiture, the U.C.S.A. establishes a number of additional procedural and substantive rules to protect the flow of legitimate commerce. The U.C.S.A. provides that public property, statutory or recorded liens for taxes, special assessments, fees due any governmental entity, and utility, road, sewer and other easements are automatically exempt from forfeiture.⁴⁹ The term public property refers to not only property held by general purpose units of government, "but also property held by authorities, quasi-governmental entities and public and private trusts for the public benefit," exclusive of private interests in such property.⁵⁰ Because such property is held for the public benefit, no rational purpose is served by requiring owners of such interests to affirmatively claim their exemptions. Under the C.F.R.A., no automatic exemptions from forfeiture are recognized, except for property sold or released by the state following its seizure or forfeiture.⁵¹

Likewise, the U.C.S.A. provides that certain types of property interests in which there are low probabilities that forfeiture will be sought will be deemed to be exempt unless the state affirmatively gives notice that such property interests are subject to forfeiture.⁵² In the event the state gives specific notice of its intent to seek forfeiture of any of these interests, eligibility for claimed exemptions must be established in the same manner as for other exemptions.⁵³ Similar provisions are

49. *Id.* § 505(a)(1)-(3).

50. *Id.* § 505(a)(1) cmt.

51. C.F.R.A. § 19(g).

52. U.C.S.A. § 505(f). These property interests include judicial liens, liens created by law, easements, covenants, restrictions, and reservations burdening property, rights to remove natural resources from real property, recorded or perfected security interests held by financial institutions, securitized property, purchase money mortgages or pledges, and the interests of tenants in real estate when the conduct of a landlord allows the forfeiture of the property. *Id.*

53. *Id.* § 505(h).

not contained in the C.F.R.A. and, instead, all property owners are required to affirmatively assert and establish their entitlement to exemptions.⁵⁴

The U.C.S.A. codifies a shelter principle for interests acquired from persons who hold exempt interests in property similar to the provisions of the Uniform Commercial Code ("U.C.C.") applicable to a holder in due course.⁵⁵ The rule provides that the transfer of property exempt from forfeiture vests in the transferee with any exemptions of the transferor, unless the transferee engaged in conduct that allows forfeiture or acts as an agent or nominee of a person whose conduct allows forfeiture.⁵⁶ This rule eliminates the need for all subsequent transferees of an exempt interest holder to separately prove entitlement to an exemption. No similar provisions are provided by the C.F.R.A.

Similar to its recognition of a shelter principle, the U.C.S.A. further provides that security interests, securitized property and purchase money mortgages and pledges held by financial institutions, which are presumptively exempt in lieu of notice of a proposed forfeiture, are conclusively exempt in the hands of a transferee who gives value prior to the receipt of such notice by the transferor.⁵⁷ These provisions are intended to preserve the negotiability of property interests that are widely transferred in secondary markets without creating unreasonable due-diligence burdens upon the purchasers of such property. The requirement that notice be given before the transfer of the property is intended to facilitate the functioning of commercial secondary markets dealing in security interests and securitized property.⁵⁸ The only equivalent provision of the C.F.R.A. authorizes the conditional interim release of property to "regulated interest holders."⁵⁹

The U.C.S.A. recognizes the complexity of applying exemption rules to executory service contracts, such as contracts to provide engineering, architectural or legal services in which a retainer is paid in advance of the provision of service. The

54. *Id.* § 505(g)-(h); C.F.R.A. § 15(i).

55. *See* U.C.C. § 3-203(b)(1989).

56. U.C.S.A. § 505(i), (l).

57. *Id.* § 505 (f)(j).

58. *Id.* § 505 cmt.

59. C.F.R.A. § 19(e).

U.C.S.A. provides that the state may forfeit property paid to a contractor for goods or services not yet delivered if the contractor would not otherwise have a right to keep the property upon a termination of the contract by a person whose conduct allows forfeiture or if the contractor would not be required to continue to perform notwithstanding the forfeiture of the property.⁶⁰ “The contractor’s interests will not be unfairly impinged upon if other law would not have permitted the contractor to keep the deposit had the contract been terminated without cause. If the contractor would only be permitted to keep a portion of the deposit, only that portion is exempt from forfeiture.”⁶¹ Similar provisions are not found in the C.F.R.A.

Finally, the U.C.S.A. recognizes the difficulty of applying the concept of acquiring property for value to spousal interests. The Act recognizes a limited exemption for a spouse who would qualify under the innocent owner provisions if he or she had given value for an interest in a primary residence or the only available automobile.⁶² States are directed to limit the dollar value of the exemption to the property value.⁶³ Similar provisions are not included within the C.F.R.A.

Although these specialized features of the 1994 version of the U.C.S.A. may be unnecessary in many circumstances because responsible prosecutors will exercise their discretion to achieve equivalent results, codifying the rules provides relief against potential prosecutorial abuses and promotes the more efficient functioning of commercial markets by reinforcing ordinary commercial expectations. In typical commercial transactions, due diligence cannot be satisfied by reliance upon expectations regarding reasonable prosecutorial discretion.

B. Excessive Forfeitures

On June 28, 1993, the Supreme Court unanimously held that civil and criminal forfeitures for violations of criminal laws are subject to the Excessive Fines Clause of the Eighth Amendment.⁶⁴ Since its 1990 annual meeting, the Conference has

60. U.C.S.A. § 505(c)(2).

61. *Id.* § 505 cmt.

62. *Id.* § 505(c)(3).

63. *Id.* § 505(d).

64. See *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (civil forfeiture); *Alexander v. United States*, 113 S. Ct. 2766, 2775-76 (1993) (criminal forfeiture).

endorsed the concept that “excessive” forfeitures should be subject to rescission or modification.

