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Caplin & Drysdale v. United States and United States v. Monsanto: Forfeiture of Attorney Fees and Constitutional Rights

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The sixth amendment to the United States Constitution guarantees criminal defendants the right to attorney representation. An essential component of a defendant’s right to counsel is the right to retain counsel of choice. The right to counsel of choice secures the effective operation of the adversarial system, preserving the balance of power between the government and a criminal defendant. However, in interpreting the sixth amendment, courts have limited the right to counsel of choice. Specifically, a defendant’s right to counsel of choice may be limited by the defendant’s ability to pay for an attorney’s services and the government’s interest in the orderly administration.

1. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); see also Wheat v. United States, 108 S. Ct. 1692, 1696-97 (1988) ("the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant . . . ."); United States v. Cronic, 466 U.S. 646, 653-54 (1984) ("An accused's right to be represented by counsel is a fundamental component of our criminal justice system."); United States v. Morrison, 449 U.S. 361, 364 (1981) ("This [sixth amendment] right [to counsel], fundamental to our system of justice, is meant to assure fairness in the adversary criminal process."); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("This [right to counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.").


3. See Caplin & Drysdale v. United States, 109 S. Ct. 2667, 2672-74 (1989) (Blackmun, J., dissenting) (when the government appoints defendant’s counsel, the relationship of trust between counsel and defendant is undermined); Strickland v. Washington, 466 U.S. 668, 685 (1984) (right to counsel accords the defendant "ample opportunity to meet the case of the prosecution" through the skill and knowledge of counsel); United States v. Ash, 413 U.S. 300, 307 (1973) (counsel functions as a guide through complex legal technicalities); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("assistance of counsel is often a requisite to the very existence of a fair trial").

4. Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., concurring) ("quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy"); see United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978) ("accused who is financially able to retain counsel must not be deprived of the opportunity to do so"), cert. denied, 439 U.S. 1069 (1979).
tion of justice.\textsuperscript{5} In addition, Congress imposed restrictions on a defendant's right to counsel of choice through enactment of the criminal forfeiture provisions in the Racketeer Influenced and Corrupt Organization (RICO) sections of the Organized Crime Control Act of 1970\textsuperscript{6} and the Continuing Criminal Enterprise (CCE) sections of the Controlled Substances Act.\textsuperscript{7}

In 1970, Congress enacted criminal forfeiture provisions in the RICO and CCE statutes\textsuperscript{8} in an attempt to terminate illegal drug and racketeering enterprises in the United States.\textsuperscript{9} However, the original forfeiture provisions proved ineffective due to statutory ambiguity and procedural limitations.\textsuperscript{10} Therefore, in 1984, Congress passed the Comprehensive Forfeiture Act (CFA or the Act)\textsuperscript{11} to clarify the scope of the criminal forfeiture provi-

\begin{footnotesize}
5. See Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (denial of a justifiable request for continuance to expedite trial renders the right to counsel "an empty formality"); Sampley v. Attorney Gen., 786 F.2d 610, 613 (4th Cir.) ("defendant has no constitutional right to dictate the time [of his trial] by objecting that counsel then retained or assigned is not presently 'counsel of his choice'"), cert. denied, 478 U.S. 1008 (1986).


9. S. REP. No. 225, 98th Cong., 1st Sess. 191, 194, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3375; see also id. at 194 (scope of property subject to forfeiture was too narrow), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3377; id. at 195 (criminal forfeiture provisions "fail adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction"), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3378.


Because the language and legislative history of the 1984 RICO and CCE forfeiture amendments are virtually identical, the courts have construed the statutes together. See United States v. Reckmeyer, 631 F. Supp. 1191, 1195 n.2 (E.D. Va. 1986) ("18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853.").
\end{footnotesize}
sions. Enforcement of these CFA provisions can affect a criminal defendant's sixth amendment right to counsel of choice in two ways. First, the forfeiture provisions allow the government to restrain a defendant from using private assets to retain counsel of choice by freezing the defendant's assets prior to, or upon obtaining a RICO or CCE forfeiture count in the indictment or information. Second, the possibility that unrestrained assets will be subject to forfeiture after trial arguably chills defense counsel's willingness to accept RICO and CCE clients.

The issue of whether the government can constitutionally apply the RICO and CCE forfeiture provisions to restrict a defendant's choice of counsel sparked considerable debate between the federal circuit courts of appeal and commentators. In 1989, however, the United States Supreme Court

14. Three circuit courts of appeal have held that the statute must be read to exempt sufficient funds for the defendant to retain counsel of choice. United States v. Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium, 853 F.2d 1445, 1450-52 (8th Cir.), mandate stayed, 864 F.2d 1421 (8th Cir. 1988); United States v. Monsanto, 852 F.2d 1400, 1402-04 (2d Cir. 1988) (en banc), rev'd, 109 S. Ct. 2657 (1989); United States v. Jones, 837 F.2d 1332, 1335 (5th Cir. 1988), rev'd en banc, 877 F.2d 341 (5th Cir. 1989); United States v. Thier, 801 F.2d 1463, 1474-75 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987).


Four circuit courts of appeal have held that the criminal forfeiture provisions of these statutes encompass legitimate defense attorney fees and that such forfeiture does not necessarily violate the fifth or sixth amendments. United States v. Bissell, 866 F.2d 1343, 1350-51, 1352 (8th Cir. 1989) (rehearing en banc denied), cert. denied, 110 S. Ct. 213 (1989); United States v. Moya-Gomez, 860 F.2d 706, 725 (7th Cir. 1988) (however pretrial post-indictment hearing is required to meet due process guarantees), cert. denied, 109 S. Ct. 3221 (1989); United States v. Weisman, 858 F.2d 389, 390-91 (8th Cir. 1988), cert. denied, 109 S. Ct. 1353 (1989); United States v. Nichols, 841 F.2d 1485, 1505 (10th Cir. 1988); Caplin & Drysdale v. United States, 837 F.2d 637 (4th Cir. 1988), aff'd, 109 S. Ct. 2646, 2650-51, 2656-57 (1989).


15. See generally Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 VA. L. REV. 493 (1986) (RICO and CCE forfeiture provisions encompass attorney fees and any resulting sixth amendment concerns are over-
resolved this uncertainty. In *Caplin & Drysdale v. United States* and *United States v. Monsanto*, the Supreme Court held that attorney fees are not exempt from the federal forfeiture provisions contained in the RICO and CCE statutes. Further, the Court stated that its interpretation of the statute to include assets needed to pay private counsel did not raise any fifth or sixth amendment concerns. The majority also concluded that the RICO and CCE statutes authorize the pretrial restraint of potentially forfeitable assets which a defendant may wish to use to pay an attorney and that such judicial restraint of the assets is constitutional.

