

COMMENTS

Constitutionality Without Wisdom: *Caplin & Drysdale* and *Monsanto* Examined

Introduction

On June 22, 1989, the United States Supreme Court handed down decisions in *Caplin & Drysdale, Chartered v. United States*¹ and its companion case, *United States v. Monsanto*.² In these cases, the Court examined the statutory and constitutional issues raised by the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)³ and the Continuing Criminal Enterprise Statute (CCE).⁴ Specifically, the Court considered whether the provisions extend to include assets that a defendant wishes to use to pay an attorney.

The forfeiture provisions embodied in the RICO and CCE statutes authorize a preconviction restraining order freezing a defendant's potentially forfeitable assets. The threshold question in this area is whether these provisions create an exemption by which some or all of a criminal defendant's assets may be used to retain private counsel. Commentators are split on this issue: some interpret the language of the statutes and congressional intent to exempt legitimate attorneys' fees from the provisions,⁵ while others find that the statutes unambiguously include all as-

1. 109 S. Ct. 2646 (1989).

2. 109 S. Ct. 2657 (1989).

3. 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986). RICO was originally Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901-904, 84 Stat. 941 (1970), amended Pub. L. No. 95-575, § 3(c), 92 Stat. 2465 (1978); Pub. L. 95-598; Title III, § 314(b), 92 Stat. 2677 (1978).

4. 21 U.S.C. § 848 (1982 & Supp. IV 1986). Originally, CCE was part of Title II of the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970).

5. See 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 (1989) (construe statutes to avoid an unconstitutional interpretation); Note, *Forfeiture of Attorneys' Fees in RICO and CCE Cases: A Denial of Due Process and the Right to Choice of Counsel*, 74 IOWA L. REV. 249 (1988) (unlikely that Congress intended the provisions to include legitimate attorneys' fees); Comment, *The Constitutionality of Attorney Fee Forfeiture Under RICO and CCE*, 22 J. MARSHALL L. REV. 155 (1988) [hereinafter Comment, *Constitutionality of Fee Forfeiture*] (interpreting provisions as exempting legitimate attorneys' fees fulfills statutory purpose and does not violate sixth amendment rights); Note, *Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 NO-

sets and provide no exemption for attorneys' fees.⁶ Legislative history is unclear on this point.⁷

A conclusion that the statutes⁸ make no exemption for attorneys' fees leads to a second inquiry regarding the constitutional issues raised by such a reading. Again commentators disagree. Some argue that to include all assets in a preconviction forfeiture order renders the defendant constructively indigent and without the resources to retain private counsel, thus violating both the defendant's sixth amendment right to choice of counsel and fifth amendment due process rights.⁹ Others argue that the sixth amendment right to counsel is not absolute; as long as the defendant has effective counsel his or her rights are not violated.¹⁰ Both sides cite the history of civil and criminal forfeiture in this country to bolster their fifth amendment claims.¹¹

These issues are significant because the potential repercussions are so great. The adversarial system as we know it may undergo vast change if prosecutors, as a legal strategy, can impair the ability of defendants to retain counsel of their choice. In addition, the way we approach these issues will shed light on what this country considers to be acceptable limits in its efforts to battle racketeering or drug-related crime.

Prior to *Caplin & Drysdale* and *Monsanto*, questions concerning attorneys' fee forfeiture had been arising with increasing frequency in fed-

TRE DAME L. REV. 535 (1988) [hereinafter Note, *Attorney Fee Forfeiture*] (language of statute leaves the issuance of restraining orders to the court's discretion).

6. See, e.g., Brickey, *Attorneys' Fees Forfeitures: On Defining "What" and "When" and Distinguishing "Ought" From "Is"*, 36 EMORY L.J. 761 (1987) (plain language of the statute encompasses attorneys' fees).

7. See *infra* notes 83-88, 98-99 and accompanying text for a discussion of cases that adopt a statutory construction of the forfeiture provisions as exempting attorneys' fees. Other courts read the statute as clear in its intent to include attorneys' fees. See *infra* notes 82, 93, 101-103, 107-117 and accompanying text for a discussion of cases that find this statute to be constitutional. See *infra* notes 91, 94, 104-105, 118-25 and accompanying text for a discussion of cases that characterize the statute as unconstitutional.

8. As amended by the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 302-303, 98 Stat. 2040 (1984), the RICO and CCE forfeiture provisions are virtually identical. Compare 18 U.S.C. § 1963 (1982 & Supp. IV 1986) with 21 U.S.C. § 853 (1982 & Supp. IV 1986). Thus, a forfeiture provision discussion applies to both the RICO and CCE statutes unless otherwise indicated.

9. See Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1 (fee forfeitures violate a defendant's sixth amendment right to choice of counsel); Comment, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary From the Adversarial System?*, 62 WASH. L. REV. 201 (1987) (fifth amendment due process rights mandate that attorneys' fees be exempt from forfeiture); Pate, *Payment of Attorneys' Fees With Potentially Forfeitable Assets*, 22 CRIM. L. BULL. 326 (1986) (forfeiture of attorneys' fees not unconstitutional provided defendant given opportunity to demonstrate legitimacy of assets).

10. See Brickey, *supra* note 6.

11. See *infra* notes 45-47 and accompanying text.

eral district and circuit courts.¹² What had emerged was an amalgam of holdings based on various statutory interpretations of the forfeiture provisions.¹³ This conflict in decisions among the circuits, epitomized by *In re Forfeiture Hearing as to Caplin & Drysdale*¹⁴ and *United States v. Monsanto*,¹⁵ led the United States Supreme Court to grant certiorari to consider fee forfeiture.¹⁶

The *Caplin & Drysdale* holding in the Fourth Circuit favors a statutory interpretation that forfeitable assets include attorneys' fees.¹⁷ Moreover, the court's constitutional analysis found that the statute does not interfere with a defendant's sixth amendment right to counsel.¹⁸ This en banc rehearing reversed a panel decision¹⁹ affirming the district court's interpretation of the statute as exempting attorneys' fees.²⁰

In contrast, the Second Circuit found in *Monsanto* that restrained assets could be used to fund reasonable attorneys' fees.²¹ An earlier panel decision²² ordered that the issuance of a pretrial restraining order freezing a defendant's assets must be accompanied by a hearing to determine the probability that the assets are forfeitable.²³ Should the Government meet this burden, however, attorneys' fees would not be exempt from the forfeiture order.²⁴ The appellate court's en banc rehearing, which reversed the panel decision and permitted the payment of legitimate attorneys' fees from restrained assets in all circumstances,²⁵ issued a per curiam opinion reflecting a number of rationales for the decision.²⁶

In affirming *Caplin & Drysdale*²⁷ and reversing *Monsanto*,²⁸ the majority in a closely divided United States Supreme Court²⁹ adopted a stat-

12. See *infra* notes 82-125 and accompanying text.

13. See *infra* notes 83-91 and accompanying text.

14. 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd*, 109 S. Ct. 2646 (1989).

15. 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 109 S. Ct. 2657 (1989).

16. *United States v. Monsanto*, 109 S. Ct. 2657, 2661 (1989).

17. 837 F.2d at 641.

18. *Id.* at 649.

19. *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *aff'g* *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986), *rev'd sub nom.* *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd*, 109 S. Ct. 2646 (1989).

20. *Id.* at 913.

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

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

23. *Id.* at 82-83.

24. *Id.* at 85.

25. *Monsanto*, 852 F.2d at 1402.

26. The court issued a per curiam order followed by eight separate concurring and dissenting opinions.

27. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2649 (1989).

28. *United States v. Monsanto*, 109 S. Ct. 2657, 2661 (1989).

29. Justice White wrote the majority opinion. He was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy.

utory construction that mandates the forfeiture of all restrained assets.³⁰ Turning to constitutional considerations, the Court rejected the argument that pretrial forfeiture of assets which prevents a defendant from retaining private counsel violates both a defendant's right to counsel of choice and right to due process under the Sixth and Fifth Amendments, respectively.³¹

In a separate opinion that addressed both the *Caplin & Drysdale* and *Monsanto* majority opinions, the dissenters³² favored a statutory construction that would have permitted the Court to avoid reaching the constitutional issues at all.³³ Even if Congress had intended the statute to have the meaning the majority placed upon it, the dissenters argued, such an interpretation would be unconstitutional because it would violate the Sixth Amendment.³⁴

This Comment discusses the United States Supreme Court decisions in *Caplin & Drysdale* and *Monsanto*. Part I examines the statutory language in the forfeiture provisions of RICO and CCE and considers whether legislative history reveals congressional intent concerning fee forfeiture. Part II takes a brief look at the various interpretations of the provisions in the courts, focusing on the *Caplin & Drysdale* and *Monsanto* appellate decisions. Against this background, Part III analyzes the reasoning used by both the majority and dissent in their Supreme Court opinions. Part IV weighs these arguments and, finding the dissenting arguments more persuasive, suggests possible future directions for the United States Supreme Court, Congress, and society in general.

I. Legislative History

A. The Racketeer Influenced and Corrupt Organizations Act and the Continuing Criminal Enterprise Statute

In 1970, Congress enacted the Organized Crime Control Act and the Comprehensive Drug Abuse Prevention and Control Act. The Racketeer Influenced and Corrupt Organizations Act (RICO) and the Continuing Criminal Enterprise Statute (CCE) originate in these Acts. Congress acted in direct response to the growing awareness that traditional law enforcement measures were less than effective against the

30. *Monsanto*, 109 S. Ct. at 2661-65; *Caplin & Drysdale*, 109 S. Ct. at 2650-51. Issues of statutory construction are discussed in greater detail in the *Monsanto* opinion. Although the Court rejects the petitioner's statutory interpretation in *Caplin & Drysdale*, it expressly refers to the explanation in *Monsanto*.

31. *Caplin & Drysdale*, 109 S. Ct. at 2651-57; *Monsanto*, 109 S. Ct. at 2665-67. Constitutional issues are dealt with in greater detail in the *Caplin & Drysdale* opinion. The Court does, however, reject the constitutional claims in *Monsanto* as well.

32. 109 S. Ct. at 2667 (Blackmun, J., dissenting). Justices Brennan, Marshall, and Stevens joined Justice Blackmun's dissent.

33. *Id.* at 2667.

34. *Id.*

modern³⁵ types of crime emerging across the nation.³⁶ Specifically, Congress aimed to cripple the strong economic incentives in organized crime and drug distribution activities.³⁷

As a result, both RICO and CCE contain provisions for heavy fines and long prison terms.³⁸ RICO is directed against persons engaging in a "pattern of racketeering activity"³⁹ to invest in, control, or conduct an "enterprise"⁴⁰ and is the weapon of choice against organized crime.⁴¹ CCE, called the "RICO drug statute" by one commentator,⁴² targets large-scale drug operations.⁴³

35. See Blakey, *Forfeiture of Legal Fees: Who Stands to Lose*, 36 EMORY L.J. 781, 783-84 (1987). Blakey discusses the "law of the nineteenth century" as being directed at individual actors and their victims. He postulates that modern law enforcement must evolve to contend with "organizational crime" which has at its base a large number of perpetrators acting within an organization to reach a greater number of victims.

36. S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969) [hereinafter S. REP. 617] ("our present laws are inadequate to remove criminal influences from legitimate endeavors or organizations"); see also S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1985), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374-76 [hereinafter S. REP. 225] (discussing the intent behind the original RICO and CCE provisions); Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 1073 ("It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.").

37. S. REP. 617 at 79 ("an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.").

38. RICO convictions carry penalty provisions providing for fines up to \$25,000 and up to 20 years of imprisonment. 18 U.S.C. § 1963(a). CCE convictions carry fines of up to \$100,000 for the first conviction and a prison sentence of 10 years to life. For subsequent convictions, a fine may be levied of up to \$200,000 and a prison sentence of 20 years to life. 21 U.S.C. § 848(a).

39. 18 U.S.C. § 1962. A "pattern of racketeering activity" is broadly defined as two or more related "acts of racketeering occurring within a ten-year period." 18 U.S.C. § 1961(5). "Acts of racketeering" include acts or threats of violent crimes such as arson, murder, kidnapping, robbery, and extortion. In addition, acts or threats of white-collar crimes such as federal mail or wire fraud, bankruptcy fraud, and securities fraud also fall under the RICO net. 18 U.S.C. § 1961(1).

