

April 1990

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Recommended Citation

Steven C. Bauman, *United States v. Monsanto: The Supreme Court Swings and Misses - Attorney Fee Forfeiture under RICO and CCE*, 10 Pace L. Rev. 439 (1990)

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Notes and Comments

United States v. Monsanto: The Supreme Court Swings and Misses — Attorney Fee Forfeiture Under RICO and CCE

I. Introduction

Congress enacted the Organized Crime Control Act of 1970¹ (1970 Act) in an effort to combat the growth of organized crime as an economic enterprise.² The Racketeer Influenced and Corrupt Organizations (RICO)³ chapter and the Continuing Criminal Enterprise (CCE)⁴ section of the 1970 Act promulgated new mechanisms for reaching racketeering activity and supplied civil and criminal remedies, particularly criminal forfeiture, to curtail such activity.⁵ Despite these legislative efforts, the 1970 Act received mixed reviews because defendants retained the ability to dispose of targeted assets prior to conviction.⁶

Nearly fourteen years later, the inadequacies of the forfeiture procedures⁷ of the 1970 Act forced Congress to amend the pertinent provisions of RICO and CCE. The Comprehensive

1. Organized Crime Control Act of 1970, Pub. L. No. 91-451, 84 Stat. 922.

2. *See Russello v. United States*, 464 U.S. 16, 28 (1983) (unanimous Court found that the legislative history indicated that organized crime derived its economic power from illegal profits, and that Congress intended for these illegal profits to fall within the purview of RICO forfeiture).

3. 18 U.S.C. §§ 1961-1968 (1988).

4. 21 U.S.C. § 848 (1988).

5. *See infra* notes 24-29 and accompanying text.

6. The ability of an accused to simply funnel his money or assets to third parties exemplifies the incompleteness of the 1970 Act. *See infra* notes 29-30 and accompanying text.

7. *See infra* notes 30-40 and accompanying text.

Forfeiture Act of 1984⁸ (CFA) was the vehicle designed to effect the original legislative spirit of the 1970 Act.⁹ The CFA employs expansive language to determine what is forfeitable: "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result"¹⁰ of a conviction. A question arises, however, whether defense attorneys' fees are included within the CFA's expansive phraseology concerning property subject to forfeiture.¹¹ Assuming, *arguendo*, that attorneys' fees are forfeitable, the essential inquiry becomes whether such a result violates the fifth or the sixth amendments to the United States Constitution.

The United States Supreme Court squarely addressed this issue in *United States v. Monsanto*.¹² The Court held that a defendant charged with violations of the RICO and CCE statutes may not pay his defense attorneys' fees from funds identified by the government to have been linked to that alleged criminal activity.¹³ It is the contention of this Note that, notwithstanding this recent five-to-four decision, permitting forfeiture of legitimate attorneys' fees under the CFA violates basic constitutional safeguards.¹⁴

Part II of this Note presents a historical development of forfeiture law and its current application in the CFA context. Part III sets forth a statement of the facts surrounding defendant Peter Monsanto's claims. It briefly examines the Second Circuit opinion and then focuses on the Supreme Court decision. Part IV analyzes the arguments favoring an exemption of attorneys' fees from the grasp of statutory forfeiture. Part V concludes that the CFA should be revised to provide for a postindictment, pretrial hearing and an increase in the government's burden of proof so that the accused is afforded a fair and adequate trial. This revision would provide a more balanced distribution of representational opportunities.

8. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040 (codified as added and amended at 18 U.S.C. § 1963 and 21 U.S.C. § 853 (1988)).

9. 21 U.S.C. § 853(a)(1) (1988); 18 U.S.C. § 1963(a) (1988).

10. *Id.*

11. See *infra* notes 31 & 37-40 and accompanying text.

12. 109 S. Ct. 2657 (1989).

13. *Id.*

14. *Id.* at 2569 (Blackmun, J., dissenting).

II. Background

A. *The Origin of Forfeiture*

The concept of forfeiture is not a recent phenomenon; society's redistribution measures for wrongful acts are of biblical origin.¹⁵ There are two types of forfeiture that have been identified: civil and criminal.¹⁶ Civil forfeiture operates in rem, or against the property, while criminal forfeiture operates in personam, or against the person.¹⁷ Civil forfeiture has been used as a penalty against the property regardless of the owner's culpability¹⁸ because the property itself is deemed the wrongdoer.¹⁹ Thus, civil forfeiture is applied without great restrictions as a means to remedy a wrong.²⁰ In comparison, prior to the passage of RICO and CCE in 1970, criminal forfeiture had been effectuated only in rare instances.²¹ For example, criminal forfeiture had been employed as punishment against the person, but only as a consequence of conviction.²² In fact, only once from 1790 to 1970 did congressional enactment permit such forfeiture.²³

15. The Old Testament makes the following reference to forfeiture: "if an ox gores a man or a woman to death, then the ox shall surely be stoned . . ." *Exodus* 21:28 (The Jerusalem Bible).

16. Stone, *Criminal Forfeiture of Attorneys' Fees Under RICO & CCE*, 2 J.L. ETHICS & PUB. POL'Y 541, 546 (1986).

17. *Id.* at 546-47.

18. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974); *United States v. Sandini*, 816 F.2d 869, 872-73 (3d Cir. 1987).

19. *Pearson*, 416 U.S. at 683-86. This is illustrated by the forfeiture of a ship engaged in piratical conduct where the innocence of the ship's owner was fully established. *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 238 (1844). The vessel was treated as the offender without regard to the owner's conduct as it was the only adequate means of suppressing the offense and insuring an indemnity to the injured party. *Pearson*, 416 U.S. at 684 (citing *Brig Malek Adhel*, 43 U.S. (2 How.) at 233). See also Stone, *supra* note 16, at 549-51.

20. See Stone, *supra* note 16, at 551.

21. An in personam action is one which seeks judgment against a person as distinguished from a judgment against property. The government's right to property attaches only "by the conviction of the offender." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).

22. The constitutionality of the confiscatory statutes which permitted recovery of the life estates of Confederate soldiers was upheld by the Supreme Court in *Bigelow v. Forest*, 76 U.S. (9 Wall.) 339 (1869) and *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870).

23. Confiscation Act, Ch. 195, 12 Stat. 589 (1862). Much of the traditional hostility towards criminal forfeiture in the United States was due to the frequent employment of the practice in England. The Framers of the Constitution demonstrated their repudiation of this harsh English tradition by rejecting the notion of forfeiture for several possi-

Hence, the principle underlying criminal forfeiture is clearly punishment as compared with the remedial nature of its civil counterpart.

B. *Forfeiture Incorporated into the RICO and CCE Statutes*

Not until 1970 was criminal forfeiture reintroduced into the laws of the United States through its integration into the RICO and CCE codifications.²⁴ The purpose of these statutes was to counter the pervasive effect that organized crime as an economic enterprise was having on the national economy.²⁵ Unlike traditional criminal forfeiture, RICO and CCE forfeitures do not reach all of a defendant's property, rather they affect only that property derived from his interest in the illicit enterprise.²⁶ RICO and CCE provide for the imposition of strict fines and sentences for violations, as well as for a mandatory forfeiture of a defendant's property acquired through illegitimate activity.²⁷ These provisions were created to further the governmental interest of combating crime by depriving criminal enterprises of their economic bases.²⁸

The original RICO and CCE forfeiture provisions were only

ble reasons. See Note, *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, 666 n.20 (1987). In particular, controversy over the effect of forfeiture on the defendant's family and heirs resulted in the provision that "no Attainer of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. CONST. art. III, § 3. The first Congress prohibited forfeiture of estate as a criminal punishment upon conviction. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117. Thus, forfeiture with an in personam application must be carefully assessed. *United States v. Martino*, 681 F.2d 952, 962 (5th Cir. 1982)(Politz, J., dissenting).

24. See 18 U.S.C. § 1963 (1988); 21 U.S.C. § 848 (1988). See also *supra* notes 21-23 and accompanying text for a discussion on the traditional doctrine of criminal forfeiture.

25. *Russello v. United States*, 464 U.S. 16, 26-27 (1983).

26. See *United States v. Rogers*, 602 F. Supp. 1332, 1341 (D. Colo. 1985) (interest involved enveloped the direct and indirect proceeds of racketeering).

27. 18 U.S.C. § 1963(a) (1988) (fines or imprisonment of not more than 20 years or both); 21 U.S.C. § 848(a) (1988)("[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years . . . up to life imprisonment, to a fine . . . [of] \$2,000,000 . . . and to the forfeiture prescribed in § 853 . . .").

28. See *United States v. Turkette*, 452 U.S. 576, 588-89 (1981). See also SENATE COMM. ON THE JUDICIARY, REPORT ON COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374 [hereinafter SENATE REPORT].

meagerly successful due to a defendant's ability to transfer assets prior to conviction, thereby avoiding forfeiture upon conviction.²⁹ Congress subsequently amended these forfeiture provisions by enacting the Comprehensive Forfeiture Act of 1984.³⁰

C. *The Extension of Forfeiture Under the Comprehensive Forfeiture Act of 1984*

The CFA expanded the scope of RICO and CCE regarding the type of property that is subject to forfeiture, the activity that could result in forfeiture, and the property that the government could freeze pursuant to a restraining order.³¹ The amend-

29. 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, 769 (1989).

30. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040 (codified at 18 U.S.C. § 1963 and 21 U.S.C. § 853 (1988)).

31. See 21 U.S.C. § 853 (1988) which provides:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law —

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; . . .

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section 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 (n) of this section 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.

. . . .

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsec-

ments were designed to “eliminate the statutory limitations and

tion (a) of this section for forfeiture under this section —(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that the failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or an indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be admissible under the Federal Rules of Evidence.

....

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

....

(o) Construction

The provisions of this section shall be liberally construed to effectuate its re-

ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies.”³² To accomplish this, Congress borrowed a fiction of property law, the relation-back doctrine. This doctrine provides that property becomes tainted, and thereby forfeitable, at the time of its illegal use.³³ Pursuant to the statutory language of the CFA, the government’s interest in the identified property vests when the illegal activity commences.³⁴ Therefore, the government may seize property that was possessed by the defendant dating back to the time of the offense, not merely to the time of conviction, including property transferred prior to conviction.³⁵ This prevents RICO defendants from averting forfeiture by liquidating and dispersing their assets prior to a conviction.³⁶ Under this interpretation, the relation-back doctrine also allows the government to seize fees paid to a defense attorney prior to a conviction because the government’s claim in the defendant’s property predates the transfer of the property to the attorney.

The CFA currently provides two avenues for an interested third party, such as an attorney, to assert a valid claim to the forfeitable property. First, an attorney may establish at a pre-trial hearing, by a preponderance of the evidence, that he had a legal interest in the property superior to the interest of the accused at the time of the actions giving rise to forfeiture.³⁷ If he successfully meets his evidentiary burden, an attorney may retain any property legitimately transferred to him that would otherwise be subject to a governmental claim under the CFA.³⁸

medial purposes.

Id.

32. SENATE REPORT, *supra* note 28, at 192.

33. Cloud, *Forfeiting Defense Attorneys’ Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 19 (“The relation back doctrine common to civil forfeiture proceedings provides that the target property becomes tainted, and thus forfeitable, at the time of its illegal use.”).

34. 21 U.S.C. § 853(c) (1988). See Note, *Against Forfeiture of Attorneys’ Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 128 (1986) (authored by Lisa F. Rackner) (“The government’s interest relates back . . . and takes precedence over the interests subsequently obtained by third parties.”). See also Cloud, *supra* note 33, at 19.

35. 21 U.S.C. § 853(c) (1988).

36. See Note, *supra* note 34, at 129.

37. 18 U.S.C. § 1963(m) (1988); 21 U.S.C. § 853(c) (1988).

38. *Id.*

Alternatively, an attorney may prevail by demonstrating, under the same preponderance standard, that he was a "bona fide purchaser for value" of the property and was, at the time of purchase, "reasonably without cause to believe" that the property was subject to forfeiture.³⁹ Thus, assuming the accused had retained an attorney after committing the alleged offense, the attorney must advance evidence to show that he relied upon facts gleaned from the defendant and was unaware of the forfeitability of the assets.⁴⁰

D. *Judicial Interpretation of the Comprehensive Forfeiture Act of 1984*

The federal courts have vacillated⁴¹ on the question of whether the CFA must be read to include attorneys' fees, as the government contends, or to exclude them on constitutional grounds,⁴² as many defendants urge. The first court to address

39. 21 U.S.C. § 853(b) (1988).