*Caplin & Drysdale* and *Monsanto* both arose from illegal drug trafficking prosecutions. In *Caplin & Drysdale*, federal prosecutors charged Christopher F. Reckmeyer with various tax evasion and CCE violations. Reckmeyer pled guilty to two tax evasion counts and the CCE count upon which forfeiture of virtually all his assets was based. The jury sentenced Reckmeyer and ordered him to forfeit the property listed in the indictment to the United States. Pursuant to the court's recommendation, defense counsel Caplin & Drysdale filed for a post-conviction third-party proceed-

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19. *Caplin & Drysdale*, 109 S. Ct. at 2651-57. The Court's consideration of fifth amendment concerns was limited to a discussion of the CFA's impact on the adversarial system. *Id.* at 2656-57. The Court declined to consider a procedural due process challenge to the CFA. *Monsanto*, 109 S. Ct. at 2666 n.10; see infra text accompanying notes 261-67.
22. *Id.*
23. *Id.*
Forfeiture of Attorney Fees

The government acknowledged the reasonableness of the Caplin & Drysdale fee petition, but alleged that the CFA relation back doctrine, which vests title of the defendant's assets in the government upon the commission of the illegal act, precluded any payment of fees. The United States District Court for the Eastern District of Virginia ordered the government to pay the fees owing to Caplin & Drysdale for legitimately performed legal services. Upon the government's appeal, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court. The Fourth Circuit granted rehearing en banc and reversed the panel decision, finding that the CFA provisions permitted the forfeiture of assets a defendant uses or intends to use to hire an attorney of choice.

In United States v. Monsanto, federal prosecutors alleged that Peter Monsanto directed a large illegal drug trafficking operation. A grand jury indicted the defendant on both RICO and CCE counts. The indictment also listed various assets that the government claimed were subject to forfeiture under the CCE statute. The government received an order restraining the defendant's use of the listed assets effective the same day the indictment issued. Monsanto moved to modify or vacate the restraining order to use his assets to retain counsel. The United States District Court for the Southern District of New York denied Monsanto's request, stating that Congress did not intend to exclude attorney fees from the scope of the CCE forfeiture provisions. A panel of the United States Court of Appeals for the Second Circuit reversed the district court decision and remanded the case for a pretrial adversary hearing to consider the government's restraint of the defend-

24. Id.
25. Id. at 1193-94; see infra notes 68-87 and accompanying text.
26. Id. at 1198.
29. Id. at 641.
31. Id.
32. The indictment specified two parcels of residential property, valued at $335,000 and $30,000, as well as $35,000 in cash, as property subject to forfeiture. Id.
33. The court entered an ex parte order pursuant to 21 U.S.C. § 853(e)(1)(A) prohibiting Monsanto from transferring or encumbering the residential property. Id.
34. Id.
35. Id.
ant's assets. On remand, the district court held an adversary hearing and found the order restraining the potentially forfeitable property valid. The Second Circuit granted rehearing en banc, reversed the district court decision, and ordered the district court to modify its restraining order to permit the defendant's use of his assets to retain defense counsel of his choice.

The United States Supreme Court affirmed the decision of the Fourth Circuit in Caplin & Drysdale and reversed the decision of the Second Circuit in Monsanto. Justice White, who delivered the opinion of the Court in each case, interpreted the statutory language and the legislative history of the CFA to support application of the RICO and CCE forfeiture provisions to assets a criminal defendant uses or intends to use to retain private counsel. The Court also determined that its interpretation of the statute raised no fifth or sixth amendment concerns.

In a single dissent to the Court's Caplin & Drysdale and Monsanto decisions, Justice Blackmun analyzed the legislative language of the RICO and CCE forfeiture provisions in light of Congress' intent in enacting the CFA. The dissent concluded that Congress did not intend the RICO and CCE forfeiture provisions to encompass assets needed to pay attorney fees. The dissent further asserted that if the CFA, as written, does authorize such forfeiture, then the Court should have declared the provisions in violation of the sixth amendment of the Constitution.

This Note compares the distinctions between civil and criminal forfeiture and their application in the context of United States federal law. It examines the CFA, focusing on the background, development, and enactment of its criminal forfeiture provisions. This Note also traces the federal circuit court case law, in particular the decisions of Caplin & Drysdale and Monsanto, as illustrative of the circuit split concerning whether application of the criminal forfeiture provisions of RICO and CCE unconstitutionally infringe upon a defendant's sixth amendment right to counsel of choice. This Note then examines the Supreme Court's majority opinions in both cases and the opinion of the dissent. This Note concludes that the Supreme Court's decisions in

36. Id.
37. Id. at 1402.
38. Id. at 1400.
40. 109 S. Ct. 2657, 2661 (1989). The Supreme Court's decision in Monsanto also remanded the case to the United States Court of Appeals for the Second Circuit for further proceedings. Id. at 2667.
41. Id. at 2662-67.
42. Caplin & Drysdale, 109 S. Ct. at 2651-57.
43. Id. at 2668-72 (Blackmun, J., dissenting).
44. Id. at 2672-78.
Caplin & Drysdale and Monsanto fail to balance adequately a criminal defendant's constitutional rights against the public's interest in deterring racketeering and illegal drug operations. As a result, it suggests that the Supreme Court should now decide whether the RICO and CCE forfeiture provisions violate a defendant's fifth amendment right to procedural due process. In addition, Congress should, at a minimum, amend the statutes to clarify the discretion of a district court to determine asset restraint and forfeiture under the RICO and CCE provisions.

I. CRIMINAL FORFEITURE LAW IN THE UNITED STATES: THE ENACTMENT OF THE COMPREHENSIVE FORFEITURE ACT

A. Criminal and Civil Forfeiture in the United States: The Bias Against Criminal Forfeiture

Federal law recognizes two types of forfeiture: civil and criminal. Civil, or in rem forfeiture, is directed against property and based on a common law fiction that the forfeitable property is guilty of the wrongdoing. In the civil context, the law considers the property subject to forfeiture tainted by the act of the offender. Therefore, under this theory, the government's right to the tainted property vests at the time of the illegal act, thereby voiding all third-party transfers occurring between the time of the illegal act and the government's forfeiture of the property.

Criminal, or in personam forfeiture, on the other hand, is directed against the person and is based on a determination of the defendant's guilt. According to this theory, a trier of fact must find that the defendant is guilty of a crime and that the defendant's property in question had some nexus with the charged illegal activity. If a trier of fact makes such a determination, the defendant must forfeit the property to the government. In contrast to

48. Id.
50. See id. at 232.
52. See S. REP. No. 225, supra note 9, at 191 (citing rules 31(e) and 32(b)(2) of the Federal Rules of Criminal Procedure), 193-94, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3376-77. The government must allege criminal forfeiture in the information or indictment. Id. If the defendant is found guilty of the underlying offense, then a special verdict
civil forfeiture, criminal forfeiture never gained wide acceptance in the United States.53

B. Development of the RICO and CCE Statutes: Criminal Forfeiture Revived

Passage of the 1970 RICO54 and CCE55 statutes established the first criminal forfeiture provisions in the United States since 1863.56 Congress enacted these statutes to deter racketeering and drug trafficking operations.57 The RICO statute required a defendant convicted of racketeering58 to forfeit any “interest” in the criminal enterprise.59 Similarly, the CCE statute required a defendant convicted of illegal drug trafficking to forfeit all “profits” derived from the criminal enterprise.60 Congress intended the criminal forfeiture provisions to diminish the economic incentive of participating in these criminal operations.61

The 1970 RICO and CCE provisions, however, failed as an effective law enforcement tool.62 Defendants frequently defeated these forfeiture provi-

must be returned with respect to the forfeiture allegations and a judgment of forfeiture entered against the defendant. Id.