The 1994 Amendments to the U.C.S.A. provide that a court shall “limit the scope of a forfeiture judgment to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner’s conduct.”⁶⁵ In determining whether a forfeiture is grossly disproportionate, the U.C.S.A. provides that a court may consider: the “degree to which property is used to facilitate conduct that allows forfeiture;” the economic gain received or expected to be received from conduct that allows forfeiture; the value of the property subject to forfeiture; the “nature and extent of the owner’s culpability;” and any actions taken by an owner to prevent the illegal use of property or to assist the prosecution of such actions.⁶⁶ If a court finds that forfeiture is grossly disproportionate, the court is required to designate the extent of the loss that may be imposed on the owner.⁶⁷ The U.C.S.A. treats proportionality in the same way that the U.C.C. treats unconscionability — as an issue to be decided as a matter of law by the court.⁶⁸

Because the decisions in *Austin v. United States*⁶⁹ and *Alexander v. United States*,⁷⁰ failed to specify the appropriate factors to consider in evaluating the excessiveness of a forfeiture, it is inevitable that these factors will become the subject of numerous debates, in and out of court. Officials of the U.S. Justice Department, for example, have indicated that the Department, in reliance on Justice Scalia’s concurring opinion in *Austin*, will argue that the only applicable factors to consider in determining whether a forfeiture is violative of the Eighth Amendment are: (1) whether criminal activity involving property has been sufficiently extensive in terms of time and use; (2) whether the role of the property was integral and indispensable to the commission of the crime; and (3) whether the property was deliberately selected to secure some special

65. U.C.S.A. § 520.

66. *Id.* § 520(1)-(3).

67. *Id.* § 522(f).

68. *See* U.C.C. §§ 2-302, 2A-108.

69. 113 S. Ct. at 2801.

70. 113 S. Ct. at 2766.

advantage in the commission of a crime.⁷¹ Defense counsel, however, will no doubt argue that an excessiveness analysis should consider the harshness of penalties in light of the gravity of offenses,⁷² sentences imposed for other offenses, and the degree to which a civil forfeiture pursues legitimate remedial objectives.⁷³

Adoption of statutory standards similar to those embodied in the U.C.S.A. may reduce the uncertainty inherent in the implementation of the constitutional doctrine announced in *Austin* and *Alexander* by establishing legal requirements which will most likely meet or exceed constitutional requirements.⁷⁴ Limiting recision or modification only to “grossly disproportionate” forfeitures and clarifying that excessiveness is a matter to be determined exclusively by the trial court should further promote predictability and finality with respect to forfeiture judgments. Although the standard incorporated into the U.C.S.A. may ultimately prove to be more protective of private property rights than is constitutionally required, the creation of a flexible judicial remedy to prosecutorial excesses may help preserve forfeiture as a valuable law enforcement tool by helping restore public confidence in the fairness and integrity of civil forfeiture proceedings.

C. Utilization of Forfeiture Revenues

No single issue has drawn more enthusiastic debate at the Conference’s annual meetings than proposals “earmarking” forfeiture revenues for law enforcement purposes. (For example, the 1990 draft of the U.C.S.A. dedicated forfeiture revenues remaining after the satisfaction of exempt interests and

71. See *Austin*, 113 S. Ct. at 2815.

72. *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992), cert. denied, 113 S. Ct. 55 (1992); *United States v. Harris*, 903 F.2d 770, 777-78 (10th Cir. 1990); *United States v. Busher*, 817 F.2d 1409, 1414 (9th Cir. 1987).

73. See *Austin*, 113 S. Ct. at 2815.

74. *Austin*, 113 S. Ct. at 2801; *Alexander*, 113 S. Ct. at 2766. Illustrative of the confusion likely to surround the implementation of the *Austin* and *Alexander* decisions is a recent decision of the Pennsylvania Supreme Court which attempted to adopt Justice Scalia’s interpretation of the Excessive Fines Clause. The court ruled that forfeitures may only be based on a “pattern of similar incidents,” established by the state using “clear and convincing evidence that the criminal conduct in question is not a onetime occurrence. . . .” *In Re: King Properties*, 635 A.2d 128, 133 (Pa. 1993).

the payment of expenses to use by prosecutorial agencies in the enforcement of the U.C.S.A.⁷⁵). In response to a motion at the 1990 annual meeting objecting to the exclusive use of forfeiture revenues to support law enforcement activities, the 1991 draft provided for the deposit of forfeiture revenues into the general state treasury and made the revenues subject to the ordinary appropriations process.⁷⁶

Based upon suggestions of U.S. Justice Department officials, the 1993 draft provided states with three alternatives regarding the use of forfeiture revenues: (1) deposit into general operating funds; (2) deposit into a restricted revenue account subject to separate legislative appropriation; or (3) exclusive use for law enforcement purposes.⁷⁷ At the Conference's 1993 annual meeting, however, the latter two alternatives were deleted.⁷⁸ The amendments presented for consideration at the Conference's 1994 annual meeting provided that revenues remaining after any payments to holders of exempt interests in property and for forfeiture expenses were to be deposited into a restricted revenue account. At the conclusion of each fiscal period this revenue account was transferred to state or local general operating funds. During the course of a fiscal period, the account was authorized to be utilized for ongoing forfeiture expenses. At the end of each fiscal period, the draft directs the retention of a "working capital" balance ("working capital" is an amount to be determined by the ordinary appropriations process) to pay for ongoing forfeiture-related expenses.⁷⁹ At the 1994 annual meeting, however, the Conference further

75. U.C.S.A. § 519(b) (1990 Draft).

76. *Id.* § 518(e) (1991 Draft).

77. *Id.* § 522(e) (1993 Draft).