40. If the attorney prevails, the court will amend the forfeiture order accordingly. Arguably, the timing question regarding when the attorney learned of the assets origins will be difficult to prove. Moreover, it presents ethical considerations that may make substantiating this premise unwise. The "reasonably without cause to believe" standard may conflict with ethical guidelines that an attorney must follow. 18 U.S.C. § 1963 (l)(6) (1988); 21 U.S.C. § 853(n)(6) (1988). See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1987) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(A), EC 5-21 (1982). An attorney may not wish to fully develop the factual basis of a case if he learns or is placed on notice that establishing certain facts may subject his fee to governmental forfeiture. See *infra* notes 212-16 and accompanying text.

41. Compare *In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 641 (4th Cir. 1988) (en banc), *aff'd*, 109 S. Ct. 2646 (1989) ("legislative history of the CFA reveals no congressional intent that would require exemption of attorneys' fees from the reach of the statute."); *United States v. Nichols*, 841 F.2d 1485 (1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989) (forfeiture statute did not exempt attorneys' fees); *Payden v. United States*, 605 F. Supp. 839, 849 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) (fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises); *United States v. Bailey*, 666 F. Supp. 1275, 1277 (E.D. Ark. 1987) (the plain language of section 881 includes attorneys' fees within its list of property subject to forfeiture); and *United States v. Stein*, 690 F. Supp. 767, 771 (E.D. Wis. 1988) (the unambiguous language of the statute does not provide an exemption of attorneys' fees from forfeiture); *with United States v. Ianniello*, 644 F. Supp. 452, 456 (S.D.N.Y. 1985) (CFA was never intended to include attorneys' fees paid for services rendered); and *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985) (attorneys' fees legitimately paid for services rendered are not subject to forfeiture).

42. It may be suggested that Congress did intend to include attorneys' fees in the provision, although not explicitly set forth, because most of the circuit court opinions

the attorney fee forfeiture issue under the CFA was the District Court of Colorado in *United States v. Rogers*.⁴³ The *Rogers* court concluded that the funds an attorney receives in return for services legitimately rendered, and not part of a sham or artifice to avoid forfeiture, were not subject to the statutory forfeiture provisions.⁴⁴

In *United States v. Ianniello*,⁴⁵ the court for the Southern District of New York concluded that the hastily enacted CFA did not intend to subject legitimately earned legal fees to forfeiture.⁴⁶ Similarly, in *United States v. Badalamenti*,⁴⁷ the same

have harped on constitutional concerns, rather than on statutory interpretation. See, e.g., *Caplin & Drysdale*, 837 F.2d at 640-48; *Nichols*, 841 F.2d at 1496-1505. The concurring opinions of Chief Judge Feinberg and Judge Oakes in *Monsanto* examined the sixth amendment infringement. *United States v. Monsanto*, 852 F.2d 1400, 1402-05 (2d Cir. 1988). See also *United States v. Bissel*, 866 F.2d 1343 (11th Cir. 1989); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Kiser*, 853 F.2d 1445 (8th Cir. 1988). Only Judge Winter's concurring opinion specifically articulated an argument regarding the statutory interpretation of the CFA to exempt from forfeiture the fees of defense attorneys and thereby circumvented the constitutional questions concerning fifth and sixth amendment violations. *Id.* at 1405-11. *Monsanto*, 852 F.2d at 1405-11 (Winter, J., concurring). The legislative history, coupled with the plain language of the statute, and the fact that exceptions were made available to third parties to make claims against the forfeitable property, indicates the expansive nature that the amendments were to encompass. It appears that Congress intended not to resolve the conflict through this legislation, but to leave the resolution to the courts. *Payden v. United States*, (*In re Grand Jury Subpoena Duces Tecum*) 605 F. Supp. 839, 850 n.14 (S.D.N.Y. 1985) *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). As a consequence of the precipitous enactment of the statute, it can be inferred that Congress was aware of the constitutional implications and nevertheless promulgated the amendment. Irrespective of what Congress intended to articulate in its hastily enacted amendment, the real question reduces to whether this statute, as applied to attorneys' fees, is constitutional. *United States v. Nichols*, 654 F. Supp. 1541, 1556 (D. Utah 1987), *rev'd*, 841 F.2d 1485 (1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989).

43. 602 F. Supp. 1332 (D. Colo. 1985).

44. *Id.* at 1348. Four years prior to *Rogers*, the Third Circuit interpreted the "un-amended" RICO statute to find that where the transfer of allegedly tainted assets was clearly a sham, the transferred property could be subject to forfeiture. *United States v. Long*, 654 F.2d 911 (3d Cir. 1981). In *Payden v. United States*, the court suggested that to exempt attorneys' fees from forfeiture would make lawyers mere conduits for the laundering of racketeering profits. *Payden v. United States*, 605 F. Supp. at 849 n.14.

45. 644 F. Supp. 452 (S.D.N.Y. 1985).

46. *Id.* at 455-56 (defendants charged with a 29 count violation of RICO, having had their assets frozen pursuant to an ex parte restraining order sought and obtained by the government, were not afforded a hearing to contest the government's right to restrain those assets and therefore were permitted access to them in order to pay for the necessities of life).

47. 614 F. Supp. 194 (S.D.N.Y. 1985).

district court suggested that the CFA's forfeiture provision may only reach funds that the defendant intended to pay over to the attorney; however, it may not be used to reach fees already paid to the attorney in consideration of the defendant's representation in a RICO prosecution.⁴⁸

Although early decisions in the district courts favored the exemption from forfeiture of attorneys' fees for legitimately rendered services,⁴⁹ later district courts have decided otherwise.⁵⁰ In addition, several circuit courts have concluded that all attorneys' fees must be subject to forfeiture simply from a plain reading of the statute.⁵¹ In *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*,⁵² the en banc majority noted that the CFA

48. *Id.* at 198 (government may not rely on statutory forfeiture to support a subpoena duces tecum served upon a defense attorney as evidence to link his client to narcotics trafficking).

49. See *United States v. Truglio*, 660 F. Supp. 103 (N.D.W. Va. 1987) (defendant's preconviction assignment of monies to counsel for legitimate attorneys' fees were not subject to forfeiture); *United States v. Madeoy*, No. 86-0377 (D.D.C. Oct. 2, 1987) (WESTLAW, Allfeds library, 1987 WL 32) (where transaction was neither a sham nor fraudulent, and where there were insufficient personal funds to retain counsel, release from forfeiture order to pay trial level costs is appropriate); *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986) (court can order payment of counsel fees to court-appointed counsel from money that had been ordered forfeited); *United States v. Estevez*, 645 F. Supp. 869 (E.D. Wis. 1986), *cert. denied*, 109 S. Ct. 3221 (1989) (court permitted \$40,000 to be excluded from forfeiture to be applied to defense attorneys' fees); *cf. United States v. Chinn*, 687 F. Supp. 125 (S.D.N.Y. 1988) (defendant's interest in assets obtained prior to the period covered by the indictment is not subject to forfeiture under § 1963). See also *supra* notes 44-48 and accompanying text.

50. See *United States v. Stein*, 690 F. Supp. 767 (E.D. Wis. 1988) (sixth amendment does not provide a defendant with the right to demand that crime-related assets be kept available to pay for privately retained counsel); *United States v. Haro*, 685 F. Supp. 1468, 1472-74 (E.D. Wis. 1988) (legislative history of § 853 reveals Congress' belief that forfeiture would provide an effective weapon against the drug trade as it would combat organized activity through the RICO statute). See also *Payden v. United States (In re Grand Jury Subpoena Duces Tecum)*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) (subpoena seeking information regarding potential forfeitable assets did not violate either defendant's fifth or sixth amendment rights).

51. See, e.g., *United States v. Nichols*, 841 F.2d 1485, 1492-96 (1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989). The *Nichols* court held that "Congress did not specifically decide that attorneys' fees should be exempt from forfeiture, but that the broad purposes of the amendments support forfeiture in as many instances as permissible." *Id.* at 1496; *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 641 (4th Cir. 1988) (en banc), *aff'd*, 109 S. Ct. 2646 (1989) ("legislative history of the CFA reveals no congressional intent that would require exemption of the attorneys' fees from the reach of the statute"). See also *supra* note 31 for statutory language.

52. 837 F.2d 637.

language is "unmistakenly clear and so plainly reaches property used or intended to be used for attorneys' fees that the inquiry should end without resort to legislative history."⁵³ The *Caplin & Drysdale* court also indicated that although some courts have applied the CFA only to sham transfers,⁵⁴ this parsed application would strip the bona fide purchaser requirement of any substantive meaning and effectively eliminate it from the statute.⁵⁵

Similarly, in *United States v. Nichols*,⁵⁶ the majority contended that the language of the CFA did not exempt any attorneys' fees from forfeiture.⁵⁷ The court found the language to be clear: assets subject to forfeiture included any property obtained as a result of the crime. Moreover, attorneys' fees were to be treated no differently than other assets.⁵⁸ The only limit to this confiscatory power relates to the nexus of the property to the illegal activity.⁵⁹ Thus, how the defendant plans to use the property is irrelevant to a forfeiture decision.⁶⁰

The *Nichols* court addressed the sham transfer concern by focusing on two statements in the legislative history.⁶¹ This legislative history was construed to deny relief to participants who engage in sham transfers of property and to prevent defendants from using third parties as conduits to avoid the forfeiture of

53. *Caplin & Drysdale*, 837 F.2d at 641 (citing *United States v. Harvey*, 814 F.2d 905, 913-18 (1986)), *rev'd en banc sub nom. In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989)). The legislative history may not be used to create an ambiguity where none exists; thus, the words of the statute are usually the best indication of the legislative intent. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

54. *See, e.g., United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

55. *Caplin & Drysdale*, 837 F.2d at 642.

56. 841 F.2d 1485 (1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989).

57. *Id.* at 1496.

58. *Id.*

59. *Id.* at 1492.

60. *Id.* The CFA provisions "define forfeitable property without regard to its intended or actual use, whether for payment to attorneys or for other uses." *Id.*

61. *Id.* at 1493. The first statement is: "The provision . . . 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.* (quoting SENATE REPORT, *supra* note 28, at 209 n.47).

The second statement is: "The purpose of the provision is to permit the voiding of certain preconviction transfers and so close a potential loophole . . . whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms length' transactions." *Id.* (quoting SENATE REPORT, *supra* note 28, at 200-01).

that property.⁶² Absent explicit and affirmative commands to the contrary, the statutory language subjecting all property which derived from illegal activity to forfeiture should be followed.⁶³ The *Caplin & Drysdale* and *Nichols* appellate decisions, which reversed their earlier circuit court panel and district court holdings, respectively, have strengthened the government's position in its attempt to prevent RICO and CCE defendants from transferring illegally obtained moneys to their attorneys and thereby circumventing forfeiture.⁶⁴

E. *Constitutional Considerations Regarding the Application of the Comprehensive Forfeiture Act of 1984*

Many of the federal courts that have confronted the attorney fee forfeiture issue have concluded that the CFA must be interpreted in a manner that will avoid constitutional friction. These courts have, therefore, found that payments made to attorneys are exempt from forfeiture through a restrictive reading of the statute.⁶⁵ A contrary interpretation, it is suggested, would infringe upon a defendant's sixth amendment right to retain counsel and also deprive him of the fifth amendment right to a fundamentally fair trial.⁶⁶

Although early decisions held that fees must be exempt from forfeiture to enable the defendant to obtain a fundamentally fair trial, the more recent trend in the circuit courts has been toward allowing the restraint of identified assets and their subsequent forfeiture to stand.⁶⁷ For instance, the *Caplin &*

62. *Nichols*, 841 F.2d at 1494.

63. *Id.*

64. See *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988).

65. See *supra* notes 44-48 and accompanying text.

66. See, e.g., *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985). The court concluded that the CFA would violate the sixth amendment by denying the defendant the right to be assisted by counsel in a situation where he could afford to retain counsel. Thus, the qualified right to obtain counsel of choice cannot be deprived absent a compelling need to assure "prompt, effective and efficient administration of justice." *Id.* at 458 (quoting *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979)). The forfeiture of fees paid to a criminal defense attorney for legitimately rendered legal services would result in an abridgment of such a right to counsel. *Id.* See also *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985).

