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Sixth Amendment--Applicability of Right to Counsel of Choice to Forfeiture of Attorneys' Fees

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SIXTH AMENDMENT—APPLICABILITY OF RIGHT TO COUNSEL OF CHOICE TO FORFEITURE OF ATTORNEYS' FEES

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

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

I. INTRODUCTION

In *United States v. Monsanto*¹ and *Caplin & Drysdale, Chartered v. United States*,² the Supreme Court held both that the criminal forfeiture provisions of the Racketeering Influenced and Corrupt Organizations Act (RICO)³ and the Continuing Criminal Enterprise (CCE)⁴ statute did not exempt from criminal forfeiture assets a defendant intends to use to pay attorneys' fees and that the forfeiture of these assets is constitutional. These criminal forfeiture provisions,⁵ which are the same in both RICO and CCE, are known as the Comprehensive Forfeiture Act⁶ and have been subject to much criticism from both courts and scholars since enacted in 1984.⁷

¹ 109 S. Ct. 2657 (1989).

² 109 S. Ct. 2646 (1989).

³ 18 U.S.C. §§ 1961-1968 (Supp. V 1987).

⁴ 21 U.S.C. §§ 848, 853 (Supp. V 1987) (CCE is a portion of the Comprehensive Drug Abuse Prevention and Control Act of 1970).

⁵ Other than a forfeiture provision under the Child Protection Act of 1984, 18 U.S.C. § 2253 (Supp. V 1987), which does not contain the relation-back provision, these are the only criminal forfeiture laws currently in effect. See Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 494 n.4 (1986). According to the legislative history of the Comprehensive Forfeiture Act, this is the first time criminal forfeiture has been allowed in the United States, S. REP. NO. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, but Brickey cited an 1886 case concerning a statute which authorized criminal forfeitures, *Boyd v. United States*, 116 U.S. 616 (1886). Brickey, *supra*.

⁶ Pub. L. No. 98-473, 98 Stat. 2040 (1984).

⁷ *United States v. Jones*, 877 F.2d 341 (5th Cir. 1989) (en banc) (requiring application of *Caplin & Drysdale*), *rev'g* 837 F.2d 1332 (1988) (property exempt from forfeiture in order to allow defendant to pay attorney); *United States v. Bissell*, 866 F.2d 1343 (11th Cir.) (forfeiture of attorneys' fees does not violate sixth amendment, and due process does not require immediate post-restraint hearing), *cert. denied*, 110 S. Ct. 213, and 110 S. Ct. 146 (1989); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (attorney fee forfeiture does not violate sixth amendment, but due process requires immediate

Courts have referred to four key provisions in the Comprehen-

post-restraint adversary hearing when forfeiture affects defendant's ability to hire attorney), *rev'g* United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986) (statute allows exemption of attorney fee from forfeiture), *cert. denied*, 109 S. Ct. 3221 (1989); United States v. Weisman, 858 F.2d 389 (8th Cir. 1988) (forfeiture allowed because it did not affect defendant's ability to hire counsel), *cert. denied*, 109 S. Ct. 1353 (1989); United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium, 853 F.2d 1445 (8th Cir. 1988) (forfeiture violated fifth and sixth amendments, but court said decision was only for narrow grounds in case), *rev'd* 890 F.2d 82 (1989) (en banc); United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988) (en banc) (attorneys' fees exempt from forfeiture; court disagreed on reason for exemption), *rev'g* 836 F.2d 74 (2d Cir. 1987) (sixth amendment does not require exemption of attorneys' fees from forfeiture, but attorneys' fees cannot be forfeited unless trial court holds immediate post-restraint adversary hearing), *rev'd*, 109 S. Ct. 2657 (1989); United States v. Friedman, 849 F.2d 1488 (D.C. Cir. 1988) (no constitutional right to release of forfeited assets to allow defendant to retain private counsel on appeal); United States v. Nichols, 841 F.2d 1485, 1509 (10th Cir. 1988) ("right to choice of counsel does not prohibit the government from restraining potentially forfeitable assets before trial"), *rev'g* 654 F. Supp. 1541 (D. Utah 1987) (forfeiture of attorneys' fees is unconstitutional); *In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc) (that since forfeiture made defendants indigents, they had no constitutional right to counsel of choice), *rev'g* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (although Comprehensive Forfeiture Act allows forfeiture of attorneys' fees, such forfeiture violates sixth amendment), *aff'g* United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986) (Comprehensive Forfeiture Act exempts attorneys' fees from forfeiture) and United States v. Bassett, 632 F. Supp. 1308, 1317 (D. Md. 1986) (no forfeiture of attorneys' fees because "Congress did not intend the statute to encompass fees to attorneys"), *aff'd*, Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Thier, 801 F.2d 1463 (5th Cir. 1986) (trial court must balance defendant's and government's interests in each case rather than categorically refusing to exempt assets from forfeiture); United States v. Stein, 690 F. Supp. 767, 768 (E.D. Wis. 1988) ("no constitutional right to retain an attorney with the illicit proceeds of a drug transaction"); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986) (court-appointed counsel may be paid from assets subject to forfeiture); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985) (attorneys' fees exempt from forfeiture because Congress did not intend exemption of attorneys' fees); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985) (attorneys' fees exempt from forfeiture because Congress did not intend exemption of attorneys' fees); *In re* Grand Jury Subpoena Dated Jan. 2, 1985, 605 F. Supp. 839, 849 n.14 (S.D.N.Y.) (no right to counsel of choice when defendant's money may actually belong to government), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) (attorneys' fees exempt from forfeiture because Congress did not intend exemption of attorneys' fees); Brickey, *Attorneys' Fee Forfeitures: On Defining "What" and "When" and Distinguishing "Ought from Is"*, 36 EMORY L.J. 761 (1987); Brickey, *supra* note 5; Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1 [hereinafter Cloud, *Forfeiting Defense Attorneys' Fees*]; Cloud, *Government Intrusions into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L.J. 817 (1987); Uelman, *Converting Retained Lawyers into Appointed Lawyers: The Ethical and Tactical Implications*, 27 SANTA CLARA L. REV. 1 (1987); 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); Comment, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124 (1986); Note, *Forfeiture of Attorneys' Fees: Should Defend-*

sive Forfeiture Act. The first defines what property is forfeitable.⁸ A person convicted under this Act must forfeit all assets involved in performing the illegal acts and all assets which directly or indirectly are derived from the proceeds of the illegal act.⁹

The second key provision, the relation-back clause, essentially alters property rights. It provides that all the property subject to forfeiture "vests in the United States upon the commission of the act giving rise to forfeiture under this section."¹⁰ This provision is at the root of constitutional considerations because it means that a guilty defendant never had title in the assets he possessed. Of course, the government cannot prove its title to the property until the defendant is convicted. A third party can contest this transfer only if that party can prove that he/she is "a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture."¹¹

The third important provision is an explanation of the proper procedure for a bona fide purchaser to follow to establish his/her

ants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?, 39 STAN. L. REV. 663 (1987).

⁸ 21 U.S.C. § 853(a); 18 U.S.C. § 1963(a). The statute states:

Any person convicted of a violation of this subchapter . . . punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter . . . that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

21 U.S.C. § 853(a) (18 U.S.C. § 1963(a) is the same in all relevant respects).

⁹ Note, *supra* note 7, at 667.

¹⁰ 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c). The section states:

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

21 U.S.C. § 853(c) (18 U.S.C. § 1963(c) is the same in all relevant respects).

¹¹ *Id.*

right to property subject to forfeiture.¹² This provision stresses that a bona fide purchaser is any person who is "at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section."¹³

The fourth significant section describes the process for obtaining a restraining order so that the government may "preserve the availability of property."¹⁴ This subsection has been used as a means of limiting the meaning of the general terms of the section defining what property is forfeitable.¹⁵

According to the legislative history, Congress enacted the Comprehensive Forfeiture Act because it recognized that drug dealers and racketeers commit their crimes with the expectation of making enormous profits.¹⁶ The Comprehensive Forfeiture Act is intended 1) "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"¹⁷ and 2) "to strip these offenders and organizations of their economic power."¹⁸

¹² 18 U.S.C. § 1963(l)(6); 21 U.S.C. § 853(n)(6). The statute states:

If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. § 853(n)(6) (18 U.S.C. § 1963(l)(6) is the same in all relevant respects).

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

¹⁴ 21 U.S.C. § 853(e)(1). The section 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 described in subsection (a) of this section for forfeiture under this section—(A) upon the filing of an indictment or information charging a violation of this subchapter . . . for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section

21 U.S.C. § 853(e)(1)(A) (18 U.S.C. § 1963(d)(2) is the same in all relevant respects).

¹⁵ See *infra* text accompanying notes 58-60, 85-90; *United States v. Monsanto*, 852 F.2d 1400, 1405-11 (2d Cir. 1988) (Winter, J., concurring), *rev'd*, 109 S. Ct. 2657 (1989).

¹⁶ S. REP. NO. 225, 98th Cong., 1st Sess. 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.

¹⁷ *Id.* at 196.

¹⁸ *Id.* at 191.

II. FACTS

A. *CAPLIN & DRYSDALE*

Prior to 1985, Christopher Reckmeyer retained the law firm of Caplin & Drysdale to represent him in an ongoing grand jury investigation.¹⁹ In January 1985, Reckmeyer was indicted for running a massive drug importation and distribution scheme, and the indictment sought forfeiture of specified assets in Reckmeyer's possession.²⁰ When Reckmeyer was indicted, the district court entered a restraining order preventing Reckmeyer from transferring any assets potentially subject to forfeiture.²¹ Nonetheless, shortly after the indictment was handed down, Caplin & Drysdale collected fees for the legal service it had already rendered.²²

Reckmeyer moved that the restraining order be modified so that he could use restrained assets to pay legal fees.²³ Before the court held a hearing on Reckmeyer's motion, however, Reckmeyer entered into a plea agreement and agreed to forfeit all assets listed in the indictment.²⁴ The court decided that the plea agreement made Reckmeyer's motion to modify the restraining order irrelevant, and Reckmeyer forfeited virtually all assets in his possession.²⁵

Caplin & Drysdale, which had continued to represent Reckmeyer, filed a petition as a third party which had entered a bona fide transaction with Reckmeyer and claimed \$170,000 in legal fees in addition to the fees it had previously obtained.²⁶ Caplin & Drysdale also argued that the Comprehensive Forfeiture Act did not allow forfeiture of attorney's fees and that if it did, then the statute would be unconstitutional.²⁷ The district court held that the Comprehensive Forfeiture Act exempted assets intended to pay attorneys' fees from forfeiture.²⁸ A panel of the Fourth Circuit affirmed the district court decision, although its decision was based on constitutional rather than statutory grounds.²⁹ The Fourth Circuit then agreed to

¹⁹ *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2649 (1989).