53. See Weiner, Crime Must Not Pay: RICO Criminal Forfeiture in Perspective, 1 N. ILL. L. REV. 225, 231 (1981). The author identifies three primary factors discouraging forfeiture in the United States: the colonial governments did not want American property forfeited to the Crown, most felons had nothing to forfeit, and the colonial government’s concern over the effect of the penalty on innocent family members. Id. The United States Constitution also banned forfeiture of estate and corruption of blood for treason. U.S. CONST. art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).


56. Confiscation Act, ch. 195, § 5, 12 Stat. 589, 590 (1862) (authorizing the President to seize the life estates of confederate soldiers).

57. See S. REP. NO. 225, supra note 9, at 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3377.


62. Id. See generally COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, ASSET FORFEITURE—A SELLDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 9 (1981) (General Accounting Office determined that the ineffectiveness of the 1970 RICO and CCE forfeiture provisions resulted from statutory flaws and limited use of the provisions by the Department of Justice.).
sions by transferring or concealing their assets prior to conviction.63 In addition, the RICO and CCE statutes narrowly circumscribed the type of property subject to forfeiture. In 1984, Congress responded to the statutory shortfalls of the criminal forfeiture provisions by enacting the CFA64 to amend the original RICO and CCE statutes. The CFA criminal forfeiture provisions reflect congressional intent to expand the scope of property subject to forfeiture.65 broaden the class of offenses for which criminal forfeiture is possible,66 and facilitate the forfeiture procedure.67

C. The Comprehensive Forfeiture Act of 1984: A Powerful Law Enforcement Measure

The CFA effected several important changes in criminal forfeiture law.68 The Act amended CCE section 853(a) and RICO section 1963(a) to provide that a defendant convicted of violating the RICO or CCE statutes shall forfeit to the United States “any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly” from the violation69 or any property used in the commission of the offense.70 The Act

65. See 18 U.S.C. § 1963(a)-(b) (Supp. V 1987); see also infra notes 69-72 and accompanying text.
66. See 18 U.S.C. § 1963(a), (m); see also infra notes 79-87 and accompanying text.
67. For an extensive analysis of the CFA, see Reed, Criminal Forfeiture Under The Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 AM. CRIM. L. REV. 747 (1985). While the CFA made no specific reference to attorney fees, it significantly affected whether attorney fees are subject to the criminal forfeiture provisions.
(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —
   (1) any interest the person has acquired or maintained in violation of section 1962;
   (2) any —
      (A) interest in;
      (B) security of;
      (C) claim against; or
      (D) property or contractual right of any kind affording a source of influence over;
defines property to include real property and tangible and intangible personal property.\textsuperscript{71} Thus, property associated with a transaction in violation of RICO or CCE is forfeitable. If only a portion of a defendant's assets are derived from the illegal activity, the defendant's legitimate gains are not subject to forfeiture.\textsuperscript{72}

Of equal importance are CCE section 853(c) and RICO section 1963(c), which revise the timetable under which the government's interest in the forfeited property vests.\textsuperscript{73} These provisions provide that although criminal forfeiture is available only upon the conviction of the defendant, the "relation back" doctrine vests the United States' interest in the forfeited property at the time of the offense rather than at the time of the defendant's conviction.\textsuperscript{74} These relation back provisions essentially borrow the taint concept
traditionally employed in civil forfeiture proceedings.\textsuperscript{75} Congress enacted these sections so that the United States' interest in the property could not be extinguished by a defendant's transfer of the property to a third-party prior to conviction.\textsuperscript{76}

RICO section 1961(1) and CCE section 853(a) broaden the types of offenses for which property is subject to criminal forfeiture. Specifically, these provisions subject assets associated with all illegal drug offenses and with other specified crimes to criminal forfeiture.\textsuperscript{77} Approximately twenty-five percent of criminal charges brought in federal court fall within the CFA expanded criminal forfeiture provisions.\textsuperscript{78}

The CFA also codifies a number of changes in the criminal forfeiture procedures. Specifically, the CFA establishes new procedures for the issuance of restraining orders restricting a defendant's access to potentially forfeitable assets.\textsuperscript{79} Under RICO section 1963(d) and CCE section 853(e), a restraining order can issue prior to the filing of an indictment, after notice and an oppor-

\textsuperscript{75} See Reed, supra note 68, at 757; see also supra note 49 and accompanying text.

\textsuperscript{76} S. REP. NO. 225, supra note 9, at 200-01, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3383-84.


\textsuperscript{79} 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e). Section 1963 of RICO provides in relevant part:

\begin{quote}
(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of a criminal or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

\textit{Provided, however,} That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause
tunity for a hearing. To secure a pre-indictment restraining order, the government must show a substantial probability that it will prevail on the issue of forfeiture, that failure to restrain such assets will result in the property being removed from the court’s jurisdiction, and that the need to preserve the potentially forfeitable assets outweighs the defendant’s hardship. A court may also issue an ex parte restraining order, on a temporary basis, after the United States establishes probable cause that the property is subject to forfeiture and that notice to the defendant would jeopardize the availability of the property. In addition, the CFA provides for the issuance of restraining orders upon the filing of an indictment or information charging a RICO or a CCE violation and stating that upon conviction, such property would be subject to forfeiture. For post-indictment restraining orders, the probable cause established in the indictment or information satisfies the requirements for issuance of the order. Congress enacted these provisions to preserve the availability of the assets pending disposition of the criminal case.

shown or unless an indictment or information described in subparagraph (A) has been filed.

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

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


82. 18 U.S.C. § 1963(d)(2); 21 U.S.C. § 853(e)(2); see supra note 79.


85. Id. at 204, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3387.
One final procedural change significantly affects the question of attorney fee forfeiture. Pursuant to RICO section 1963(l) and CCE section 853(n), a court may hold a post-conviction ancillary hearing, if so requested, to permit third-parties to assert their claims to the forfeited property.\textsuperscript{86} To defeat the United States' claim to the forfeited property, a third-party must be the bona fide purchaser of the property and establish that, at the time of the purchase, the purchaser was "reasonably without cause to believe that the property was subject to forfeiture."\textsuperscript{87}

Viewed as a whole, the CFA criminal forfeiture provisions appear to apply to all assets that have a sufficient connection with illegal RICO or CCE activity. The literal language of the CFA creates no exception either in its definition of property subject to forfeiture\textsuperscript{88} or in its third-party forfeiture provisions\textsuperscript{89} for a criminal defendant to pay an attorney for legitimate services rendered in connection with a RICO or CCE prosecution.