67. See *United States v. Bissel*, 866 F.2d 1343 (11th Cir. 1989); *United States v.*

*Drysdale*⁶⁸ court found attorneys' fees to be forfeitable since their seizure posed no threat to the absolute right to representation by counsel.⁶⁹ The court observed that the defendant's sixth amendment right to counsel of choice is not absolute and must yield to countervailing government concerns.⁷⁰

The Tenth Circuit similarly held in *United States v. Nichols*⁷¹ that failure to exempt attorneys' fees from the forfeiture of the CFA provisions does not deny a defendant the right to counsel since the defendant may use untainted assets to obtain counsel or may have counsel appointed by the court if he is indigent.⁷² The *Nichols* majority stated that the government does not deny a defendant's right to counsel of choice when it acts pursuant to a statutory procedure to protect its interest in assets

Moya-Gomez, 860 F.2d 706 (7th Cir. 1989); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989); *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989). *But see United States v. Kiser*, 853 F.2d 1445 (8th Cir. 1988); *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987).

68. 837 F.2d 637.

69. *Id.* at 643. The *Nichols* court suggested that the presumption of innocence did not forbid interference with a defendant's property prior to a guilty verdict beyond a reasonable doubt. *Id.* Forfeiture, the court continued, was problematic in that it can meddle with a defendant's property that is merely alleged to be illicit. *Id.* However, the majority explained that "just as the government may restrain liberty to prevent the flight of a suspect, it may restrain property to prevent the flight of forfeitable assets." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 534 (1979)). The majority stated that these defendants may be required to rely on appointed counsel if they do not possess sufficient uncontested funds to hire a private defense attorney. *Id.* The court suggested that if this were not so, the government would be unable to prosecute defendants who possessed no funds for fear of violating the defendants' constitutional rights. *Id.* at 646-47.

70. *Id.* at 645-46.

71. 841 F.2d 1485 (10th Cir. 1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989).

72. *Id.* Specifically, the *Nichols* court balanced various factors and hardships, "including the government's interest in the efficient administration of the trial and the defendant's interest in preserving chosen counsel" in determining whether a forfeiture order was proper. *Id.* at 1504. The majority advanced the theory that as long as the forfeiture order is not issued in an arbitrary manner, a court may restrict a defendant's choice of counsel if permitting the representation by a particular attorney would "adversely affect an important public interest." *Id.* (citing *United States v. Phillips*, 699 F.2d 798, 801-02 (6th Cir. 1983)). *See also Ford v. Israel*, 701 F.2d 689, 692-93 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983). The *Nichols* court stated that the standard of arbitrariness is merely the threshold inquiry and then concluded that reliance on a grand jury indictment to issue a restraining order does not amount to an arbitrary act. *Nichols*, 841 F.2d at 1504-05. *See also United States v. Musson*, 802 F.2d 384, 386 (10th Cir. 1986).

possessed by the accused.⁷³

In *United States v. Friedman*,⁷⁴ the Court of Appeals for the District of Columbia Circuit found, in a per curiam opinion, that the defendant was not entitled to the release of forfeited assets to allow for the retention of counsel of choice for the anticipated appeal from the judgment of conviction.⁷⁵ The court held that the right to counsel of choice is qualified and not absolute⁷⁶ and emphasized that upon his conviction, the assets which defendant sought to recover were no longer his own.⁷⁷

73. *Nichols*, 841 F.2d at 1494. Despite the dissenting opinion of Circuit Judge Logan that warned against becoming "carried away by . . . [the] emotional revulsion" to these crimes when deciding constitutional issues, application for a rehearing en banc was denied. *Id.* at 1509 (Logan, J., dissenting).

74. 849 F.2d 1488 (D.C. Cir. 1988).

75. Friedman did not rely on a statutory interpretation to allow for the release of assets, nor did he rely on the validity of the forfeiture order. Rather, the defendant challenged the constitutionality of the forfeiture provision regarding the infringement of his right to counsel. *Id.* at 1489.

76. *Id.* at 1490. Criminal defendants who are financially able to retain counsel merely have a qualified right to do so. *Wheat v. United States*, 486 U.S. 153, 161 (1988). This right is circumscribed by the advocate being a member of the bar, affordable to his client, willing to accept the representation of the defendant, and not having a previous or ongoing relationship with an opposing party. *Id.*

77. *Id.* at 1491. The court qualified its holding by stating that it expressed no view regarding cases arising from a defendant seeking to free restrained assets prior to a conviction pursuant to the CFA. *Id.* In such cases "it is not entirely clear who owns the property." *Id.*

Moreover, in *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) the Court of Appeals for the Seventh Circuit affirmed in part and vacated and remanded in part while finding that defendants' sixth amendment right to counsel was not violated by the issuance of a restraining order freezing their tainted assets. *Id.* at 724-25. However, to the extent that such an order interfered with the ability to retain counsel and the Justice Department failed to demonstrate the basis for its assertion relating to forfeitable assets coupled with the court not releasing sufficient funds to pay for counsel, defendants' fifth amendment due process arguments were well received due to the potential for prosecutorial abuse. *Id.* at 725-30. The court stressed, however, the "very limited degree to which [they found] the present statutory scheme constitutionally infirm." *Id.* at 730. Only where a defendant presents a bona fide need to utilize assets subject to the restraining order to maintain their defense to accused offenses will assets be released for that specific purpose. *Id.*

In the latest case prior to the Supreme Court's pronouncement in this arena, the Eleventh Circuit announced in *United States v. Bissel*, 866 F.2d 1343 (11th Cir. 1989), that the pre-trial restraint of all of the defendant's assets upon the finding by the district court judge of a probable cause to believe that the assets had been derived from drug trafficking did not violate the defendant's fifth and sixth amendment rights. *Id.* at 1351, 1356.

In *United States v. Thier*,⁷⁸ the Fifth Circuit Court of Appeals never reached the issue of the constitutionality of attorney fee forfeiture, but held that the procedures employed when issuing a restraining order must comport with minimum due process requirements.⁷⁹ The fifth amendment right to due process of law demands that notice and an adversarial hearing be provided before depriving an individual of the right to use these assets in securing an attorney to defend him against criminal charges.⁸⁰

78. 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987).

79. *Id.* at 1467. The majority cited a Ninth Circuit decision which held the CCE to be "unconstitutional on its face because Congress failed to provide for a hearing on a restraining order before trial or conviction." *Id.* (quoting *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985)). The *Crozier* court found that Rule 65 of the Federal Rules of Civil Procedure controlled the restraining order in the absence of valid procedural guidelines. *Id.* at 1382. Thus, without notice and a meaningful opportunity to be heard at an adversarial hearing, the deprivation of property pursuant to the CFA violated defendant's fifth amendment right to due process of the law. *Id.* at 1383-84.

80. *Thier*, 801 F.2d at 1468. The court found that the statute "does not on its face or by necessary implication bar minimum due process protections." *Id.* Congress intended the indictment to be sufficient notice of the government's plan to seek forfeiture. However, the language of Section 853 does not expressly or impliedly negate the application of Rule 65 of the Federal Rules of Civil Procedure, which applies to the issuance of all ex parte restraining orders by the federal courts of the United States. The court balanced the defendant's interest in having access to funds to pay ordinary and necessary living expenses and attorneys' fees against the government's interest in preventing the depletion of potentially forfeitable assets. *Id.* at 1474-75. Unless the record clearly indicates the government's compelling need to seek forfeiture, the balance of hardships must shift substantially when the government desires to freeze assets needed to provide counsel and sustenance to himself and his family. *Id.* at 1476 (Rubin, J., concurring). Attorneys' knowledge of charges against their clients does not ipso facto disqualify their claim as bona fide purchasers without notice of the alleged origins of the property. *Id.*

In *United States v. Jones*, 837 F.2d 1332, *reh'g en banc granted*, 844 F.2d 215 (1988), *rev'd*, 877 F.2d 341 (5th Cir. 1989) (the Fifth Circuit reversed as a result of *Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989), and *United States v. Monsanto*, 109 S.Ct. 2657 (1989) without reaching the merits, the Fifth Circuit reaffirmed the principle it announced in *Thier*. The first *Jones* court followed its earlier ruling in *Thier* to find that neither a plain reading of the statute nor an examination of the legislative history ipso facto disqualifies the attorney's claim as a bona fide purchaser for services rendered. *Jones*, 837 F.2d at 1334.

The Eighth Circuit found, in *United States v. Kiser*, 853 F.2d 1445 (8th Cir. 1988), *rev'd*, 890 F.2d 82, 84 (8th Cir. 1989) (the Eighth Circuit reversed as a result of *Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989), and *United States v. Monsanto*, 109 S. Ct. 2657 (1989) without reaching the merits) that where the seizure warrants were issued two months prior to the actual arrest, the Justice Department had offended the defendant's fifth amendment right to due process and his sixth amendment right to counsel. 853 F.2d at 1449. The court found that depriving the defendant of the ability to use his assets to secure counsel solely on the basis of the government's allegations and a magistrate's ex parte finding of probable cause to believe his assets forfeitable compromised

Although many of the circuit courts have held that attorney fee forfeiture is permissible,⁸¹ a fragmented Second Circuit adopted an opposite view.⁸² In addition, the decisions in the circuit courts favoring forfeiture have been closely split. This dissension within each of the circuit courts made the question ripe for Supreme Court analysis. The Supreme Court chose to address the issue in the case of *United States v. Monsanto*.⁸³

III. *United States v. Monsanto*

A. *Factual History*

On July 8, 1987, Peter Monsanto was charged with eight counts of violating the RICO and CCE statutes by allegedly directing a heroin distribution enterprise.⁸⁴ In its federal indictment, the government identified the property which was subject to the forfeiture provision of the CFA: a home in Mount Vernon, New York worth \$335,000; a cooperative apartment in Bronx, New York, worth \$30,000; and \$35,000 in cash.⁸⁵ A restraining order was entered immediately after the indictment.⁸⁶ That order prevented Monsanto from transferring to a third party or encumbering any of the assets that were allegedly linked to criminal activities.⁸⁷

On August 21, 1987, defense counsel filed a motion to vacate or modify the restraining order to permit Monsanto to use the

his constitutional guarantees. *Id.* at 1450. The procedural posture was, however, unlike those of other appellate cases which have considered the validity of the forfeiture orders available under the CFA. *Id.* at 1448. *Kiser* dealt with the particular application of the statute, not with its facial constitutionality, whereas most cases have surfaced after the government had granted or denied a restraining order pursuant to 21 U.S.C. § 853(e) which prevented the defendant from disposing of the allegedly forfeitable property. *Id.*

81. See *supra* notes 67-80 and accompanying text.

82. *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), *rev'd*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2657 (1989).

83. 109 S. Ct. 363 (1989). See *infra* notes 84-98 and 127-195 and accompanying text.

84. *United States v. Monsanto*, 836 F.2d 74, 75-76 (2d Cir. 1987), *rev'd*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2657 (1989).

85. *Id.* at 76.

86. *Id.*

87. *Id.* at 75-76. Even with Criminal Justice Act (CJA) level compensation, none of the attorneys contacted by Monsanto was interested in representing him. *Id.* at 77. See 18 U.S.C. §3006A(d) (1988).

restrained assets to retain private trial counsel, and to exempt legal fees paid to counsel from post-trial forfeiture.⁸⁸ The district court judge refused to grant the motion, but certified it for immediate review by the Court of Appeals for the Second Circuit.⁸⁹ The circuit court panel rendered its decision on December 21, 1987, refusing to modify the order and finding that legitimate attorneys' fees were not exempt from the statutory language.⁹⁰ The court contended, however, that forfeitable assets could be invaded for the purposes of paying attorneys' fees at the rates prescribed by the Criminal Justice Act (CJA).⁹¹ Further, the court found that an insufficient opportunity for an adversarial hearing existed.⁹² Thus, the court held that without such notice and the opportunity to contest the restraint of assets, the restraining order did not comport with the defendant's fifth amendment right to due process of law.⁹³ The panel remanded the case to the district court to establish a hearing procedure where the defendant would have an opportunity to contest the government's contention that the property was forfeitable.⁹⁴

An adversarial hearing was subsequently held, and the assets were deemed subject to forfeiture.⁹⁵ Simultaneous with this hearing, defendant appealed to the court for a rehearing en banc.⁹⁶ On March 30, 1988, the Second Circuit, sitting en banc, heard oral arguments from the defendant, the government, and several amici curiae.⁹⁷ The full court took the matter under ad-

88. *Monsanto*, 836 F.2d at 76.