²⁰ *Id.* (indictment of forfeiture was under CCE).

²¹ *Id.*

²² *Id.* at 2650.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986).

²⁹ *Caplin & Drysdale*, 109 S. Ct. at 2650; *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

hear the case *en banc* and reversed the decision of the panel.³⁰ The Supreme Court granted certiorari "to determine whether the federal drug forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought" and if there is no exemption, "whether the statute, so interpreted, is consistent with the Fifth and Sixth Amendments."³¹

B. *MONSANTO*

*Monsanto*³² presented the same issue presented by *Caplin & Drysdale*, but the procedural stance was different. Monsanto was indicted in July 1987 for directing a large-scale heroin distribution enterprise.³³ The indictment listed CCE counts and specified three assets subject to forfeiture pursuant to CCE: a house, an apartment, and \$35,000.³⁴ The same day the indictment was unsealed the court granted the government's motion for a restraining order freezing the assets mentioned in the indictment.³⁵ Monsanto moved to vacate the restraining order so he could use the assets to pay attorney's fees and also moved for a declaration that assets used to pay attorney's fees would not be forfeited upon conviction.³⁶ The district court held that only assets sufficient to pay an attorney the wages specified under the Criminal Justice Act³⁷ could be exempted from the restraining order for attorneys' fees.³⁸ On appeal, a Second Circuit panel decided that neither the language of the Comprehensive Forfeiture Act nor the sixth amendment required that attorneys' fees be exempted from forfeiture, but the court remanded the case for an adversarial hearing at which the government would be required to prove that the assets likely were forfeitable.³⁹ The court held that if the government failed to prove likelihood of forfeiture at an initial hearing of this sort, it could not subject assets intended to pay attorneys' fees to forfeiture upon defendant's conviction.⁴⁰

³⁰ *Caplin & Drysdale*, 109 S. Ct. at 2650; *In re Forfeiture Hearing as to Caplin & Drysdale*, Chartered, 837 F.2d 637 (4th Cir. 1988).

³¹ *Caplin & Drysdale*, 109 S. Ct. at 2649.

³² *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

³³ *Id.* at 2659.

³⁴ *Id.* at 2659-60.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 18 U.S.C. § 3006A (1982).

³⁸ *Monsanto*, 109 S. Ct. at 2661; Brief for Respondent at 4 - 5, *Monsanto* (No. 88-454).

³⁹ *Monsanto*, 109 S. Ct. at 2661; *United States v. Monsanto*, 836 F.2d 74, 84 (1987).

⁴⁰ *Monsanto*, 109 S. Ct. at 2661; *Monsanto*, 836 F.2d at 84.

Pursuant to the directions of the appellate court, the district court held a hearing on the likelihood of forfeiture and decided to continue the restraining order.⁴¹ The case then proceeded to trial, and Monsanto was represented by appointed counsel.⁴² During the trial, the Second Circuit reheard the case *en banc* and reversed the decision of the panel, requiring modification of the restraining order so restrained assets could be used to pay attorneys' fees.⁴³ The rationale of the court was not clear because the court was divided among eight opinions:⁴⁴ three judges claimed the statute violated the sixth amendment;⁴⁵ three judges claimed the statutory language required an exemption of attorneys' fees from forfeiture;⁴⁶ two other judges concurred in part and argued that the statute violated the due process clause.⁴⁷ The other four judges, for varying reasons, accepted forfeiture of attorneys' fees according to both the language of the statute and the Constitution.⁴⁸

The Supreme Court granted certiorari to determine "whether the federal drug forfeiture statute authorizes a District Court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney; [and] if so, . . . whether such an order is permissible under the

⁴¹ *Monsanto*, 109 S. Ct. at 2661.

⁴² *Id.*

⁴³ *Id.*; *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988). A few days after the Second Circuit decided forfeiture of attorneys' fees was improper, Monsanto moved for a mistrial because his right to retain counsel had been violated. Brief for Respondent, at 10, *Monsanto* (No. 88-454). The district court denied the motion and simply gave him the opportunity to obtain counsel in the midst of summations, which, as the court recognized, was not plausible. *Id.* At the conclusion of the trial, Monsanto was convicted and his assets were forfeited. *Id.* The Supreme Court said that none of these proceedings made the issue of the pretrial restraining order moot. *Monsanto*, 109 S. Ct. at 2661 n.4.

⁴⁴ *Monsanto*, 109 S. Ct. at 2661; *Monsanto*, 852 F.2d at 1400.

⁴⁵ Chief Judge Feinberg wrote an opinion in which Judges Oakes and Kearse joined. *Monsanto*, 852 F.2d at 1402-04. Judge Oakes also wrote a separate opinion to emphasize the interest of the entire criminal justice system in recognizing the sixth amendment right to counsel in this case. *Id.* at 1404-05.

⁴⁶ Judge Winter wrote an opinion in which Judges Miskill and Newman joined. *Id.* at 1405-11.

⁴⁷ Judge Miner wrote an opinion, in which Judge Altimari joined, and explained that Congress, not the courts, must decide whether an immediate post-restraint hearing would remedy the unconstitutionality of the statute; the courts can only decide whether the statute is constitutional. *Id.* at 1411-12. Judge Miner would have held that pre-trial restraint of assets intended to pay an attorney was unconstitutional without reaching the question of whether post-trial forfeiture of attorneys' fees was allowed. *Id.*

⁴⁸ *Id.* at 1412-20. Each dissenting judge wrote his own opinion. The opinions ranged from supporting the panel decision to claiming it was unnecessary to reach the question of when assets could be seized after trial, to claiming that forfeiture was always acceptable and there was not need to change the statute.

Constitution.”⁴⁹

III. OPINIONS

A. *MONSANTO* MAJORITY

The Court, somewhat arbitrarily, used *Monsanto* to discuss the statutory aspects of the issue and *Caplin & Drysdale* to discuss the constitutional claims.⁵⁰ Justice White wrote the opinion for the Court in both cases.

In *Monsanto*, Justice White, joined by Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia, discounted two methods which had been used by lower courts to find an exemption to attorneys' fees within the Comprehensive Forfeiture Act. The first method depended on finding an ambiguity within the statute which required the courts to apply the canon of statutory interpretation that courts should “construe statutes to avoid decision as to their constitutionality.”⁵¹ *Monsanto* argued that the failure to consider the treatment of attorneys' fees created ambiguity; since the legislative history indicates Congress did not even consider attorney fee forfeiture, the Court could imply that had Congress considered the issue, Congress would have exempted attorneys' fees from forfeiture.⁵²

Justice White rejected this method. Section 853(a) requires forfeiture of “any property” that fits into the broad definition of property given in section 853(b).⁵³ The statute contains no language that singles lawyers out for special treatment.⁵⁴ Given this language and the fact that every court of appeals which had considered the question unanimously noted insufficient ambiguity in the statute to justify exempting attorneys' fees from forfeiture, Justice White decided there is no reason to exempt attorneys' fees from forfeiture.⁵⁵

⁴⁹ *United States v. Monsanto*, 109 S. Ct. 2657, 2659 (1989).

⁵⁰ The Court did address one constitutional claim in *Monsanto*; the Court concluded that the due process clause does not prohibit courts from freezing the defendant's assets before he/she has been convicted if the court has probable cause to believe the assets are forfeitable. *Monsanto*, 109 S. Ct. at 2666. Justice White explained that since courts can restrain persons upon a showing of probable cause that they have committed a crime, courts must be able to restrain property upon a similar showing. *Id.* The Court reserved the question of whether an adversary hearing is necessary in order for courts to impose a pretrial restraining order on the defendant. *Id.* at 2666 n.10.

⁵¹ *Id.* at 2664 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979)).

⁵² *Id.* at 2662.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

Furthermore, Monsanto's argument was unconvincing because the lack of any specific provisions in the legislative history⁵⁶ demonstrates breadth rather than ambiguity: "Congress' failure to supplement section 853(a)'s comprehensive phrase—'any property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language."⁵⁷

The second method of exempting attorneys' fees from forfeiture is the method developed by Judge Winter in the Second Circuit's *en banc* decision in *Monsanto*.⁵⁸ Judge Winter focused on the section describing pretrial restraining orders.⁵⁹ This section provides that a court "may enter" a restraining order, and Judge Winter contended that since the statute says "may" rather than "shall," courts must apply equitable principles, which favor defendants, before granting the restraining order. Once a district court decides a defendant may use his/her funds to pay his/her attorney, the money will never be forfeited because the statute requires the same discretionary standard for seizing money from third parties that it does for restraining assets.⁶⁰

Justice White rejected this interpretation for three reasons. First, he found no indication that the general forfeiture provisions applicable to "any property" should be limited by instructions on when the court may grant a restraining order.⁶¹ Second, instead of giving the courts "equitable discretion," Judge Winter's interpretation requires courts to exempt attorneys' fees from forfeiture, and given the strong language of other parts of the Comprehensive For-

⁵⁶ The legislative history does say, "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 199 n.1 (1984). But this is an ambiguous passage which is too inconclusive to give much support to either side. *Monsanto*, 109 S. Ct. at 2663 & n.8. Furthermore, Justice White believed that the legislative history contained material which supported allowing forfeiture of attorneys' fees. *Id.* In explaining why it was necessary to change the forfeiture provisions originally included in RICO, the House Judiciary Committee referred to a case in which the aims of forfeiture had been frustrated because the government wanted forfeiture of \$750,000 worth of assets, but collected only \$16,000 because, among other reasons, \$559,000 was used to pay attorneys' fees. H. R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 3 (1984) (citing *United States v. Meinster*, 475 F. Supp. 1093 (S.D. Fla. 1979), *aff'd*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982)).

⁵⁷ *Monsanto*, 109 S. Ct. at 2663 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

⁵⁸ *United States v. Monsanto*, 852 F.2d 1400, 1405-11 (2d Cir. 1988) (Winter, J., concurring).

⁵⁹ *Id.* at 1405-06 (citing 21 U.S.C. § 853(e)(1)(A)).

⁶⁰ *Id.* at 1410 (citing § 853(c) which says, "property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture" (emphasis added by court)).