40. 18 U.S.C. § 1962. The definition of "enterprise" is not restricted to formally structured legal entities such as businesses or associations; it also includes any informal group whose members are connected through their participation in related acts of illegal activity. 18 U.S.C. § 1961(4).

41. The statute's reach is not limited to mobsters, however. The language of the statute has been broadly construed to include white-collar criminals, and there have been an increasing number of prosecutions under RICO against these nontraditional "racketeers." Note, *Constitutional Law—The Eighth Amendment as Applied to RICO Criminal Forfeiture—United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), 10 W. NEW ENG. L. REV. 393, 396-400 (1988).

42. Blakey, *supra* note 35, at 783.

43. 21 U.S.C. § 848. The statute is aimed at persons committing a series of drug violations who occupy "a position of organizer, a supervisory position, or any other position of

Honoring the commitment to move beyond conventional sanctions in this new phase of the war on crime, Congress included forfeiture provisions in RICO and CCE.⁴⁴ Although civil forfeiture has been used extensively in the United States, criminal forfeiture has had only a very limited use.⁴⁵ Criminal forfeiture is an *in personam* proceeding against the owner of potentially forfeitable property that requires a finding of guilt before forfeiting the property.⁴⁶ Civil forfeiture, on the other hand, is an *in rem* proceeding against the property itself. The property may be forfeited even after the acquittal of its owner because civil forfeiture embraces the legal fiction that the property itself is the guilty party in the action.⁴⁷ Through the increasing use of criminal forfeiture to strike at the economic power bases of modern crime, Congress hoped "to remove the profit from organized crime by separating the racketeer from his dishonest gains."⁴⁸

The initial impact was not as great as Congress had anticipated. In the ten years after the implementation of the provisions, only ninety-eight cases were filed under the RICO and CCE statutes.⁴⁹ The reasons for this were multifold. The Justice Department's slow response in familiarizing itself with the new regulations has been cited as one cause.⁵⁰

management" over five or more other persons engaged in the same activities. 21 U.S.C. § 848(b).

44. The original forfeiture provisions were found in 18 U.S.C. § 1963 (1982) and 21 U.S.C. § 848 (1982). The RICO provisions demanded the forfeiture of "any interest . . . acquired or maintained" in violation of the statute. 18 U.S.C. § 1963(a)(1). The CCE provisions required the forfeiture of "the profits obtained" in violation of the statute. 21 U.S.C. § 848(a)(2)(A).

45. *United States v. Nichols*, 841 F.2d 1485, 1487 (10th Cir. 1988) (rejection of criminal forfeiture in the early years of our nation); *United States v. Sandini*, 816 F.2d 869, 873 (3d Cir. 1987) (use in England set an example to avoid). Except for a short period during the civil war when criminal forfeiture was used as a punishment for treason, criminal forfeiture was not used in the United States until its recent revival under RICO and CCE. Note, *Attorney Fee Forfeiture*, *supra* note 5, at n.32; Wade, *Feds in Your Pocket: Attorney's Fee Forfeiture and Attorney Disqualification Under RICO*, 10 CRIM. JUST. J. 217, 226 (1988) (quoting *United States v. Veon*, 538 F. Supp. 237, 241 (E.D. Cal. 1982)); Markus, *Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 TEMP. L.Q. 1097, 1103-1105 (1986); see also Note, *RICO Forfeiture: Can the Adversary Be Removed From the Adversary Process?*, 35 DE PAUL L. REV. 709, 712-13 (1986) [hereinafter Note, *RICO Forfeiture*].

46. Markus, *supra* note 45, at 1105-1106; Comment, *Forfeiture of Attorneys' Fees Under RICO: An Affront to a Defendant's Right to Counsel and to a Fair Trial*, 12 U. DAYTON L. REV. 553, 558 (1987) [hereinafter Comment, *Forfeiture Under RICO*] (forfeiture "inextricably linked" with defendant's guilt).

47. Markus, *supra* note 45, at 1105.

48. *Russello v. United States*, 464 U.S. 16, 28 (1983).

49. U.S. Comptroller General, General Accounting Office, *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking*, at 10 (1981) [hereinafter GAO Report].

50. Blakey, *supra* note 35, at 787-88. See also GAO Report, *supra* note 49, at 16 ("The Department of Justice has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique.").

Much of the fault, however lies with Congress and the construction of the statutes themselves. Ambiguous language and the lack of procedural direction plagues the forfeiture provisions.⁵¹ The courts had difficulty interpreting what Congress meant by "interest" and "proceeds" and, as a result, frequently construed the provisions narrowly.⁵²

The ability of defendants to dissipate the proceeds of their crimes prior to conviction created even more of a problem because the statutes failed to define the standards regarding the issuance of preconviction restraining orders. Without consistent procedural standards to follow, the statutes were rarely implemented in the manner envisioned by Congress.⁵³ The failure of the provisions to include a procedure that would permit the issuance of a restraining order during the preindictment period proved particularly fatal.⁵⁴ Defendants had plenty of time to transfer or conceal their assets, thereby mitigating the effects of the provisions.

B. Comprehensive Forfeiture Act of 1984

To address the shortcomings of the original forfeiture provisions, Congress passed the Comprehensive Forfeiture Act of 1984 (CFA).⁵⁵ According to one commentator, "the Act contains the most significant changes in the federal criminal justice system ever instituted at one time."⁵⁶ The CFA left the original penalty provisions untouched. Instead, Congress added new forfeiture provisions in an attempt to rectify

51. See generally Note, *RICO Forfeiture*, *supra* note 45, at 717-19 (discussing the statutory limitations of the original forfeiture provisions).

52. GAO Report, *supra* note 49, at 30; see also S. REP. NO. 225, *supra* note 36, at 195 (the interpretation by some courts results in the failure to reach criminal profits); Blakey, *supra* note 35, at 788 ("The federal judiciary came to the statutes as a country parson reading the first chapter of Genesis—with a dry and hostile literalism."). The question confronting the courts was whether the statute could be read expansively to include the indirect proceeds of criminal activity in addition to the direct profits that all courts agreed were forfeitable. The Supreme Court put this issue to rest in *Russello v. United States* when it held that the language of the statute was to be liberally construed to include both direct profits and derivative proceeds obtained by illegal activity. 464 U.S. at 16, 22.

53. S. REP. 225, *supra* note 36, at 195. The effect of the limited interpretation placed upon the forfeiture provisions has been to "seriously undercut the statute's utility and significantly limit the extent of RICO forfeitures." *Id.*

54. *Id.* at 195 ("present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets.").

55. Pub. L. No. 98-473, 98 Stat. 1837 (1984) (amending 18 U.S.C. § 1963 (1984) and adding 21 U.S.C. § 853 (1984)). The forfeiture provisions that create the CFA are Chapter III of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 1837 (1984). The CFA repealed 21 U.S.C. § 848(d), the original CCE forfeiture provision, and amended 21 U.S.C. § 848(a) of the statute to subject those convicted of CCE violations to the newly added 21 U.S.C. § 853. In addition, the CFA modified 18 U.S.C. § 1963, RICO's original forfeiture provision. The new forfeiture provisions, 21 U.S.C. § 853 and modified 18 U.S.C. § 1963, essentially replicate each other and are treated as interchangeable for the purposes of interpretation by the courts.

56. Wade, *supra* note 45, at 217.

what many in Congress saw as the most grievous flaw in the original provisions: the failure to mount a strong attack on the economic power bases of crime.⁵⁷ To accomplish this goal, Congress clarified the definition of property subject to forfeiture,⁵⁸ added a relation-back provision that vests title in the government as of the time an offense is committed,⁵⁹ eased procedures connected with the issuance of restraining orders,⁶⁰ and established a process whereby bona fide purchasers could challenge the forfeiture of specific assets.⁶¹

The CFA amended RICO and CCE to clarify that the indirect proceeds of criminal activity are subject to forfeiture along with the direct proceeds.⁶² These amendments affirmed an earlier decision by the Supreme Court that broadly defined the original provisions as including both direct and indirect proceeds.⁶³ In addition, Congress described the types of property subject to forfeiture⁶⁴ with a far-reaching intent.⁶⁵

In an attempt to prevent the preconviction dissipation of assets by a defendant, Congress added a relation-back provision to the CFA and simplified the procedure for obtaining preconviction restraining orders.⁶⁶ The original provisions did not give the government any rights to potentially forfeitable assets until the defendant's conviction.⁶⁷ Under the CFA provisions, title to forfeitable property vests in the government as of

57. S. REP. 225, *supra* note 36, at 196 (Congress intended the new forfeiture provisions "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 as a result avoid the economic impact of forfeiture.").

58. 18 U.S.C. § 1963(a)(3); 21 U.S.C. § 853(a) (Supp. IV 1986).

59. 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c).

60. 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e).

61. 18 U.S.C. § 1963(l); 21 U.S.C. § 853(n); *see also* Comment, *Constitutionality of Fee Forfeiture*, *supra* note 5, at 159-62; Note, *Attorney Fee Forfeiture*, *supra* note 5, at 539-43; Comment, *Forfeiture of Attorney Fees Under RICO's New Amendments*, 32 ST. LOUIS U.L.J. 199, 203-207 (1987); Comment, *Forfeiture Under RICO*, *supra* note 46, at 559-63; Pate, *supra* note 9, at 328-33; Note, *RICO Forfeiture*, *supra* note 45, at 720-26.

62. 18 U.S.C. § 1963(a)(3); 21 U.S.C. § 853(a). Both statutes define forfeitable property as: "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly" in violation of either the RICO or CCE statute. *Id.*

63. *Russello v. United States*, 464 U.S. 16, 26 (1983) ("statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots"); *see also supra* note 52 and accompanying text.

64. 18 U.S.C. § 1963(b); 21 U.S.C. § 853(b) (includes real property, tangible personal property, and intangible personal property such as "rights, privileges, interests, claims, and securities").

65. S. REP. 225, *supra* note 36, at 200 (what is meant to be encompassed by the term property should be "broadly construed").

66. 18 U.S.C. § 1963(c) and (d); 21 U.S.C. § 853(c) and (e).

67. 18 U.S.C. § 1963(c); 21 U.S.C. § 848(d).

the time the criminal activity takes place,⁶⁸ and includes property the defendant has transferred to third parties.⁶⁹ To reduce third-party transfers prior to conviction, Congress authorized the issuance of postindictment and preindictment restraining orders. Postindictment orders do not require a hearing and may be based upon the information provided in the indictment.⁷⁰ Preindictment orders may be obtained at an adversary hearing upon a showing that: (1) "there is a substantial probability that the United States will prevail on the issue of forfeiture;" and that (2) "the need to preserve the availability of the property"⁷¹ outweighs any hardship that the defendant may suffer. Temporary preindictment restraining orders may be obtained *ex parte* upon a showing of probable cause that the assets specified would be subject to forfeiture.⁷² Hearings concerning the issuance of restraining orders use relaxed evidentiary rules which permit a government showing based on hearsay.⁷³

Congress attempted to protect innocent third parties from the reach of the provisions by permitting bona fide purchasers to challenge forfeiture in a postconviction hearing.⁷⁴ The third party must petition the court and establish by a preponderance of the evidence that he or she received title before the occurrence of the defendant's alleged violation.⁷⁵ Alternatively, if the transfer occurred after the violation, at a time when title in the government had already vested, it must be shown that the transfer from the defendant was made for value and that the purchaser had no reason to believe at the time of the transfer that the property was subject to forfeiture.⁷⁶ If third parties meet their burden, the forfeiture order will be amended to exclude the property in question.

The new forfeiture provisions have provoked great controversy concerning their application to attorneys' fees and have led to conflicting statutory interpretations. If the relation-back provision applies without exception to all forfeitable property either in a defendant's possession or transferred to third parties who do not qualify for bona fide purchaser

68. 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c) (providing that "[a]ll right, title, and interest in property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section").

69. 18 U.S.C. § 1963(g); 21 U.S.C. § 853(c).

70. 18 U.S.C. § 1963(d)(1)(A); 21 U.S.C. § 853(e)(1)(A).