89. *Id.* at 76-77.

90. *Id.* at 85.

91. 18 U.S.C. § 3006A(d) (1988). The rates prescribed by the CJA are \$60.00 per hour, or \$75.00 per hour under justifiable circumstances, for in-court time, and \$40.00 per hour otherwise up to a maximum of \$3,000. *Id.*

92. *Monsanto*, 836 F.2d at 83-85.

93. *Id.* at 85.

94. *Id.*

95. *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2657 (1989).

96. *Id.* at 1401-02.

97. *Id.* at 1400-01. Briefs were filed on appellant's behalf by the New York Council of Defense Lawyers, New York State Association of Criminal Defense Lawyers, New York Criminal Bar Association, Association of the Bar of the City of New York, the Committee on Criminal Advocacy, the Committee on Criminal Law, the New York City Deputy Attorney General for Medicaid Fraud Control, the National Association of Crim-

visement and issued its decision on July 30, 1988.⁹⁸

B. *The Second Circuit Opinion*

The en banc decision of the Second Circuit⁹⁹ discusses many of the issues addressed by the other circuits and represents, in effect, a microcosm of the views of the remaining circuits. Indeed, the division among the *Monsanto* judges, which resulted in a varied combination of votes in four concurring opinions, is indicative of the confusion and disagreement regarding attorney fee forfeiture.

1. *Statutory Interpretation*

Judge Winter, joined by Judges Meskill and Newman, focused on the permissiveness of the statutory language.¹⁰⁰ In an effort to rescue the CFA from constitutional scrutiny and its possible invalidation, Judge Winter argued that the permissive word "may" rather than the mandatory term "shall" vests district court judges with great discretionary power.¹⁰¹ He stated that the exercise of such discretion is to be performed with reference to the traditional equitable principles that balance the relative hardships to the parties. He further argued that estab-

inal Defense Lawyers, the National Network for the Right to Counsel and the New York Civil Liberties Union. *Id.*

98. *Id.*

99. 852 F.2d 1400. In addition to the Second Circuit opinions discussed below, Judge Miner was joined by Judge Altimari in a short concurring opinion which reasoned that the restraining order should be vacated in order to permit Monsanto access to the assets restrained by the government's order to the extent necessary to pay legitimate attorneys' fees for his defense. *Id.* at 1411-12 (Miner, J., concurring in part and dissenting in part). In an opinion authored by Judge Pierce, Judge Cardamone joined in finding that the statute authorized postindictment restraint of assets that would otherwise be utilized for retaining counsel. *Id.* at 1418 (Pierce, J., concurring in part and dissenting in part). Judge Pratt drafted a separate opinion in which he argued that the predominant function of the sixth amendment is to guarantee an effective advocate for a criminal defendant, not to ensure that the defendant will be represented by the lawyer he prefers. *Id.* at 1420 (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988)) (Pratt, J., concurring in part and dissenting in part).

100. See *supra* note 31 and accompanying text.

101. *Monsanto*, 852 F.2d at 1405 (Winter, J., concurring) ("Because of the 'may' language and the lack of any evidence of congressional intent to the contrary, I read the Act to vest district courts with a discretionary power to restrain assets identified in an indictment as subject to forfeiture.").

lished canons of statutory interpretation favor the retention of a court's full equitable powers absent a clear statement by the legislature to effect a contrary purposeful result.¹⁰² Thus, in view of the many theories of statutory interpretation,¹⁰³ it is conceivable to declare the CFA to exempt defense attorneys' fees from forfeiture.

The *Monsanto* dissent, authored by Judge Mahoney attacked the rationale of the four concurrences by arguing that any transfer of property subject to a restraining order frustrates the statutory purpose¹⁰⁴ of preventing the dissipation of identified assets upon conviction.¹⁰⁵ In another dissenting opinion, Judge Cardamone urged that the permissive "may" in the statute¹⁰⁶ should be construed "sensibly to allow for certain invasions into otherwise restrainable assets."¹⁰⁷ This reading of the congressional purpose of criminal forfeiture coupled with the progressive goals of the RICO and CCE statutes,¹⁰⁸ Judge Maho-

102. *Id.* "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Id.* at 1406 (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 496, 503 (1836)). Judge Winter commented on the permissiveness of the statutory language and questioned why many courts have routinely authorized the most "draconian of restraints on a defendant's assets" without pondering the hardship it imposes. *Id.* at 1405 (Winter, J., concurring).

103. The well-recognized canon of construction concerning the rule of lenity in criminal proceedings warns that if the statute does not clearly outlaw private conduct, the private actor cannot be penalized; for the punishment deprives the defendant of his personal liberty and freedom. W. ESKRIDGE & P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 658 (1988). Additionally, where two possible interpretations of a statute exist, the statute must be construed in such a manner to avoid a constitutional friction. *Id.* at 676. *See also* *United States v. Turkette*, 452 U.S. 576, 580 (1981) (where the statutory language is unambiguous, that language must ordinarily be regarded as conclusive in absence of a clearly expressed legislative intent to the contrary).

104. *Monsanto*, 852 F.2d at 1413 (Mahoney, J., dissenting). The legislative history indicates that the 1984 amendments were "designed to enhance the use of [criminal] forfeiture . . . as a law enforcement tool" to effectuate the 1970 Act's objective. SENATE REPORT, *supra* note 28, at 191. The overall statutory purpose is to "preserve the availability of a defendant's assets for criminal forfeiture and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot [do, so in order to] avoid the economic impact." *Id.* at 196.

105. "The sole purpose of the bill's restraining order provision . . . is to preserve the . . . availability of the property pending disposition of the criminal case." SENATE REPORT, *supra* note 28, at 204.

106. 21 U.S.C. § 853(e)(1) (1988).

107. *Monsanto*, 852 F.2d at 1419 (Cardamone, J., dissenting).

108. The intent of the congressional draftsmen was to remove the economic foundations and incentives from enterprising criminal activities by the promulgation of the

ney argued, leads to the conclusion that the spirit of the CFA did not intend to provide an exemption for defense attorneys' fees.¹⁰⁹

2. *Constitutional Analysis*

In addition to the per curiam opinion, a plurality of the court grounded the decision in the sixth amendment right to counsel and ruled that Monsanto should be permitted access to the restrained assets to the extent necessary to pay legitimate attorneys' fees in connection with the criminal charges he confronted.¹¹⁰

a. *The Concurring Opinions*

Chief Judge Feinberg filed a concurring opinion which stated that the CFA forfeiture provisions were violative of the sixth amendment to the extent that they prevented RICO and CCE defendants from securing counsel of choice.¹¹¹ Further, he expressed a concern that the hearing which was envisioned by the original three member panel would not "overcome the constitutional infirmities."¹¹²

Chief Judge Feinberg maintained that the right to counsel of choice cannot be infringed absent a compelling governmental interest¹¹³ and that the interest in the instant case was not

CFA. *Russello v. United States*, 464 U.S. 16, 26-28 (1983).

109. *Monsanto*, 852 F.2d at 1415 (Mahoney, J., dissenting).

110. *Id.* at 1402 (Feinberg, C.J., concurring).

111. *Id.*

112. *Id.* The initial Second Circuit *Monsanto* opinion set in place a post-restraining order adversarial hearing to ascertain the status of the assets identified in the forfeiture-related restraining orders. This hearing was established in the same vein as Rule 65 of the Federal Rules of Civil Procedure hearing requirement. Where such a hearing is afforded, the continued restraining order does not conflict with the accused's constitutional right to due process of the law. *United States v. Monsanto*, 836 F.2d 76, 83 (2d Cir. 1987).

In the panel opinion, Judge Oakes observed the Supreme Court's resistance to the implementation of mini-trials and thus, cautioned the creation of this new procedural step. *Id.* (Oakes, J., dissenting). See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

113. *Monsanto*, 852 F.2d at 1402 (Feinberg, C.J., concurring). This sixth amendment guarantee is a fundamental right that is a key element in our criminal justice system. *Id.* However, the application of the CFA to defendants, like Monsanto, nearly destroys this security by depriving them of the funds to retain their choice of attorney

“overwhelmingly persuasive.”¹¹⁴ The Chief Judge argued that although the government has a legitimate interest in the property subject to forfeiture, this interest is not as formidable as a defendant’s when no other assets are available to secure counsel to mount a defense to the criminal charges faced.¹¹⁵ Moreover, he suggested that the government could seek to control, and consequently weaken, the ability of an accused to defend himself at a RICO or CCE prosecution.¹¹⁶ Permitting the government to control who its opposing counsel will be by limiting the pool of available defense counsel creates a potential risk to the adversarial system that offends the constitutional notions of fundamental fairness.

Judge Oakes (now Chief Judge),¹¹⁷ also in a concurring opinion, argued that the sixth amendment may be implicated not only on the individual basis of a particular defendant’s right to the counsel of his choice, but also on an institutional level of the criminal justice system in its entirety.¹¹⁸ He further stated that to permit prosecutors to undermine the quality of the defendant’s counsel in the precise type of complex matter where astute, experienced defense attorneys are most sought, is to condone the abridgment of these constitutionally secured guarantees.¹¹⁹

prior to the trial’s commencement. *Id.* The purported interest of the government, Feinberg argued, merely relates to the possible dissipation of the identified assets in the relatively brief period from indictment to possible conviction. *Id.* In addition, he contended, the government sought to prevent alleged criminals from using their economic power obtained through possibly illegal activities. *Id.*

114. *Id.* The government’s claim, which is only conditional for ownership interests of the specified assets, is not determined until the outcome of the criminal proceeding. *Id.* at 1402-03.

115. *Id.* at 1403.

116. *Id.* This interest, Chief Judge Feinberg urged, is “not a legitimate government interest.” *Id.*

117. *Id.* at 1404 (Oakes, J., concurring).

118. *Id.*

119. *Id.* The institutional interests of a fair adversarial system, Judge Oakes argued, must be considered when possibly granting the government unbridled discretion respecting an unwholesome “power over the defendant’s choice of counsel” in RICO and CCE litigation. *United States v. Monsanto*, 836 F.2d 74, 86 (2d Cir. 1987)(Oakes, J., dissenting).

Further, Judge Oakes elaborated, the sixth amendment right to counsel is not rescued by the proposed pre-trial hearing for several reasons, which he had given in his earlier *Monsanto* decision. *United States v. Monsanto*, 852 F.2d 1400, 1404 (2d Cir. 1988)

Judge Oakes echoed Chief Judge Feinberg's concern regarding ethical dilemmas: "The forfeiture provisions infect the system with . . . unavoidable conflicts of interest . . . for the defense attorney that jeopardizes the right to due process."¹²⁰ In addition, he argued, pretrial forfeiture coupled with pretrial detention is too similar to the "Alice-in-Wonderland Queen's 'sentence first, verdict afterward' mode of justice."¹²¹

b. *Judge Mahoney's Dissenting Opinion*

Judge Mahoney's dissenting opinion stressed that the adversarial hearing requirement implemented by the *Monsanto* panel majority,¹²² which merely attached a forfeiture order to the indictment, would provide the requisite procedural check against broad and uncurtailed governmental discretion with re-

(citing *Monsanto*, 836 F.2d at 85)(Oakes, J., concurring). In his earlier analysis, Judge Oakes first asked, who will represent the defendant at this hearing? *Monsanto*, 836 F.2d at 86-87. Second, he suggested, the pre-trial hearing will do little to protect the interests of the defendant or the adversarial system. *Id.* at 87. Absent vigorous cross-examination or the production of evidence to establish the legitimacy of the property's origins, the government will have little trouble meeting its burden of showing its likelihood of success on the merits. *Id.*

120. *Monsanto*, 852 F.2d at 1404 (Oakes, J., concurring). See *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985). In *Badalamenti*, Judge Leval framed the ethical concern most appropriately:

A lawyer who was so foolish, ignorant, beholden or idealistic as to take the business would find himself in inevitable positions of conflict. His obligation to be well informed on the subject of his client's case would conflict with his interest in not learning facts that would endanger his fee by telling him his fee was the proceeds of illegal activity. If he made efforts to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture," the evidence on this issue would consist primarily of privileged matter confided to him by his client. He might furthermore be found to have accepted a contingent fee in a criminal case in violation of DR 2-106(C), since his retention of his fee would depend on gaining an acquittal in the client's trial. The statute would give attorneys a motive to negotiate a guilty plea that did not involve forfeiture, rather than to fight the case thereby expending valuable time and increasing the risk of incurring forfeiture.