⁶¹ *Monsanto*, 109 S. Ct. at 2665.

feiture Act, such a command should not be implied.⁶² Third, the legislative history states, "The sole purpose of [section 853's] restraining order provision . . . is to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case,"⁶³ and Judge Winter's interpretation bears no relation to this objective.⁶⁴

B. *CAPLIN & DRYSDALE* MAJORITY

In *Caplin & Drysdale*,⁶⁵ Justice White, joined by Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia, explained that neither the fifth amendment nor the sixth amendment requires exemption of attorneys' fees from forfeiture. Caplin & Drysdale based its sixth amendment claim on the right of a defendant to choose his own counsel. The Court decided, however, that since impecunious defendants do not enjoy a right to counsel of choice, the Comprehensive Forfeiture Act is constitutional.⁶⁶ As long as the Comprehensive Forfeiture Act does not force defendants to proceed without any counsel at all, the Act takes away no sixth amendment rights and "[t]he burden placed on defendants by the forfeiture law is . . . a limited one."⁶⁷

Justice White compared a defendant subject to forfeiture to a bank robber who wants to use money he has stolen from a bank to retain counsel.⁶⁸ Just as taking funds from the bank robbery would be improper because the funds rightfully belong to the bank, a defendant may not use assets that belong to the government to pay his attorney.⁶⁹

Caplin & Drysdale had argued that the bank robber analogy is not conclusive because the property right created by the relation-back clause is different than the property right a bank has in funds stolen from it. Justice White held, however, that the property right created by the relation-back clause is much stronger than Caplin & Drysdale claimed because "this approach, known as the 'taint theory,' is one that 'has long been recognized in forfeiture cases.'"⁷⁰

⁶² *Id.*

⁶³ S. REP. NO. 225, 98th Cong., 1st Sess. 204, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.

⁶⁴ *Monsanto*, 109 S. Ct. at 2665.

⁶⁵ *Caplin & Drysdale*, Chartered v. United States, 109 S. Ct. 2646 (1989).

⁶⁶ *Id.* at 2652 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* (citing *Laska v. United States*, 82 F.2d 672, 677 (10th Cir. 1936)).

⁷⁰ *Id.* at 2653 (citing *United States v. Stowell*, 133 U.S. 1 (1890)). The *Stowell* Court stated:

Furthermore, Justice White explained that it is illogical to contend that the relation-back provision is invalid with regard to attorneys' fees but that the defendant has no right to use assets subject to forfeiture to exercise any other constitutionally protected right, such as the right to speak.⁷¹ Just as the Court would not distinguish between different types of property rights, it refused to create a "distinction between, or hierarchy among, constitutional rights."⁷²

Justice White also applied a "balancing analysis" to the situation, although under his analysis it was unnecessary to take this step.⁷³ *Caplin & Drysdale* argued that the balance favored the defendant because the government's only interest was in "dispossessing a drug dealer or racketeer of the proceeds of his wrongdoing," and that was accomplished whether the money went to the government or to the defendant's lawyer.⁷⁴ Justice White recognized three other reasons for forfeiture which tilt the balance in favor of the government.

First, "the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways."⁷⁵ Second, the government has an interest in "returning property, in full, to those wrongfully deprived or defrauded of it."⁷⁶ This is the same interest which makes it illegal for bank robbers to retain lawyers with money stolen from a bank.⁷⁷

Third, Congress enacted the Comprehensive Forfeiture Act to "lessen the economic power of organized crime and drug enterprises," and "[t]his includes the use of such economic power to retain private counsel."⁷⁸ Justice White recognized that this interest is unsettling:

As soon [as the possessor of the forfeitable asset committed the violation] of the internal revenue laws, the forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title, and interest then remaining in the [possessor]; and was as valid and effectual, against all the world, as a recorded deed. The right so vested in the United States could not be defeated or impaired by any subsequent dealings of the . . . [possessor].

Stowell, 133 U.S. at 19.

⁷¹ *Caplin & Drysdale*, 109 S. Ct. at 2653-54.

⁷² *Id.* at 2654.

⁷³ *Id.*

⁷⁴ *Id.* (citing Brief for Petitioner at 39, *Caplin & Drysdale* (No. 87-1729)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 2654-55.

[W]hen a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of 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."⁷⁹

Justice White concluded his balancing analysis by stating that the result is necessary to avoid encountering "interference with a defendant's Sixth Amendment rights whenever the government freezes or takes some property in a defendant's possession before, during or after a criminal trial."⁸⁰

The Court also rejected the fifth amendment claim that the Comprehensive Forfeiture act causes an imbalance of power. The fifth amendment claim essentially is that the Comprehensive Forfeiture Act gives the prosecution too much control over who the defense counsel will be because the prosecution can threaten forfeiture when it is not content with a defendant's choice of counsel.

The fifth amendment argument added virtually nothing to the sixth amendment argument because the sixth amendment defines the elements which bring due process to a criminal trial.⁸¹ Furthermore, the Court will not invalidate a statute merely because it could be used unjustly. If there ever is a situation in which a prosecutor manipulates defense counsel with the threat of forfeiture, a claim of prosecutorial misconduct would solve the injustice; a declaration that the statute is facially unconstitutional is unnecessary.⁸²

C. DISSENT

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented from the decisions of the Court.⁸³ Justice Blackmun wrote that there is "one core insight" which compelled the dissent: "that it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial."⁸⁴

In response to the Court's holding that the Comprehensive Forfeiture Act contains no ambiguities that make it possible to inter-

⁷⁹ *Id.* at 2655 (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in result)).

⁸⁰ *Id.* Justice White supported this argument by referring to jeopardy tax assessments—seizures by the IRS which ensure payment of potential tax liabilities—which circuit courts have upheld as constitutional. *Id.*

⁸¹ *Id.* at 2556.

⁸² *Id.* at 2657.

⁸³ *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667 (1989) (Blackmun, J., dissenting).

⁸⁴ *Id.* at 2667 (Blackmun, J., dissenting).

pret the statute as exempting attorneys' fees, Justice Blackmun adopted Judge Winter's argument⁸⁵ and argued that silence as to the issue of attorneys' fees creates sufficient ambiguity to justify invoking the canon of statutory interpretation that statutes should be interpreted to avoid constitutional problems.⁸⁶ The majority erroneously focused on section 853(a), which states that property in the defendant's possession must be forfeited.⁸⁷ The relevant section is section 853(c), which states that property in the possession of third parties "may be the subject of a special verdict of forfeiture,"⁸⁸ giving courts discretion to determine how to treat property possessed by third parties. Furthermore, section 853(e)(1) allows courts discretion in determining whether to grant post-indictment protective orders.⁸⁹ In exercising their discretion, courts may consider the interests of third parties, and, therefore, "the Government does not have an absolute right to an order preserving the availability of property by barring its transfer to third parties."⁹⁰

Since proving that a judge may exercise discretion does not prove that this discretion will lead to the exemption of attorneys' fees, Justice Blackmun next proved that balancing the interests of the parties necessitates exemption. The majority failed to recognize this result because it took "an overly broad view of the Act's purposes."⁹¹ In *Monsanto*,⁹² the Court claimed that "the Act aims to preserve the availability of *all* potentially forfeitable property during the pre-conviction period, and to achieve the forfeiture of *all* such property upon conviction."⁹³ Congress' purpose, however, was not to raise as much revenue as possible but "to prevent the profits of criminal activity from being poured into future such activity."⁹⁴ Congress also desired forfeiture of all assets purchased with the fruit of crime in order to prevent illegal dealings from becoming too lucrative to be deterred.⁹⁵ Finally, Congress needed to allow forfeiture from third parties to prevent those convicted of crimes from

⁸⁵ For a description of this argument, see *supra* text accompanying notes 58-60. *United States v. Monsanto*, 852 F.2d 1400, 1405-11 (Winter, J., concurring).

⁸⁶ *Caplin & Drysdale*, 109 S. Ct. at 2668 (Blackmun, J., dissenting).

⁸⁷ *Id.* (Blackmun, J., dissenting).

⁸⁸ *Id.* (Blackmun, J., dissenting) (emphasis added).

⁸⁹ *Id.* at 2669 (Blackmun, J., dissenting).

⁹⁰ *Id.* (Blackmun, J., dissenting).

⁹¹ *Id.* (Blackmun, J., dissenting).

⁹² *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

⁹³ *Caplin & Drysdale*, 109 S. Ct. at 2669 (Blackmun, J., dissenting) (emphasis in original) (citing *Monsanto*, 109 S. Ct. at 2665).

⁹⁴ *Id.* at 2670 (Blackmun, J., dissenting) (citing S. REP. NO. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182).

⁹⁵ *Id.* (Blackmun, J., dissenting).

hiding their assets by transferring them to others only until they got out of jail.⁹⁶ Given these purposes, courts can freely exempt attorneys' fees from forfeiture. In fact, Justice Blackmun contended that given this alternative, district courts will never refuse to exempt attorneys' fees.⁹⁷

Justice Blackmun continued by claiming that even though the Court did not accept a statutory interpretation exempting attorneys' fees, it should have required an exemption of attorneys' fees from forfeiture because the sixth amendment requires exemption.⁹⁸ The majority analyzed the sixth amendment issue improperly because it did not consider the extent or function of the right to counsel of choice, a much more substantial right than the majority acknowledged.⁹⁹

According to Justice Blackmun:

The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate. . . . [T]he defendant's perception of the fairness of the process, and his willingness to acquiesce in its results, depend upon his confidence in his counsel's dedication, loyalty, and ability. 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.¹⁰⁰

Defendants have a "right to privately chosen and compensated counsel" because private counsel is far superior to appointed counsel.¹⁰¹

This right to private counsel is important not only to the individual defendant but to the integrity of the criminal justice system.¹⁰²

There is a place in our system of criminal justice for the maverick and the risk-taker, for approaches that might not fit into the structured environment of a public defender's office, or that might displease a judge whose preference for non-confrontational styles of advocacy might influence the judge's appointment decisions. There is also a place for the employment of "specialized defense counsel" for technical and complex cases. The choice of counsel is the primary means for the defendant to establish the kind of defense he will put forward.¹⁰³

⁹⁶ *Id.* (Blackmun, J., dissenting).

⁹⁷ *Id.* at 2671 n.9 (Blackmun, J., dissenting).

⁹⁸ *Id.* at 2672 (Blackmun, J., dissenting).

⁹⁹ *Id.* (Blackmun, J., dissenting).

¹⁰⁰ *Id.* at 2672-73 (Blackmun, J., dissenting) (citations omitted).

¹⁰¹ *Id.* (Blackmun, J., dissenting) ("Without the defendant's right to retain private counsel, the Government too readily could defeat its adversaries simply by outspending them.").

¹⁰² *Id.* (Blackmun, J., dissenting).

¹⁰³ *Id.* at 2674 (Blackmun, J., dissenting) (citations omitted).