71. 18 U.S.C. § 1963(d)(1)(B); 21 U.S.C. § 853(e)(1)(B). Preindictment orders expire in ninety days unless an indictment is filed or an extension is granted. *Id.*

72. 18 U.S.C. § 1963(d)(2); 21 U.S.C. § 853(e)(2). The order is obtained *ex parte* upon a showing that notice would create a risk of future unavailability. The initial order expires in ten days unless an extension is granted. *Id.*

73. 18 U.S.C. § 1963(d)(3); 21 U.S.C. § 853(e)(3).

74. 18 U.S.C. § 1963(l); 21 U.S.C. § 853(n). The petition must be made within thirty days following the verdict for forfeiture. The hearing is an adversary hearing that is conducted without a jury. *Id.*

75. 18 U.S.C. § 1963(l)(6)(A); 21 U.S.C. § 853(n)(6)(A).

76. 18 U.S.C. § 1963(c) and (l)(6)(B); 21 U.S.C. § 853(c) and (n)(6)(B).

status, it also may apply to attorneys' fees. Those opposed to attorneys' fee forfeiture may frame their arguments from either a constitutional or a statutory perspective.

From a constitutional standpoint, a statute applicable to attorneys' fees implicates fifth and sixth amendment concerns. Those commentators who argue that such a statute is unconstitutional claim that fee forfeiture deprives defendants of their right to counsel of choice. In addition, the statute affects due process rights because defendants are prevented from using potentially forfeitable property before the question of their guilt has been adjudicated.⁷⁷

Alternatively, other commentators avoid the constitutional issues by adopting a statutory construction that does not find legitimate attorneys' fees forfeitable. In other words, they find the language of the statute to be sufficiently ambiguous so as to allow an interpretation that carves out a forfeiture exemption for attorneys' fees.⁷⁸

On the other hand, the statute may be read as unambiguous in its intent to reach all tainted assets. Those commentators that accept this interpretation make no objection to the inclusion of attorneys' fees in forfeitable assets.⁷⁹ This reading of the statute looks to the legislative pledge to combat modern crime on an economic level. As one commentator asserts: "In passing the 1984 Act, Congress committed itself to making RICO and CCE work, if necessary, over the objections of the federal judiciary, over the objections of the practicing bar and of criminal defense lawyers."⁸⁰ Each viewpoint has had its representation in the courts.⁸¹

II. Case Law

A. Early Trend in District Courts: Statutory Construction to Avoid Reaching Constitutional Issues

With one notable exception,⁸² the majority of district courts that

77. See *supra* note 9.

78. See *supra* note 5.

79. See *supra* note 6.

80. Blakey, *supra* note 35, at 789.

81. See *infra* notes 82-125 and accompanying text.

82. *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). The *Payden* court did not follow the early trend in the district courts. Although the issue was not directly before the court, *Payden* held that attorneys' fees are forfeitable. Overriding constitutional objections, the court found that the statute does not interfere with the sixth amendment right to counsel due to the availability of appointed counsel. Because forfeitable property vests in the government as of the time of the crime's commission, the court reasoned that such property is not under the defendant's ownership and control and, as a result, cannot be used to retain an attorney. The court stated: "In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds." The court

first addressed the issue of attorneys' fee forfeiture under the new forfeiture provisions adopted a statutory construction exempting legitimate fees from forfeiture.⁸³ In reaching this result, the courts have taken different approaches. Some courts tried to characterize attorneys as bona fide purchasers.⁸⁴ Others offered sometimes obscure legislative history to support the determination that Congress intended to exempt legitimate attorneys' fees,⁸⁵ and only sham fees or fraudulently obtained fees are forfeitable.⁸⁶

emphasized that forfeiture of attorneys' fees is compatible with congressional intent to strike at the economic power supporting crime. *Id.* at 850 n.14.

83. See *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986); *United States v. Estevez*, 645 F. Supp. 869 (E.D. Wis. 1986).

84. See, e.g., *United States v. Rogers*, 602 F. Supp. 1332, (D. Colo. 1985). In *Rogers*, the court tried to fit attorneys' fees within the bona fide purchaser exemption and found that any attempt to characterize attorneys as bona fide third-party transferees would probably fail. Although an attorney gives value for the assets he or she receives, a defendant's attorney could never take without notice because the assets subject to forfeiture are listed in the indictment. *Id.* at 1346-47. Because the provisions are silent concerning the forfeitability of attorneys' fees, the court turned to legislative history to determine the intent of Congress. The Senate Report, referring to the creation of the bona fide purchaser exemption, stated: "An order may reach only property of the defendant, save in those instances where a transfer to a third party is voidable." S. REP. 225, *supra* note 36, at 201. The court interpreted this statement as intent on the part of Congress to limit forfeiture of third-party assets to situations where the arm's-length nature of the transaction is in question. *Rogers*, 602 F. Supp. at 1347. Thus, the court held that attorneys should be paid for "services actually and legitimately rendered." *Id.* at 1348.

85. See, e.g., *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985). This court also looked to the legislative history behind the forfeiture provisions and, like *Rogers*, the *Badalamenti* court found little to aid interpretation. The court found a reflection of congressional intent to avoid constitutional infringements in a sentence in a House Judiciary Committee Report. *Id.* at 197. This statement declared: "Nothing in this section is intended to interfere with a person's sixth amendment right to counsel." H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984) [hereinafter H.R. REP. 845]. Because, in dictum, the court questioned the constitutionality of a statute that reaches attorneys' fees, the court concluded that Congress did not intend the forfeiture provisions to include legitimate fees. *Id.* at 198. *But cf. Payden*, 605 F. Supp. at 849 n.14. The *Payden* court used the same Committee Report to support the contrary interpretation that Congress intended to avoid the question entirely, leaving the issue for the courts to resolve. *Id.* at 850 n.14. The statement to which the *Payden* court refers declared: "The Committee . . . does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." H.R. REP. 845, *supra*, at 19 n.1. The *Badalamenti* court dismissed *Payden* and interpreted the second sentence as questioning specifically the constitutionality of restraining orders. *Badalamenti*, 614 F. Supp. at 197.

86. See, e.g., *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985). The *Ianniello* court held that because status as a bona fide purchaser would require an attorney to disclose privileged information, Congress could not have intended for the forfeiture provisions to apply to legitimate attorneys' fees. Thus, the court reasoned, only sham or fraudulent transactions between the attorney and the defendant are subject to forfeiture. *Id.* at 458. The court deter-

All the decisions, however, shared a common theme. Each court analyzed the statutory language of the forfeiture provisions and found it ambiguous.⁸⁷ This released the courts from the necessity of considering the constitutional implications of a statute that includes the forfeiture of legitimate attorneys' fees. Rather, the courts may look to legislative history to resolve ambiguities in the statutory language and to seek support for judicial interpretation of congressional intent.⁸⁸

This trend came to a halt in *United States v. Nichols*.⁸⁹ *Nichols* rejected a method of analysis that used legislative history to clarify ambiguities in statutory language. On the contrary, the *Nichols* court found the statutory language clear and unambiguous. Without resorting to legislative history, the court held that the forfeiture provisions encompass attorneys' fees.⁹⁰ Accordingly, because the language of the statute clearly indicates that attorneys' fees are forfeitable property, the court concluded that the issue to decide is whether a statute with such provisions passes constitutional muster.⁹¹

B. Post-*Nichols* Constitutional Issues: A Split Among the Circuits

Nichols marked a change in the focus of the courts regarding the question of fee forfeiture. After *Nichols*, an increasing number of circuit courts read the provisions as subjecting attorneys' fees to forfeiture. This, in turn, led the courts to a constitutional analysis of fifth and sixth amendment issues. Unlike the identifiable trend in the district courts, no one viewpoint held sway in the circuit courts. Instead, the circuits split in their decisions on the constitutionality of the statute.⁹²

Some courts found that the failure of the statute to provide an ex-

mined congressional intent by examining a Senate Committee Report regarding the provision for bona fide purchasers. The Report stated that 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." S. REP. 225, *supra* note 36, at 3392.

87. See, e.g., *Estevez*, 645 F. Supp. at 872 (reading the provisions to exempt legitimate fees conforms with the "spirit" of the statute); *Rogers*, 602 F. Supp. at 1339 (statute silent on the issue of fees and so must turn to legislative history); *Ianniello*, 644 F. Supp. at 455 (no express mention of attorneys' fees).

88. See *United States v. Bassett*, 632 F.Supp. 1308, 1315-16 (D. Md. 1986) (Congress, in its aim to prevent the dissipation of assets prior to conviction, could not have meant to include legitimate attorneys' fees); *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196-97 (E.D. Va. 1986) (no intent to include legitimate fees because forfeiture would disrupt judicial efficiency).

89. 654 F. Supp. 1541 (C.D. Utah 1987), *rev'd*, 841 F.2d 1485 (10th Cir. 1988).

90. *Id.* at 1555 ("if anything, the reverse is true: the statute is clear on its face; the legislative history is ambiguous").

91. *Id.* at 1556 ("the only issue Congress left to the courts was whether or not the provision, as written to encompass attorneys' fees, is constitutional"). A constitutional analysis found that the statute, as interpreted by the court, impermissibly interfered with a defendant's sixth amendment right to counsel. *Id.* at 1556-57.

92. See *infra* notes 93-94 and accompanying text.

emption for attorneys' fees created no constitutional problems.⁹³ These courts focused on the qualified nature of the sixth amendment right to counsel. In general, the courts following this reasoning found no infringement of a defendant's sixth amendment rights as long as the court provided appointed counsel as a substitute.

Other courts found that forfeiture as applied to attorneys' fees is unconstitutional.⁹⁴ These courts gave greater weight to a defendant's sixth amendment right to counsel of choice when balanced against the government's interest in forfeiture. Most did not find appointed counsel a comparable substitute.

C. Decisions in the Fourth and Second Circuits: Setting the Stage for Review by the United States Supreme Court

In 1988, the United States Supreme Court granted certiorari in *Caplin & Drysdale, Chartered v. United States*⁹⁵ and *United States v. Monsanto*,⁹⁶ two cases arising in different circuits. The cases supported opposing arguments and arrived at different conclusions concerning the constitutionality of the CFA. *Caplin & Drysdale* and *Monsanto* have a long history of review and provide an excellent overview of the various arguments on both sides of the issue.

1. *Caplin & Drysdale, Chartered v. United States*

The backdrop for the Fourth Circuit's *Caplin & Drysdale* decision was set by *United States v. Harvey*.⁹⁷ The court addressed both statutory

93. See, e.g., *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988). *Nichols* reversed a district court decision that declared the statute violated the Sixth Amendment because it did not provide for the exemption of legitimate attorneys' fees. *Id.* at 1509. The court found that a plain reading of the statute includes attorneys' fees. *Id.* at 1494. The court also found that the statute does not present an arbitrary interference with a defendant's sixth amendment right to counsel as long as appointed counsel is made available. *Id.* at 1505; see also *United States v. Friedman*, 849 F.2d 1488, 1491 (D.C. Cir. 1988) (no denial of sixth amendment right to counsel since defendant may obtain representation by appointment); *United States v. Moya-Gomez*, 860 F.2d 706, 731 (7th Cir. 1988) (no violation of Fifth and Sixth Amendments as long as pretrial hearing establishes the probability that the assets are forfeitable); *United States v. Lewis*, 759 F.2d 1316, 1317 (8th Cir.), *cert. denied* 106 S. Ct. 406 (1985) (sixth amendment right to counsel of choice is not violated); *United States v. Weisman*, 858 F.2d 389, 391 (8th Cir. 1988) (no infringement upon sixth amendment right to counsel of choice); see *infra* notes 109-117 and accompanying text.

94. See *United States v. Jones*, 837 F.2d 1332, 1333 (5th Cir.), *reh'g granted*, 844 F.2d 215 (5th Cir. 1988) (statute that requires forfeiture of assets needed to pay reasonable and legitimate fees violates Sixth Amendment); *United States v. Unit No. 7 & Unit No. 8*, 853 F.2d 1445, 1452 (8th Cir. 1988) (a restraining order that interferes with the payment of legitimate attorneys' fees violates the Fifth and Sixth Amendments); see also *infra* notes 118-124 and accompanying text.

95. 488 U.S. 940 (1988).

96. 488 U.S. 941 (1988).