\section*{II. Federal Circuit Court Interpretation of the CFA: Conflict Among the Circuits}

Although the statutory language of the CFA criminal forfeiture provisions appears clear, the federal circuit courts of appeals that considered such pro-

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

\item If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —
  \begin{enumerate}[\textsuperscript{(A)}]
  \item 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
  \item 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; the court shall amend the order of forfeiture in accordance with its determination.
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visions interpreted the statute and its legislative history in diverse and inconsistent manners. The circuit courts disagreed concerning both the application of the CFA to attorney fees and whether application of the provision implicated constitutional concerns. In *Caplin & Drysdale v. United States*, the United States Court of Appeals for the Fourth Circuit held that the criminal forfeiture provisions of the CFA encompass legitimate defense attorney fees and that forfeiture under those provisions did not implicate a defendant’s sixth amendment rights. Conversely, in *United States v. Monsanto*, the United States Court of Appeals for the Second Circuit considered the application of the CFA to attorney fees and held that the defendant could use certain potentially forfeitable assets to retain private counsel. The dichotomy and confusion which existed among the circuit courts regarding attorney fee forfeiture is effectively illustrated by juxtaposing the facts and lower court decisions in *Caplin & Drysdale* with *Monsanto*.

A. Attorney Fees Subject to CFA Forfeiture — Caplin & Drysdale v. United States

In *Caplin & Drysdale*, the Fourth Circuit encountered the attorney fee forfeiture issue within the context of a post-conviction claim by defense counsel to recover fees from assets forfeited to the United States. The case involved a defendant who pled guilty to various criminal counts, including the CCE count upon which forfeiture of virtually all his assets was based. Following the judge’s forfeiture decision and sentencing of the defendant, defense counsel, Caplin & Drysdale, filed for a post-conviction third-party hearing to recover unpaid legal fees and expenses.

The district court ordered the government to pay Caplin & Drysdale for legitimately performed legal services. The court stated that Congress had not intended the CFA to encompass the forfeiture of bona fide attorney

91. Id. at 649.
93. Id. at 1401-02.
96. Id. at 1192-93. The court sentenced Reckmeyer to 17 years in prison for violating the CCE statute. The court also imposed two two-year sentences upon Reckmeyer for his tax violations which were to run concurrently with the CCE sentence. United States v. Reckmeyer, 786 F.2d at 1217 n.1 (4th Cir. 1986).
98. Id. at 1198.
fees.\textsuperscript{99} Further, the court asserted that interpreting the statute to allow forfeiture of such fees would violate a defendant's sixth amendment right, by preventing the retention of counsel of choice.\textsuperscript{100} Moreover, the district court noted that interpreting the CFA forfeiture provisions to include such fees would violate the due process clause of the fifth amendment by creating conflicts between defense counsel and the criminal defendant that "would undermine the adversary system."\textsuperscript{101}

On appeal, a panel of the Fourth Circuit unanimously affirmed the district court's order.\textsuperscript{102} While the Fourth Circuit panel found that the CFA forfeiture provisions encompassed legitimate attorney fees,\textsuperscript{103} the panel determined that such an interpretation of the statute rendered it unconstitutional because it violated a defendant's sixth amendment right to counsel of choice.\textsuperscript{104} However, the Fourth Circuit granted rehearing of \textit{Caplin & Drysdale} en banc and reversed the panel decision.\textsuperscript{105}

The en banc court agreed with the Fourth Circuit panel's statutory determination\textsuperscript{106} that the CFA unmistakably provides that property used or intended to be used for attorney fees is subject to forfeiture. The court maintained that the literal language of the statute subjected the defendant's assets to forfeiture regardless of their possible use.\textsuperscript{107} Because the court found the statute unambiguous, it found resort to the legislative history of the Act unnecessary.\textsuperscript{108} Nevertheless, the court stated that the plain meaning of the statute should not be enforced if it would contravene express legislative intent.\textsuperscript{109} Having established that the language of the statute provided no express exemption for attorney fees, the court examined whether enforcement of the statute would contravene express legislative intent.\textsuperscript{110} The court concluded that the legislative history of the Act revealed no congressional intent to exempt attorney fees.\textsuperscript{111}

\textsuperscript{99} \textit{Id.} at 1195.

\textsuperscript{100} \textit{Id.} at 1196-98.

\textsuperscript{101} \textit{Id.} at 1197.

\textsuperscript{102} United States v. Harvey, 814 F.2d 905, 931 (4th Cir. 1987). For the background of the \textit{Reckmeyer} case, see supra note 27.

\textsuperscript{103} \textit{Harvey}, 814 F.2d at 913-17.

\textsuperscript{104} \textit{Id.} at 926-27.


\textsuperscript{106} \textit{Id.} at 641-42.

\textsuperscript{107} \textit{Id.} at 642.

\textsuperscript{108} \textit{Id.} at 641.

\textsuperscript{109} \textit{Id.} (citing Russello v. United States, 464 U.S. 16, 20 (1983)).

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.}
After determining that the panel decision correctly interpreted the Act, the court turned to the panel’s constitutional analysis, wherein the en banc court reversed. Citing prior Supreme Court precedent, the Fourth Circuit acknowledged that implicit in due process is the right to representation. However, the court reasoned that the CFA forfeiture provisions did not threaten the sixth amendment right to representation because either counsel privately retained or counsel appointed and paid by the government under the provisions of the Criminal Justice Act would satisfy this interest. Moreover, in the forfeiture context, the court noted that if a defendant’s sole resources are subject to forfeiture under the CFA, legal ownership of the assets is in question. According to the court, a defendant does not acquire a right to an attorney of choice unless the resources in his possession are clearly his own and are not subject to government forfeiture. Thus, based on both statutory and constitutional grounds, the Caplin & Drysdale court decided that attorney fee forfeiture was appropriate.

B. Removing Attorney Fees from the Purview of CFA Forfeiture — United States v. Monsanto

In contrast to the Fourth Circuit’s decision, in United States v. Monsanto, the United States Court of Appeals for the Second Circuit determined that a criminal defendant has a right to assets restrained under the RICO and CCE forfeiture provisions to pay legitimate attorney fees. The Second Circuit’s decision cemented the conflict among the circuits regarding the CFA’s application to attorney fees.