78. The Conference voted on August 2, 1993, by a vote of 58 to 35 to delete the former two alternatives. *Uniform Controlled Substances Act Amendments Article 5, Civil Forfeiture*, PROCEEDINGS IN THE COMMITTEE OF THE WHOLE (The Conference, Charleston, S.C.), Aug. 2, 1993, at 139. The author opposed the motion on the grounds that: (1) it is appropriate to ask persons acting in violation of criminal laws to pay for the costs of enforcement and prosecution; (2) the earmarking of funds, although perhaps not fiscally sound, is a well established practice in numerous other regulatory and law enforcement purposes; (3) legislative oversight, auditing, conflict-of-interest laws and professional codes of conduct can minimize the potential for abuse; and (4) although it may be desirable for the Conference to offer guidance to the states regarding the use of forfeiture revenues, there is no need for interstate uniformity with respect to decisions regarding the expenditure of funds. Transcript of August 2, 1993, 132-36.

79. U.C.S.A. § 522(h) (June 1, 1994 Draft).

amended the U.C.S.A. to simply provide for the deposit of all monies derived from forfeiture sales into the general fund of the state.⁸⁰

The provisions of the U.C.S.A. are based upon the proposition that giving seizing agencies direct financial incentives in forfeiture is an unsound policy that risks skewing enforcement priorities and creating conflicts of interest that may undermine the impartiality and objectivity of law enforcement agencies.⁸¹ In contrast to these recommendations, the C.F.R.A. continues to allocate forfeiture revenues to law enforcement activities, with the exception of an optional diversion of ten percent of revenues to drug treatment programs.⁸² The C.F.R.A. also

80. *Id.* Illustrative of the intensity of concerns regarding the use of forfeiture revenues are the following extracts from the 1993 debate of the Conference:

What, in fact, you're looking at is the worst attribute of the routine administration of criminal justice in the United States today, which is that . . . the prosecutorial establishment profit[s] from having this forfeiture money flowing through their coffers . . . I should hope we have the courage to make sure that Alternative "A" [providing for the deposit of revenues into general operating funds] is the only one which is appropriate. Anything else is just plain venial.

Statement of Commissioner John Langbein of Connecticut, *Uniform Controlled Substances Act Amendments Article 5, Civil Forfeiture*, PROCEEDINGS IN COMMITTEE OF THE WHOLE (The Conference, Charleston, S.C.), Aug. 2, 1993, at 114.

I think [the proposal to use forfeiture revenues for law enforcement purposes] . . . is carrying privatization of public works a little too far. It creates an overzealous attitude which is incompatible with everything in the history of our law. . . .

Statement of Commissioner M. Michael Cramer of Maryland, *Uniform Controlled Substances Act Amendments Article 5, Civil Forfeiture*, PROCEEDINGS IN COMMITTEE OF THE WHOLE (The Conference, Charleston, S.C.), Aug. 2, 1993, at 115.

One of the parts of our history of Anglo-Saxon jurisprudence is that we have tried to move away from [the privatization of the criminal justice system]. We have tried to have objective quality decision making based upon objective facts, not upon personal interest. We're going backwards with this concept [of earmarking revenues for law enforcement]. I wholeheartedly believe this motion [to deposit revenues in general operating funds for ordinary appropriation] would do more to promote equality and justice and a concept of appropriateness in this whole field than anything else.

Statement of Commissioner Peter Langrock of Vermont, *Uniform Controlled Substances Act Amendments Article 5, Civil Forfeiture*, PROCEEDINGS IN COMMITTEE OF THE WHOLE (The Conference, Charleston, S.C.), Aug. 2, 1993, at 116.

81. *E.g.* Harmelin v. Michigan, 111 S. Ct. 2680, 2693 n.9 (1991) (opinion of Scalia, J.) (Eighth Amendment may demand more careful scrutiny of fines than terms of imprisonment because "fines are a source of revenue"). Connally v. Georgia, 429 U.S. 245, 250 (1977) (declaring unconstitutional a system whereby unsalaried justice of peace received \$5 for each search warrant issued but nothing for refusing to issue a warrant).

82. C.F.R.A. § 20(b).

relies upon prosecutorial codes of ethics and conduct to prevent abusive forfeiture practices.⁸³

D. Attorney Fees

The U.C.S.A. provides specialized exemptions applicable to attorney fees because the general rules exempting the interests of “innocent owners” are not adequate to deal with the unique problems raised by the attorney-client relationship.⁸⁴ Under the rules ordinarily applicable to innocent owners, to preserve their exemptions property owners must not willfully ignore acts that give rise to forfeiture.⁸⁵ In representing a client, however, an attorney has the responsibility to diligently seek all information related to a client’s defense.⁸⁶ Attorneys are also required to protect client confidences. Accordingly, attorneys are limited in the extent to which information can be revealed to prevent conduct that allows forfeiture or to reveal information necessary for the prosecution of criminal offenses. Additionally, a desire to protect fees may encourage attorneys to refuse to provide defense services absent proof of a legitimate source for a fee. The combination of these elements creates pressure on attorneys which may interfere with the effective representation of clients charged with drug offenses. Attorney-client relationships are severely jeopardized if attorneys are penalized for knowing information necessary for their clients’ defense. The risk of forfeiture could lead attorneys to fail to abide by their ethical obligations to encourage full disclosure from their clients.⁸⁷

To avoid this undesirable consequence, the U.C.S.A. provides states with three optional provisions on the issue of attorney fees. The U.C.S.A. provides that “[a]n interest in

83. *Id.* § 20 cmt.

84. *See* U.C.S.A. § 506.

85. *Id.* §§ 501(6), 505(b)(1).

86. ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(c); 1.6; 1.14(1983).