97. 814 F.2d 905 (4th Cir. 1987).

and constitutional issues in *Harvey*. A three-judge panel faced a consolidated appeal of three district court decisions: *United States v. Reckmeyer*,⁹⁸ *United States v. Bassett*,⁹⁹ and *United States v. Harvey*.¹⁰⁰ After a statutory analysis, the appellate court held that the CFA does not exempt attorneys' fees from forfeiture.¹⁰¹ The court also stated that the peculiar position a defense attorney occupies in relation to his or her client makes it highly unlikely that the attorney could ever fulfill the requirements necessary for standing under the bona fide purchaser exemption. An attorney would rarely be able to claim that tainted assets were received without notice of their potential forfeitability because the attorney would be alerted to the nature of his or her client's criminal difficulties.¹⁰² Finally, the court did not find legislative history helpful in understanding the language of the statute.¹⁰³

Once the *Harvey* court concluded that the forfeiture provisions encompassed attorneys' fees, it turned to a constitutional analysis of the provisions. The court stated that the CFA provisions mandating forfeiture of legitimate attorneys' fees infringed upon a defendant's sixth amendment right to counsel of choice.¹⁰⁴ The court balanced the government's interest in forfeiture against a defendant's interest in obtaining counsel of choice and found that sixth amendment rights carry more weight. Thus, the court held the CFA provisions unconstitutional to the extent that they prevent the payment of legitimate attorneys' fees.¹⁰⁵

In re Forfeiture Hearing as to Caplin & Drysdale,¹⁰⁶ an en banc rehearing by the Fourth Circuit, reversed *Harvey* and held that even legiti-

98. 631 F. Supp. 1191 (E.D. Va. 1986). In *Reckmeyer*, the court held that the statute provided an exemption for bona fide attorneys' fees. *Id.* at 1195. The court found that a statutory interpretation that permits the forfeiture of legitimate fees violates a defendant's sixth amendment rights. *Id.* at 1196.

99. 632 F. Supp. 1308 (D. Md. 1986). In *Bassett*, the court held that forfeiture of attorneys' fees under the statute extended only to sham or fraudulent transactions. *Id.* at 1315-16. To avoid sixth amendment violations, the court found that Congress did not intend to place legitimate fees within the reach of the statute. *Id.* at 1317.

100. The district court opinion for this case is unpublished. All citations appear in the appellate opinion. In *Harvey*, the district court denied a motion to exempt assets from forfeiture in order to retain private counsel. The defendant was represented by appointed counsel. *United States v. Harvey*, 814 F.2d 905, 912 (4th Cir. 1987).

101. *Id.* at 913-18. This view of the statute contradicts the *Reckmeyer* and *Bassett* holdings. See *supra* notes 98-99.

102. *Id.* at 915. To avoid addressing the constitutional issues raised by a statutory construction that permitted attorneys' fees forfeiture, earlier district court decisions often tried to fit attorneys' fees within the bona fide purchaser exemption. See *supra* note 84.

103. *Id.* at 918. The Senate Committee Report statement upon which many district court opinions rely to support their interpretation of congressional intent to exempt attorneys' fees was dismissed as a "reassuring political gesture." *Id.*; see *supra* note 85.

104. *Id.* at 923-27. This reverses the district court decision in *Harvey*. See *supra* note 100.

105. *Id.* at 927.

106. 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd*, 109 S. Ct. 2646 (1989). The 5-4 decision includes two judges writing concurring opinions. *Id.*

mate attorneys' fees are subject to forfeiture under the statute.¹⁰⁷ The rehearing was based entirely upon the defense counsel's third-party claim for unpaid fees in *Reckmeyer*.¹⁰⁸ The district court allowed the claim against the forfeitable assets, and the appellate court affirmed. The en banc rehearing reversed, however. The *Caplin & Drysdale* court did not find the CFA unconstitutional¹⁰⁹ although it agreed with the panel that the statutory language encompassed attorneys' fees.¹¹⁰ The court reasoned that the right to counsel is a qualified one and may be limited by a defendant's resources. The court did not find this right at issue because forfeited assets do not belong to the defendant and are not available to retain private counsel.¹¹¹

2. United States v. Monsanto

The Second Circuit Court of Appeals faced the same issues in *United States v. Monsanto*.¹¹² In *Monsanto*, a three-judge panel held that the plain meaning of the statute does not exempt legitimate attorneys'

107. *Id.* at 642.

108. The Government did not seek rehearing of *Basset* and *Harvey*. The Government chose to pursue only *Reckmeyer*. *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986), *aff'd sub nom.*, *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom.*, *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), *aff'd*, 109 S. Ct. 2646 (1989). The history of this case is complex. *Reckmeyer* was indicted on drug charges under the CCE statute. Despite a district court order restraining the assets listed in the indictment as subject to forfeiture, the defendant transferred \$26,444.97 to the third-party law firm to obtain their legal services. In addition, the defendant filed a motion to modify the restraining order to permit the use of the restrained assets to pay his attorneys' fees. The court denied the motion because the defendant entered into a plea agreement in which he agreed to plead guilty to the CCE charge and forfeit all restrained assets. Defense counsel acted to recover \$170,512.99 in fees and retain the \$26,444.97 previously received for services rendered. *Id.* at 1193. The district court allowed the claim for a share of the forfeited assets, holding that Congress did not intend for the statute to reach legitimate attorneys' fees. *Id.* at 1195. The appellate decision based its affirmance of the holding in *Reckmeyer* upon a different rationale, however. The *Harvey* court found that although the statutory language must be interpreted as making no exemption for attorneys' fees, the failure to do so is unconstitutional and the statute could not be enforced against legitimate fees. *United States v. Harvey*, 814 F.2d 905, 926 (4th Cir. 1987).

109. *Caplin & Drysdale*, 837 F.2d at 648.

110. Even the four dissenters agreed that the provisions do not make an exception for attorneys' fees. *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 651 (4th Cir. 1988) (Phillips, J., dissenting). They believed that the provisions violated the defendant's sixth amendment right to counsel of choice. *Id.*

111. *Id.* at 644.

112. 836 F.2d 74 (2d Cir. 1987), *vacated*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 109 S. Ct. 2657 (1989). The defendant was charged under RICO, CCE, and a firearm statute. An *ex parte* restraining order was issued by the district court pursuant to the indictment that prohibited the transfer of two parcels of real property, the bulk of the defendant's assets. The defendant moved to vacate or modify the order so that private counsel could be obtained. The district court denied the motion, and the defendant was represented by appointed counsel. The defendant appealed. *Id.* at 76.

fees from forfeiture.¹¹³ Regarding constitutional issues, the court rejected the result reached in *Harvey*. The *Monsanto* panel found that the *Harvey* court placed too much weight on a defendant's interest in using tainted assets to mount a defense and undervalued the government's interest in forfeiture as a weapon against crime.¹¹⁴

The court, however, was reluctant to establish an absolute rule allowing forfeiture of attorneys' fees. As a solution, the panel held that an adversarial hearing must take place after the issuance of a restraining order relating to forfeiture in order to satisfy the due process requirements of notice and hearing.¹¹⁵ The court found that the government must meet its burden of proof in the hearing to establish the likelihood that the property is subject to forfeiture. Once the government meets its burden, there is no sixth amendment right to require that the defendant be permitted to use the property to retain private counsel.¹¹⁶ Should the government fail to meet its burden, the defendant may use the assets in question to retain counsel of his or her choice. Assets used for this purpose would remain outside the reach of the statute should the government later succeed in proving its case at trial.¹¹⁷

At an en banc rehearing,¹¹⁸ the circuit court vacated the panel decision.¹¹⁹ The court held, in a per curiam opinion, that the defendant is entitled to use restrained assets to pay the legitimate costs of private counsel.¹²⁰ Unfortunately, no single rationale explained this decision, prompting one commentator to note that this was a "result without a reason."¹²¹ Although concurring in the result, some judges objected to

113. *Id.* at 80. Two judges joined in the majority opinion. One judge dissented. *Id.* at 74.

114. *Id.* at 80-81.

115. *Id.* at 82-83.

116. *Id.* at 83-84.

117. *Id.* at 84.

118. *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam).

119. *Id.* at 1402. The timing of the decisions is complicated. Following the panel order, the district court held a forfeiture hearing that spanned four days. The Government met its burden of proof at this hearing, and the restraining order remained intact. The defendant could not use the assets to engage private counsel. The Second Circuit agreed to rehear the appeal en banc. *Id.* After being granted a rehearing, but before a decision was rendered, the case went to trial in the district court. Because the defendant's assets remained frozen pending rehearing, the defendant was represented by appointed counsel at trial. During the trial, the en banc decision was handed down. In an 8-4 decision, the court ordered the modification of the restraining order to permit the use of the forfeitable assets for legitimate attorneys' fees. The district court then offered the defendant use of the assets to retain private counsel. *Id.* The defendant rejected this offer because of its timing, more than four months into the trial and just prior to closing arguments, and continued with appointed counsel. Three weeks later the defendant was convicted and his assets forfeited in a special verdict. *United States v. Monsanto*, 109 S. Ct. 2657, 2661 n.4 (1989).

120. *Monsanto*, 852 F.2d at 1402.

121. Brickey, *Tainted Assets and the Right to Counsel—The Money Laundering Conundrum*, 66 WASH. U.L.Q. 47, 59 (1988).

the forfeiture of attorneys' fees on sixth amendment grounds.¹²² Others found it unnecessary to address constitutional issues because they believed that the language of the statute exempts legitimate fees.¹²³ Two judges stated that the statute infringes upon due process rights because of its failure to provide for the type of hearing the panel ordered.¹²⁴ Finally, the dissenters would have upheld the restraining order and forfeited the assets without providing for attorneys' fees.¹²⁵

III. The Supreme Court and Attorneys' Fee Forfeiture: *Caplin & Drysdale and Monsanto*

The United States Supreme Court divided its consideration of the issue of attorneys' fee forfeiture under the provisions of the Comprehensive Forfeiture Act (CFA) into two parts, statutory interpretation and constitutional analysis. The merits of the *Caplin & Drysdale*¹²⁶ and *Monsanto*¹²⁷ appeals are weighed in separate, companion opinions written by Justice White. The majority contemplated statutory construction in the *Monsanto* opinion. Constitutional arguments received only limited attention. The *Caplin & Drysdale* opinion, on the other hand, contains the main thrust of the constitutional analysis. In a separate opinion, the dissent addressed statutory and constitutional issues as they apply to both *Caplin & Drysdale* and *Monsanto*.¹²⁸

In these cases, the issue concerning the petitioner's standing in *Caplin & Drysdale* and the respondent's standing in *Monsanto* to bring their cases before the Court was resolved in their favor. In *Caplin & Drysdale*, the Government argued that the petitioner¹²⁹ did not have the required *jus tertii* standing to advance the constitutional rights of Reckmeyer.¹³⁰ While conceding that the Government's argument had some merit, the

122. *Monsanto*, 852 F.2d at 1402, 1404, 1418 (Feinberg, Oakes, JJ., concurring and Pierce, J., concurring in part and dissenting in part). Judge Feinberg was joined by Judge Oakes and Judge Pierce. Judge Oakes filed a separate concurring opinion. Judge Pierce was joined by Judge Cardamone.

123. *Id.* at 1405 (Winter, J., concurring). Judge Winter was joined by Judge Meskill and Judge Newman.

124. *Id.* at 1411 (Miner, J., concurring in part and dissenting in part). Judge Miner was joined by Judge Altamari. See also *supra* notes 115-117 and accompanying text.

125. *Id.* at 1412 (Mahoney, J., dissenting). Judge Mahoney was joined by Judge Cardamone and Judge Pierce except as to section D of the dissenting opinion.

126. 109 S. Ct. 2646 (1989).

127. 109 S. Ct. 2657 (1989).

128. 109 S. Ct. 2667 (1989) (Blackmun, J., dissenting).

129. The petitioner is a law firm that represented Reckmeyer during the grand jury investigation prior to his indictment. The firm continued to represent Reckmeyer after his indictment and in the proceedings that followed. The firm sought to recover approximately \$170,000 in legal fees incurred during this period as well as to retain the \$26,444.97 previously paid by Reckmeyer. *Caplin & Drysdale*, 109 S. Ct. at 2649-50.

130. *Id.* at 2651 n.3.