The district court in Monsanto considered the issue of attorney fee forfeiture in the context of a post-indictment restraining order issued pursuant to

112. Id. at 642.
113. Caplin & Drysdale, 837 F.2d at 643 (“This right to representation is fundamental to our system, and universally recognized as an ‘immutable principle of justice’ implicit in due process.” (quoting Powell v. Alabama, 287 U.S. 45, 71 (1932))).
115. Caplin & Drysdale, 837 F.2d at 643.
116. Id. at 644.
117. Id. While deciding that the sixth amendment requires no special exemption for defense counsel to recoup legitimate fees for services, the Fourth Circuit acknowledged that fee forfeiture raises many complex issues. Id. at 648. Specifically, the court noted that attorney fee forfeiture could implicate issues involving a defendant’s access to counsel, attorney-client privilege, and a defendant’s access to public defender services. Id. However, because the court failed to discern any constitutional right at issue, the Fourth Circuit dismissed these concerns as questions of policy for Congress, not the courts, to consider. Id.
119. Id. at 1402.
120. See supra note 14.
the CCE which precluded the defendant from using his assets to pay an attorney of choice. 121 The grand jury indictment against Monsanto contained both RICO and CCE counts and listed various assets that the government claimed were subject to forfeiture under the CCE statute. 122 The government moved for, and received, an order restraining the defendant's use of the listed assets effective the same day the government filed the grand jury indictment. 123

Monsanto moved to modify or vacate the restraining order to use his assets to retain counsel. 124 In addition, Monsanto asked the district court to rule prospectively that the fees paid to his counsel would be exempt from post-trial forfeiture. 125 The district court denied Monsanto's requests, finding that Congress did not intend to exclude attorney fees from the CCE forfeiture provisions, and that such provisions are constitutional. 126 However, the court noted that Monsanto could use the potentially forfeitable assets to pay counsel of choice at the rates established by the Criminal Justice Act. 127

A divided panel of the court of appeals reversed the district court decision and remanded the case for further proceedings. 128 The panel decision acknowledged that the post-indictment restraining order and the CFA post-conviction forfeiture provisions apply to attorney fees and that such provisions are constitutionally valid. 129 However, the court stated that the Constitution requires notice and a pretrial adversary hearing before the government may restrain assets that a defendant could otherwise use to pay attorney fees. 130 The court held that at the pretrial hearing the government must demonstrate a likelihood that the defendant will be convicted and that the jury will find the property forfeitable. 131 Unless the government can meet this burden at the pretrial hearing, the panel ruled, funds used to pay legitimate attorney fees are exempt from post-conviction forfeiture. 132

121. Monsanto, 852 F.2d at 1400.
122. Id. at 1401. The indictment specified two parcels of residential property, valued at $335,000 and $30,000, as well as $35,000 in cash, as property subject to forfeiture. Id.
123. Id. The court entered an ex parte order pursuant to 21 U.S.C. § 853(e)(1)(A) prohibiting Monsanto from transferring or encumbering the residential property. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id. at 1401-02.
129. Id. at 1401.
130. Id. at 1401-02.
131. Id.
132. Id. at 1402.
On remand, the district court held an adversary hearing and determined that the government had met its requisite burden for restraining the defendant's use of the assets. However, the court of appeals granted rehearing en banc and ordered modification of the post-indictment restraining order to allow the defendant access to his assets to retain defense counsel of choice. The court of appeals also held that any assets used to pay counsel would be exempt from post-conviction forfeiture. The court rendered its en banc decision in a short per curiam opinion, accompanied by three plurality opinions.

1. A Constitutional Analysis of the CFA: No Compelling Government Interest

One plurality opinion in Monsanto, written by Chief Judge Feinberg for himself and two others, focused almost exclusively on constitutional rather than statutory concerns. Chief Judge Feinberg asserted that the forfeiture provisions of the CCE clearly applied to assets paid or owing to an attorney, and therefore, violated the Constitution. He stated that under the sixth amendment, if a defendant has sufficient assets, his right to counsel of choice cannot be restricted unless the government demonstrates a compelling governmental interest. While the Chief Judge acknowledged the fact that the government typically is justified in pursuing forfeiture of a defendant's illegal assets, he noted that particular problems arise when such forfeiture prevents a criminal defendant from retaining counsel of choice. Therefore, he contended, a district court must assess the government's interests against the

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133. Id.
134. Id.
135. Id.
136. Id.
137. Id.
138. Id. (Feinberg, C.J., concurring). Judges Oakes and Kearse joined Chief Judge Feinberg. Judge Oakes also submitted a separate concurring opinion which stated that the sixth amendment is implicated not only on an individual level regarding a particular defendant's right to counsel of choice, but also on an institutional level in the attorney fee forfeiture context. Id. at 1404-05 (Oakes, J., concurring). Judge Oakes similarly concluded that the CFA was unconstitutional under the fifth amendment due process clause because it vested too much power with the prosecutor to influence the selection of defense counsel. Id.
139. Id. at 1403 (Feinberg, C.J., concurring).
140. Id. at 1402.
141. Id. at 1403 (the problem arises when an accused has no funds, other than those restrained by the government, to retain counsel of choice).
142. The Feinberg plurality identified the governmental interests in RICO and CCE forfeiture as the preservation of a defendant's assets and the prevention of a defendant's use of ill-gotten gains. Id. at 1402.
1989]  

Forfeiture of Attorney Fees  

defendant's interests\textsuperscript{143} prior to the forfeiture of assets intended for use as attorney fees.\textsuperscript{144} The plurality concluded that the government's interests in forfeiture were not sufficiently compelling to override the defendant's sixth amendment interest.\textsuperscript{145}

Chief Judge Feinberg's plurality opinion remanded the case to the district court, vacating the post-indictment restraining order to permit the defendant to retain counsel of choice and prohibiting the government from seeking post-conviction forfeiture of such fees.\textsuperscript{146}

2. A Statutory Analysis of the CFA: A Balancing of Interests

The second three-judge plurality opinion in \textit{Monsanto},\textsuperscript{147} written by Judge Winter, resolved the attorney fee forfeiture issue as a matter of statutory construction, thereby avoiding the constitutional claims.\textsuperscript{148} Judge Winter read the broad definition of property contained in the statute to include assets the defendant intended to use to retain private counsel.\textsuperscript{149} Similarly, he acknowledged that attorney fees would not meet the requirements of the bona fide purchaser exemption.\textsuperscript{150} However, Judge Winter contended that the use of "may" rather than "shall" in two provisions of the RICO and CCE statutes\textsuperscript{151} indicated Congress' intent to vest the courts with discretion to weigh the defendant's interests against the government's interests in issuing pretrial restraining orders and in exercising the third-party forfeiture provisions.\textsuperscript{152} The plurality asserted that the government derives no benefit pursuant to the CFA in preventing a defendant from making ordinary lawful

\textsuperscript{143} The Feinberg plurality identified the defendant's interest as the right to retain counsel of choice. \textit{Id}.

\textsuperscript{144} \textit{Id}. In analyzing the governmental interests at stake in \textit{Monsanto}, the Feinberg plurality noted that the government's claim of ownership to the disputed assets was only established upon conviction. \textit{Id}. at 1402-03. Therefore, such interest in the property was conditioned upon securing a conviction. \textit{Id}. Similarly, it argued that although the government maintains an important interest in preventing the defendant's use of his ill-gotten gains, such an interest did not outweigh a criminal defendant's right to counsel of choice. \textit{Id}. at 1403.

\textsuperscript{145} \textit{Id}. at 1403.

\textsuperscript{146} \textit{Id}. at 1402.

\textsuperscript{147} \textit{Id}. at 1405 (Winter, J., concurring). Judges Meskill and Newman concurred in Judge Winter's opinion.

\textsuperscript{148} \textit{Id}.

\textsuperscript{149} \textit{Id}.

\textsuperscript{150} \textit{Id}. at 1409-10.