Justice Blackmun argued that four main conflicts will arise as a result of the majority's decision. First, the defendant will distrust any appointed counsel and will view the forfeiture as a means of preventing him/her from putting forth an adequate defense.¹⁰⁴ The public defender's office will be able to do little to counteract this view because appointed counsel will most likely be inexperienced, and trials in which forfeiture is involved will be costly and difficult for public defender offices to manage with their scarce resources.¹⁰⁵

Second, any private lawyer who is willing to represent a forfeiture defendant will be faced with a conflict of interest forbidden by ethical norms because he/she will in effect be working on a contingent fee basis. The lawyer may want to enter into a plea agreement which is not in the best interests of the client simply because it waives forfeiture and enables the lawyer to collect a fee.¹⁰⁶

Third, the government will be able "to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case."¹⁰⁷ The prosecution may seek a forfeiture count in the indictment simply to avoid facing a certain lawyer who is very talented.¹⁰⁸

Finally, lawyers will no longer be willing to join the criminal-defense bar. Lawyers willing to practice in an area where fees are never certain must be either very idealistic or very incompetent.¹⁰⁹

Justice Blackmun acknowledged that the majority correctly stated that the right to counsel of choice is not absolute, but "never before . . . has the Court suggested that the Government's naked desire to deprive a defendant of 'the best counsel money can buy,' is itself a legitimate government interest that can justify the Government's interference with the defendant's right to chosen counsel—and for good reason."¹¹⁰ Since this is the only strong claim the majority included in its balancing analysis and it is illegitimate, the balancing analysis must come out in favor of the defendants.¹¹¹

The majority failed to balance the right to counsel of choice

¹⁰⁴ *Id.* (Blackmun, J., dissenting).

¹⁰⁵ *Id.* at 2675 (Blackmun, J., dissenting).

¹⁰⁶ *Id.* (Blackmun, J., dissenting).

¹⁰⁷ *Id.* (Blackmun, J., dissenting).

¹⁰⁸ *Id.* (Blackmun, J., dissenting).

¹⁰⁹ *Id.* (Blackmun, J., dissenting).

¹¹⁰ *Id.* at 2676 (Blackmun, J., dissenting).

¹¹¹ *Id.* (Blackmun, J., dissenting). The other two claims in the government's favor presented by the majority were the need to raise money to fight crime and the need to return property to innocent third parties. See *supra* text accompanying notes 75-77. Arguably, the first interest has some strength but Justice Blackmun rejected it as a real interest of government earlier in his opinion. See *supra* text accompanying notes 92-96.

correctly because it depended on circular logic to reach its conclusion: the relation-back clause gives the government a paramount interest in the defendant's assets because the relation-back clause gives the government title to the assets.¹¹² Justice Blackmun rejected this argument because as he reads the statute, the government has no right in the property until after the defendant is convicted.¹¹³

Justice Blackmun also distinguished the analogies that Justice White and other courts have used. The forfeiture defendant is unlike the bank robber because the bank robber never had title in the assets; he merely had possession of them for a short time.¹¹⁴ Civil forfeiture cases are distinguishable because they involve forfeiture of contraband which the law recognizes no right for anyone to possess.¹¹⁵ Jeopardy assessment cases are distinguishable because the government's claim arises prior to conviction and because most of the difficulties arise in civil court where there is no right to counsel.¹¹⁶

The probable cause showing necessary to obtain a restraining order does not help matters at all because defendants will have trouble retaining counsel at stages long before the indictment if there is any indication that the client could at some point be subject to forfeiture.¹¹⁷

IV. ANALYSIS

In *Caplin & Drysdale* and *Monsanto*, the Court decided that neither the Comprehensive Forfeiture Act nor the sixth amendment gives a rapidly growing class of defendants¹¹⁸ any protection against forfeiture of attorneys' fees; since upon conviction the government may be able to prove title in the assets dating back to the time of the crime, the defendant cannot use the assets to help contest the government's claim to the assets. The Court's evaluation of the statute is justifiable, but its constitutional analysis is weak. Although the view presented by the Court has logical appeal, there are some gaps

¹¹² *Caplin & Drysdale*, 109 S. Ct. at 2676 (Blackmun, J., dissenting).

¹¹³ *Id.* (Blackmun, J., dissenting).

¹¹⁴ *Id.* (Blackmun, J., dissenting).

¹¹⁵ *Id.* at 2676 n.15 (Blackmun, J., dissenting).

¹¹⁶ *Id.* (Blackmun, J., dissenting) ("[T]he IRS . . . has a legal claim to the sums at issue at the time of the assessment, based upon substantive provisions of the Code.").

¹¹⁷ *Id.* at 2677 (Blackmun, J., dissenting).

¹¹⁸ Several recent articles have recognized that the threat of forfeiture is so widespread that lawyers are feeling the effect and leaving criminal law practice. See, e.g., Fricker, *Dirty Money*, A.B.A. J., Nov. 1989, at 60; *Drug War Spotlight Is on Legal Fees Issue*, Chicago Tribune, Oct. 29, 1989, § 1, at 21, col. 5.

in the logic which deserve consideration because of the potentially devastating effect of the statutes.¹¹⁹ This Note will explain briefly the reasons for preferring the majority's analysis of the statute to the dissent's and then will present a thorough analysis of the constitutional arguments revealing the gaps in the Court's argument and showing that the Court erroneously categorized forfeiture defendants as indigents for purposes of the right to counsel of choice.

A. INTERPRETATION OF THE STATUTE

The Comprehensive Forfeiture Act provides a fascinating view of statutory interpretation. The Court split along the same lines for both the statutory and constitutional questions, indicating that the justices formed their views on the constitutionality of the statute before they decided how to interpret it.¹²⁰ Some lower courts took this approach to the extreme and altered the legislative history to support the view that Congress, recognizing the constitutional problems presented by forfeiture of attorneys' fees, intended to exempt them from forfeiture.¹²¹

In *Monsanto*, both statutory arguments were compelling, but the majority correctly determined that the language of the statute and the intent of Congress taken together do not provide for an exemption of attorneys' fees from forfeiture. There is no reason to expand on the majority's analysis here¹²² other than to point out that the statute was not quite as clear as Justice White indicated it was. It is not altogether impossible to read an exemption into the statute, but

¹¹⁹ For a discussion of this effect, see *Caplin & Drysdale*, 109 S. Ct. at 2674-76 (Blackmun, J., dissenting); Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 33-65; Winick, *supra* note 7, at 772-84.

¹²⁰ It would be interesting to use this statute to examine many different theories of statutory interpretation, but such a discussion is beyond the scope of the Note.

¹²¹ In *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985) (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 209 n.47, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182), the court inserted the word "only" into the legislative history: "The provision should be construed to deny relief [only] to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." Although the court had some reason to believe that Congress intended the statement to have the meaning the court gave it by adding the word "only," this addition made it easy to justify exempting attorneys' fees from forfeiture. Several other courts followed *Rogers* and based exemption on the altered version of legislative history. See *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Ianiello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985). Appellate courts rejected this reformation of the legislative history and, as the Court stated in *Monsanto*, Judge Winter and the two judges joining his opinion were the only appellate court judges to believe that the statute could be read as exempting attorneys' fees. *United States v. Monsanto*, 109 S. Ct. 2657, 2662 (1989).

¹²² For a description of the analysis, see *supra* text accompanying notes 51-64.

doing so is neither the most straightforward means of reading the statute, nor is there any indication that Congress intended any exemption. The ambiguity is sufficient that a broad adoption of the canon of statutory construction—that statutes should be interpreted to avoid constitutional problems—could justify reading an exemption into the statute. However, as Judge Posner explained, this canon causes courts “to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.”¹²³

Judge Winter’s argument does not present sufficient ambiguity because he relied on small aspects of procedural sections, and his interpretation does not absolutely prohibit exemption of attorneys’ fees from forfeiture.¹²⁴ Dependence on a judge’s equitable powers will not ensure that attorneys’ fees will not be subject to forfeiture.¹²⁵ When a judge balances the defendant’s and the government’s interests, he/she will have to consider that the purpose of the restraining order is “‘to assure the availability of the property pending disposition of the criminal case.’”¹²⁶ A judge may conclude that “the rather massive financial outlays often necessary to pay private defense counsel in RICO and CCE prosecutions” should be forfeited.¹²⁷ Justice Blackmun “find[s] it exceedingly unlikely that a district court, instructed that it had the discretion to permit a defendant to retain counsel, would ever choose not to do so,”¹²⁸ but since Justice Blackmun seems to rely only on an *ipse dixit* which is not wholly convincing.

These shortcomings might be acceptable had something in the statute expressed any concern for lawyers fees or even had the legislative history contained a few clear statements on attorneys’ fees. However, when a somewhat unsatisfactory answer is obtained by pulling one word out of a long statute it is absurd to base an entire case on that construction. If courts were always allowed to interpret

¹²³ Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

¹²⁴ For a description of Judge Winter’s argument, see *supra* text accompanying notes 58-60, 85-90.

¹²⁵ *United States v. Monsanto*, 852 F.2d 1400, 1414 (2d Cir. 1988) (en banc) (Mahoney, J., dissenting).

¹²⁶ *Id.* (Mahoney, J., dissenting) (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 204, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182).

¹²⁷ *Monsanto*, 852 F.2d at 1414 (Mahoney, J., dissenting).

¹²⁸ *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2657, 2671 n.9 (1989) (Blackmun, J., dissenting).

statutes in this manner Congress could become meaningless; courts could uncover almost any position they desired to discover in statutes.¹²⁹

B. THE CONSTITUTIONAL ISSUE

Because the statute does not exempt attorneys' fees from forfeiture the Court had to consider the sixth amendment issue.¹³⁰ The Court reached its decision by claiming that defendants subject to forfeiture are indigent and that indigent defendants do not have a right to counsel of choice.¹³¹ The Court, however, did not consider that there may be good reasons for treating forfeiture defendants differently than other indigents and that there are subtle but very significant differences between indigence caused by forfeiture and indigence from other causes. Of course, merely proving that different considerations apply to indigents does not render the Court's decision incorrect, because the right to counsel of choice is not an absolute right.¹³² Application of the right requires balancing the needs of the defendant and of the government. The Court attempted to show how these needs balanced out, but the Court's balancing was poor. The Court gave little consideration to how much weight to give the right to counsel of choice but used considerable imagination to create government interests.¹³³

¹²⁹ In an article which argues that the canons of interpretation are "wrong," Judge Posner said, "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." Posner, *supra* note 123, at 817. Posner listed the things he believes it is appropriate for judges to consider. First, they must look at the "usual things": "the language and apparent purpose of the statute, its background and structure, its legislative history, . . . and the bearing of related statutes." *Id.* at 818. However, courts should also carefully consider "the values and attitudes, so far as they are known today, of the period in which the legislation was enacted," and "any sign of legislative intent regarding the freedom with which he should exercise his interpretive function." *Id.* The only one of these factors which clearly supports Judge Winter's interpretation is the structure of the statute because Congress does seem to detract from the all-encompassing view of § 853(a) in sections which describe the actual operation of forfeiture.