Id.

121. *Monsanto*, 852 F.2d at 1404. Judge Oakes concluded his opinion by emphasizing that a statutory scheme that denies a defendant his right to counsel of choice, that compromises the attorney-client relationship, that permits the government to undermine the adversarial process, and that punishes prior to the trial on the merits "cannot and must not survive Constitutional scrutiny." *Id.* at 1405.

122. *Monsanto*, 836 F.2d at 84-85.

gard to limiting RICO and CCE defendants' choice of counsel.¹²³ If the government failed to show the probable likelihood that a jury would find the identified assets to be proceeds of the criminal activity and thus forfeitable, then the defendant's interest in using the property would prevail.¹²⁴ If, however, the government met its burden through a sufficient showing to justify restraint, then the defendant would have no sixth amendment right to exemption of property sought to be applied to defense counsel.¹²⁵ In the event that the defendant does not prevail at the hearing, he still may be represented by court-appointed counsel.¹²⁶

C. Monsanto in the Supreme Court

On November 7, 1988, the United States Supreme Court granted the government's petition for a writ of certiorari¹²⁷ to

123. *Monsanto*, 852 F.2d at 1415 (Mahoney, J., dissenting).

124. *Id.* (quoting *Monsanto*, 836 F.2d at 84-85).

125. *Id.* Judge Mahoney likened the latter scenario to the situation where a defendant is refused access to contraband where a third party has a clear possessory interest. *Id.* at 85. He argued that no constitutional principle existed that permitted a defendant to pay private counsel from the proceeds of criminal activity. *Id.*

126. *Id.* Defendants with this status, he argued, should not be placed in a position superior to that of an indigent defendant without such property at his disposal. *Id.* In essence, Judge Mahoney's views were similar to the notions espoused by the Fourth and Tenth Circuits. For example, his discussion was similar to that of the *Caplin & Drysdale* Fourth Circuit majority:

We . . . decline . . . to accord this class of criminal defendants a unique and favored constitutional status. Such a rule would constitutionally prefer the drug merchant with none but illicit assets not only to indigent defendants but to defendants with untainted assets, who must sacrifice them to secure the counsel of their choice.

In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 646 (4th Cir. 1988) (en banc), *aff'd*, 109 S. Ct. 2646 (1989).

Or as the Tenth Circuit majority put it in *United States v. Nichols*:

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."

United States v. Nichols, 841 F.2d 1485, 1507 (1988), *aff'd on other grounds*, 877 F.2d 825 (10th Cir. 1989).

127. *United States v. Monsanto*, 109 S. Ct. 363 (1989). Another petition, by the law firm of *Caplin & Drysdale*, for review of a Fourth Circuit decision that dealt with the application of the same CFA forfeiture provisions under a similar factual setting, was granted on the same day. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 363 (1989). The Court heard the two cases in tandem. *Id.*

Caplin & Drysdale, although factually similar to *Monsanto*, differed from *Monsanto*

hear arguments with respect to the Second Circuit's *Monsanto* decision.¹²⁸ The Supreme Court resolved several years of confusion and turmoil among the circuit courts throughout the nation by issuing its opinion on June 22, 1989.¹²⁹ The slim five-to-four majority handed the Justice Department a major victory in its efforts to counter the vast spread of criminal racketeering and illegal activity in our society, particularly with respect to drug traffickers.

1. *Justice White's Majority Opinion*

Justice White, writing for the majority,¹³⁰ framed the question in terms of whether the federal drug forfeiture statute permitted pretrial restraint of assets possessed by the defendant, even when the defendant sought to use the assets to retain defense counsel.¹³¹ If the answer to this inquiry was yes, then the Court had to focus on whether this restraint was constitutionally permitted.¹³²

because it involved petitioners that did not have a direct stake in the outcome. *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989). Because the petitioners Caplin & Drysdale were third parties, the Fourth Circuit, in its earlier decision, had ruled for the government. *Id.* The Court found Caplin & Drysdale to have *jus tertii* standing due to their assertion of a direct and palpable injury sufficient to satisfy the article III case or controversy requirement as a result of the government subjecting their client's assets to forfeiture. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2651 n.3 (1989). The Caplin & Drysdale law firm stood to lose, and eventually did lose, over \$170,000 in legal fees incurred in connection with their representation of Christopher Reckmeyer in defense of his CCE charges for drug trafficking. *Id.* The judicially created prudential concerns were satisfied upon examination of three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third party rights. *Id.* The first and third factors were found by the Court to weigh in favor of Caplin & Drysdale. The attorney-client relationship, the Court declared, like the doctor-patient relationship, "is one of special consequences." *Id.*

128. *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2657 (1989).

129. *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

130. *Id.* Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy joined Justice White's opinion. *Id.* at 2659.

131. *Id.*

132. *Id.*

a. *Statutory Question*

Justice White began his discussion of the forfeiture statute by illustrating the meaning and the breadth of the statutory language.¹³³ He stated that “[i]n determining the scope of a statute, we look first to its language.”¹³⁴ He continued his analysis by remarking that section 853 is plain and unambiguous; that is, no exceptions are set forth for assets to be used to pay attorneys’ fees.¹³⁵ Therefore, he urged, all assets that fall within the statute’s scope are to be forfeited.¹³⁶

Justice White quickly disposed of Monsanto’s argument concerning the silence of the legislative history of the statute with respect to the attorney fee forfeiture question and the need for the Court to create such an exemption.¹³⁷ He argued that the legislative silence was meaningless because the legislative history and congressional debates were similarly silent on the “use of forfeitable assets to pay stockbroker’s fees, laundry bills, or country club memberships.”¹³⁸ He emphasized the fact that the forfeiture provision could be used to attach these assets without an express provision “‘does not demonstrate ambiguity’ . . . [rather] ‘[i]t demonstrates breadth.’”¹³⁹

Justice White also remarked that when Congress adopted the CFA,¹⁴⁰ it also provided for the special forfeiture of collateral profits that a convicted defendant accrues from his crimes.¹⁴¹ This provision, however, expressly permits exemption of money for a defendant’s legal representation in matters related to the offense for which the defendant was convicted.¹⁴²

133. *Id.* at 2662.

134. *Id.* (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 2662-63.

139. *Id.* at 2663 (citing *Sedima, S.P.R.L. v. Imrex, Inc.*, 473 U.S. 479, 499 (1985) (quoting *Haroco, Inc. v. American Nat’l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984))).

140. Comprehensive Forfeiture Act of 1984, Pub. L. 98-473, 98 Stat. 2040 (codified as added and amended at 18 U.S.C. § 1963 and 21 U.S.C. § 853 (1988)).

141. *Monsanto*, 109 S. Ct. at 2664 (citing *Victims of Crime Act of 1984*, Pub. L. 98-473, 98 Stat. 2175-2176 (codified as amended at 18 U.S.C. §§ 3681-3682 (1988))).

142. 18 U.S.C. §§ 3681-3682 (1988). That is, the government is permitted to purge up to 20% of the total profits reaped from contractual rights in books, movies, or other saleable items made derivatively as a result of the defendant’s crime. 18 U.S.C. §

This express statement, Justice White suggested, indicated that Congress was aware of its actions when no like statement was placed in the text of the CFA.¹⁴³

Justice White viewed the "equitable discretion" of the court under section 853(e)(1)(A) very conservatively. That section permits the issuance of a restraining order to preserve the availability of property that has been identified by the Justice Department as forfeitable.¹⁴⁴ Justice White noted, however, that this "equitable discretion" given the court is actually "no discretion at all" with respect to the issues under review.¹⁴⁵ He argued that the discretion of the court must be "cabined" by the purposes for which Congress created the statute.¹⁴⁶ That is, in view of the relation-back provision of section 853(c)¹⁴⁷ and the comprehensive "any property . . . any proceeds" language of section 853(a),¹⁴⁸ it is inconceivable that Congress would nullify the effectiveness of these provisions by allowing the court in its discretion to return the questioned property to the defendant's possession.¹⁴⁹

b. *Constitutional Analysis*

Having concluded that asset forfeiture was neither exempt from the statute nor to be utilized at the court's discretion, Justice White considered the constitutionality of the concerns that were raised for review.¹⁵⁰ Relying primarily on the *Caplin & Drysdale*¹⁵¹ decision, which was issued by the Court on the same day, Justice White disposed of the fifth and sixth amendment arguments by succinctly holding that the Constitution does not require that Congress permit a defendant to use assets adjudged

3681(c)(1)(B)(ii) (1988).

143. *Monsanto*, 109 S. Ct. at 2664.

144. *Id.* It was on this framework that Judge Winter concurred with the per curiam opinion below. *Id.* (citing *United States v. Monsanto*, 852 F.2d 1400, 1405-11 (2d Cir. 1988)(en banc)(Winter, J., concurring)).

145. *Monsanto*, 109 S. Ct. at 2665.

146. *Id.*

147. 21 U.S.C. § 853 (1988).

148. *Id.*

149. *Monsanto*, 109 S. Ct. at 2665.

150. *Id.*

151. 109 S. Ct. 2646 (1989).

to be forfeitable to pay that defendant's legal expenses.¹⁵²

In conclusion, Justice White addressed the concern that distinct constitutional rights were being impinged by freezing assets before a final judgment was rendered with respect to their forfeitability.¹⁵³ He dismissed this notion by concluding that it would be peculiar for the government to be unable to restrain property held by the defendant, based on a finding of probable cause, when the Court has found that the government may restrain a person where there is a finding of probable cause to believe he has committed a serious offense.¹⁵⁴

2. Justice Blackmun's Dissenting Opinion

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, prefaced his dissent by establishing a commonality among the "jurists who have held forth" against the majority's interpretation of this statute.¹⁵⁵ He found it "unseemly and unjust . . . for the Government to beggar those [whom] it prosecutes" thereby effectively crippling their ability to mount a defense at trial.¹⁵⁶

The "trivializ[ation]" of the burden placed on a RICO or CCE defendant with respect to the forfeiture law is certainly unwarranted.¹⁵⁷ Justice Blackmun contended that the majority should pay "heed to the warnings" sounded by the district courts who have much greater exposure to these situations than any appellate judge.¹⁵⁸ This will enable the majority to better grasp the devastating effects that the forfeiture provisions have on these defendants and ensure the "integrity of . . . [the] adversarial system of justice [as a whole]."¹⁵⁹

152. *Monsanto*, 109 S. Ct. at 2666.

153. *Id.*

154. *Id.* (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

155. *United States v. Monsanto*, 109 S. Ct. 2657 (1989) (because these cases were heard in tandem, Justice Blackmun's consolidated dissent is reported separately).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

a. *Statutory Interpretation*

Justice Blackmun remarked in his analysis, as did Justice White in his majority opinion,¹⁶⁰ that the statute was clearly and obviously silent on the issue of attorney fee exemption from forfeiture.¹⁶¹ However, Justice Blackmun quickly dismissed the majority's reference to stockbroker's fees, laundry expenses, and country club dues by stating that "one cannot believe that Congress was unaware that interference with the payment of attorneys' fees, unlike interference with these other [mundane] expenditures, would [certainly] raise sixth amendment concerns."¹⁶²

A review of the legislative history and congressional hearings surrounding the CFA's promulgation "demonstrates that the Act does not seek forfeiture of property for its own sake merely to maximize the amount of money the government collects."¹⁶³ Rather, he continued, the "central purposes of the Act . . . are fully served by an approach to forfeiture that leaves ample room for the exercise of statutory discretion."¹⁶⁴

Justice Blackmun reiterated that the founding purposes of the CFA are to "prevent the profits of criminal activity from being poured into future such activity, for 'it is through economic power that [criminal activity] is sustained and grows.'"¹⁶⁵ The drafters of the statute recognized, according to Justice Blackmun, that for the laws addressing organized crime and illegal drugs to have meaning, the economic power bases which support racketeers, mobsters, and drug dealers would have to be diluted in order to give convictions meaning and increase the effectiveness of the CFA.¹⁶⁶ Thus, he continued, a district court operates within its discretionary boundaries that have been delineated by the statute's framework when it exempts assets that a defendant needs to retain counsel of choice from preconviction restraint

160. *Id.* at 2662.