87. *Compare* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, §§ 4-3.1(a), 4-3.2(b)(1993) (stating that an attorney “should explain the necessity of full disclosure of all facts known to the client” and it is unprofessional conduct for the lawyer to “intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel’s knowing of such facts”) *with United States Attorneys’ Manual* § 9-111.230 (Oct. 1, 1990) (stating that requiring attorneys to prove lack of reasonable cause to suspect forfeitability of fee “may prevent the free and open exchange of information between an attorney and a client”).

property acquired by an attorney as payment of or as security for payment of a reasonable fee for legal services in a criminal matter . . . is exempt from forfeiture unless": (1) the attorney was "aware at the time the interest was acquired that the property was subject to forfeiture" ("alternative one"); (2) the attorney knew "before the interest was acquired . . . of a judicial determination of probable cause that the property was subject to forfeiture" ("alternative two"); or (3) the payment "represents a fraud or sham to protect the interest from forfeiture" ("alternative three").⁸⁸ In all cases, the state has the burden of proving that an exemption claimed for attorney fees is not applicable.⁸⁹ The state may not utilize "evidence made available by the compelled disclosure of confidential communications between attorney and client, other than [non-privileged] information relating to attorney fees."⁹⁰ In addition, the U.C.S.A. provides that states may choose not to include any special provisions relating to attorney fees and handle attorney fees using the general exemption provided for "innocent owners," especially as applied to contractors with obligations under executory service contracts.⁹¹

The first alternative is based upon informal guidelines of the U.S. Department of Justice that preclude any forfeiture of fees paid in a criminal case if the attorney lacked "actual knowledge" that the fee was forfeitable.⁹² This alternative is broader than the federal practice, however, because it also covers attorneys who become aware of the forfeitability of payments after accepting them. Federal practice focuses on the attorney's mental state when the fee was earned. Accordingly, when an attorney comes to possess actual knowledge that the advance payment was forfeitable, his or her fees earned subsequently are not immune from forfeiture. In contrast, the first alternative provided by the U.C.S.A. focuses on the attorney's mental state at the time the interest in the payment was acquired — that is, when the attorney first accepted the payment in return for a promise to provide services. This alternative is preferable to federal practice, because it ensures that attorneys

88. U.C.S.A. § 506(a).

89. *Id.* § 506(b).

90. *Id.*

91. *Id.* § 505 (c)(2) cmt.

92. *United States Attorneys' Manual*, §§ 9-111.430 (October 1, 1990).

will not develop personal motives to avoid acquiring full information from their clients. It also protects defense counsel from the forced choice between either assuming the risk of working for free after knowledge is acquired or jeopardizing a client's assets by withdrawing representation, indicating forfeitability may exist.⁹³

The U.C.S.A.'s second alternative provision for attorney fees (i.e. knowledge of a judicial determination that property is subject to forfeiture) allows an advance fee even when the attorney has actual knowledge that the fee is tainted. This alternative may be preferable to alternative one for several reasons. First, under the first alternative (i.e. actual knowledge), private attorneys may be reluctant to represent drug defendants. An attorney without actual knowledge of the forfeitability of a fee may be concerned that a factfinder will later erroneously conclude that the attorney possessed actual knowledge when the fee was received. The second alternative may be preferable to the first because it also removes incentives to avoid learning all the facts about a case at its inception. The practical effect of the difference between the two alternatives is that under both alternatives attorneys will seek to collect fees prior to interviewing clients, then, under alternative one, decline representation. Clients rejected in this manner may continue to seek representation but cease to make full disclosure of important information.

The third alternative attorney fees provision offered in the U.C.S.A. limits the forfeitability of amounts paid as attorney fees based upon the 1985 and 1986 recommendations of the House of Delegates of the American Bar Association. Alternative three protects attorney fees from forfeiture unless the attorney by accepting the fees is engaging in a fraud or sham transaction intended to protect the illegal conduct of the client. The third alternative is the most protective of the attorney-client relationship.

93. Notwithstanding the apparent difference between the first alternative and federal practice, as applied, the differences may be less significant. Because U.S. Justice Department policy forbids compelling disclosure of confidential communications to establish forfeitability of the attorney's fee in the same manner as provided by the U.C.S.A., attorneys who do acquire actual knowledge of the forfeitability of their fee may continue working on the case with little risk that the fee will ultimately be forfeited. *Id.*

The C.F.R.A. rejects any exemption for attorney fees. Instead it allows a person charged with a criminal offense to “apply to the court where a forfeiture proceeding is pending for the release of property seized . . . to pay necessary” legal expenses for a criminal defense.⁹⁴ Unless the petition is not opposed by the state, however, the C.F.R.A. only allows the release of property if “there is no probable cause for the forfeiture of property.”⁹⁵ Such a provision allows the prosecution to directly and improperly interfere with the defendant’s selection of counsel.

In rejecting a special exemption for attorney fees, the Commission concluded that an exemption is unwarranted because it would permit a wrongdoer to benefit from misconduct by using drug proceeds to retain private counsel rather than making do with less expensive counsel or court-appointed counsel. The Commission also compares an exemption for attorney fees to permitting attorneys to receive their fees in the form of money stolen from a bank.⁹⁶

Neither of these justifications appears particularly compelling. Generally, the relevance of an attorney fee exemption arises prior to a criminal conviction for conduct that allows forfeiture. Accordingly, the practical impact of denying an exemption for attorney fees may be to deprive a defendant of access to counsel prior to a determination that the property may be subject to forfeiture. Likewise, the Commission’s analogy regarding the use of stolen property confuses the rights of crime victims with those of the state. Unlike a crime victim, the state is better able to bear the loss of property that it might otherwise have forfeited. Because the state would often be compelled to pay for the defense of the wrongdoer if the fee were forfeitable, it is a mistake to consider the entire sum a loss. Moreover, the goal of depriving the wrongdoer of illicitly acquired assets is accomplished if they are expended during the judicial process.⁹⁷

94. C.F.R.A. § 15(f).

95. *Id.* § 15(g).