¹³⁰ The Court also considered the fifth amendment issue of whether forfeiture of attorneys' fees violates the due process clause by creating an imbalance of power. *Caplin & Drysdale*, 109 S. Ct. at 2656. As the Court explained, this analysis cannot be separated from the sixth amendment issue. *Id.* If a defendant has counsel that is adequate under the sixth amendment, there is, by definition, no unconstitutional imbalance of power adequate to make forfeiture statutes facially unconstitutional. If a prosecutor takes improper advantage of the power the forfeiture statutes give him/her, prosecutorial misconduct claims should remedy the wrong. *Id.* at 2657.

¹³¹ *Id.* at 2652-53 (since relation-back clause is valid, a forfeiture defendant has no right to any assets).

¹³² See *infra* note 135.

¹³³ See *supra* text accompanying notes 75-80; *Caplin & Drysdale*, 109 S. Ct. at 2654-55.

Thus, two aspects of the Court's analysis require close consideration: 1) the holding that forfeiture defendants are indigents indistinguishable from any other indigent and 2) the holding that a balancing analysis favors the government. This Note will examine each of these holdings and prove that the Court should have found forfeiture of attorneys' fees to be unconstitutional.

1. *The Rights of Indigents*

The Supreme Court's assumption that forfeiture defendants should be treated like other indigents is appealing because it is easier to be sympathetic with the bank robber who has spent his life in abject poverty and robs a bank in order to provide his family with food and shelter than with drug kingpins and mobsters. Nonetheless, our ability to entertain more sympathy for some stereotypes than for others is not and should not be the source of constitutional law.¹³⁴

Justice White erred because, although indigents do not have a right to counsel of choice,¹³⁵ there is no reason to categorize forfeiture defendants as indigents and force them to enjoy lesser rights unless there is a clear justification for doing so. Comprehensive Forfeiture Act defendants are distinguishable from other indigents only if differences between the groups would either cause forfeiture-defendants to be deprived of more rights than other indigents or make granting forfeiture defendants the right to counsel of choice

¹³⁴ Furthermore, forfeiture is not necessarily limited to drug kingpins and racketeers: "The same analysis that today permits a pretrial seizure and then a forfeiture of the property of drug dealers may be applied tomorrow to anyone who violates federal anti-trust laws or laws prohibiting polluting the water or the air." *United States v. Nichols*, 841 F.2d 1485, 1509 (10th Cir. 1988) (Logan, J., dissenting).

¹³⁵ When an indigent client attempts to assert his/her right to counsel of choice, courts do not even give the defendant a choice between two potential appointed attorneys. *W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE* § 11.4(a) (1984). Courts must focus on different interests depending on whether counsel is retained or appointed: "In relation to indigent criminal defendants, the Sixth Amendment seeks not to maximize free choice of counsel but to prevent anyone from being unjustly convicted or illegally sentenced." *United States v. Ely*, 719 F.2d 902, 904-05 (7th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984). In *Morris v. Slappy*, 461 U.S. 1 (1983), the Supreme Court seemed to support the same principle when it refused to grant indigents a right to a meaningful attorney-client relationship. A common justification for this practice is that "indigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer." *Ely*, 719 F.2d at 905. The appointment of counsel would not work as efficiently if the right to counsel of choice were respected. *W. LAFAVE & J. ISRAEL, supra*, § 11.4(a). This treatise lists three justifications for not allowing indigents the right to counsel of choice: 1) judges can pick attorneys better than indigents because judges are more familiar with the lawyers abilities, 2) attorneys with a good reputation would receive a disproportionate number of cases, and repeat offenders would be most likely to get the best lawyers, and 3) no defendant has a right to be represented by the best counsel. *Id.*

more efficient than it would be with other indigents. Forfeiture defendants must be compared to two groups: 1) people who have never had any money or any capacity to retain an attorney and 2) people forced to give up their money to the government in situations other than criminal forfeiture cases.

There is a significant difference in regard to ownership of assets between people who have never had access to money and people whose indigence is caused by the relation-back clause. In *United States v. Nichols*,¹³⁶ the court recognized, "The problem raised by the relation back provision is that while title shifts upon the occurrence of the illegal act, the determination that the defendant committed a crime and that the designated assets are linked to that crime is not made until after trial. The government's title is established by the judgment."¹³⁷ Thus, forfeiture defendants have assets with which they could pay an attorney, but there is a dispute over who owns the assets which prevents the defendant from having access to them at the time when they are most crucial to the defendant's exercise of the right to counsel.

The presence of funds potentially belonging to forfeiture defendants is especially significant in setting them apart from indigents who cannot even contend to have funds because criminal defendants enjoy a presumption of innocence.¹³⁸ Although the Supreme Court did not consider this presumption at all, and some circuits courts have claimed that a court is not violating a presumption of innocence when it "act[s] in a manner that adversely affects a criminal defendant before trial when it is necessary to protect an important public interest,"¹³⁹ the fact that forfeiture defendants have this claim, while other indigents do not, sets forfeiture defendants apart.

Forfeiture defendants, unlike other indigents, can point to money at the time of trial that may be their money. Although other indigents may be subject to pretrial deprivation of liberty or bail requirements,¹⁴⁰ these are unlike forfeiture because they have virtu-

¹³⁶ 841 F.2d 1485 (10th Cir. 1988).

¹³⁷ *Id.* at 1498.

¹³⁸ Note, *supra* note 7, at 686:

The criminal justice system has a tradition of favoring the defendant in order to avoid conviction of the innocent. It would be unjust to prevent a person from using the assets in his possession to retain the counsel of his choice and then find him guilty because he was denied the more effective representation of his chosen counsel.

¹³⁹ *Nichols*, 841 F.2d at 1500; see also *Caplin & Drysdale*, 837 F.2d at 643.

¹⁴⁰ *Nichols*, 841 F.2d at 1500-01 (pre-trial detention and bail requirements are constitutional when necessary to protect public interest) (citing *United States v. Salerno*, 481 U.S. 739 (1987)); *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d

ally no effect on a defendant's ability to retain counsel.

Additionally, granting Comprehensive Forfeiture Act defendants the right to counsel of choice does not cause the kind of efficiency problems that are caused by granting indigents the right to counsel of choice.¹⁴¹ In *United States v. Reckmeyer*,¹⁴² the court said, "Subjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice. The forfeiture of attorney's fees would likely cause chosen counsel to withdraw, leading to delays, disruption of the criminal proceeding, and further creating serious problems for already overburdened public defenders."¹⁴³ If the government could not seize legitimate attorneys' fees, defendants whose assets are subject to forfeiture would retain an attorney just as any other person with sufficient funds would. Courts would not have to worry about all the difficulties surrounding the appointment of counsel. Thus, Comprehensive Forfeiture Act defendants are sufficiently different from those indigent due to natural circumstances, such that it is not necessary to automatically deny them a right to counsel of choice.

Forfeiture defendants are also in a situation distinguishable from other situations in which a defendant may be unable to retain counsel because of a seizure of assets. The analogy which the Supreme Court depended on is the bank robber's loot: courts may freeze money alleged to be proceeds from a bank robbery even if it was the only money with which a defendant could pay his lawyer.¹⁴⁴

The Supreme Court contended that allowing a defendant to use assets allegedly obtained from racketeering or drug enterprises is analogous to allowing a defendant to use assets allegedly obtained from a bank robbery.¹⁴⁵ Several courts, however, have contended that different interests are implicated in the two situations. In *United States v. Harvey*,¹⁴⁶ the court explained that when the defendant is an alleged bank robber, "the government seizes property manifestly that of someone other than the accused and for preservative purposes. Forfeiture under the Act [however] may obviously reach

637, 643 (2d Cir. 1988) (government may restrain liberty and property prior to arrest as long as it acts within the confines of due process) (citing *Bell v. Wolfish*, 441 U.S. 520, 534 (1979)).

¹⁴¹ See *supra* note 135.

¹⁴² 631 F. Supp. 1191 (E.D. Va. 1986), *rev'd*, In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988), *aff'd*, 109 S. Ct. 2646 (1989).

¹⁴³ *Id.* at 1196-97.

¹⁴⁴ *Caplin & Drysdale*, 109 S. Ct. at 2653; see also Brecher, *The Sixth Amendment and the Right to Counsel*, 136 U. PA. L. REV. 1957, 1960-61 (1988).

¹⁴⁵ *Caplin & Drysdale*, 109 S. Ct. at 2652-53.

¹⁴⁶ 814 F.2d 905 (4th Cir. 1987).

property of the accused to which no third party has a superior claim."¹⁴⁷

Judge Logan, dissenting in *Nichols*, stressed the legal basis of the difference between the two claims: the assets belong to the bank because of ancient common law property rules, not because of a property scheme devised by the legislature as a penalty.¹⁴⁸ In the bank robbery situation, the government would rather risk that an innocent defendant will be denied the right to counsel of choice than that many completely innocent depositors will be denied money which could be essential to their well-being; in the case of forfeiture, however, no innocent victim will be denied his/her savings if a defendant uses tainted assets to pay the attorney.¹⁴⁹

The Supreme Court rejected these distinctions because property rights created by the relation-back clause are no different than "pre-existing property rights."¹⁵⁰ The Court, however, referred only to the general concept that criminal forfeiture is acceptable without recognizing that the relevant period for this analysis is a time prior to conviction when ownership of assets is unclear. In effect, as Justice Blackmun asserted in his dissenting opinion, the

¹⁴⁷ *Id.* at 926.

¹⁴⁸ *United States v. Nichols*, 841 F.2d at 1509-13 (Logan, J., dissenting). Judge Logan stated:

The property law jargon borrowed by Congress—that 'title vests' in the government on the date the crime is committed—does not alter the essentially penal basis and justification for the forfeiture. In my view, this distinction between the desire to punish and the protection of legitimately pre-existing property rights demands treating the property to which the government claims a right of forfeiture as different from the property of competing contestants who assert claims as rightful owners under common law property concepts.

Id. at 1511; see also Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 55-56 (title differences are very significant because the owner of the stolen goods has title at all times, but in forfeiture cases, title passes to the government only upon conviction).