\textsuperscript{152} \textit{Monsanto}, 852 F.2d at 1406 (Winter, J., concurring). The Winter plurality contended that district courts must be guided by the traditional equitable principles that balance the relative hardships of the parties. \textit{Id}.
expenditures including the payment of legal expenses.\textsuperscript{153} Thus, this plurality determined that the defendant could use his assets to pay for defense counsel of his choice. Judge Winter's plurality opinion applied the same balancing rationale to preclude subsequent post-conviction forfeiture of attorney fees.\textsuperscript{154}

3. \textit{A Procedural Analysis of the CFA: Defer to Congress}

The final plurality opinion in \textit{Monsanto},\textsuperscript{155} written by Judge Miner, for himself and one other, analyzed the issue on procedural due process grounds. This plurality agreed with the \textit{Monsanto} panel opinion that a criminal defendant's right to counsel of choice under the sixth amendment would not be unduly infringed under the CFA if courts held adversary pretrial restraint hearings.\textsuperscript{156} However, because the CFA statute did not specifically delineate the authority for mandatory post-indictment restraint hearings, the plurality contended that the courts could not impose such hearings without congressional action.\textsuperscript{157} Judge Miner concluded that Congress, not the courts, should create the statute's constitutionally required procedural safeguards.\textsuperscript{158} Therefore, this plurality urged the district court to vacate the Monsanto restraining order.\textsuperscript{159}

4. \textit{The Monsanto Dissenting Opinions: The CFA Forfeiture Provisions Encompass Attorney Fees}

The dissenting opinions in \textit{Monsanto}\textsuperscript{160} also were fragmented. One dissent, written by Judge Mahoney,\textsuperscript{161} analyzed the issue from a statutory perspective. The dissent stated that the RICO and CCE statutes provide no exemption from criminal forfeiture for attorney fees. In addition, the dissent argued that if the government could show at a pretrial adversary hearing a likelihood that the defendant's assets are forfeitable, the statute could be applied constitutionally to attorney fees.\textsuperscript{162}

\begin{flushleft}
\textsuperscript{153} \textit{Id.} at 1408, 1410-11.
\textsuperscript{154} \textit{Id.} at 1410-11.
\textsuperscript{155} \textit{Id.} at 1411 (Miner, J., concurring). Judge Miner was joined by Judge Altimari in the opinion.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at 1412 (Mahoney, J., dissenting).
\textsuperscript{161} \textit{Id.} Judge Mahoney's dissent was joined by Judges Cardamone and Pierce.
\textsuperscript{162} \textit{Id.} at 1416 (Mahoney, J., dissenting).
\end{flushleft}
The second dissent, written by Judge Pratt, relied on the Monsanto panel opinion. The dissent stated that a pretrial hearing is required to meet the constitutional due process standards necessary for restraint of the defendant's assets and that authority for such a hearing can be found in the RICO and CCE statutes. Therefore, Judge Pratt contended that the statute was constitutional and could be used to restrain assets that a criminal defendant intended to use for attorney fees.

The Fourth Circuit's decision in Caplin & Drysdale and the Second Circuit's decision in Monsanto raised the important statutory and constitutional issues the circuit courts considered within the attorney fee forfeiture context. These decisions illustrate the difficulty courts encountered in interpreting the statute in accordance with congressional intent and constitutional principles. The decisions also reflect the lack of consensus that existed within the courts and among the jurisdictions regarding whether the RICO and CCE forfeiture provisions can be applied constitutionally to restrict a defendant's choice of private counsel. Because Congress did not act to clarify application of the RICO and CCE forfeiture provisions with regard to attorney fees, the United States Supreme Court moved to settle the debate.

III. **Caplin & Drysdale v. United States and United States v. Monsanto: Settling the Circuit Court Controversy over Attorney Fee Forfeiture**

In Caplin & Drysdale and Monsanto, the Supreme Court held that the federal forfeiture provisions contained in the RICO and CCE statutes do not contain an exemption allowing a criminal defendant to use potentially forfeitable assets to hire a defense attorney of choice and that such an interpretation of the statutes raises no fifth or sixth amendment concerns. The Court also concluded that the statutes authorize the issuance of pretrial restraint orders to prevent a defendant from using potentially forfeitable assets

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163. Id. at 1420 (Pratt, J., dissenting).
164. Id. In addition, the dissent disagreed with the majority's resolution of post-conviction forfeiture under the CFA, stating that it did not feel the issue was ripe for review. Id.
165. Id. The final two dissents, written by Judges Pierce and Cardamone, concurred in part with Judge Mahoney's dissent, relying on the Monsanto panel opinion. However, these dissents also concurred with the majority per curiam opinion to the extent that it exempted from post-conviction forfeiture assets, or bona fide attorney fees, that had not been the subject of valid pretrial restraint. Id. Both dissents opposed post-conviction forfeiture of attorney fees on the ground that, if allowed, the government, by threat of forfeiture after conviction, could substantially limit a defendant's choice of counsel during the pretrial and trial stages of the proceeding. Id.
to pay an attorney of choice\textsuperscript{168} and that such judicial restraint orders are consistent with the Constitution.\textsuperscript{169}

A. Interpreting the RICO and CCE Criminal Forfeiture and Pretrial Restraint Provisions to Encompass Assets a Criminal Defendant Needs to Retain an Attorney of Choice

1. The Majority's Statutory Analysis: Giving Effect to the Plain Meaning of the Statute

The Supreme Court considered the statutory challenges to the RICO and CCE forfeiture provisions in its \textit{Monsanto} decision.\textsuperscript{170} Justice White, writing for the majority, focused on the statute's language as determinative of its scope. Specifically, the Court found that the forfeiture language of the statute was plain and unambiguous.\textsuperscript{171} The majority stated that neither the statute's definition of property nor the statute's specific forfeiture mandate contain exemptions for assets a defendant intends to use to pay attorney fees.\textsuperscript{172} Moreover, the Court determined that the absence of an express provision in the CFA specifically permitting the forfeiture of attorney fees did not render the Act ambiguous, but rather demonstrated the statute's breadth.\textsuperscript{173} Therefore, the Court found resort to the statute's legislative history for interpretation of the statute unnecessary because the "plain meaning" of the statute clearly applied the forfeiture provisions to attorney fees.\textsuperscript{174}

The Court also summarily rejected the proposition that the RICO and CCE provisions, authorizing pretrial judicial restraint orders, contain discretionary language which permit district courts to exempt from restraint assets a defendant wishes to use to hire an attorney of choice.\textsuperscript{175} Focusing on the categorical nature of the statute's forfeiture provisions and the statute's purpose, the majority interpreted the statute to limit district court discretion in issuing pretrial restraint orders.\textsuperscript{176} The Court stated that a district court can only exercise its equitable discretion in determining the pretrial restraint of assets in a manner consistent with the overall purpose of the statute.\textsuperscript{177} Moreover, the Court determined that Congress intended the statute to pre-

\textsuperscript{168} \textit{Monsanto}, 109 S. Ct. at 2664-65.

\textsuperscript{169} \textit{Id.} at 2665-67.