96. *Economic Remedies* at A-41.

97. See *Commonwealth v. Hess*, 617 A.2d 307, 314 (Pa. 1992). The Pennsylvania Supreme Court used this reasoning to support its conclusion that the Pennsylvania Constitution forbids a state, prior to conviction, from restraining a criminal defendant’s lawyer from using a possibly forfeitable retainer, even respecting portions of the

E. Cost Bonds and the Award of Attorney Fees and Costs

The 1990 draft of Article V of the U.C.S.A. required a person claiming an exempt interest in property subject to forfeiture to post a bond of \$2,500, or a greater amount as the court may determine, upon the condition that in the event of forfeiture, the claimant must pay the costs and expenses of the proceeding.⁹⁸ Upon final judgment, the 1990 draft authorized the court, in its discretion, to order the payment of costs and expenses, including attorney fees and costs of investigation, to the prevailing party.⁹⁹ The draft prohibited an order directing the state to pay fees and costs, however, if the court finds that there was reasonable cause for the seizure, forfeiture or forfeiture proceedings.¹⁰⁰

The provisions of the 1990 draft are similar to current federal law. Under Section 1608 of Title 19 of the United States Code, a person claiming property that has been seized must file a bond in the penal sum of \$5,000 or ten percent of the value of the claimed property, whichever is lower, but not less than \$250, to secure all of the costs and expenses of the proceeding.¹⁰¹ In addition, federal law authorizes the award of costs to prevailing parties in civil actions brought by or against the government, but limits the award of costs in civil forfeiture actions to situations in which there was not a reasonable cause for the forfeiture.¹⁰²

The 1991 draft of the U.C.S.A. eliminated both the cost bond provisions and provisions for the award of fees and costs to prevailing parties.¹⁰³ In preparing these revisions to the 1990 text, the drafting committee concluded that the award of fees and costs should be left to other state law, including emerging state statutes similar to the Equal Access to Justice Act, which provides for the award of fees and costs to parties litigating with the government if the position of the government

retainer that the attorney had not yet earned at the time of acquiring knowledge that the fee was paid with tainted funds. *Id.*

98. U.C.S.A. § 515(f) (1990 Draft).

99. *Id.* § 518(f) (1990 Draft).

100. *Id.* § 518(e) (1990 Draft).

101. 19 U.S.C. § 1608 (1988).

102. 28 U.S.C. §§ 2412(a), 2465 (1988).

103. U.C.S.A. §§ 515(d), 516(f) (2) (1991 Draft).

was not “substantially justified.”¹⁰⁴ These revisions arose from a perception that it is inappropriate to require a person not accused or charged with criminal conduct to post bonds and risk liability for costs and expenses to defend a claim to private property.

Contrary to the 1991 recommendations of the drafting committee, the C.F.R.A. restores and modifies the cost bond and cost and fee provisions of the 1990 version of the U.C.S.A. The C.F.R.A. requires a person claiming an innocent owner exemption from forfeiture to file a “cost” bond of \$2,500 or ten percent of the property’s value, whichever is greater, up to a maximum of \$250,000.¹⁰⁵ An exception is provided, however, for a person proceeding in forma pauperis.¹⁰⁶ The C.F.R.A. also provides that a claimant who fails to establish that a “substantial portion” of the claimant’s interest is not exempt from forfeiture must pay the reasonable costs and expenses of any claimant who establishes entitlement to an exemption and the costs and expenses of the state for the investigation and prosecution of the matter, including reasonable attorney fees.¹⁰⁷ The C.F.R.A. does not, however, restore provisions of the 1990 U.C.S.A. allowing courts to award costs and fees to claimants, but does insulate the government from paying costs and damages to claimants if there was “reasonable cause” for seizure or forfeiture of property.¹⁰⁸

The C.F.R.A. both substantially increases bonding requirements and exposes claimants to potential exposure to a broader range of costs and fees. By providing an exemption for the payment of costs and damages to the government, but requiring the payment of costs and expenses in all cases by the defendant, the C.F.R.A. in effect follows the British rule¹⁰⁹ when the State wins but the American rule¹¹⁰ when the State loses.

The 1994 Amendments to the U.C.S.A. seek to restore a reasonable balance of remedies available to both the state and defendants to recover attorney fees and costs. The U.C.S.A.

104. 28 U.S.C. § 2412(d)(1)(A) (1988).

105. C.F.R.A. § 16(e).

106. *Id.*

107. *Id.* § 19(i).

108. *Id.* § 19(h).

109. *Id.*

110. *Id.* § 19(i).

does not impose a cost bond requirement, but instead provides for the award of fees and costs to a prevailing party if the position of the opposing party was not "substantially justified."¹¹¹

F. Expedited Release of Property

Both the C.F.R.A. and the 1994 Amendments to the U.C.S.A. include provisions to facilitate the expeditious release of property following either its seizure, or the filing or recording of a forfeiture lien. Both proposals require the release of property if timely forfeiture proceedings are not initiated, if the state lacks probable cause for forfeiture, or upon the substitution of a bond or other property in lieu of the property subject to forfeiture.¹¹² The proposals differ substantially, however, with respect to the extent and effectiveness of the release provisions.