Court acknowledged that the petitioner had the necessary standing to pursue litigation.¹³¹ In *Monsanto*, the Court decided that although Monsanto had been brought to trial and a special verdict judged his assets forfeitable, the issue concerning the pretrial restraining order remained alive because Monsanto had not yet exhausted the appellate process.¹³²

A. Majority Opinions

1. *Rejection of a Statutory Interpretation Exempting Attorneys' Fees From Forfeiture*

In *Monsanto*, the Court looked first to the language of the statute to determine whether the forfeiture provisions include attorneys' fees. The Court found the statutory language "plain and unambiguous" in its failure to provide an exemption for attorneys' fees.¹³³ For support, the Court drew upon the strong language used in the statute. Cast in terms of the compulsory "shall order forfeiture" and the expansive reach of "all property,"¹³⁴ the Court maintained that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited."¹³⁵

The Court dismissed respondent's argument that the definition of property does not include attorneys' fees.¹³⁶ The Court found no language in the statute to support this reading. On the contrary, the statute's property definition is "all-inclusive."¹³⁷ Nor was the Court able to find support for this argument from the circuit courts. Nearly every cir-

131. *Id.* The Court has two requirements that must be satisfied in order to obtain *jus tertii* standing. First, the petitioner must be injured in a manner that satisfies Article III's case-or-controversy criteria. The Court must determine that the attorneys' fees at issue are sufficient to meet this condition. Second, the Court considers whether prudential concerns would favor permitting the petitioner to advance a third party's claim.

The Court weighed three factors in this determination: (1) the relationship of the petitioner to Reckmeyer; (2) Reckmeyer's ability to appear before the Court to advance his own rights; and (3) the impact that the appeal would have on third party interests. Although there was nothing to prevent Reckmeyer from advancing his own claim, the Court concluded that the relationship between Reckmeyer and his attorneys was of "special consequence" and the statute may have made it difficult for Reckmeyer, as a third party, to advance his own rights. As a result, the Court found that the law firm had *jus tertii* standing. *Id.*

132. *Monsanto*, 109 S. Ct. at 2661 n.4.

133. *Id.* at 2662.

134. Section 853 states: "The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed . . . that the person forfeit to the United States all property described in this subsection." 21 U.S.C. § 853(a) (Supp. IV 1986).

135. *Monsanto*, 109 S. Ct. at 2662.

136. *Id.*

137. *Id.* Section 853(b) defines property to include "real property" as well as "tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 21 U.S.C. § 853(b).

cuit court that considered this argument rejected it.¹³⁸

Although the statute does not expressly exempt attorneys' fees from the property subject to forfeiture, the respondent argued that the statute's failure to address the issue indicates a lack of congressional intent to place fees within the scope of the provisions. At the very least, the respondent declared, the silence indicates that Congress did not consider the implications of the provisions as they apply to attorneys' fees.¹³⁹

The Court acknowledged that the legislative history is not voluminous regarding congressional intent on the issue of attorneys' fee forfeiture. The Court disagreed, however, that the small amount that can be considered applicable to the issue favored the respondent's interpretation of the statute. The Court stated that the passage in a House Judiciary Committee Report most frequently cited in support of an exemption for attorneys' fees¹⁴⁰ can better be interpreted as an express indication that legislators intended to leave this determination to the courts rather than to resolve it themselves.¹⁴¹ In addition, the Court pointed to another section of the same report suggesting that part of the motivation behind the provisions was congressional frustration with the amount of forfeitable property diverted to pay attorneys' fees.¹⁴²

The Court placed no value upon the postenactment comments of legislators regarding the purpose behind the statute, despite Monsanto's efforts to convince them otherwise.¹⁴³ The Court found that congressional intent is "best determined by [looking to] the statutory language it chooses."¹⁴⁴ Furthermore, the Court questioned the respondent's interpretation of the intent behind the provisions because another statute enacted simultaneously with the CFA contains the "precise" exemption

138. *Monsanto*, 109 S. Ct. at 2662 & n.7.

139. *Id.* at 2662.

140. *Id.* at 2662 n.8. Monsanto cited a House Judiciary Committee Report to support his view that Congress wanted to remain aloof from the issue of attorneys' fee forfeiture: "Nothing in this section is intended to interfere with a person's sixth amendment right to counsel. The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." *Id.* (quoting H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984)).

141. *Id.* The Court read this "ambiguous passage" as a sign that Congress withheld its disapproval of pretrial restraining orders. According to the Court, Congress was simply warning the courts to act prudently in this area. *Id.*

142. *Id.* at 2662 n.8. The Court cited a House Judiciary Committee Report that discussed the result of a major drug prosecution: "Of the \$750,000 for the residences, \$175,000 was returned to the wife of one of the defendants, and \$559,000 was used to pay the defendant's attorneys The Government wound up with \$16,000 It is against this background that present Federal forfeiture procedures are tested and found wanting." *Id.* (quoting H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 3 (1984)).

143. *Id.* at 2663. The Court was referring to comments made by Senator Leahy and Representatives Hughes and Shaw indicating that they never envisioned that the forfeiture provisions would encompass attorneys' fees. *Id.*

144. *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985)).

the respondent was attempting to impose here.¹⁴⁵ As further evidence of congressional intent, the Court pointed to the failure of Congress to amend the forfeiture provisions despite subsequent opportunities and repeated urging to do so.¹⁴⁶

Moreover, the Court declared that any silence on the part of Congress should not be used to create ambiguity. Legislative history does not mention the express intention of Congress to encompass "stockbroker's fees, laundry bills, or country club memberships," but it does not make sense to argue that these items were meant to be excluded from forfeiture.¹⁴⁷ The Court expressed that Congress should not be required to add, "and we even mean assets to be used to pay an attorney," before the statute may be construed to reach attorneys' fees.¹⁴⁸

Both the respondent in *Monsanto* and the petitioner in *Caplin & Drysdale* adopted an argument based on the concurring opinion of Judge Winter in the en banc decision of *United States v. Monsanto*.¹⁴⁹ Judge Winter urged that the permissive language¹⁵⁰ the statute uses to describe the issuance of pretrial restraining orders gives district courts the discretion to decide the manner in which to implement such orders.¹⁵¹ The decision to issue a restraining order should be based upon "traditional equitable principles that balance the relative hardships to the parties."¹⁵² Judge Winter asserted that, in most cases, the defendant should be permitted to use potentially forfeitable assets for "ordinary lawful expenditures, including expenditures to retain private legal counsel."¹⁵³ Further, once a district court exercises its discretion to permit the release of restrained assets to retain counsel, these assets should be immunized from

145. *Id.* at 2664. The Victims of Crime Act of 1984 requires the forfeiture of collateral profits derived from crime. In other words, criminals may not keep the profits of any books written or movies made about their lives. The forfeiture provision expressly exempts attorneys' fees that do not exceed twenty percent of the forfeited collateral profits. *Id.* (citing 18 U.S.C. § 3681(c)(1)(B)(ii) (Supp. 1982)).

146. *Id.* at 2663.

147. *Id.*

148. *Id.*

149. *Id.* at 2664-65; *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2650-51 (1989).

150. Section 853(e)(1) states: "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 . . ." 21 U.S.C. § 853(e)(1) (Supp. IV 1986) (emphasis added).

151. *United States v. Monsanto*, 852 F.2d 1400, 1405 (1988) (Winter, J., concurring). Judge Winter stated: "I am frankly puzzled why a statutory provision with such permissive language has been read by so many courts to authorize as a routine matter, much less require, the most draconian of restraints on a defendant's assets without giving any consideration to the hardship such a restraint imposes." *Id.*

152. *Id.*

153. *Id.* at 1406.

later forfeiture should the government prevail at trial.¹⁵⁴

The Court rejected this argument as a misreading of the provision. The Court stated that the district courts simply do not have as much discretion as this interpretation would indicate.¹⁵⁵ Any discretion afforded the district courts "must be cabined by the purposes for which Congress created it."¹⁵⁶ Because the goal of this statute is to "preserve the availability of property . . . for forfeiture,"¹⁵⁷ the Court declared that the permissive language pertains only to the issuance of a restraining order, not to forfeiture itself. A restraining order is only one tool district courts may use to implement the statute. A court also may permit a defendant to post bond for the value of the forfeitable assets instead of freezing the specific assets. Should the defendant be unable to post bond, however, the court must issue a restraining order to prevent the pretrial dissipation of assets. Thus, while the manner of implementation is at the court's discretion, whether to impose forfeiture is not.¹⁵⁸

Finally, the Court refused to accept the respondent's argument that doctrines of statutory construction demand that the statute be interpreted to avoid the issue of its constitutionality.¹⁵⁹ The Court stated that these doctrines should be followed only in cases in which the statute is ambiguous. Because the Court found the language in this case clearly unambiguous, the Court found no need to utilize the canons of statutory construction to construe the statute.¹⁶⁰ The doctrines are not, the Court declared, "a license for the judiciary to rewrite language enacted by the legislature."¹⁶¹ In the words of Justice White, "This result may seem harsh, but we have little doubt that it is the one that the statute mandates."¹⁶²

2. *Rejection of Constitutional Arguments Against Attorneys' Fee Forfeiture*

In *Caplin & Drysdale*, the petitioner advanced two constitutional arguments. First, the petitioner argued that a statutory interpretation of the forfeiture provisions that does not provide an exemption for attorneys' fees violates a defendant's sixth amendment right to counsel of choice.¹⁶³ Second, the petitioner contended that the statute places too much power in the hands of the prosecution, thereby creating an imbalance that impermissibly interferes with a defendant's due process rights

154. *Id.* at 1410.

155. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2651 (1989).

156. *United States v. Monsanto*, 109 S. Ct. 2657, 2665 (1989).

157. *Id.* (quoting 21 U.S.C. § 853(e)(1) (Supp. V 1982)).

158. *Id.*

159. *Id.* at 2664.

160. *Id.*

161. *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

162. *Id.* at 2665.

163. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2651-52 (1989).

under the Fifth Amendment.¹⁶⁴ The Court ultimately rejected both constitutional challenges to the statute.¹⁶⁵

a. The Sixth Amendment Argument

The petitioner contended, in its sixth amendment argument, that there will be times when defendants are prevented from obtaining their counsel of choice.¹⁶⁶ This will occur because a defendant no longer has the freedom to use his or her assets to engage an attorney, or because the preferred attorney will not accept the defendant as a client out of fear that his or her fees may be subject to later forfeiture. The petitioner urged that it is in these situations that the Sixth Amendment protects a defendant.¹⁶⁷

In dismissing the petitioner's sixth amendment argument, the Court stated that the protection afforded a defendant is one of adequate counsel, not an unlimited choice of counsel.¹⁶⁸ A particular defendant's resources and the preferred attorney's willingness to take on the case limit the right to acquire representation of choice. The Court declared that "a defendant may not insist on representation by an attorney he cannot afford."¹⁶⁹ Thus, a defendant may hire an attorney within his or her price range or one who will work without pay. The Government may not interfere in this selection. Accordingly, the Court found the burden placed on a defendant by the forfeiture provisions was of a limited nature only.¹⁷⁰ A defendant has the option of using other nonrestrained assets in his or her possession to obtain preferred counsel. The Court maintained that even defendants rendered constructively indigent by the statute "may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future."¹⁷¹

Further, the Court asserted that if defendants do not have sufficient nonforfeitable resources to retain private counsel, they "have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."¹⁷² Because forfeitable assets belong to the government as of the time of the commission of the crime for which a de-

164. *Id.* at 2656.

165. *Id.* at 2657.

166. *Id.* at 2652.