\textsuperscript{170} \textit{Id.} at 2662-65.

\textsuperscript{171} \textit{Id.} at 2662.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.} at 2663 (citing \textit{Sedima, S.P.R.L. v. Imrex Co.}, 473 U.S. 479, 499 (1985)).

\textsuperscript{174} \textit{Id.} at 2663-64.

\textsuperscript{175} \textit{Id.} at 2664.

\textsuperscript{176} \textit{Id.} at 2665.

\textsuperscript{177} \textit{Id.}
serve the availability of all assets potentially subject to forfeiture. Therefore, the Court's interpretation of the statute and its purpose effectively denied the district courts any discretion in exempting assets from pretrial restraining orders.

2. *The Dissent's Statutory Analysis: Construing the Statute to Avoid Constitutional Issues*

The dissent strongly disputed the majority's statutory interpretation of the RICO and CCE forfeiture provisions. The dissent asserted that the Court should have interpreted the CFA to avoid forfeiture of attorney fees and to avoid the constitutional concerns raised by such forfeiture. Justice Blackmun, writing a common dissent for *Caplin & Drysdale* and *Monsanto*, argued that the majority incorrectly interpreted the CFA forfeiture provisions. Justice Blackmun based his opinion on two considerations. First, he asserted that the discretionary language in the statutes evidenced Congress' intent to preserve a district court's flexibility in determining the pretrial restraint and forfeiture of assets under the RICO and CCE provisions. Second, Justice Blackmun contended that, in enacting the CFA, Congress intended to minimize the economic activity of drug trafficking and racketeering operations not maximize asset forfeiture.

The dissent acknowledged that the CFA contains no express language relating to the forfeiture of attorney fees and that no legislative history accompanying the CFA specifically exempts attorney fees from forfeiture. However, the dissent emphasized that Congress inserted discretionary language in the RICO and CCE statutes to permit district courts flexibility in determining RICO and CCE asset restraint and forfeiture. Justice Blackmun contended that the majority erred in taking an overly broad view of the CFA's purpose and in applying that purpose to require district courts to maximize asset forfeiture. Instead, the dissent asserted that the purpose of the CFA, as gleaned from the legislative history of the Act, was not the maximization of assets available for forfeiture, but rather a threefold attack on organized crime and criminal drug operations. According to Justice Blackmun, Congress enacted the forfeiture provisions "to prevent the profits

178. *Id.*
180. Justice Blackmun's dissent in *Caplin & Drysdale* and *Monsanto* was joined by Justices Brennan, Marshall, and Stevens.
182. *Id.* at 2669-72.
183. *Id.* at 2668.
184. *Id.* at 2669.
185. *Id.*
of criminal activity from being poured into future such activity," 186 "to strip convicted criminals of all assets purchased with the proceeds of their criminal activities," 187 and to prevent criminal defendants from "sheltering their assets in order to preserve them for their own future use." 188

Given the dissent's reading of the CFA, district courts operating under the discretionary provisions could exempt from pretrial restraint assets a defendant needs to retain an attorney of choice without impeding the purposes of the Act. 189 Thus, the dissent argued that the CFA and its legislative history were susceptible to a statutory interpretation that permitted the Court to avoid the constitutional questions. 190 The dissent concluded, quoting from the Second Circuit court's decision in Monsanto, "if anything remains of the canon that statutes capable of differing interpretations should be construed to avoid constitutional issues . . . it surely applies here." 191

B. Dispelling the Fifth and Sixth Amendment Concerns Relating to the Criminal Forfeiture of Attorney Fees Under the RICO and CCE Statutes

1. The Majority's Constitutional Analysis: Rejecting Fifth and Sixth Amendment Concerns

Having determined that the RICO and CCE statutes authorize the pretrial restraint and the criminal forfeiture of assets intended for attorney fees, the Court addressed the remaining constitutional claims.

In Caplin & Drysdale, the Court rejected claims that the fifth or sixth amendments to the Constitution require a criminal defendant access to potentially forfeitable assets to pay attorney fees. 192 The Court began its analysis by rejecting the claim that the RICO and CCE forfeiture provisions impermissibly infringe upon a criminal defendant's sixth amendment right to counsel of choice. 193 Justice White noted that the sixth amendment of the Constitution guarantees criminal defendants the right to adequate representation and the right to an attorney of choice. 194 The Court pointed out, however, that the right to counsel of choice extends only so far as the de-
fendant's own resources. Because the relation back provisions of the RICO and CCE statutes vest title to potentially forfeitable assets in the government as of the time of the illegal act, the Court determined that under the statute, such property does not clearly belong to the defendant. Therefore, the Court reasoned, the sixth amendment affords no justification for a criminal defendant's use of such property to hire private counsel. Justice White concluded that the Constitution does not give a criminal defendant the right to use the government's property to pay an attorney even though such use would further a constitutionally protected right.

The Court also supported its decision that the forfeiture provisions raise no sixth amendment concerns based on an alternative rationale. The majority posited that the government's interest in the recovery of all forfeitable assets exceeds any potential sixth amendment interest a criminal defendant might have in using the assets to pay for an attorney of choice. The Court again accorded the defendant's interest in the property little weight, asserting that the forfeiture process clouded the defendant's title to the property. The Court stated that, in comparison, the government had a strong interest in the property based on three considerations: the government's interest in recovering all forfeitable property to support law enforcement efforts, the government's restitutionary interest in returning property to persons wrongly deprived or defrauded of it, and Congress' interest in depriving organized crime and drug operations of their economic power. The majority concluded that these governmental interests substantially outweighed a criminal defendant's interest in the potentially forfeitable property.

The Court also rejected a fifth amendment claim that the forfeiture statute infringes upon a criminal defendant's due process rights because it allows the government to upset the balance of power between parties in the adversarial system. Relying on earlier Supreme Court precedent, Justice White noted that the Court will not declare a statute invalid simply because, under some conceivable set of circumstances, the Act might operate unconstitutionally. Applying this reasoning in the forfeiture context, the majority noted

195. *Id.* (citing Walters' v. National Ass'n of Radiation Survivors, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).
196. *Id.* at 2653-54.
197. *Id.*
198. *Id.* at 2655.
199. *Id.* at 2654.
200. *Id.*
201. *Id.* at 2654-55.
202. *Id.* at 2655.
203. *Id.* at 2656-57.
204. *Id.* at 2657 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).
that absent prosecutorial abuse, the Constitution does not restrict the use of forfeiture as a criminal sanction.\textsuperscript{205} Therefore, the Court denied the defendant's claim that the CFA was facially invalid under the fifth amendment.\textsuperscript{206} Rather, the Court deferred to the district court's power to address the issue of prosecutorial misconduct on a case by case basis should such abuse occur in the forfeiture context.\textsuperscript{207}