The C.F.R.A. requires the "temporary release" of property to the owner "as custodian for the court, pending further proceedings."¹¹³ Temporary release occurs when the state fails to file a notice of pending forfeiture against the property within ninety days after seizure of the property, or fails to commence a judicial forfeiture proceeding within ninety days after a notice of pending forfeiture is filed upon which a proper and timely "claim" is filed.¹¹⁴ A claim is filed in response to a notice of pending forfeiture by either filing an answer in a judicial proceeding asserting a claim to the property which is not subject to forfeiture, or by requesting the administrative recognition of an exempt interest in property.¹¹⁵

The 1994 Amendments to the U.C.S.A. require the prosecuting attorney to commence an administrative or judicial forfeiture proceeding within ninety days after seizing property or filing or recording a forfeiture lien, unless the court extends the time for good cause shown.¹¹⁶ The commencement of "administrative forfeiture proceedings" serves the same function under the U.C.S.A. as the filing of a "notice of forfeiture" under the C.F.R.A. If timely administrative or judicial forfeiture

111. U.C.S.A. § 524(e).

112. U.C.S.A. § 511; C.F.R.A. § 10.

113. C.F.R.A. § 11 (a)(1).

114. *Id.*

115. *Id.* § 11(a)(2).

116. U.C.S.A. § 519(a).

proceedings are not commenced by the state, the U.C.S.A. requires the release of property and liens and prohibits a later seizure, lien or forfeiture proceeding based upon the same conduct allowing forfeiture.¹¹⁷

Although the C.F.R.A. does provide for “temporary release” of property if the state fails to initiate timely forfeiture proceedings, property is only released to the owner as “custodian for the court” and continues to remain subject for an indefinite period to forfeiture claims.¹¹⁸ In contrast, the U.C.S.A. provides that if the state fails to initiate timely administrative or judicial forfeiture proceedings, the property is unconditionally released to the owner and the state is prevented from subsequently initiating forfeiture proceedings based on the same conduct involved in the first proceeding.¹¹⁹ The provisions of the U.C.S.A are based upon the premise that the state should not be allowed to deprive persons of the ownership and full enjoyment of property rights without the timely commencement of judicial or administrative proceedings.¹²⁰

Regardless of whether timely forfeiture proceedings are commenced, the C.F.R.A. provides for an expedited probable cause hearing after five days notice to the prosecuting attorney if property has been seized or made subject to a forfeiture lien without a previous judicial determination of probable cause.¹²¹ In order to request a probable cause hearing, an owner must file an application within ten days after notice of the seizure of property or the filing of a lien, or actual knowledge of seizure or the filing of a lien.¹²² If the court concludes at the hearing that there is no probable cause for the forfeiture of the property, or if the state elects not to contest the issue, the property must be released “to the applicant, as custodian for the court, or from the lien pending the outcome of a judicial proceeding.”¹²³

The 1994 Amendments to the U.C.S.A. also provide for expedited probable cause hearings. The U.C.S.A. requires a

117. *Id.* § 519(c).

118. C.F.R.A. § 16(e).

119. U.C.S.A. § 519(c).

120. *See generally id.*

121. C.F.R.A. § 15(c)(1).

122. *Id.* § 15(c)(2).

123. *Id.* § 15(d).

probable cause hearing within thirty days of the service of a petition requesting a hearing, unless the court delays the hearing upon the consent of the parties or for good cause.¹²⁴ If the state fails to demonstrate probable cause for the forfeiture of the property, the court must order the release of the property and any forfeiture liens.¹²⁵ The state may satisfy its burden of proof by evidence of a previous judicial determination based upon conduct that allows forfeiture under the U.C.S.A. and entered by a state or federal court, or administrative agency.¹²⁶ Finally, the U.C.S.A. provides that if property or a lien has been released for lack of probable cause, knowledge that the property had been seized or a lien filed and subsequently released, does not constitute knowledge regarding conduct that allows forfeiture for the purpose of defeating innocent owner exemptions.¹²⁷

The provisions of the C.F.R.A. and the U.C.S.A. with respect to probable cause hearings differ in two significant respects. First, the U.C.S.A. requires a probable cause hearing within thirty days of a request, unless a court postpones the hearing upon the consent of the parties or for good cause.¹²⁸ The C.F.R.A. requires five days prior notice to the prosecuting attorney, but does not set a time period in which the hearing must be conducted.¹²⁹ The C.F.R.A., accordingly, does not mandate timely interim relief from unjustified seizures or liens. Second, as was the case with the release of property for failure to initiate timely proceedings, the C.F.R.A. only provides for release to the applicant as custodian for the court and continues to make the property subject to forfeiture.¹³⁰ Under the U.C.S.A., if the state cannot prove probable cause for forfeiture, the property must be unconditionally released.¹³¹ The mere seizure of property or the filing of a lien followed by release of property for lack of probable cause does not constitute "knowledge" regarding conduct that allows forfeiture.¹³² The

124. U.C.S.A. § 511(c).

125. *Id.* § 511(f).

126. *Id.* § 507(b).

127. *Id.* § 505(n).

128. *Id.* § 511(c).

129. C.F.R.A. § 15(c).

130. *Id.* § 15(d).

131. U.C.S.A. § 511(f).

132. *Id.* § 505(n).

U.C.S.A. assumes that if the state cannot prove even probable cause for the forfeiture of property, the owner has an unconditional right to the release of the property.