161. *Id.* at 2668 (Blackmun, J., dissenting).

162. *Id.* (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

163. *Monsanto*, 109 S. Ct. at 2670.

164. *Id.*

165. *Id.* (citing SENATE REPORT, *supra* note 28, at 191) (alteration in original).

166. *Id.* at 2670-71.

and postconviction forfeiture.¹⁶⁷ The government does not have the power, Justice Blackmun urged, to punish the defendant before conviction.¹⁶⁸ Moreover, no important and legitimate governmental interest is served by permitting such a result.¹⁶⁹ Further, he concluded, this power is not one that was contemplated by the drafters of the forfeiture provisions of the CFA.¹⁷⁰

b. *Constitutional Questions*

Justice Blackmun criticized the majority's rationale for the resulting decision which was based on a constitutional question that it could have avoided.¹⁷¹ Justice Blackmun argued that construing the statute to give effect to its plain meaning and legislative purpose would circumvent any constitutional conflicts and preserve the statute.¹⁷² Thus, the prudentially preferable construction of the CFA is also the one that gives full effect to the discretionary language of section 853.¹⁷³

Justice Blackmun again criticized the majority for moving rapidly from its proposition that "a defendant may not insist on representation by an attorney he cannot afford"¹⁷⁴ to the end result that "the Government is free to deem the defendant indigent by declaring his assets 'tainted' by criminal activity the Government has yet to prove."¹⁷⁵

While court-appointed counsel is critical to assuring the fairness of criminal trials, "it has never defined the outer limits of the Sixth Amendment demands."¹⁷⁶ He argued that the majority seemed to have forgotten the "distinct role" that the sixth amendment right to counsel of choice plays in "protecting the integrity of the judicial process."¹⁷⁷ The right to retained counsel of choice, Justice Blackmun continued, "serves to foster the

167. *Id.* at 2671.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 2671-72.

172. *Id.*

173. *Id.*

174. *Id.* at 2672 (citing *Wheat v. United States*, 486 U.S. 153, 161 (1988)).

175. *Id.*

176. *Id.*

177. *Id.*

trust between attorney and client that is necessary for the attorney to be a truly effective advocate."¹⁷⁸ The ensuing relationship governs the crucial decisions with respect to the defendant's liberty that has been placed in the hands of counsel,¹⁷⁹ but the defendant's perception of the judicial process and his willingness to accept its results, "depend upon his confidence in his counsel's dedication, loyalty, and ability."¹⁸⁰

In addition, Justice Blackmun argued, the right to retain private counsel serves to "assure some modicum of equality between the Government and those it chooses to prosecute."¹⁸¹ Further, the right to privately retained and compensated counsel also serves broader institutional goals.¹⁸² That is, the "virtual socialization of criminal defense work" in the United States would likely result if widespread abandonment of the right to retain chosen counsel was to occur concurrently with the standardization of criminal defense services.¹⁸³ Thus, a place exists in this system for the "maverick and the risk taker, for approaches that might not fit into the structured environment of a public defender's office, or that might displease a judge whose preference for nonconfrontational styles of advocacy might influence the judge's appointment decisions."¹⁸⁴ Similarly, there exists a distinct place for "specialized defense counsel" who possess a certain prowess to direct technical and complex criminal litigation, such as RICO or CCE defenses.¹⁸⁵ Therefore, Justice Blackmun contended, only a healthy and independent defense bar can possibly be expected to meet the demands placed on it by individual defendants passing through our criminal justice system.¹⁸⁶

If Congress' aim had been to undermine the adversary sys-

178. *Id.*

179. *Id.* (citing *Faretta v. California*, 422 U.S. 806 (1975)).

180. *Monsanto*, 109 S. Ct. at 2673 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

181. *Id.*

182. *Id.*

183. *Id.* (quoting Brief for Amici Curiae Committees on Criminal Advocacy and Criminal Law of the Ass'n of the Bar of the City of New York at 9, *United States v. Monsanto*, 109 S. Ct. 2657 (1989)(No. 88-454)).

184. *Monsanto*, 109 S. Ct. at 2674 (quoting Bazelon, *The Defective Assistance of Counsel*, U. CIN. L. REV. 1, 6-7 (1973)).

185. *Id.*, at 2674.

186. *Id.*

tem, then, Justice Blackmun fervently argued, attorney fee forfeiture would be the ideal "engine of destruction."¹⁸⁷ With the prospect of pretrial restraint of defendant's assets, private counsel will be unwilling or unable to continue or take on the defense.¹⁸⁸ Even without the issuance of a restraining order, Justice Blackmun contended that the possibility of governmental seizure of the forfeitable assets after conviction will itself substantially decrease the likelihood of retaining private counsel.¹⁸⁹

The relationship between an attorney appointed by the court and his client will likely begin in distrust and become "exacerbated to the extent that the defendant perceives his newfound 'indigency' as a form of punishment imposed by the Government in order to weaken his defense."¹⁹⁰ Thus, attorney fee forfeiture is the perfect vehicle to destroy the relationship that often forms so delicately between an attorney and his client.¹⁹¹

Justice Blackmun suggested that the immediate effect of attorney fee forfeiture would be to compromise the discovery of truth. An attorney's interest in preserving his fees from forfeiture may lead him to avoid learning the truth, which may adversely affect his client's best interests.¹⁹² The long-range results of this forfeiture practice will be to ultimately "decimate the private criminal-defense bar."¹⁹³ As the use of the forfeiture provisions spreads exponentially throughout the profession — across new categories of federal crimes and soon thereafter to the states — He argued that only the most idealistic and least skilled attorneys, many of whom will be fresh out of law school, would be attracted to the field, "while the remainder [of the criminal defense bar would] seek greener pastures elsewhere."¹⁹⁴ Thus, he concluded, attorney fee forfeiture "substantially undermines every interest served by the Sixth Amendment, on the individual and institutional levels, over the short and the long

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 2675.

193. *Id.*

194. *Id.* (citing Winick, *supra* note 29, at 781-82.

haul."¹⁹⁵

IV. Analysis

The federal courts have generally agreed that a plain meaning interpretation of the forfeiture provisions of RICO and CCE lends support to the government's position that attorneys' fees are forfeitable pursuant to the CFA.¹⁹⁶ Conceding that the CFA was drafted with the intent to cover at least some types of attorneys' fees, the real inquiry is whether its application to all defense attorneys' fees is constitutionally permissible.

A. *Right to Counsel and the Diminished Opportunity to Retain Experienced Legal Counsel*

The sixth amendment right to representation by counsel is a concept of fundamental importance in our society.¹⁹⁷ It provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹⁹⁸ This right was designed to assure fairness in the adversarial criminal process.¹⁹⁹ Closely affiliated with a defendant's right to counsel is the right to a fair and reasonable opportunity to retain the counsel of his choice.²⁰⁰ The right to choose an attorney is a significant factor in allowing the defendant to decide what type of defense to mount.²⁰¹ The sixth amendment "grants to the accused personally the right to make his defense," because "it is he who suffers the consequences if the defense fails."²⁰² Indeed, it has been said that "the most impor-

195. *Monsanto*, 109 S. Ct. at 2676 (Blackmun, J., dissenting).

196. *See supra* note 41.

197. *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

198. U.S. CONST. amend. VI.

199. *United States v. Morrison*, 449 U.S. 361, 364 (1981).

200. *Powell*, 287 U.S. at 53. This right is not absolute; it is qualified by the defendant's ability to afford the fee and it must be carefully balanced against the public's interest in the orderly administration of justice. *See Note, supra* note 23, at 675. *See also Gideon v. Wainwright*, 372 U.S. 335 (1963).

201. *Wilson v. Mintzes*, 761 F.2d 275, 277 n.2, 279 n.5 (6th Cir. 1985). The *Wilson* court determined that where defense counsel engaged in heated confrontation with trial judge rather than cross-examining witness, as well as ignoring client's statements of dissatisfaction, an irreconcilable conflict between interests of defense counsel and those of defendant was found. *Id.*

202. *Wheat v. United States*, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting)

tant decision a defendant makes in shaping his defense is his selection of an attorney."²⁰³

The CFA, as currently interpreted by the Supreme Court, will cause many criminal defense attorneys to become uninterested and unwilling to represent a client if their legal fees are susceptible to forfeiture upon conviction.²⁰⁴ This chain of events will effectively cripple a RICO or CCE defendant's ability to retain counsel of choice.²⁰⁵

(quoting *Farreta v. California*, 422 U.S. 806, 819-20 (1975)). "Giving the defendant the ability to select his own counsel . . . [through personal choice] furthers participatory and autonomy values." Winick, *supra* note 29, at 803-04.

203. *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979). It is likely that a defendant would have more faith and reliance on an attorney he chose rather than one who was appointed for him. See note, *supra* note 23, at 676. However, it would be difficult to show that a privately retained attorney may create a different result than the one reached. Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must establish that first, the attorney's particular conduct was deficient with respect to the reasonableness standard of "prevailing professional norms" and second, a defendant must establish that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 688-89.

204. See *supra* notes 88 & 93 and accompanying text. "[I]n addition to depriving a defendant of counsel of choice, there will be instances in which the threat of forfeiture will deprive the defendant of any counsel." *United States v. Monsanto*, 109 S. Ct. 2657, 2674 n.14 (1989) (emphasis in original). See also Cloud, *supra* note 33, at 44-45; Note, *supra* note 34, at 133-35. Very few attorneys would be willing to take on these long and complex defenses without an assurance of payment. It is not profitable, nor a smart gamble to be retained by an individual indicted in a RICO matter. "A lot of lawyers are saying it's just not worth it." Chambers, *Criminal Lawyers in Study Say New Laws Inhibit Case Choices*, N.Y. Times, Nov. 21, 1985, at A20, col. 1 (quoting William J. Genego, Professor of Law at the University of Southern California Law Center, who conducted a survey of members of the National Association of Defense Lawyers). Attorneys are afraid of not only losing their fees, which few can afford to do, but also of becoming targets themselves of "undercover operations." *Id.*

205. "Indictments are notoriously easy to obtain"; the restraining order thus imposes a stringent penalty without the determination of whose interests are paramount. *United States v. Thier*, 801 F.2d 1463, 1476-77 (1986), *modified*, 809 F.2d 249 (5th Cir. 1987). Although the government does have an interest in precluding criminals from employing ill-gotten financial power to hire attorneys, this interest simply does not outweigh an accused's constitutional right to counsel of choice. *Id.* at 1403 (Feinberg, C.J., concurring). The small cost to society of possibly permitting criminals to use their illegally acquired wealth to hire an attorney is the price the public must pay to protect the rights of the innocent. *Monsanto*, 852 F.2d at 1403 (Feinberg, C.J., concurring). If this presumption of innocence was not present in our criminal justice system, an innocent individual accused of a crime could be deprived of legitimate economic power to wage a full defense. Again, it is the "cost of our adversarial system, which places great value on protecting the rights of the accused." *Id.* The problem with the CFA is that it deprives defendants of their financial resources to hire a lawyer before they are proven criminals.

Not only does the accused have a qualified right to counsel of his choice, he has an absolute right to effective assistance of counsel.²⁰⁶ The right to effective assistance of counsel demands that a defendant be granted the right to choose representation by counsel who is experienced and proficient in the RICO field and who is free from conflicting interests.²⁰⁷ Therefore, the appropriate inquiry must focus on the adversarial process to ensure that a defendant is represented by an effective advocate.²⁰⁸

If lawyers' fees are subject to forfeiture contingent upon their clients' acquittals, attorneys will have interests that may directly conflict with their clients' interests.²⁰⁹ Although it is not argued that all attorneys would pursue situations of potential conflict, it is certainly foreseeable that some would embark upon this avenue — conflict becomes inevitable whenever forfeiture is a possibility. When placed in this desperate situation, some attorneys may not wish to elicit facts that suggest that their fees were derived from illegal activities.²¹⁰ Thus, the distinct possibil-

Id. at 1403-04. Moreover, it makes available to these defendants only the "maverick and risk-tak[ing]" attorney from the private sector, for arguably only these attorneys would risk their fees for such a cause. *Monsanto*, 109 S. Ct. at 2674 (Blackmun, J., dissenting).

206. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

207. Appointed counsel is probably unable to mount a suitable defense for a RICO or CCE defendant. The length and complexity of these defenses make the public defender offices, which already lack the human resources to perform the requisite preparatory work, incapable of countering the effort of the Justice Department. See Krieger, *Lawyer, Client and New Law*, 22 AM. CRIM. L. REV. 737, 739 (1984). See also *Caplin & Drysdale*, 109 S. Ct. 2646 (1989). "The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defenders' office which is already over-taxed." *United States v. Rogers*, 602 F.Supp. 1332, 1349 (D. Colo. 1985). See also *United States v. Madeoy*, No. 86-0377 (D.D.C. Oct. 2, 1987)(WESTLAW, Allfeds database [1987 WL 32]). An unaided layman may have little skill in arguing the law or in coping with an intricate procedural system. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Similarly, an attorney who is inexperienced in the type of representation required in these weighty matters may not present a sufficient or adequate defense for his client. See *Cloud*, *supra* note 33, at 48-49. See *supra* notes 225-26 and accompanying text.

208. *Wheat v. United States*, 486 U.S. 153, 159 (1988). See also *Cloud*, *supra* note 33, at 34.

209. The *Caplin & Drysdale* majority opinion relegated this critical inquiry concerning ethical considerations to mere footnote status. *Caplin & Drysdale*, 109 S. Ct. at 2656 n.10.

210. "[T]he attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity . . ." *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986), *aff'd sub nom. United States v. Harvey*, 814 F.2d 905 (1987),

ity exists that their clients' interests will be sacrificed due to the temptation to choose litigation strategies that are more likely to preserve their fees.²¹¹

By prohibiting post-trial fee recapture, the brutal concern of an attorney's conflict of interest can be avoided.²¹² Forcing a defendant to bear this risk of conflict of interest, as the CFA currently does, in essence forces the defendant to bear the risk of ineffective assistance of counsel, which violates the sixth amendment. Thus, absent a sufficient showing by the government to legitimize the restraining order, it is imperative that RICO and CCE defendants not be made to shoulder the risk that private counsel may be deterred by the prospect of disgorging their fees when the trial is over.

Further, the existence of the attorney-client privilege may be as fundamental to effective assistance of counsel as the requirement of representation free from thwarting conflicts of interest.²¹³ The primary purpose of the privilege is to reduce a defendant's fear of incriminatory disclosure and thus encourage "full and frank communication between attorneys and their clients."²¹⁴ A defendant must have confidence in the attorney who will represent him because the "basic trust between counsel and client[] is a cornerstone of the adversary system."²¹⁵ By subjecting attorneys' fees to forfeiture, the government will "chill" this fundamentally respected rapport between a client and his counsel.²¹⁶

rev'd en banc sub nom. In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989). In addition, the "reasonably without cause to believe" standard of section 853, used in connection with an attorney's determination of whether the assets were linked to the alleged activities, necessarily compromises the effectiveness of an attorney's counseling and defense offered to a client since the attorney has incentive to remain ignorant about the origin of the assets in order to circumvent fee forfeiture. See *supra* note 192 and accompanying text; See also *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985).

211. *Badalamenti*, 614 F. Supp. at 196.

212. *United States v. Ianniello*, 644 F. Supp. 452, 458 (S.D.N.Y. 1985).

213. *Upjohn v. United States*, 449 U.S. 383 (1981).

214. *Id.* at 389.

215. *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

216. *Cloud*, *supra* note 33, at 57-58. The serious conflicts of interest that may occur between an attorney and his client, due to subjecting attorneys' fees to forfeiture, place

B. *Balance of Power in RICO and CCE Proceedings*

1. *Evidentiary Standard*

The "balance of forces between the accused and the accuser" is central to the concept of constitutional due process.²¹⁷ Thus, under the current law, before a court can issue a preconviction restraining order prohibiting a RICO or CCE defendant from transferring his property, the government must demonstrate that there is a probable likelihood that a nexus exists between the property and the alleged criminal activity. These determinations must be made at a full hearing; the government cannot rely on an indictment alone to justify forfeiture.²¹⁸ The statute, however, mistakenly requires persons seeking to avoid the imposition of the criminal penalty to prove their innocence rather than requiring the government to prove their guilt. This application of the CFA permits government prosecutors to fall short of the heightened evidentiary burdens required to establish guilt. In criminal matters, prosecutors carry the burden of proving their case beyond a reasonable doubt in order to secure a conviction of the accused. When the CFA is applied after obtaining a mere indictment the government's evidentiary burden is lessened and the accused is effectively convicted prior to having received a trial on the merits. This undermines the foundation of the American criminal justice system which is premised

the statutory provision on questionable grounds. More generally, ethical considerations run to the very heart of the American justice system. The relationship established between an attorney and his client is one based on trust; this trust is promoted by the attorney's duty to preserve confidences and secrets of the client. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1982). The relationship is fostered through the confidentiality mechanism known as the attorney-client privilege. See *Upjohn*, 449 U.S. at 389. Further, the attorney owes an ethical duty to advance his client's best interests within the bounds of the law. See *Nix v. Whiteside*, 106 S. Ct. 988, 995 (1986).

By gambling with the prospect of losing his fee upon the finding of his client's guilt, the defense attorney's fee is transformed into a fee which is tantamount to contingent. To accept a contingent fee in a criminal matter is clearly prohibited by community standards for fear of compromising the defendant's best interests. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1982). Further, contingency fees in criminal cases are not only against public policy, they have been recognized as illegal and unenforceable under contract law. RESTATEMENT (FIRST) OF CONTRACTS § 542 (1932).

217. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

218. *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981).

upon the concept of an accused's presumption of innocence.²¹⁹

2. *The Interest Affected*

In addition to the opportunity to be heard in a meaningful manner, the specific dictates of due process require the identification and consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²²⁰

This balancing test articulated by the Supreme Court in *Mathews v. Eldridge*²²¹ may be implemented in the realm of attorney fee forfeiture as a means of softening the impact of the CFA.²²² First, the private interests at stake in a RICO or CCE context are of paramount importance since a defendant risks a substantial prison term and possible fine if convicted;²²³ therefore, he must be afforded the opportunity to mount a sufficient and adequate defense. Moreover, the characteristics of the CFA

219. The key to Justice White's majority opinion, and the majority analyses in *Nichols* and in *Caplin & Drysdale*, is the statutory engagement of the relation-back doctrine. The misconception of these analyses is that the government's interest in forfeited property is not derived from a common law ownership right to the property. *Nichols*, 841 F.2d at 1510 (Logan, J., dissenting). "The government neither owned the property before the crime nor gave value for the property as a creditor or purchaser does." *Id.* The governmental purpose that justifies forfeiture of a common law owner's property is to deprive an individual of the rewards from criminal activity, to confiscate the resources to prevent the commission of further crimes, and to punish. *Id.* at 1511. The pre-trial seizure is justified only to the extent of possible dissipation or concealment. *Id.* Thus, the application of the property law figment in the criminal forfeiture context undermines a defendant's presumption of innocence. *United States v. Nichols*, 654 F. Supp. 1541, 1559 (D. Utah 1987); see also *United States v. Thier*, 801 F.2d 1463, 1476 (1986), *modified*, 809 F.2d 249 (5th Cir. 1987); *United States v. Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985).

220. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citation omitted).

221. *Id.*

222. "Prior to conviction, sole title to such assets — not merely possession . . . — rests in the defendant; no other party has any present legal claim to them." *Monsanto* 109 S. Ct. at 2676 (Blackmun, J., dissenting).

223. See 18 U.S.C. § 1963(a) (1988) (calling for sentences of up to 20 years in addition to possible fines as great as \$25,000).

could result in the accused losing not only property used or acquired as a result of alleged illegal activity, but potentially his entire estate since, in most cases, the property sought to be seized is a derivative proceed from crime.²²⁴

The second inquiry focuses on whether the procedures relied upon will enhance the outcome of the proceeding. A RICO or CCE defendant's ability to use otherwise restrainable assets to secure defense counsel of choice will only work to make the proceeding advance in a more efficient and expedient manner. Because of the nature of the complex proceeding and the often lengthy duration of the preparative and court activities,²²⁵ adequately funded, expert counsel of choice will be better able to conduct an efficient defense rather than a public defender, who is constrained by limited assets, inexperience in RICO and CCE matters and lack of time.²²⁶ Thus, the accused's ability to use otherwise potentially forfeitable assets to retain counsel of choice will only improve the quality of the proceeding and, therefore, ultimately benefit the public interest.

224. *United States v. Monsanto*, 109 S. Ct. at 2676. To pose a hypothetical: an individual, previously engaged in illicit activities, has ceased those activities and has established a private business from the proceeds of his earlier enterprises. This business performs well and he purchases a home, a car, and other items. Because his net worth was established from the proceeds of his illicit conduct, his entire estate is subject to governmental forfeiture. See Comment, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary from the Adversary System?*, 62 WASH. L. REV. 201, 205 n.27 (1987).

225. RICO cases often involve a considerable amount of time, money, and expertise because of the complexity of the issues. See *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985). "Adequate defense[s] of RICO cases generally require representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety . . . days before trial is patently inadequate." *Id.* at 1349-50. For the complexity of a RICO prosecution, see *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136 (1982). "The magnitude of the effort required . . . for careful review . . . is reflected both by the size of the record — more than 80 volumes containing some 12,000 pages of trial transcript and some 3,000 pages in the volumes of pleadings . . ." *Id.* at 985-86 n.4.

226. See *supra* notes 205-08 and accompanying text. This is not to say that public defenders are patently inadequate or incompetent; quite the contrary, the accomplishments and capabilities of the public defender's office nationwide have been and continue to be, extraordinary. It merely suggests that since they were never intended to replace private attorneys, as a substitution in kind, private attorneys may provide greater representation for these RICO and CCE defendants because of a specialty that they may have developed having represented many defendants in like situations. Further, a private counsel may have greater investigative and research capabilities available to him than the court appointed attorney. See *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

The final consideration under the *Mathews*' criteria is the government's interest in the forfeited attorneys' fees weighed against permitting the accused to retain an attorney with these funds.²²⁷ To that end, the question becomes whether countervailing governmental interests actually exist to justify the "drastic expedient" of freezing and eventually forfeiting RICO and CCE defendant's assets such that they cannot retain private defense counsel.²²⁸ In any event, the government's interest is served whether the fees are forfeited or are used to retain counsel; that is, in either scenario the criminal is separated from the ill-gotten gains.²²⁹ Thus, the government interest is not harmed, because the overriding institutional factor is to serve the public interest which, by permitting the operation of an efficient, expedient, and fair criminal justice system, is promoted as well.

3. *The Power of the Restraining Order*

The government is provided with an unfair advantage over RICO and CCE defendants by permitting a restraining order to be appended to an indictment.²³⁰ The restraining order alerts talented defense counsel to the piercing threat of fee forfeiture.²³¹ This may permit the government to selectively exclude the more skilled and experienced defense attorneys simply by attaching the restraining order to the defendant's indictment.²³²

227. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See also *supra* notes 220-21 and accompanying text.

228. *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 652 (4th Cir. 1988) (en banc) (Phillips, J., dissenting).

229. See *Cloud*, *supra* note 33, at 47.

230. See *supra* notes 197-208 and accompanying text. The government should not be permitted to cripple the defendant at the commencement of his trial by removing his ability to retain counsel. *United States v. Thier*, 801 F.2d 1463, 1477 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987) (Rubin, J., concurring).

231. If attorneys' fees are made vulnerable to forfeiture, RICO and CCE defendants will be unable to hire counsel. *United States v. Bassett*, 632 F. Supp. 1308, 1316 (D. Md. 1986). "[B]y the forfeiture . . . statute's [permissible application to defense attorneys' fees], we insure that no lawyer accept the business." *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). See also *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667, 2674 (1989).