¹⁴⁹ Professor Winick, who wrote an amicus brief in *Monsanto and Caplin & Drysdale* for several organizations, including the National Association of Criminal Defense Lawyers and the American Civil Liberties Union, explained that the bank robber analogy was false:

The cash proceeds of a bank robbery belong to the bank or to its depositors; this is true even in the absence of a forfeiture statute. These wrongfully deprived owners have a common law right to the return of their property, and government has a compelling interest in obtaining its return that plainly outweighs the robber's claim to use it for any purpose, even to hire an attorney. Moreover, this interest simply cannot be accomplished in any way other than the return of the property. In the forfeiture situation, however, the government's interest in stripping the accused of his property is not frustrated by permitting a portion of the property to be transferred to defense counsel.

Winick, *supra* note 7, at 814-15 (citations omitted).

¹⁵⁰ *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2653 (1989) (There is a "long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture.").

Court engaged in circular reasoning.¹⁵¹ It is true that the validity of the relation-back clause in situations outside the attorneys' fees issue has been declared valid¹⁵² and that legislatures are generally free to create property interests since we do not depend exclusively on a common law property system,¹⁵³ but the Court uses the general validity of the relation-back clause to prove that in a specific situation which presents unique constitutional problems courts are free to use the relation-back clause. Since a constitutional right is involved, a broad assertion that the clause in general does not violate due process rights is not conclusive. Legislatures cannot create a property right that takes away constitutional rights. Thus, it is necessary to consider the differences described by judges and scholars and recognize that they justify treating the forfeiture defendant differently than the alleged bank robber.¹⁵⁴

The Court also used other cases similar to the bank robbery situation to justify allowing forfeiture of attorneys' fees.¹⁵⁵ The cases which provide the closest parallels are jeopardy tax assessment cases.¹⁵⁶ The jeopardy assessment allows the IRS to "seize a taxpayer's assets before he has an opportunity to challenge the validity of the assessment in court."¹⁵⁷ Courts that have considered whether money should be released from the assessment when the defendant needs it to offset the costs of either criminal or civil suits have not required the release of funds.¹⁵⁸

¹⁵¹ *Caplin & Drysdale*, 109 S. Ct. at 2676 (Blackmun, J., dissenting).

¹⁵² *See id.* at 2653 (citing *United States v. Stowell*, 133 U.S. 1 (1890)).

¹⁵³ *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits are a matter of statutory entitlement).

¹⁵⁴ In *Caplin & Drysdale*, the Court claimed that if it allowed assets subject to a restraining order to be used for sixth amendment rights, it would have to allow assets to be used to exercise any constitutional right. *See supra* text accompanying notes 71-72; *Caplin & Drysdale*, 109 S. Ct. at 2653. This analysis, however, is not accurate. The assets are restrained for a relatively short period, and the government's interest in assuring it can collect the assets will outweigh the defendant's need to use the assets for most other activities during that time because the activities can be carried out at any time. The right to counsel, however, is meaningful only during the period during which assets are restrained.

¹⁵⁵ *Caplin & Drysdale*, 109 S. Ct. at 2655. It may be possible that the situations like forfeiture under the Comprehensive Forfeiture Act should be found to be unconstitutional, but since the situations are distinguishable there is no need to address the possibility that they may be unconstitutional. The petitioners in *Caplin & Drysdale* conceded that the analogous situations were constitutional. *Id.*

¹⁵⁶ Kathleen Brickey gives several other examples which are simply variations on jeopardy tax assessments and bank robbery situations. Brickey, *supra* note 7, at 770-72, cited in *Caplin & Drysdale*, 109 S. Ct. at 2655 n.9.

¹⁵⁷ Brickey, *supra* note 5, at 525.

¹⁵⁸ *United States v. Marshall*, 526 F.2d 1349 (9th Cir. 1975) (a court hearing a criminal case does not have jurisdiction to order that funds be released from a jeopardy tax assessment involving the defendant); *Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975)

The Comprehensive Forfeiture Act, however, has a different purpose than the tax statutes, and the "different purposes . . . require different procedures."¹⁵⁹ Tax assessments enjoy a presumption of validity and are civil proceedings.¹⁶⁰ The criminal case for which the defendants want money is a proceeding separate from the assessment proceeding.¹⁶¹ The IRS has substantial power to make assessments because its purpose is to raise revenue.¹⁶² There is a "strong congressional policy against judicial interference in the tax collecting process."¹⁶³ In contrast, forfeiture is a criminal penalty for which no special governmental procedures are provided; "special rules govern the resolution of issues in the context of assessment proceedings which make them poor authority for criminal prosecutions."¹⁶⁴ Furthermore, *United States v. Brodson*,¹⁶⁵ the case cited most often in forfeiture cases, is "easily distinguished."¹⁶⁶ The defendant retained the counsel of his choice and wanted money released from the assessment to pay an accountant he wanted to use as an expert.¹⁶⁷

In *Marshall*, one of the few assessment cases linked to a criminal proceeding, the court did not reach any constitutional issues because it decided that it did not have authority to enjoin a tax collec-

(court refused to consider whether any sixth amendment rights had been violated because of a jeopardy tax assessment because defendant had been represented by appointed counsel); *Avco Delta Corp. Canada v. United States*, 484 F.2d 692 (7th Cir. 1973) (release of funds to pay attorneys' fees was error in jeopardy assessment case because right to counsel issue was decided prematurely; necessary to wait until after trial to determine effects); *Illinois Redi-Mix Corp. v. Coyle*, 360 F.2d 848 (7th Cir. 1966) (constitutional question decided prematurely; money cannot be released from jeopardy tax assessment to aid in defense in civil trial); *United States v. Brodson*, 241 F.2d 107 (7th Cir. 1957) (court would not release money from jeopardy tax assessment to allow defendant to hire accountant as an expert witness; constitutional questions should only be decided after trial); *Shapiro v. Secretary of State*, 76-2 U.S. Tax Cas. (CCH) para. 9507 (D.D.C. June 22, 1976) (in a civil action, a court does not have jurisdiction to order a release of funds from the jeopardy tax assessment).

¹⁵⁹ Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 40 n.189.

¹⁶⁰ *Id.* In *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667, 2677 n.15 (1989) (Blackmun, J., dissenting), Justice Blackmun explained:

[E]ven if a jeopardy assessment were to deprive a taxpayer of the funds necessary to file a challenge to the assessment in the Tax Court, the proceeding in that court is civil, and the Sixth Amendment therefore does not apply. . . . [T]he constitutionality of a jeopardy assessment that deprived the defendant of the funds necessary to hire counsel to ward off a criminal challenge is not to be assumed.

¹⁶¹ See *Brodson*, 241 F.2d at 108.

¹⁶² Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 40 n.189.

¹⁶³ *United States v. Marshall*, 526 F.2d 1349, 1353 (9th Cir. 1975).

¹⁶⁴ Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 40 n.189.

¹⁶⁵ 241 F.2d 107 (7th Cir. 1957).

¹⁶⁶ *United States v. Nichols*, 654 F. Supp. 1541, 1557 (D. Utah 1987).

¹⁶⁷ *Id.*

tion.¹⁶⁸ Clearly, there is no similar problem in Comprehensive Forfeiture Act cases. Thus, defendants who have suffered forfeiture under the Comprehensive Forfeiture Act should not be regarded as indigents merely because defendants in jeopardy tax assessment cases are indigents. The Court had no need to class forfeiture defendants along with all other indigents who enjoy a limited right to choice.

2. *The Right to Counsel of Choice*

Since forfeiture defendants are not indigents, the Court should have carefully considered the balance between the defendants' and the government's rights rather than quickly throwing out some weak and poorly analyzed reasons for reaching the balance it had already determined it had to reach. The only way to conduct an appropriate balance is to carefully analyze the right to counsel of choice, a feat the Court achieved without ever looking at a right to counsel of choice case.¹⁶⁹

*Powell v. State*¹⁷⁰ introduced the concept of a right to counsel of choice: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."¹⁷¹ Since *Powell*, many courts have applied the right to counsel of choice in a variety of situations. Courts have consistently decided right to counsel of choice cases by balancing the interests of the government and the interests of the defendant,¹⁷² but a balancing test means little unless courts know how much weight the defendant's right to counsel of choice deserves.¹⁷³

Several cases have hinted at the purpose of the right to counsel

¹⁶⁸ *United States v. Marshall*, 526 F.2d 1349, 1354 (9th Cir. 1975).

¹⁶⁹ *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652 (1989). The Court used *Wheat v. United States*, 486 U.S. 153 (1988), to support its view of the right to counsel of choice; but although right to counsel of choice was relevant to the case, *Wheat* primarily concerns the right to conflict-free counsel. The right to counsel of choice has a long history which the Court ignored.

¹⁷⁰ 287 U.S. 45 (1932).

¹⁷¹ *Id.* at 53.

¹⁷² See, e.g., *United States v. Rankin*, 779 F.2d 956, 958 (3d Cir. 1986).

¹⁷³ In the relatively simple situation of defendants asking for a continuance so that counsel of their choice can appear, courts have decided similar cases inconsistently because the importance of the right to counsel of choice is unclear. Some claim the continuance is valid as long as the request is for a moderate delay and for legitimate reasons. See, e.g., *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (trial court erred in refusing to grant continuance when first counsel withdrew because of scheduling conflicts and new counsel had only ten days to prepare for trial). Others consider only the necessity of a speedy trial. See, e.g., *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986) (refusal to grant continuance justified when case had been continued several times

of choice and the weight due the right. In *Linton v. Perini*,¹⁷⁴ the only case to directly explain a purpose, the court said that the right to counsel of choice ensures that there will be a certain level of confidence between the attorney and the client. Other cases implicitly support this purpose. For example, in *Morris v. Slappy*,¹⁷⁵ Justice Brennan, in a concurring opinion, recognized that a meaningful attorney-client relationship is the crucial element in the right to counsel of choice. *Morris* concerned an indigent defendant who tried to obtain a continuance by claiming that he needed a continuance to ensure a "meaningful attorney-client relationship."¹⁷⁶ The Court decided that there was no such thing as the right to a "meaningful attorney-client relationship,"¹⁷⁷ but Justice Brennan argued that acceptance of this right did not mean courts would be inquiring into the quality of a relationship; it simply meant courts should be willing to grant continuances in order to allow a defendant to be represented by one attorney throughout the case.¹⁷⁸

Professor Winick explained in some depth the value of the right to counsel of choice at which the courts hint:

Allowing the defendant free choice in the critical matter of who will represent him at trial fosters both the reliability of the outcome and values unrelated to truth determination. Thus the right to counsel of choice is critical to the basic trust between counsel and client that is a cornerstone of the adversary system. This basic trust, indispensable to an effective attorney-client relationship, both increases the reliability of the trial and serves a crucial participatory function, "generating the feeling, so important to a popular government, that justice has been done." . . . A crucial aspect of the participatory and autonomy values served by the right to counsel of choice is the selection and employment of the advocate who will assert the defendant's legal rights.¹⁷⁹

Although the value of ensuring a right to counsel of choice in

before and defendant wanted another continuance when two lawyers had a trial that went longer than they expected).