In addition to allowing the release of property for a failure to commence proceedings in a timely manner and for a lack of probable cause, the C.F.R.A. allows the owner of seized property to obtain the release of the property by posting with the prosecuting attorney a surety bond or cash in an amount equal to the full market value of the property "as determined by the attorney for the state." The prosecutor may refuse to release the property if the bond tendered is inadequate, the property is retained as contraband or as evidence, or the property is "particularly altered or designed for use in conduct giving rise to forfeiture." If a surety bond or cash is posted and the property is forfeited, the court forfeits the surety bond or cash in lieu of the property.¹³³

The 1994 Amendments to the U.C.S.A. allow property to be released upon the posting of a bond or other "substituted property," either in an administrative forfeiture proceeding,¹³⁴ at a preliminary hearing,¹³⁵ or in the course of a judicial forfeiture proceeding.¹³⁶ In each instance, an owner is entitled to substitute property if "its value equals or exceeds the value of the original property upon the date of substitution."¹³⁷ The conditions may be imposed upon the acceptance of the substituted property to protect the state's interest in the forfeiture proceeding, to prevent future violations of the law and to minimize obligations relating to the maintenance or management of the substituted property.¹³⁸ Finally, the original property must not be contraband, evidence, or not particularly suited for use in illegal activities.¹³⁹ The court or prosecuting attorney may accept property of lesser value than the original property, including a secured or unsecured agreement to honor a forfeiture judgment, if the owner "establishes a high probability that the owner's interest in the original property is exempt

133. *Id.*

134. *Id.* § 513(a).

135. *Id.* § 511(a)(3).

136. *Id.* § 510(b).

137. *Id.* § 510(a)(1).

138. *Id.* § 510(a)(2).

139. *Id.* § 510(a)(4).

from forfeiture . . . ”¹⁴⁰ The U.C.S.A. clarifies that “[u]pon the substitution of property, the original property must be released, any lien upon it removed . . . ” and forfeiture proceedings terminated.¹⁴¹ The substituted property, however, is subject to forfeiture to the same extent as the original property, but the original property is no longer subject to forfeiture for the same conduct upon which the original forfeiture proceedings were based.¹⁴²

By allowing the substitution of property in both administrative and judicial proceedings, the U.C.S.A. guarantees a judicially enforceable right to request the substitution of property. In addition, by allowing a court to adjust the value of a bond or other substitute property required based upon the likelihood that a claimant will prevail in proving entitlement to an exemption, the U.C.S.A. allows a court to consider equitable factors in determining the amount of substitute property required.

In addition to allowing the substitution of property, the U.C.S.A. further authorizes the release of property in administrative proceedings, preliminary hearings or during judicial proceedings if less restrictive alternatives exist to the seizure of real property.¹⁴³ Alternatives to the seizure of real property recognized under the U.C.S.A. include the execution of an occupancy agreement, the designation of substitute property or the entry of a restraining order.¹⁴⁴ These alternatives are deemed acceptable if they “adequately protect the state’s interest in forfeiture, including the state’s interest in income generated by the property and in preventing future violations of law.”¹⁴⁵

Although both the C.F.R.A. and the U.C.S.A. prohibit the seizure of real property without an opportunity for a prior adversarial hearing, in exigent circumstances, the C.F.R.A. only limits seizure of real property if the state lacks probable cause.¹⁴⁶ The U.C.S.A., in contrast, considers whether seizure

140. *Id.* § 510(a)(1).

141. *Id.* § 510(d).

142. *Id.*

143. *Id.* § 507(c)(1).

144. *Id.* § 507(c)(2).

145. *Id.* § 507(c)(1)(ii).

146. C.F.R.A. § 9(c).

is the most appropriate remedy to protect the interests of the state pending the outcome of forfeiture proceedings.¹⁴⁷

G. *Administrative Forfeiture Proceedings*

Both the C.F.R.A. and the U.C.S.A. establish administrative procedures under which forfeiture proceedings may be adjudicated without judicial involvement. The administrative proceedings may be particularly important to owners of exempt interests in property seeking an expeditious resolution of their claims. The manner in which administrative proceedings are conducted under the two proposals, however, differs significantly.

Under the C.F.R.A., administrative proceedings are initiated only if the state issues a "notice of pending forfeiture" within ninety days of the seizure of property or the filing of a seizure lien.¹⁴⁸ The U.C.S.A., in contrast, allows administrative proceedings to be initiated either by the filing of a notice of pending forfeiture by the attorney for the state,¹⁴⁹ or by the filing of a request for the administrative recognition of exempt interests.¹⁵⁰ Under the U.C.S.A., a property owner is not required to await the filing of a notice of pending forfeiture to file such a request.¹⁵¹ This distinction is likely to be critical to innocent owners seeking to regain property as soon as possible. Under the C.F.R.A., the state may delay the filing of a notice of pending forfeiture for up to ninety days.¹⁵²

In the event a timely notice of pending forfeiture is filed by the state, the C.F.R.A. requires that an answer or a request for the recognition of an administrative exemption must be filed within thirty days after the date of notice of a pending forfeiture.¹⁵³ No extensions to the thirty day period are authorized for any reason.¹⁵⁴ If a request for the recognition of an administrative exemption is filed, the C.F.R.A. provides that the state may delay commencing a judicial forfeiture proceeding for

147. See generally U.C.S.A. § 507 (c)(1)(ii) and cmt.

148. C.F.R.A. § 11(a)(1).

149. U.C.S.A. § 512(a).

150. *Id.* § 513(a).

151. *Id.*

152. C.F.R.A. § 11(a)(1)(A).

153. *Id.* § 11(a)(2).

154. *Id.* § 11(a)(3).