167. *Id.*

168. *Id.*

169. *Id.* (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

170. *Id.*

171. *Id.*

172. *Id.*

defendant is charged,¹⁷³ the Court declared that a defendant has no claim to such assets. No sixth amendment violation occurs unless a defendant is prevented from using his or her own property to obtain counsel. The Court declared that “[a] defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.”¹⁷⁴

The petitioner also argued that the interest in protecting a defendant’s sixth amendment rights outweighs the government’s interest in forfeiture.¹⁷⁵ The petitioner claimed that, unlike the proceeds of other crimes, a defendant retains good title to restrained assets until a special verdict forfeits the property to the United States. For example, robbery proceeds never belong to a defendant because title does not pass simply as a result of unlawful possession.¹⁷⁶ Therefore, the petitioner contended, the legal fiction employed by the forfeiture provisions to deprive defendants of their choice of counsel is not strong enough to sanction the resulting impairment of interests protected by the Sixth Amendment.¹⁷⁷

In addition, the petitioner asserted that the congressional purpose behind the statute is to remove the economic incentive from specific types of crime. The petitioner argued that using forfeitable assets to retain counsel accomplishes this goal.¹⁷⁸ Forcing defendants to use these proceeds to retain defense counsel effectively separates defendants from the proceeds of their crimes. Defendants then are prevented from using illegal profits in the furtherance of other crimes. Thus, the petitioner contended, the government’s interest in forfeiture of attorneys’ fees is substantially diminished because the objective of the statute can be achieved without depriving defendants of their right to counsel of choice.¹⁷⁹

The Court rejected these arguments. The Court asserted that the Government’s property interest was “more substantial than petitioner acknowledges.”¹⁸⁰ The Court looked to a similar forfeiture provision in the Internal Revenue Code to establish that the United States has a long history of forfeiting title to assets as of the time of violation. The Court maintained that “[c]oncluding that [a defendant] cannot give good title to such property . . . because he did not hold good title is neither ex-

173. Section 853(c) states that “[a]ll right, title and interest in property . . . vests in the United States upon commission of the act giving rise to forfeiture.” 21 U.S.C. § 853(c) (Supp. IV 1986).

174. *Caplin & Drysdale*, 109 S. Ct. at 2652.

175. *Id.* at 2653.

176. *Id.* at 2652-53.

177. *Id.* at 2653.

178. *Id.* at 2654.

179. *Id.*

180. *Id.* at 2653.

traordinary or novel."¹⁸¹

Moreover, the Court stated that the government has a strong pecuniary interest in divesting criminals of their criminal proceeds. Allowing defendants to deplete forfeitable assets prior to conviction does not serve this interest.¹⁸² The government has an interest in recovering "all forfeitable assets" because they can be used to fund "law-enforcement efforts in a variety of important and useful ways."¹⁸³ In addition, the government has an interest in preserving forfeitable property intact because the property must be returned to any bona fide owners who claim it.¹⁸⁴ The Court declared that "[w]here the Government pursues this restitutionary end, the government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery."¹⁸⁵ Finally, the Court declared that destroying the economic power of crime figures "includes the use of such economic power to retain private counsel."¹⁸⁶ While recognizing that this concept may be "somewhat unsettling,"¹⁸⁷ the Court asserted that this reflects "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."¹⁸⁸ The Court did not feel that a drug dealer deserves a better defense than a petty thief because he or she has access to larger sums of money.¹⁸⁹

Following this reasoning, the Court rejected the argument that appointed counsel is inadequate to deal with the complexities of a RICO or CCE defense.¹⁹⁰ The Court stated that "[i]f such an argument were accepted, it would bar the trial of indigents charged with such offenses, because those persons would have to rely on appointed counsel"¹⁹¹ If counsel is ineffective in an individual case, this can be dealt with as it occurs. The Court dismissed any notion that "the Sixth Amendment's guarantee of effective assistance of counsel is a guarantee of a privately-retained counsel in every complex case, irrespective of a defendant's ability to pay."¹⁹²

The Court also rejected the arguments the petitioner advanced regarding possible ethical conflicts. First, the Court declared that any dis-

181. *Id.*

182. *Id.* at 2654.

183. *Id.* (emphasis in original).

184. *Id.*

185. *Id.*

186. *Id.* at 2654-55.

187. *Id.* at 2655.

188. *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in the result)).

189. *Id.*

190. *Id.* at 2655 n.7.

191. *Id.*

192. *Id.*

incentive created by the statute to fully investigate the source of a client's funds would be slight.¹⁹³ The provision requires that third parties demonstrate they were "reasonably without cause to believe that the property was subject to forfeiture" at the time the property was transferred to them.¹⁹⁴ Because "the only way a lawyer could be a beneficiary of [the bona fide purchaser provision] would be to fail to read the indictment of his client," the Court found it unlikely that attorneys will attempt to qualify.¹⁹⁵

Second, the Court dismissed the argument that the possibility that an attorney may encourage a defendant to accept a less desirable plea bargain renders the statute unconstitutional. The Court declared that if an attorney recommends an agreement because it contains a prison term rather than forfeiture, the case could be resolved on the basis of ineffective assistance of counsel. Such cases can be addressed on an individual basis as they arise.¹⁹⁶ Finally, the Court did not believe that the statute creates a system of contingency fees for criminal cases. The Court did state, however, that even if the statute were interpreted in this manner, "[t]he fact that a federal statutory scheme authorizing contingency fees . . . is at odds with model disciplinary rules or state disciplinary codes hardly renders the federal statute invalid."¹⁹⁷

b. The Fifth Amendment Arguments

The Court then turned to the petitioner's second constitutional argument, that the statute violates due process under the Fifth Amendment because it disturbs the balance of power between the government and the defendant. Although the Due Process Clause protects the right to a fair trial, the Court stated that the Sixth Amendment defines the principles of a fair trial.¹⁹⁸ Because the Court had already determined that the Sixth Amendment does not render the statute invalid, the Court concluded that the Fifth Amendment due process claim added nothing.¹⁹⁹ Nor did the Court find that the mere possibility of prosecutorial abuse violating due process rendered the statute unconstitutional.²⁰⁰ The Court declared that "[t]he Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them"²⁰¹ The Court instead suggested that the lower courts deal with the abuses indi-

193. *Id.* at 2656 n.10.

194. *Id.* (quoting 21 U.S.C. § 853(n)(6)(B) (Supp. 1982) and Brief for Petitioner 31).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 2656.

199. *Id.*

200. *Id.* at 2657.

201. *Id.*

vidually "when (and if) any such cases arise."²⁰²

In addition to the issues raised in *Caplin & Drysdale*, the Court in *Monsanto* considered a final fifth amendment argument. In *Monsanto*, the respondent contended that a preconviction restriction of assets infringed upon his constitutional right to due process.²⁰³ The Court did not accept this argument and declared that assets may be restrained before conviction "based on a finding of probable cause to believe that the assets are forfeitable."²⁰⁴ Because it is possible to restrain persons based on such a showing, the Court stated that "it would be odd to conclude that the Government may not restrain property."²⁰⁵ The Court, however, did not establish a procedure for determining whether probable cause exists to issue protective orders. The Court expressly left open the question whether a hearing is required before the issuance of a pretrial restraining order.²⁰⁶

B. Dissenting Opinion

The dissenters²⁰⁷ began by stating that they have been guided by "one core insight: that it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial."²⁰⁸ This statement set the tone for the dissent. Justice Blackmun continued by declaring that the majority "trivializes" the burden on the defendant and advised the Court to follow the lead of the district courts because they encounter RICO and CCE cases more frequently.²⁰⁹ Blackmun believed that the statutes could have and should have been interpreted as exempting legitimate attorneys' fees from forfeiture. Even if Congress wrote these statutes intending the forfeiture of attorneys' fees, Blackmun argued that such statutes could not be enforced because they violate the Sixth Amendment.²¹⁰

1. *Statutes Should Be Read To Exempt Attorneys' Fees From Forfeiture*

The dissenters stated that there was no express provision mandating

202. *Id.*

203. *United States v. Monsanto*, 109 S. Ct. 2657, 2666 (1989).

204. *Id.*

205. *Id.*

206. *Id.* at 2666 n.10. Because the Government established probable cause at a hearing ordered by the Second Circuit and the district court issued a restraining order, the Court found it unnecessary to consider the issue. Nor did the Court consider whether the district court's four-day hearing was adequate in the event that such a hearing was required by the Due Process Clause. *Id.*

207. Justice Blackmun wrote the dissenting opinion. He was joined by Justices Brennan, Marshall, and Stevens.

208. 109 S. Ct. at 2667 (Blackmun, J., dissenting).

209. *Id.*

210. *Id.*

the forfeiture of attorneys' fees.²¹¹ Nor was there useful discussion of the issue in the statutes' legislative history.²¹² The dissenters stated, however, that unlike "stockbroker's fees, laundry bills, or country club memberships" described by the majority,²¹³ "one cannot believe that Congress was unaware that interference with the payment of attorney's fees . . . would raise Sixth Amendment concerns."²¹⁴

Although the dissenters conceded that the statutory language may be broad and mandatory in a specific section, they argued that the statutes "*as a whole*" are ambiguous.²¹⁵ The dissenters agreed with Judge Winter that the mandatory language of section 853(a) applies only to "any person convicted"²¹⁶ under the statute.²¹⁷ Thus, forfeiture of property transferred to third parties is controlled by the discretionary provision of section 853(c).²¹⁸ The dissenters declared that this departure from mandatory language is significant.²¹⁹ Therefore, the dissenters contended that the property held by third parties will be forfeited "only if it is included in the special verdict, and its inclusion in the verdict is discretionary."²²⁰ The dissenters found the different treatment accorded forfeitable property depending on whether it remains in the hands of the defendant or has been transferred to a third party, consistent with the distinction between civil and criminal forfeiture.²²¹

In addition, the dissenters claimed that "the Government does not have an absolute right to an order preserving the availability of property by barring its transfer to third parties."²²² On the contrary, the section of the provision that controls the issuance of preconviction restraining

211. *Id.* at 2668.

212. *Id.* The dissenters felt that the most legislative history has to say on attorneys' fees is contained in the passage of the House Report cited in *Monsanto*: "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." *Id.* at 2668 n.2 (quoting H.R.REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984)). Even if the dissenters accepted the majority's opinion that the passage is simply a warning to the courts to take special care with this issue, the dissenters did not understand why the majority "proceed[ed] to ignore Congress' exhortation to construe the statute to avoid implicating Sixth Amendment concerns." *Id.*

213. *Id.* at 2668 (quoting *United States v. Monsanto*, 109 S. Ct. 2657, 2663 (1989)).

214. *Id.* at 2668.

215. *Id.* (emphasis in original).

216. 21 U.S.C. § 852(a) (Supp. IV 1986).

217. 109 S. Ct. at 2668 (Blackmun, J., dissenting) (citing *United States v. Monsanto*, 852 F.2d 1400, 1410 (2d Cir. 1988) (Winter, J., concurring), *rev'd*, 109 S. Ct. 2657 (1989)).

218. *Id.* Section 853(c) states: "Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture . . ." 21 U.S.C. § 853(c) (Supp. IV 1986).

219. 109 S. Ct. at 2669 n.4 (Blackmun, J., dissenting).

220. *Id.* at 2668.

221. *Id.* at 2669 n.5. Because the "purpose of [criminal] forfeiture is to punish the defendant, the Government's penal interests are weakest when the punishment also burdens third parties." *Id.*

222. *Id.* at 2669.

orders uses discretionary language.²²³ The dissent also drew support from a Senate report stating that a district court may hold a hearing before a protective order is issued to determine its "reasonableness" and may modify the order at a later time.²²⁴

Although the dissenters agreed with the majority that the discretion given to the district courts in sections 853(c) and 853(e)(1) must not frustrate congressional intent, the dissenters asserted that the majority had ascribed an overly broad purpose to the statute.²²⁵ The dissenters contended that the statute is not a "revenue-raising measure."²²⁶ Rather than aiming to preserve "all" property for government use, legislative history demonstrates that the statutes' purpose is to destroy the economic power bases of criminals left untouched in the past.²²⁷ Allowing a criminal to retain criminal proceeds permitted their use in future illegal activities.²²⁸ The dissenters declared that "Congress' desire to maximize punishment, however, cannot be viewed as a blanket authorization of government action that punishes the defendant before he is proved guilty."²²⁹ The dissenters contended that the statutes' primary purpose can be achieved without depriving defendants of assets with which they may retain private counsel because "[a]ssets used to retain counsel by definition will be unavailable to the defendant or his criminal organization after trial, even if the defendant is eventually acquitted."²³⁰ The dissenters also asserted that district court supervision will ensure good

223. *Id.* Section 853(e)(1) states: "Upon application of the United States, the court may enter a restraining order or injunction . . ." 21 U.S.C. § 853(e)(1) (Supp. IV 1986).

224. 109 S. Ct. at 2669 (citing S. REP. NO. 225, 98th Cong., 1st Sess., at 202 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3385-86).