¹⁷⁴ 656 F.2d 207, 211-12 (6th Cir. 1981).

¹⁷⁵ 461 U.S. 1, 19-25 (1983) (Brennan, J., concurring).

¹⁷⁶ It appears that the defendant couched his claim in this language rather than in terms of the right to counsel of choice simply because he was indigent and knew indigents could not make right to counsel of choice claims.

¹⁷⁷ *Morris*, 461 U.S. at 13-14. This aspect of the decision was mere dictum because the Court decided the defendant had not raised this claim at trial; he had asked for a continuance only on the basis that his attorney had not had adequate time to prepare. *Id.* at 13. Furthermore, the Court's discussion of the right to a meaningful attorney-client relationship may apply only to indigent defendants and it does not require that courts refuse to recognize obtaining a meaningful attorney-client relationship as a rationale behind recognizing a right to counsel of choice.

¹⁷⁸ *Id.* at 25 (Brennan, J., concurring).

¹⁷⁹ Winick, *supra* note 7, at 802-03 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

order to encourage a relationship of trust and confidence is evident, a recent Supreme Court case, *Wheat v. United States*,¹⁸⁰ suggests that the right to counsel of choice is little more than another name for effective assistance of counsel and that the right to counsel of choice is insignificant. Neither of these beliefs, however, is necessarily accurate.

In *Wheat*, the defendant claimed that the right to counsel of choice allowed him to have the same attorney as two of his co-defendants.¹⁸¹ All of the defendants were willing to waive their right to conflict-free representation in order to allow the defendant to use their attorney.¹⁸² The chance that any conflicts of interest would arise was quite remote, according to the defendant.¹⁸³

The statement that could cause the equating of the right to counsel of choice and the right to effective assistance of counsel is "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."¹⁸⁴ If this view is correct, there would be no explanation for the development of the right to counsel of choice. However, two distinct rights have developed.

The right to effective assistance of counsel is usually applied subsequent to a trial, and in order to claim this right a defendant must demonstrate that his/her counsel was incompetent.¹⁸⁵ The right to counsel of choice, however, applies at the beginning of a

¹⁸⁰ 486 U.S. 153 (1988).

¹⁸¹ *Id.* at 156-57.

¹⁸² *Id.* at 157.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 159. Other courts have made similar claims. See *United States v. Ely*, 719 F.2d 902, 904-05 (7th Cir. 1983), *cert denied*, 465 U.S. 1037 (1984); *Burgos v. Murphy*, 692 F. Supp. 1571, 1575 (S.D.N.Y. 1988). Both of these cases concern the right of indigents to counsel of choice, so the view in these cases does not necessarily represent all considerations pertinent to the counsel of choice.

¹⁸⁵ In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court developed a two prong test for ineffective assistance of counsel cases: 1) the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and 2) "the defendant must show that the deficient performance prejudiced the defense." This test addresses individual incidents of improper conduct rather than the adequacy of a provision such as the Comprehensive Forfeiture Act. No matter how bad the Comprehensive Forfeiture Act may be, it will not cause consistent violation of the right to effective assistance of counsel. In *Strickland*, 466 U.S. at 692, the Court recognized that situations exist where prejudice can be presumed and where one does not have to identify specific acts of incompetence. Violations of the right to counsel of choice fall into this category. Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 42; Note, *supra* note 7, at 677. Furthermore, the right to counsel of choice applies when the defendant complains at the beginning of trial, as occurs in Comprehensive Forfeiture Act cases, rather than after trial is

trial and provides a means for courts to ensure that the defendant has a lawyer whom he/she can trust and with whom he/she can work. Without a good relationship, a defendant may not receive effective representation even though no outward signs would demonstrate the deficiencies.¹⁸⁶

Wheat does not disprove that this crucial distinction between right to counsel of choice and right to effective assistance of counsel exists. The Court correctly stated that the basis of all right to counsel considerations is that all defendants should receive effective assistance of counsel. What the Court left unstated, but in no way denied, is that there are many means of ensuring effective assistance of counsel, and one way is to make sure defendants have attorneys in whom they can trust and confide. In *Wheat*, the Court left this unstated because the defendant was deprived only of one lawyer for good reason and still could retain any other lawyer. In forfeiture cases, the situation is much more serious and the problem of maintaining a confidential and trusting relationship cannot be overstated because instead of being denied one attorneys' services, a forfeiture defendant is completely denied the opportunity to select counsel.¹⁸⁷

The second suggestion in *Wheat* is its indication that the right to counsel of choice is insignificant. The Court's holding in *Wheat*, however, is not inconsistent with giving the right to counsel of choice a high value; *Wheat* simply indicates that the right to conflict-free counsel, a right intimately related to the right to effective assistance of counsel, is more important.¹⁸⁸ Such a priority is logical be-

finished and one can pick out the incompetent acts. Note, *Wilson v. Mintzes: A Case of Ineffective Assistance or Denial of Counsel of Choice?*, 17 TOLEDO L. REV. 615, 630 (1986).

¹⁸⁶ Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2667, 2674 (1989) (Blackmun, J., dissenting) (denial of right to counsel of choice in forfeiture setting will cause defendant to distrust his appointed counsel and feel that counsel was imposed upon him as a punishment); *Morris*, 461 U.S. at 21 (Brennan, J., concurring) (uninhibited communications between lawyer and client are necessary, and lawyer and client must be able to work together to make crucial decisions). *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985), illustrates the possibility that counsel may not be effective even though a defendant has no hope of fulfilling the *Strickland* requirements. The court initially tried *Wilson* as a right to effective assistance of counsel case, *id.* at 277, but the court decided it could not require a dissatisfied client to show severe incompetence to obtain the right to get a new lawyer: "Application of the two-prong *Strickland* test to motions for substitution of counsel would require a defendant who cannot communicate with counsel, who is dissatisfied with counsel or whose defense is burdened by a conflict of interest to prove that counsel's conduct rises to the level of constitutional ineffectiveness." *Id.* at 283 (citations omitted).

¹⁸⁷ See Winick, *supra* note 7, at 800.

¹⁸⁸ See *id.* at 810 (citations omitted):

[T]he Court's holding in *Wheat*—that a defendant could not choose representation by an attorney found to be subject to an actual conflict of interest—does not 'encompass' the discrete question of whether the government may deprive a defendant

cause many lawyers equally competent to the lawyer the defendant had chosen were available, and only one lawyer presented conflict of interest problems. Consequently, the Court's decision avoided all conflict of interest problems but had minimal effect on the defendant's ability to find an attorney in whom he/she had confidence. Furthermore, courts have stressed that *Wheat* leaves in place the presumption in favor of right to counsel of choice.¹⁸⁹

Several circuit court cases on the right to counsel of choice show that there are strong arguments for the right to counsel of choice which were irrelevant in *Wheat*.

In *United States v. Diozzi*,¹⁹⁰ the prosecution wanted to call the defendants' lawyers as witnesses. The court refused to allow the prosecution to call these lawyers because doing so would create a conflict of interest and would deprive the defendants of their counsel of choice.¹⁹¹ The court warned "that disqualification of defense counsel should be a measure of last resort. . . . In moving to disqualify appellants' chosen counsel, the government bears a heavy burden of establishing that disqualification is justified."¹⁹²

In *United States v. Romano*,¹⁹³ the court similarly favored a strong right to counsel of choice. The district court judge told the defendant that if she wanted to proceed *pro se*, he would appoint stand-by counsel and then if he later denied her *pro se* status, stand-by counsel would represent her.¹⁹⁴ During the trial, the judge denied the defendant's *pro se* status based on her inappropriate conduct, and the defendant then wanted to retain counsel to take over her defense. The court, however, required her to use the appointed stand-by counsel. Besides claiming that the defendant had to use the appointed counsel because of court procedures, the judge claimed that the defendant's chosen counsel would likely cause the same disruptions that the defendant had caused.¹⁹⁵

On appeal, the court reversed and vehemently opposed the idea that the trial court could interfere with the defendant's right to counsel of choice merely because the defendant's retained counsel

of the opportunity to select any private counsel, let alone one subject to a disqualifying condition such as conflict of interest.

¹⁸⁹ *United States ex rel Stewart on Behalf of Tineo v. Kelly*, 870 F.2d 854, 856 (2d Cir. 1989); *United States v. Alamo*, 872 F.2d 202, 206 (7th Cir. 1989).

¹⁹⁰ 807 F.2d 10 (1st Cir. 1986).

¹⁹¹ *Id.* at 12.

¹⁹² *Id.*

¹⁹³ 849 F.2d 812 (3d Cir. 1988).

¹⁹⁴ *Id.* at 818.

¹⁹⁵ *Id.* at 819.

might act improperly.¹⁹⁶ The court needed proof that such improper behavior would occur because the right to counsel of choice is "fundamental."¹⁹⁷

In *United States v. Panzardi Alvarez*,¹⁹⁸ the court also endorsed as fundamental the right to counsel of choice and decided that the right to counsel of choice cannot be denied merely because of a statute which prevented attorneys not licensed to practice law in Puerto Rico from trying more than one case in Puerto Rico per year.¹⁹⁹ The defendant was involved in two trials and wanted a certain lawyer to represent him in both.

In overturning the statute, the court recognized that legislatures may regulate the attorneys who appear before the court.²⁰⁰ The court, however, went on to state:

The right to counsel of choice cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice. The mere fact that a defendant seeks to retain an out-of-state attorney does not hinder the efficacious administration of justice.²⁰¹

According to the court, the right to counsel of choice is an established one which legislatures must carefully consider when regulating the court system.

Thus, the right to counsel of choice deserves a great deal of weight because it assures a fair trial by giving defendants an opportunity to find a lawyer in whom they have confidence and with whom they can cooperate. No defendant could hope to present a successful defense absent attorney-client communication.

Courts must balance this right to counsel of choice and the government's interest in obtaining forfeiture of attorneys' fees. The government interests at stake in most right to counsel of choice cases are the efficient functioning of the case and the avoidance of conflicts of interest.²⁰² In cases under the Comprehensive Forfeiture Act, however, allowing defendants to exercise their right to counsel of choice could increase efficiency.²⁰³ Thus, the balancing

¹⁹⁶ *Id.* at 820.

¹⁹⁷ *Id.*

¹⁹⁸ 816 F.2d 813 (1st Cir. 1987).