180 days.¹⁵⁵ During this period the prosecuting attorney must provide “regulated interest holders” a statement recognizing or denying any claimed exempt interests within sixty days, and must provide other property owners a statement recognizing or denying claimed exempt interests within 120 days.¹⁵⁶ A “regulated interest holder” is a business authorized to operate in the particular state which is under the jurisdiction of banking, securities, insurance or real estate regulating agencies.¹⁵⁷

If no party files exceptions to the administrative statement of exempt and non-exempt interests, the state may either treat the statement as a final adjudication of exempt and non-exempt interests and dispose of the property, or commence judicial forfeiture proceedings.¹⁵⁸ If the state does not initiate judicial forfeiture proceedings, the C.F.R.A. authorizes the state to release any property “if forfeiture or retention of actual custody is unnecessary,” but does not require the state to do so.¹⁵⁹ Instead, the state is authorized to sell the property and use a portion of the proceeds, after deducting reasonable expenses incurred, to satisfy exempt interest holders.¹⁶⁰

The U.C.S.A. Amendments are similar to the C.F.R.A. in requiring the filing of either a request for recognition of an administrative exemption or a demand for a judicial proceeding within thirty days of the service of notice of the administrative forfeiture proceeding.¹⁶¹ Unlike the C.F.R.A., if a request for recognition of an administrative exemption is filed, the state is required to prepare a statement of exempt or non-exempt interests.¹⁶² Although the state may elect to commence judicial forfeiture proceedings, it must do so within ninety days of the initial seizure of property or the filing of a forfeiture lien,¹⁶³ and must prepare the statement of exempt and non-exempt interests for parties which request such a statement.¹⁶⁴ Unlike the C.F.R.A., the mere filing of a request for recognition

155. *Id.* § 11(a)(4).

156. *Id.* § 11(a)(4)(A).

157. *Id.* § 4(h).

158. *Id.* § 11(a)(4)(C), (D).

159. *Id.* § 10(b).

160. *Id.* §§ 10(h), (i), 20(a), (b).

161. U.C.S.A. § 512(e).

162. *Id.* § 513(f)(1).

163. *Id.* § 519(a).

164. *Id.* § 512(f).

of an administrative exemption does not extend for 180 days the time in which the state may commence judicial proceedings.

The U.C.S.A. requires the state to prepare a statement of exempt and non-exempt interests within ninety days.¹⁶⁵ A party whose interests are listed as non-exempt may demand a judicial forfeiture proceeding within thirty days of receipt of the statement.¹⁶⁶ The statement of exempt and non-exempt interests is binding upon the state, except with respect to a party which demands a judicial forfeiture proceeding in response to the initiation of an administrative forfeiture proceeding or which files a demand for a judicial proceeding within thirty days of receiving a statement classifying its interests as non-exempt.¹⁶⁷ If no party demands a judicial proceeding after the preparation of the statement of exempt and non-exempt interests, the statement is deemed to be final.¹⁶⁸ Thereafter, if no interest in the property is found to be forfeitable, the property must be released to the owner and any forfeiture lien removed.¹⁶⁹ If one or more interests are forfeitable and others are exempt, the state must either transfer the property in a manner agreeable to the exempt owners and the state or transfer or dispose of the property "in a manner that protects the owners of exempt interests as completely as they would be protected . . . [from] an ordinary judgment creditor of the owner of the forfeited interest."¹⁷⁰

The procedures for the release of property through administrative forfeiture proceedings under the C.F.R.A. and the U.C.S.A. differ in several important respects. First, the C.F.R.A. extends the time for commencing judicial forfeiture proceedings for up to 270 days if a request for recognition of an administrative exemption is filed.¹⁷¹ Under the C.F.R.A. the state is apparently free to ignore the request and simply defer initiating judicial proceedings for an additional 180 days.¹⁷² The U.C.S.A., however, requires the state to either respond to the

165. *Id.* § 513(f)(1).

166. *Id.* § 513(f)(3).

167. *Cf. id.* § 513(f)(4).

168. *Id.* § 513(f)(3).

169. *Id.* § 522(b).

170. *Id.* § 522(d)(1).

171. C.F.R.A. § 11(a)(1)(A), (a)(4).

172. *Id.* § 11(a)(4)(D).

request for a statement of exempt or non-exempt interests within 120 days¹⁷³ or release the property within ninety days of seizure or the filing of a forfeiture lien.¹⁷⁴ Second, the C.F.R.A. does not mandate the release of property to non-exempt interest holders if all interests have been found to be exempt. Instead, it allows the sale of the property and the recovery of its expenses, even against innocent owners.¹⁷⁵ The U.C.S.A., in contrast, requires the release of property to exempt owners.¹⁷⁶ Finally, if certain interests are recognized as exempt and other interests are non-exempt, the only remedy mandated under the C.F.R.A. is the sale of property and the allocation of proceeds in the order of priority of exempt interests. Under the U.C.S.A., however, the state is first required to reach agreement with exempt owners regarding a voluntary plan of distribution.¹⁷⁷ If agreement cannot be reached, the sale of the property is not mandated, but instead the state assumes the rights of a judgment creditor of the owner whose interests are subject to forfeiture.¹⁷⁸

IV. CONCLUSION

This article discusses some of the most important differences between the C.F.R.A. and the 1994 Amendments to the U.C.S.A. The differences between the C.F.R.A. and the U.C.S.A. are reflective of a fundamental difference in perspective and orientation between the Conference and the Commission. The C.F.R.A. represents a continuation of law enforcement strategies popular in the 1980s and 1990s which sought to aggressively expand the scope and utilization of forfeiture as a valuable adjunct to more traditional law enforcement techniques. The C.F.R.A. proceeds from the perspective that more powerful and flexible forfeiture laws are needed to pursue law enforcement objectives and that prosecutorial discretion can provide adequate protection for innocent property owners and legitimate commercial transactions. In contrast, the 1994 amendments to the U.C.S.A. seek to more narrowly focus and

173. U.C.S.A. § 513(c), (f)(1).

174. *Id.* § 519(a).

175. C.F.R.A. § 10(h).

176. U.C.S.A. §§ 513(f)(2), 522(b).

177. *Id.* § 522(d)(1).

178. *Id.*

refine forfeiture laws, allowing them to combat more effectively the misuse of property for illegal activity while providing expanded procedural and substantive protections of the rights of innocent property owners.