225. *Id.*

226. *Id.* at 2670 n.6 (citing *United States v. Monsanto*, 852 F.2d 1400, 1407 & n.1 (2d Cir. 1988) (Winter, J., concurring), *rev'd*, 109 S. Ct. 2657 (1989)). Thus, while the Government has an interest in using the forfeitable property it recovers for law-enforcement efforts, the dissenters did not find this interest to be dispositive. Nor is restitution a dispositive goal because the types of assets at issue in typical RICO and CCE cases are profits resulting from criminal activity that no particular individual can claim. *Id.*

227. *Id.* at 2670.

228. *Id.*

229. *Id.* at 2670 n.8. The dissenters objected to the majority's easy dismissal of this issue: "The notion that the Government has a legitimate interest in depriving criminals'—before they are convicted—of economic power . . . to retain counsel of choice' is more than just 'somewhat unsettling,' . . . [it] is constitutionally suspect, and . . . completely foreign to Congress' stated goals." *Id.* at 2670 n.7 (quoting *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2655 (1989) (emphasis in original)). Even the "similar" forfeiture provision cited from the Victims of Crime Act "cuts against the result the majority reaches" because it applies to postconviction earnings. *Id.* at 2671 n.10 (citing *Victims of Crime Act, Pub. L. No. 98-473, 98 Stat. 2175, codified as 18 U.S.C. § 3681 (Supp. V 1982)*). The dissenters found it unlikely that "Congress intended to be more punitive when it comes to a defendant's need for counsel prior to conviction, when the defendant's own liberty is at stake." *Id.* (emphasis in original).

230. *Id.* at 2671.

faith transfers and protect the government's interests.²³¹

Thus, the dissenters concluded, it is possible to interpret the statutes to exempt legitimate attorneys' fees from forfeiture. A statutory construction that gives "full effect to the discretionary language in §§ 853(c) and 853(e)(1)" avoids any constitutional questions.²³² Because the majority did not interpret the statutes in this manner, the dissenters turned to an examination of the constitutional problems inherent in the majority's statutory reading.

2. *A Statute That Does Not Exempt Attorneys' Fees From Forfeiture Is Unconstitutional*

The dissenters criticized the majority's failure to fully appreciate the extent of the Sixth Amendment's protection of the right to counsel of choice.²³³ The dissenters believed this failure is illustrated by the way the majority "move[d] rapidly from the observation that 'a defendant may not insist on representation by an attorney he cannot afford,' to the conclusion that the Government is free to deem the defendant indigent by declaring his assets 'tainted' by criminal activity the Government has yet to prove."²³⁴ The dissenters argued "[t]hat the majority implicitly find[ing] the sixth amendment right to counsel of choice so insubstantial that it can be outweighed by a legal fiction demonstrates, still once again, [that it] has lost track of the distinct role of the right to counsel of choice in protecting the integrity of the judicial process"²³⁵

The dissenters placed great weight on the independence of the defense attorney for a number of reasons.²³⁶ First, trust is an essential component of the relationship between attorney and client. Trust is engendered by a defendant's ability to select his or her own counsel.²³⁷ Thus, attorneys' fee forfeiture intrudes where it does not belong: "When the Government insists upon the right to choose the defendant's counsel for him, that relationship of trust is undermined: counsel is too readily perceived as the Government's agent rather than his own."²³⁸

Second, independent choice of counsel puts some equality back into a system in which the prosecution has access to significantly greater re-

231. *Id.*

232. *Id.* at 2671-72. Indeed, the dissenters stated that "even the broadest statutory language may be interpreted as excluding cases that would raise serious constitutional questions, absent a clear expression of an affirmative intention of Congress to include those cases." *Id.* at 2671 n.11.

233. *Id.* at 2672.

234. *Id.* (quoting *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652-53 (1989) (citation omitted)).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 2673.

sources.²³⁹ The government can often simply outspend the defendant. The disparity is even more apparent in RICO and CCE cases because the government may devote greater resources to those cases because "the punitive stakes are high."²⁴⁰ In these situations, "there are few defendants . . . who fail to hire the best lawyers they can get to prepare and present their defenses."²⁴¹ On the other hand, in appointed counsel cases, "there is no guarantee that levels of compensation and staffing will be even average."²⁴²

The dissenters feared that if appointed-counsel rates were the only compensation to be earned from criminal-defense work, eventually there would be a decrease in the quality of talent and in the number of attorneys entering the criminal-defense bar.²⁴³ This would lead to a "virtual socialization of criminal defense work in this country" resulting in the standardization of services and decreased independence for those that remain in the field.²⁴⁴ Perhaps more than any other area of law, criminal defense needs the "the maverick and the risk-taker" to discover new approaches and to address the increasing complexity of our criminal justice system.²⁴⁵

The dissenters declared that "[h]ad it been Congress' express aim to undermine the adversary system as we know it, it could hardly have found a better engine of destruction than attorney's-fee forfeiture."²⁴⁶ The dissenters predicted that even the possibility of forfeiture will "substantially diminish the likelihood that private counsel will agree to take the case."²⁴⁷ Perhaps an attorney would take the case on a contingency fee basis, but the dissenters questioned "the integrity of any criminal-defense attorney who would violate the ethical norms of the profession by doing so"²⁴⁸

The dissenters also addressed the issue of potential conflict-of-interest problems. The dissenters feared that when appointed counsel faces "a lengthy trial against a better-armed adversary, the temptation to recom-

239. *Id.*

240. *Id.*

241. *Id.* (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

242. *Id.* For example, compensation under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, considered to be one of the more generous plans, is quite "low by American standards." *Id.* at 2673 n.12 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 57 n.21 (1972) (Powell, J., concurring in the result)).

243. *Id.* at 2673.

244. *Id.* at 2673-74.

245. *Id.* at 2674.

246. *Id.*

247. *Id.* The dissenters feared that some defendants may find themselves without access to appointed counsel because they do not qualify as indigent, yet are unable to employ private counsel due to the risk of subsequent fee forfeiture. *Id.* at 2674 n.14.

248. *Id.* at 2675.

mend a guilty plea will be great.”²⁴⁹ Even private attorneys may be confronted with conflicts as they try to maintain bona fide third-party status. “The attorney’s interest in knowing nothing is directly adverse to his client’s interest in full disclosure” and may lead to a “failure to recognize or pursue avenues of inquiry necessary to the defense.”²⁵⁰ Neither situation, the dissenters argued, takes into account a defendant’s best interests.

Because forfeiture remains a discretionary tool of the government, the dissent contended that “[t]he Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client’s behalf—the attorney who is better than what, in the Government’s view, the defendant deserves.”²⁵¹ This creates a situation in which “burdening the exercise of the defendant’s Sixth Amendment right was not the unfortunate consequence of the Government’s action, but its very purpose.”²⁵² As a result, the government becomes the adversary of both the defense attorney and the defendant.²⁵³

Furthermore, the government’s interest in forfeiture is too weak to legitimize its “naked desire” to deprive a defendant of a worthy advocate.²⁵⁴ Property rights based on a legal fiction do not outweigh a defendant’s sixth amendment rights especially because they do not vest in the government until after conviction. Until conviction, “sole title to such assets . . . rests in the defendant; no other party has any present legal claim to them.”²⁵⁵ There is no contest: “The Government’s interest in the assets at the time of their restraint is no more than an interest in safeguarding fictive property rights, one which hardly weighs at all against the defendant’s formidable Sixth Amendment right to retain counsel for his defense.”²⁵⁶ In addition, other “legitimate providers of services” will qualify under the bona fide purchaser exemption: “The exception is the defendant’s attorney, who cannot do his job (or at least cannot do his job well) without asking questions that will reveal the source of the defendant’s assets.”²⁵⁷ The dissenters rejected the idea that

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 2678 n.16.

253. *Id.* at 2675.

254. *Id.* at 2676.

255. *Id.*

256. *Id.* at 2677. According to the dissenters, the majority’s analogy to a bail situation is not appropriate here. Before a person is held over without bail for trial, the government must demonstrate that the defendant’s appearance could not be assured by some other means. No alternative showing is required under the forfeiture provisions. “Furthermore, the potential danger resulting from the failure to restrain assets differs in kind and severity from the danger faced by the public when a defendant who is believed to be violent remains at large before trial.” *Id.*

257. *Id.* at 2678.

the government has an interest in recovering all forfeitable property when "the burdens fall almost exclusively upon the exercise of a constitutional right."²⁵⁸

The dissenters concluded by arguing that the majority's construction of the statute was "inconsistent with the intent of Congress" and "seriously undermines the basic fairness of our criminal-justice system."²⁵⁹ The dissenters called upon Congress to amend the statute to show that it did not intend the majority's result.²⁶⁰

IV. Weighing the Arguments

A. The Majority's Reasoning for Choosing a Statutory Interpretation Encompassing Fees Is Unpersuasive

The majority's assertion that both the language of the statute and legislative history reveal an intent for the forfeiture provisions to encompass legitimate attorneys' fees is unpersuasive.²⁶¹ The majority did not adequately explain the shift from mandatory language to discretionary language in selected sections of the statute.²⁶² This shift has more significance than the majority suggests.²⁶³ More importantly, the majority's interpretation of the statute does not accurately reflect congressional intent in passing the forfeiture provisions.

Congress did not create an express provision in the statute requiring the forfeiture of attorneys' fees.²⁶⁴ Nor does the legislative history directly address the issue.²⁶⁵ Thus, the best way to interpret the statute is to examine Congress' stated purpose in enacting the forfeiture provisions. Congress stated that the primary purpose behind the forfeiture provisions is to attack the incentive behind organized crime and drug activities: huge economic profits.²⁶⁶ The original forfeiture provisions under RICO and CCE failed in this endeavor because of procedural difficulties in preventing the preconviction dissipation of assets. With the CFA, Congress hoped to address this problem and ensure that a defendant could not escape the economic impact of forfeiture so easily.²⁶⁷ Congress sought to destroy the economic organization that directed the criminal activities and to punish the individual members. Otherwise, the proceeds

258. *Id.*

259. *Id.*

260. *Id.*

261. *See supra* notes 133-162 and accompanying text.

262. *See supra* notes 150-158 and accompanying text.

263. *See supra* notes 155-158 and accompanying text.

264. *See supra* notes 78-80, 87 and accompanying text.

265. *See supra* notes 85-86 and accompanying text.

266. *See supra* notes 57-65 and accompanying text.

267. *See supra* note 57.

earned from illegal activities would continue to support crime.²⁶⁸ Congress could consider this goal accomplished if criminals were denied access to the profits of their wrong-doing and thus prevented from contributing to the perpetuation of a criminal enterprise.

Therefore, preventing a defendant from using forfeitable assets to retain an attorney is not encompassed by the statutes' primary purpose. Even if the forfeitable assets derive from illegal activities, the intent of the statute has been fulfilled as long as the defendant is prevented from recycling the proceeds transferred to defense counsel in order to fund future criminal enterprises. Other benefits are simply by-products of this goal. No legitimate government interest is served by recovering all forfeitable property because the statute is not primarily directed at revenue-raising.²⁶⁹ Nor is restitution an adequate barrier to an exemption for attorneys' fees. The nature of the proceeds is such that there is no identifiable victim to step forward and claim them.

Furthermore, by establishing procedures allowing bona fide third parties a means to claim assets or retain those transferred in good faith, Congress recognized that some claims are superior to those of the government.²⁷⁰ This is consistent with congressional design. As long as defendants do not have the freedom to dissipate assets in a manner that contributes to their enjoyment or amounts to sham or fraudulent transfers, the statutes' goal is satisfied. Distinguishing attorneys from other third parties who provide legitimate services serves no purpose. Criminal forfeiture, unlike civil forfeiture, has a penal element.²⁷¹ This punishment, however, is reserved for the convicted defendant—not innocent third parties. Criminal forfeiture should not punish defendants before conviction by crippling their ability to put on a defense of their choice. The government's only legitimate interest in attorneys' fees is in preventing the dissipation of assets through sham or fraudulent transfers. This can be accomplished, as the dissenters suggest, through reasonable court supervision to ensure good faith transfers.²⁷²

A passage in a House Judiciary Committee report cited by the majority reflects congressional frustration with the loss of forfeitable assets to large attorneys' fees.²⁷³ This frustration then is taken as a signal the forfeiture provisions meant to include those large fees.²⁷⁴ A number of factors, however, must be considered. Legislators may have been displeased because they thought the size of the fees indicated a possibility that the fees sheltered a sham transaction. In addition, Congress was

268. See *supra* note 63.

269. See *supra* note 226 and accompanying text.

270. See *supra* notes 61, 74-76 and accompanying text.

271. See *supra* note 46 and accompanying text.

272. See *supra* note 231 and accompanying text.

273. See *supra* note 142 and accompanying text.

274. See *supra* notes 140-148 and accompanying text.

reacting after the defendant had been found guilty. The frustration may have reflected a value judgment that a guilty defendant does not deserve the representation provided by attorneys charging large fees. Had the defendant in question been acquitted, would Congress' reaction toward the amount of attorneys' fees have been the same? Perhaps the money would have been regarded as well-spent.