¹⁹⁹ *Id.* at 817-18.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See, e.g., *Wheat v. United States*, 486 U.S. 153 (1988) (Court cannot reconcile right to conflict-free counsel and right to counsel of choice, so it denied right to counsel of choice); *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986).

²⁰³ See *supra* text accompanying notes 141-43; *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985), cited in *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667, 2675 (1989) (Blackmun, J., dissenting). In *Badalamenti*, the court

in forfeiture cases is unique, and the Court had little direction other than the cases described above indicating that the right to counsel of choice deserves considerable respect.

However, not only did the court fail to refer to any of these cases that indicate the need to respect the right to counsel of choice, the Court invented governmental interests which were not intended by Congress. In fact, these interests have little foundation other than the fertile imaginations of the Justices of the Court.

The Court invented three interests.²⁰⁴ First, the Court claimed that the government should "recover[] all forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways."²⁰⁵ Justice Blackmun pointed out that the government can claim no such interest because the Comprehensive Forfeiture Act was clearly meant as a penal statute, not as a revenue raising statute.²⁰⁶ Furthermore, "the appearance of justice requires an end to the Assets Forfeiture Fund, which gives the United States Attorney . . . a budgetary stake in the vindication of the government's claim to the property."²⁰⁷

Second, the Court said that the assets of the defendant must go to "those wrongfully deprived or defrauded of [them]."²⁰⁸ This claim is completely acceptable because the assets in question are the ones analogous to the bank robber's loot; third parties never relinquished title to certain assets, so they must be returned and this claim supercedes the attorney's. Nonetheless, the reason forfeiture raises a problem is that the Comprehensive Forfeiture Act allows

explained that denying the right to counsel of choice in forfeiture cases creates forfeitures rather than avoiding them:

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

Badalamenti, 614 F. Supp. at 196-97.

²⁰⁴ See *supra* text accompanying notes 75-79; *Caplin & Drysdale*, 109 S. Ct. at 2654-55.

²⁰⁵ *Caplin & Drysdale*, 109 S. Ct. at 2654.

²⁰⁶ *Id.* at 2670 & n.6 (Blackmun, J., dissenting) (citing S. REP. NO. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182).

²⁰⁷ Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 334 (1988).

²⁰⁸ *Caplin & Drysdale*, 109 S. Ct. at 2654.

the government to seek forfeiture of a wide variety of assets,²⁰⁹ and for most of the assets there will be no one to whom to return the money. The Court cannot be suggesting that everyone who bought drugs from the defendants in these cases should have the money spent on illegal drug purchases returned to them.

The third governmental interest recognized by the Court is the most troublesome; the Court said that when Congress referred to depriving defendants of "economic power," it included "the use of such economic power to retain private counsel."²¹⁰ The Court claimed that this interest does not interfere with sixth amendment rights because a defendant cannot use proceeds of the crime to retain counsel.²¹¹ This justification is unacceptable for two reasons: first, because, in effect, it suggests that prosecutors have a right to make sure they do not have to face the best criminal defense lawyers and, second, because it suggests that, at the time when the defendant must exercise right to counsel of choice, it is clear that the assets belong to the government. Justice Blackmun was alarmed by the possibility that the government could base the legitimacy of forfeiture on a desire to make sure a defendant did not get the best representation potentially available to him; he found this interest to be clearly illegitimate.²¹²

If the Supreme Court had considered the intentions of Congress, it would have been clear that the Comprehensive Forfeiture Act serves three major governmental interests.²¹³ Two of the governmental interests are explicitly referred to in the legislative history, and the third is a purpose of all penal statutes: 1) the defendant must not "avoid the economic impact of forfeiture,"²¹⁴ 2) defendants must give up their "economic power bases,"²¹⁵ and 3)

²⁰⁹ 21 U.S.C. § 853(a); 18 U.S.C. § 1963(a).

²¹⁰ *Caplin & Drysdale*, 109 S. Ct. at 2655.

²¹¹ *Id.*

²¹² *Id.* at 2676 (Blackmun, J. dissenting); see also *infra* text accompanying notes 221-24.

²¹³ *United States v. Harvey*, 814 F.2d 905, 924 (4th Cir. 1987), *rev'd*, *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637 (1988), *aff'd*, 109 S. Ct. 2646 (1989).

²¹⁴ S. REP. NO. 225, 98th Cong., 1st Sess. 196, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182. The committee discussed why avoidance of forfeiture was a major concern:

[P]resent criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both 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.

Id.

²¹⁵ S. REP. NO. 225, 98th Cong., 1st Sess. 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182. The committee said:

More than ten years ago, the Congress recognized in its enactment of statutes spe-

the government needs to deter potential racketeers and drug dealers.²¹⁶

Allowing the exemption of attorneys' fees from forfeiture would not interfere with these interests.²¹⁷ First, defendants who are convicted under RICO or CCE and who are forced to forfeit all their assets will feel an equal impact whether or not they use part of those assets to pay their attorneys. Even if all of the assets go towards attorneys' fees, the defendants will not have any assets to enjoy. The only difference is that the lawyer instead of the government gets the money. Since forfeiture is not intended to raise revenue,²¹⁸ the loss of money does not interfere with the government's interests.

Second, for substantially the same reasons, the defendant will not have an economic power base whether or not the attorney collects his fees. Courts will carefully regulate all fees paid to the attorney and no sham transfers will be allowed.²¹⁹ Fees are not difficult to regulate; consequently this government interest is hardly significant enough to override the defendant's right to counsel of choice.

Third, the only interest that presents any difficulty is the government's interest in deterrence. Potential criminals may fear crime more if they know they will not have access to an attorney whom they trust and who may not have resources which could be very helpful in a long, complex trial. Of course, potential criminals

cifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Id. (citation omitted).

²¹⁶ *Harvey*, 814 F.2d at 924.

²¹⁷ See *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc) (Feinberg, C.J., concurring), *rev'd*, 109 S. Ct. 2657 (1989), in which the court stated:

The suggested governmental interests that are served by restraining, and permitting the ultimate forfeiture of assets that are needed to pay attorney's fees are not all that compelling. The government's interests are that assets it seeks to obtain not be dissipated in the relatively brief period from indictment to possible conviction and that an alleged criminal not be able to use his economic power obtained from illegal activities. As to the former, the government's claim to the disputed assets at the time of restraint is only conditional, since under the CFA the government's ownership interest in the assets is not determined until the outcome of the criminal prosecution. This is not to say that the government has no claim to these assets at all, but only that the claim is not sufficiently strong to prevent those assets from being spent on an accused's defense when the accused has no other funds available.

²¹⁸ Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 7, at 40 n.189. Cloud said, "The criminal forfeiture statutes . . . are designed to punish criminal activity," and he contrasted this with the Internal Revenue Code which should be treated differently because it exists only to raise revenues. *Id.*

²¹⁹ *Harvey*, 814 F.2d at 927 (bona fide purchaser requirement, 18 U.S.C. § 1963(m) (6)(B), establishes that only legitimate fees could be exempted).

would be even more deterred if they were not allowed any representation at all, but clearly the sixth amendment would invalidate such an act.²²⁰ Similarly, in this case, the Court cannot give the prosecution every opportunity it might be able to use to deter criminals.²²¹ In *United States v. Thier*,²²² the court explained that regarding the ability to secure good counsel as an incentive to crime does not make sense:

Expenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel to prove his innocence or protect his procedural rights should not be considered incentives to crime. The notion that a defendant would commit criminal acts to accumulate monies or property in order to pay for necessary food, clothing and shelter while he is being tried or in order to pay a reasonable fee to the attorney he chooses to assist in his defense is sophistry.²²³

Since the right to counsel of choice is a significant right which courts must recognize when no equally strong interests are present,²²⁴ the forfeiture of attorneys' fees is unconstitutional.

V. CONCLUSION

In *Monsanto* and *Caplin & Drysdale*, the Supreme Court adopted a strong stance against allowing exemption of attorneys' fees from forfeiture. Its emphasis on the mandatory language in the statute leaves courts no room to avoid the harsh result of forfeiture, and the uncompromising approach to the right to counsel of choice leaves no room for defendants to challenge the statute on any sixth amendment ground.

The implications of these decisions could be far reaching both because prosecutors now have little reason not to seek forfeiture of everything including attorneys' fees and because the opinions seem to encourage the adoption of forfeiture penalties for many other crimes. Also, the decisions could have an adverse effect on cases in which a defendant relies on right to counsel of choice simply to seek a continuance in a case. These cases, combined with *Wheat* and *Morris*, indicate that right to counsel of choice is of minimal significance. It is frightening that the Court is placing more and more emphasis

²²⁰ *Powell v. State*, 287 U.S. 45 (1932).

²²¹ *United States v. Monsanto*, 852 F.2d 1400, 1403 (2d Cir. 1988) (en banc) (Feinberg, C.J., concurring) ("[W]eakening the ability of an accused to defend himself at trial is an advantage for the government. But it is not a legitimate government interest that can be used to justify invasion of a constitutional right.").

²²² 801 F.2d 1463 (5th Cir. 1986).

²²³ *Id.* at 1474-75.

²²⁴ See *supra* notes 170-203 and accompanying text.

on the right to effective assistance of counsel, which is almost impossible to prove.

One route of challenge to the forfeiture of attorneys' fees is still open. The Court reserved the fifth amendment issue of whether an immediate post-restraint hearing is necessary in which the government would have to prove that it had probable cause to believe the property was subject to forfeiture.²²⁵ In some recent cases, courts have held that although there is no violation of the right to counsel of choice, a defendant should not be deprived of this right unless there has been an adversary hearing.²²⁶ The Court may solve this problem simply by requiring a hearing, but it could also declare the statute unconstitutional and leave it for Congress to fix before it can be used against attorneys' fees.²²⁷

Depending on a ruling on the fifth amendment issue, however, is not the best way to assure defendants will be able to exercise their right to counsel. Instead, Congress should amend the Comprehensive Forfeiture Act. Such an amendment would not be difficult. Congress would simply have to include in the definition of a bona fide purchaser a lawyer who does not engage in sham or fraudulent transactions.

MELINDA HARDY

²²⁵ *United States v. Monsanto*, 109 S. Ct. 2657, 2666 n.10 (1989).

²²⁶ *United States v. Moya-Gomez*, 860 F.2d 706, 731 (7th Cir.), *cert. denied*, 109 S. Ct. 3221 (1989); *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), *rev'd*, 852 F.2d 1400 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2657 (1989).

²²⁷ *United States v. Monsanto*, 852 F.2d 1400, 1411-12 (2d Cir. 1988) (en banc) (Miner, J., concurring), *rev'd*, 109 U.S. 2657 (1989).