232. *Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985). See also *Cloud*, *supra* note 33, at 43-44. Further, the forfeiture of attorneys' fees impedes, rather than advances, the efficient and orderly administration of justice. Scenarios are certainly foreseeable where defense attorneys resign prior to and during trial rather than risk the forfeiture of their compensation for their efforts from a full litigation. In fact, an attorney made a trip from

An imbalance is likely to result from this granting to the government of *carte blanche* over who would represent a RICO or CCE defendant.²³³ This resulting imbalance would disrupt the fair and balanced administration of justice.²³⁴ Thus, an attorney whose fees are potentially forfeitable will be "forced to operate in an environment in which the government is not only the defendant's adversary, but also his own."²³⁵ The very premise of the American criminal justice system is that partisan advocacy on both sides of a case will best promote the ultimate objective of our adversary system.²³⁶ Further, defense counsel will lose their independence and autonomy by cooperating with prosecutors who possess the power to seek forfeiture in their cases.²³⁷ If sanctioned, the end result would force all RICO and CCE defendants to seek court-appointed counsel and thereby permit the government to control the members of the adversarial pool it is to face.²³⁸ In addition, government's implementation of the re-

Boston to inquire about Monsanto's defense and the possibility of representing him in connection with the charges he faced, but refused to render assistance until the district court settled the attorneys' fee concern. *United States v. Monsanto*, 836 F.2d 74, 86 (2d Cir. 1987). This situation wastes the court's valuable time by disrupting trials and results in higher court costs due to the untimely and inefficient delay. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196-97 (E.D. Va. 1986).

233. *Reckmeyer*, 611 F. Supp. at 1196-97. "The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defenders office which is already over taxed." *Rogers*, 602 F. Supp. at 1349. Further, "federal defenders' offices cannot marshal the wherewithal required to counter the human and financial resources the Justice Department devotes to these complex cases." *Cloud*, *supra* note 33, at 48.

234. *Monsanto*, 836 F.2d at 86 (Oakes, J., dissenting). Judge Oakes expressed concern regarding the systemic interest of permitting defense attorneys to perform their proper role in the adversary system of justice. *Id.* (Oakes, J., dissenting). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* See also *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *United States v. Cronin*, 466 U.S. 648, 655-56 (1984); *Herring v. New York*, 422 U.S. 853, 862 (1975).

235. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2664, 2675 (1989) (Blackmun, J., dissenting).

236. *United States v. Cronin*, 466 U.S. 648, 655 (1984).

237. Although the *Payden* court dismissed this realistic alarm because it believed that the courts would prevent this malady from infiltrating the system, it did not present a means of determining which counsel were selectively excluded by subjecting their fees to forfeiture. *Payden v. United States (In re Grand Jury Subpoena Duces Tecum)*, 605 F. Supp. 839, 853 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

238. *Cloud*, *supra* note 33, at 47-54. The criminal justice system cannot permit this

lation-back²³⁹ doctrine places the accused in a financial quandary which renders him effectively indigent.²⁴⁰ If the defendant's sixth amendment right to counsel must yield to countervailing government interests, the relation-back device would be an appropriate measure to promulgate the government's concerns — nevertheless, it surely cannot serve as a substitute for them.²⁴¹ Thus, the Justice Department's construction of the CFA undermines the system's objectives by shifting the balance of interests away from the defendant and toward the government.²⁴²

C. *The Approach for the Future*

The correct approach to the attorney fee forfeiture question is clearly not to be gleaned exclusively from the majority opinion of the Supreme Court in *Monsanto*. Moreover, the correct approach is not located solely within the insightful commentary of

type of laissez-faire representation when incarceration is faced as the ultimate punishment. *Id.*

239. Although the government employs the relation-back fiction as a powerful tool in its arsenal under RICO to seize allegedly tainted property, it typically has no more right in that property than the accused because of the derivative nature of the property. This property was not itself acquired illegally, but merely purchased or initiated with allegedly tainted assets. Hence, "prior to [a] conviction, sole title to such assets — not merely possession, as is the case . . . [when considering a bank robbery . . . —rests in the defendant; no other party has any present legal claim to them." *United States v. Monsanto*, 109 S. Ct. 2657, 2676 (1989) (Blackmun, J., dissenting).

240. Thus, the government's argument simply begs, rather than answers, the constitutional question because the courts are not dealing with a financially indigent individual, but instead, they are passing judgment on someone who was placed in this dire position by unbridled government discretion. *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 652 (4th Cir. 1987)(en banc) (Phillips, J., dissenting).

241. *Monsanto*, 109 S. Ct. at 2676 (citing *Caplin & Drysdale*, 837 F.2d at 652) (Blackmun, J., dissenting). As Fourth Circuit Judge Phillips contended, the constitutional right to private counsel cannot be permitted to hang on the thread of uncontained legislative indulgence." *Caplin & Drysdale*, 837 F.2d at 652 (Phillip J., dissenting). Further, the analysis advanced by the *Nichols* measure, which today permits a pretrial seizure and subsequent forfeiture of property may be applied tomorrow to anyone in violation of federal antitrust or environmental laws. *United States v. Nichols*, 841 F.2d 1485, 1509 (1988), *aff'd* on other grounds, 877 F.2d 825 (10th Cir. 1989)

242. "A man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community." Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970).

Justice Blackmun's dissenting opinion.²⁴³ Rather, it is one necessarily composed of discreet segments of many of the views advanced by the federal courts that have confronted this critical issue. In addition to Justice Blackmun's analysis of the problem, Chief Judge Feinberg's and Judge Oakes' concurring opinions in the Second Circuit *Monsanto* rehearing best describe the proper direction upon which to focus the inquiry.²⁴⁴ The dissenting views espoused by Judge Phillips of the Fourth Circuit, regarding the imperative balancing of interests between the government and the accused,²⁴⁵ and Judge Logan of the Tenth Circuit, concerning the need to concentrate on the constitutional issue presented and not become moved by "emotional revulsion" to the nature of the acts involved,²⁴⁶ also have considerable merit and, therefore, cannot be ignored.

If the statute is to be amended, that amendment must clearly and explicitly state its intention to subject such attorneys' fees to forfeiture upon conviction. Only upon a proper trial-type hearing, which focuses on the narrow issue of asset origin, will the government have the proper forum to establish the forfeitability of a defendant's attorneys' fees to the government. At this hearing, the government should be required to prove at least by clear and convincing evidence, if not beyond a reasonable doubt,²⁴⁷ that the assets in question are linked to the alleged criminal activity. If the government fails to meet this heightened burden, then the defendant's property must be released to the extent necessary for him to pay reasonable attorneys' fees²⁴⁸ in connection with his defense to the criminal charges faced. This is the only appropriate measure that can be generated for a society that has as its benchmark of its criminal justice system the notion of a presumption of innocence in connection with one who has been accused, but not yet tried, of a crime.

243. *Monsanto*, 109 S. Ct. 2664 (1989) (Blackmun, J., dissenting).

244. See *supra* notes 113-21 and accompanying text.

245. *Caplin & Drysdale*, 837 F.2d 637 (Phillips, J., dissenting).

246. *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988).

247. The "probable likelihood" standard envisioned by the panel majority's "*Monsanto* hearing" is too easily met. The statute is a criminal statute; thus, the accused's presumption of innocence in a criminal proceeding cannot be compromised by a standard that is more akin to the civil standard of a mere "preponderance of the evidence" rather than that of the criminal law's "beyond a reasonable doubt" standard.

248. See *infra* text accompanying notes 250-51.

Hence, the CFA should first be revised such that the government is required to specifically identify the assets allegedly linked to the criminal activity. This specificity will remove the vagueness from the expansive language of the current statute. Second, a hearing should be implemented in order to establish the status of the property identified in the government's restraining order.²⁴⁹ Third, the burden on the government to show that the assets forfeitability must be increased from the current "probable likelihood" standard of forfeitability to the higher criminal standard of at least "clear and convincing evidence" if not "beyond a reasonable doubt."²⁵⁰ This amendment will lend clarity to the indecisive language and cloudy legislative intent of the earlier provisions.

By providing this elevated standard in an amendment to the CFA, a RICO or CCE defendant's presumption of innocence will be retained and his right to counsel of choice will be preserved. The engagement of this safeguard will necessitate that a prosecutor prove his case at *all* stages of the prosecution in order to secure a conviction of the accused. If those assets allegedly linked to the criminal activities so charged against that defendant are now declared forfeitable, a RICO or CCE defendant has no valid claim of being unable to secure counsel since the government will have established by the requisite burden that the assets are not his to use. A RICO or CCE defendant would then have to rely on court-appointed counsel or private counsel willing to assume the defense knowing that his fees are subject to forfeiture.

It will be necessary, however, to purge those assets from the defendant's forfeitable estate in order to pay for the accused's counsel of choice at the pretrial evidentiary hearing. This cost for legal fees is a necessary one for our society to bear in order to ensure that the goals of the criminal justice system are satisfied. If this safeguard was not included in an amendment to the CFA,

249. See *supra* notes 220-42 and accompanying text.

250. This greater burden placed on the government will provide an increased procedural check against prosecutorial abuse. The government's effective unbridled discretion regarding circumscribing a RICO or CCE defendant's choice of counsel merely by affixing a forfeiture charge to the indictment will be greatly limited by this new standard. If the government fails to meet this expectation, the defendant's interest in employing the property to obtain counsel must prevail.

the opportunity exists for a defendant who has assets, which are not linked to the illegal activities he is charged with engaging in, to suffer the consequences of being effectively sentenced before his trial from the efforts of an overly zealous prosecutor.²⁵¹ If a dispute surfaces regarding the reasonableness of the attorneys' billing rates, then the fees should be determined by employing a *quantum meruit* measure of recovery based on the fair market value of the reasonable legal services legitimately rendered. For the pretrial hearing, a sum equal to the value of the rates charged by the governing community standard of the private criminal defense bar should be assessed from the assets sought in the government's restraining order. Further, for the defense of the charges themselves, a reasonable fee should be determined from those community standards established in these type of matters. With these improvements implemented, the CFA will be able to effectuate its purpose of stripping the economic bases of criminal activity without stripping the individuals of their constitutional protections.

As Chief Judge (then Judge) Bazelon has stated, "we are in that terrible period known as 'meanwhile.' We know enough to be troubled but not enough to know how to resolve our troubles"²⁵² Once the concerns discussed in this section have been considered, it is clear that the most logical approach for the Supreme Court would have been to strike down the forfeiture statute as unconstitutional. The Court would then have left no room for congressional doubt with respect to the need for a revision of the hastily prepared CFA. Maybe Congress will pay heed to Justice Blackmun's comprehensive and accurate dissenting opinion which highlighted some of the most important constitutional and social considerations that the American criminal justice system has faced to date.

251. See *supra* notes 222-26 and accompanying text. It warrants cautioning that the finding at this pre-trial evidentiary hearing must not be permitted to be introduced at the criminal trial because of the potential prejudicial effect the earlier finding regarding the criminality of the identified assets may have on the jury.

252. *United States v. Wiley*, 492 F.2d 547, 555 (D.C. Cir. 1974) (Bazelon, J., concurring).

V. Conclusion

Although the Supreme Court's five-to-four decision favors the forfeiture of defense attorneys' fees in the context of RICO and CCE prosecutions, the well-crafted accurate dissenting opinion of Justice Blackmun identifies the constitutional and policy concerns facing the practical and institutional facets of the criminal justice system today. The upshot of the long struggle with attorneys' fee forfeiture throughout the federal courts of this nation has finally settled with a decision that was narrowly focussed and prepared with insufficient foresight. The Supreme Court's *Monsanto* decision of 1989 will not be the culmination of the issue for the statute's continued application will surely raise the concerns discussed by Justice Blackmun and the various other judges who have commented on the subject. Notwithstanding *Monsanto's* outcome, the legislature should not be content with its earlier effort. As Justice Blackmun declared at the conclusion of his dissenting opinion:

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. This Court has the power to declare the Act constitutional, but it cannot thereby make it wise.²⁵³

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253. *United States v. Monsanto*, 109 S. Ct. 2667, 2677 (1989) (Blackmun, J., dissenting).