Perhaps the frustration with large fees can be attributed to more basic motivations. It may simply be difficult for some people to believe that an attorney can earn, by legitimate means, exorbitant fees. This concept is illustrated by the remarks of one government commentator: "I would hate to think that I would have to sell my time at what it is truly worth, rather than what I can command when working on RICO and CCE cases."²⁷⁵ Any number of motives could be hidden behind the frustration expressed in this passage. This does not necessarily mean, however, that Congress would act to infringe upon a defendant's right to counsel of choice based on this frustration.

B. The Majority Does Not Give Sufficient Weight to the Burdens the Statutes Impose on a Defendant's Fifth and Sixth Amendment Rights

The majority placed too little weight on the burden defendants suffer when the statutes take away their ability to pay legitimate fees. When the majority said appointed counsel was adequate,²⁷⁶ it completely ignored the complexity and length of an average RICO or CCE trial. The average criminal trial simply does not take either the time or resources required by a RICO or CCE trial.²⁷⁷ The appointed counsel's competency is not in question. At present rates of compensation for appointed attorneys, and with current limits on funding for investigative or expert services,²⁷⁸ it is unlikely that an extensive investigation of the case will be achieved. Thus, the result of a statute that unnecessarily renders defendants constructively indigent is added weight to an already overburdened court system.²⁷⁹ "Can we seriously contend that a proper balance would be effected in such cases by giving a defendant, made 'indigent' by the Government's assertion of a potential forfeiture claim, a young attorney from an underfunded, overworked public defender's office for the ensuing

275. Blakey, *supra* note 35, at 790.

276. See *supra* note 172 and accompanying text.

277. For example, the Monsanto trial lasted four and one-half months. The hearing to determine whether the Government had sufficient probable cause to believe the defendant's assets would be forfeitable took four days.

278. See *supra* note 242 and accompanying text.

279. Greenhalgh & Hughes, *The Assistance of Counsel Clause in the Year 2000*, 25 CRIM. L. BULL. 86, 110-11 (1989).

6-15 month trial?"²⁸⁰

A public policy argument may be made that there are simply inadequate resources, either in attorneys or in dollars, to meet such an increased demand. This burden on the system will affect all defendants, not just RICO and CCE defendants, because the time required by the more complex cases will reduce the time available for other cases. It is unlikely that the assets recovered through forfeiture will be used to remedy this situation. Finally, the forfeiture of attorneys' fees is not efficient. Time is added to every case in which the government seeks forfeiture. If the court requires a hearing to establish probable cause before it will issue a protective order, a portion of trial time that could be better spent on substantive issues will be spent arguing the merits of the forfeiture.

Contrary to the majority's assertion,²⁸¹ the government actually is interfering in a defendant's attorney selection. Ultimately, these defendants are impecunious only because the government chooses to characterize them as such. The majority gives too much weight to the government's property interest in forfeitable assets. Unfortunately, the majority gets tangled in cyclical rhetoric. The government states that it has an interest in recovering property that does not belong to the defendant.²⁸² This determination, however, cannot be made until a defendant is convicted. Defendants retain title to their assets unless they are convicted. Thus, the government is using a future estimation of guilt to infringe upon a defendant's currently existing rights. When the majority asserted that a drug dealer does not deserve a better defense than a petty thief,²⁸³ it missed the point. This is illustrated by the majority's failure to include an important qualifier. The defendant is only an "alleged" drug dealer. "[T]he right to private counsel of choice guaranteed by the sixth amendment cannot be made to turn on how bad the particular crime or criminal may be, but that . . . is the linchpin of the majority's constitutional analysis."²⁸⁴ The presumption of innocence must not be ignored.²⁸⁵

280. *United States v. Monsanto*, 836 F.2d 74, 86 (2d Cir. 1987) (Oakes, J., dissenting), *vacated*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 109 S. Ct. 2657 (1989).

281. See *supra* notes 168-171 and accompanying text.

282. See *supra* notes 180-186 and accompanying text.

283. See *supra* note 189 and accompanying text.

284. *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 652 (4th Cir. 1988) (en banc) (Phillips, J., dissenting), *aff'd*, 109 S. Ct. 2646 (1989).

285. One commentator finds the presumption of innocence unduly burdensome:

We are, presumably, attempting to seize assets from bad people. I am not talking about the presumption of innocence appropriate to trial, but the real world perspective of law enforcement: We do not bring cases against people who are in fact innocent. We do bring cases against people who are presumed to be innocent. But the government has every reason to believe that in fact they are guilty. Since eighty-five to ninety percent of the people plead guilty, the government is correct eighty-five to ninety percent of the time. My point is that most people in the system are, in fact,

Nor does the majority assign enough importance to the damage caused to the adversarial system as a whole. The lawyer functions as an advocate, not as a judge. By forcing attorneys to withdraw when the source of their fees is suspicious, the government is putting attorneys in the position of having to judge their client. Guilty as well as innocent defendants are guaranteed representation under the Constitution.²⁸⁶

Additionally, the majority too easily dismissed the ethical norms of a judicial system where the behavior of attorneys is strictly circumscribed by professional codes.²⁸⁷ Despite the majority's assertion that attorneys could accept potential RICO and CCE cases on a contingency fee basis,²⁸⁸ many attorneys would be uncomfortable with such a violation of established professional conduct.²⁸⁹ Yet if attorneys follow their conscience and continue to represent alleged drug dealers and racketeers, the government may target their clients for forfeiture.²⁹⁰ The willingness of some to justify the government's use of forfeiture in this manner may be attributed to the fact that they associate the reputation of attorneys with the reputation of the defendants they choose to represent.²⁹¹

Forfeiture is a powerful weapon that gives increased leverage to the prosecution at the expense of the defense. The government is given a "negative, indeed an unwholesome, power over the defendant's choice of counsel in the very type of complex criminal case where astute, experienced counsel is most needed."²⁹² If a defendant cannot be convicted in the old-fashioned way, with sufficient evidence to convince a jury of his or her guilt, our criminal justice system requires that the defendant go free. The fact that the government may not be able to meet its burden of proof in all the cases it brings to trial does not justify government interference with a defendant's attorney-selection process.²⁹³

The simple fact remains that defendants must be found guilty before they are punished, not deemed guilty by the government because of the nature of the offense with which they are charged. Government entitlement to forfeitable assets is something that can only be decided retro-

guilty. And if we wait until the conclusion of the litigation, will there be any assets there to seize?

Blakey, *supra* note 35, at 786.

286. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

287. See *supra* notes 193-197 and accompanying text.

288. See *supra* note 171 and accompanying text.

289. See *supra* note 197 and accompanying text.

290. See *supra* note 251 and accompanying text.

291. "[T]hey need lawyers to keep the law off their backs. They need house counsel to make possible their day-to-day operations; they need corrupt lawyers to make possible their operations." Blakey, *supra* note 35, at 785.

292. *United States v. Monsanto*, 836 F.2d 74, 86 (2d Cir. 1987) (Oakes, J., dissenting), *vacated*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 109 S. Ct. 2657 (1989).

293. See *supra* notes 251-254 and accompanying text.

spectively, not prospectively. Thus, the majority is not convincing in its determination that the statutes do not violate rights guaranteed by the Fifth and Sixth Amendments.

C. Future Directions

The Court left open the possibility that due process may require a hearing before a permanent restraining order is issued. Future challenges based on this issue can be expected. Even with a hearing, however, the same problems exist. The question still remains as to who will represent the defendant at such a hearing, a "pre-trial mini-trial" in itself.²⁹⁴ The threat of forfeiture affects not only the individual defendant, but also a specific class of defendants.²⁹⁵ Attorneys, like most other working people, will avoid cases in which there is a risk they will not be paid. Certain defendants will find private representation more difficult to obtain. In addition, the showing required at such hearings is not a heavy burden of proof. The government should have no difficulty meeting the probable cause standard in most cases.²⁹⁶ As a practical matter this means that every time the government seeks forfeiture it will achieve its objective. An announcement of government intention to seek forfeiture in a specific case thereby becomes a warning to the attorney not to represent the potential client.²⁹⁷

Some commentators are troubled that successful criminals have access to a better defense than they deserve and resent that "[t]he rights of poor people charged with crime have a life only in the rhetoric of the system"²⁹⁸ As one commentator remarks: "We are not troubled when poor people charged with complex crimes have to be represented by public defenders. It escapes me why we should be concerned when this happens to those who are illegally rich through committing crimes."²⁹⁹ The right to counsel of choice "obviously cannot be taken literally and at best can mean counsel of choice for the rich."³⁰⁰ These are existing problems within the system. The question is what to do about them. Do we address the anomalies of the system by eliminating private defense in the pursuit of equal treatment? Should some defendants be deprived of their constitutional right to choose an attorney because others do not have equal access? Or should our society change priorities and provide resources to increase representation for all defendants?

294. *Monsanto*, 836 F.2d at 86-87 (Oakes, J., dissenting).

295. *Id.* at 86.

296. See *supra* notes 70-73 and accompanying text.

297. See *supra* notes 251-253 and accompanying text.

298. Greenhalgh & Hughes, *supra* note 279, at 111.

299. *Id.* at 109.

300. *Id.*

Perhaps the best thing that could occur would be for Congress to clarify the statutes. Both the majority and the dissent have called for guidance.³⁰¹ In the words of one commentator: "Congressional intent has been one of the major problems in interpretation of the Comprehensive Crime Control Act."³⁰² Congress could end these problems by amending the statutes to contain an express exemption for attorneys' fees. Unfortunately, this is unlikely given the public perception of criminal defendants. The sad fact may be that until attorneys' fee forfeiture infringes upon the rights of a more sympathetic type of defendant, such as a white-collar RICO defendant, the current abuses of the statutes may be tolerated and even deemed an acceptable sacrifice in this "war" on crime.

V. Conclusion

This Comment has traced the history of the Comprehensive Forfeiture Act of 1984 in an attempt to provide background for the debate over attorneys' fee forfeiture. The various approaches taken by the federal courts also have been examined. A number of these positions were adopted by either the majority or the dissent in the Supreme Court decisions in *Caplin & Drysdale, Chartered v. United States* and *United States v. Monsanto*.

Despite the majority's holding that the statutes encompass attorneys' fees, there is no express provision in the statutes providing for the forfeiture of fees, nor does examination of congressional purpose demand it. Moreover, the majority seemed intent on downplaying the impact of the infringement that such statutes create upon the rights of individual defendants and upon the adversarial system as a whole. The majority placed great weight on the government interest in recovering all forfeitable property, even at the expense of depriving defendants of their right to choice of counsel.

The dissenters, on the other hand, are ultimately more persuasive in their detailed analysis of the constitutional problems caused by the majority's interpretation of the statute. The dissenters recognized that certain realities exist in the criminal-defense field and that these statutes have the power to alter the criminal defendant's ability to defend against RICO or CCE charges. Although some areas remain to be explored, such as whether hearings are required before a court may issue protective orders restraining assets, the government now has a tool at its disposal that may fundamentally alter the balance of power in criminal trials.

Congress needs to amend the statutes if the forfeiture of attorneys' fees was an unforeseen construction of the provisions. Congress must

301. See *supra* notes 146 & 260 and accompanying text.

302. Wade, *supra* note 45, at 258.

move quickly, before the entire fabric of the adversarial system undergoes drastic change. As Justice Blackmun stated in his dissent: "This Court has the power to declare the Act constitutional, but it cannot thereby make it wise."³⁰³

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303. *Caplin & Drysdale, Chartered v. United States and United States v. Monsanto*, 109 S. Ct. 2667, 2678 (1989) (Blackmun, J., dissenting).

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