Finally, in \textit{Monsanto}, Justice White dispelled the claim that judicial restraint of a defendant's assets prior to an adjudication of guilt implicates constitutional concerns.\textsuperscript{208} Specifically, the Court stated that a criminal defendant's assets may be restrained by a pretrial order "based on a finding of probable cause to believe that the assets are forfeitable."\textsuperscript{209} The majority supported this proposition by noting that prior Supreme Court decisions permit the government to seize assets based on a finding of probable cause that the property will be found forfeitable.\textsuperscript{210} In addition, the Court analogized the pretrial restraint of assets to the situation in which circumstances justify pretrial detention of individuals to insure their presence at trial and to protect the community.\textsuperscript{211} Thus, the Court found precedential and logical support for the pretrial restraint of assets to insure their availability for trial.\textsuperscript{212}

\textbf{2. The Dissent's Constitutional Analysis: Recognizing the Constitutional Infirmities of Attorney Fee Forfeiture}

The dissent began its criticism of the majority's opinion by asserting that once the majority determined that Congress mandated the forfeiture of attorney fees under the CFA, the Court should have declared such provisions unconstitutional under the sixth amendment.\textsuperscript{213} The dissent noted that, in 1932, the Court decided that "a defendant should be afforded a fair opportunity to secure counsel of his own choice."\textsuperscript{214} The dissent further acknowledged that the Court's decisions over the past fifty years have imposed limits on the right of criminal defendants to hire private counsel.\textsuperscript{215} However, in

\begin{itemize}
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} United States v. Monsanto, 109 S. Ct. 2657, 2666-67 (1989).
\item \textsuperscript{209} Id. at 2666.
\item \textsuperscript{210} Id. (citing United States v. $8,850, 461 U.S. 555 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).
\item \textsuperscript{211} Id. at 2666 (citing United States v. Salerno, 481 U.S. 739 (1987)).
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id. at 2667 (Blackmun, J., dissenting).
\item \textsuperscript{214} Id. at 2672 (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)).
\item \textsuperscript{215} Id.
\end{itemize}
his dissent, Justice Blackmun asserted that the majority's decisions in *Monsanto* and *Caplin & Drysdale* lost sight of the complex role the right to counsel of choice serves in preserving the integrity of the judicial process.\(^{216}\) The dissent supported this contention by detailing various components within the adversarial system that the *Caplin & Drysdale* Court's narrow interpretation of the sixth amendment right to private counsel jeopardized.\(^{217}\) Specifically, the dissent asserted that attorney fee forfeiture, pursuant to the RICO and CCE statutes, undermines such factors as attorney-client trust,\(^{218}\) the balance of forces between the government and the accused,\(^{219}\) and the viability of the criminal defense bar.\(^{220}\) Justice Blackmun concluded that contrary to the majority's decisions, the effectiveness of the adversarial system is compromised by attorney fee forfeiture.\(^{221}\)

In addition, the dissent disputed the majority's insistence that the government's interest in forfeiture outweighs the interest of a criminal defendant in hiring private counsel.\(^{222}\) Justice Blackmun summarily discounted the Court's claim of a governmental interest in the defendant's potentially forfeitable assets, noting that sole title to the assets remains with the defendant until conviction.\(^{223}\) The dissent also criticized the government's asserted interest in maximizing total asset forfeiture in light of the underinclusive nature of the RICO and CCE third-party purchaser exemptions,\(^{224}\) which permit a third-party transferee to keep assets transferred by a criminal defendant provided that the purchaser was "reasonably without cause to believe that the property was subject to forfeiture."\(^{225}\) In particular, the dissent noted that most third-party transferees will meet the statute's bona fide purchaser requirements with one exception, defense attorneys.\(^{226}\) Based on the dissent's balancing of the government's interest in forfeiture against a criminal defendant's sixth amendment interest in hiring an attorney of choice, Justice Blackmun concluded that the Court should have declared the CFA forfeiture provisions unconstitutional.

\(^{216}\) *Id.*

\(^{217}\) *Id.* at 2672-73.

\(^{218}\) *Id.*

\(^{219}\) *Id.* at 2673.

\(^{220}\) *Id.* at 2673-74.

\(^{221}\) *Id.* at 2674.

\(^{222}\) *Id.* at 2676-78.

\(^{223}\) *Id.* at 2676.

\(^{224}\) *Id.* at 2677-78.

\(^{225}\) *Id.* at 2678.

\(^{226}\) *Id.*
C. Rejecting Ethical Considerations Arising from Attorney Fee Forfeiture

In *Caplin & Drysdale*, the majority dismissed the ethical challenges to the RICO and CCE forfeiture provisions in a footnote, rejecting each of the defendant's ethical claims seriatim. First, the Court determined that the bona fide purchaser exemption of the CFA did not provide an incentive for attorneys to investigate inadequately RICO or CCE cases. The Court noted that the CFA's bona fide purchaser exemption requires that a purchaser be "reasonably without cause to believe that the property was subject to forfeiture." However, the Court dismissed the defendant's claim that the provision provides an incentive to attorneys not to investigate a defendant's claim to prevent forfeiture of any legal fees received from a defendant. The Court reasoned that because an indictment must specify the assets subject to forfeiture, only an attorney who neglects to read the indictment could claim the protection of the bona fide purchaser provision.

Second, the majority rejected the defendant's claim that the CFA provides an incentive for lawyers to accept plea bargains that require stiffer prison sentences rather than forfeiture to protect attorney fees. The majority dismissed this argument, stating that should such behavior arise, the Court's prior decisions regarding ineffective assistance of counsel could adequately deal with the problem.

Finally, the Court discarded the defendant's assertion that the CFA's forfeiture provisions, in practice, created a contingent fee system for criminal defense lawyers. The majority asserted that the fact that an attorney must wait until a final case disposition to collect a fee does not necessarily make the fee contingent. Furthermore, the Court stated that if the statute actually authorizes contingency fees for criminal defense work, its conflict with professional disciplinary codes does not render the statute invalid.

228. Id.
229. Id. (citing FED. R. CRIM. P. 7(c)(2)).
230. Id.
231. Id.
232. Id.
233. Id.
IV. THE SUPREME COURT’S INTERPRETATION OF THE CFA: AN OVERLY BROAD VIEW OF THE STATUTE AND ITS PURPOSE

A. A Critical Assessment of the Court’s Opinions

1. An Analysis of the Court’s Statutory Interpretation of the CFA

The Monsanto majority opinion relied heavily upon its interpretation of the “plain meaning” of the CFA to establish that the RICO and CCE forfeiture provisions encompass assets that a criminal defendant needs to hire an attorney of choice. Focusing on the language of the CFA, Justice White asserted that the Act unambiguously provides that a defendant convicted of RICO or CCE violations must forfeit to the United States any property with a nexus to such offenses. The majority reasoned that because the CFA contains no specific language authorizing an exemption for attorney fees, the Act, as a whole, must be read to endorse the forfeiture of such assets.

The majority’s analysis, however, minimizes the Act’s discretionary language. Congress specifically incorporated language into the CFA affording judicial discretion in the determination of pretrial restraint orders and third-party forfeiture. The majority’s interpretation of the CFA’s language constructively rewrites the Act to nullify its discretionary provisions. While the majority’s interpretation of the plain meaning of the Act comports with certain provisions of the statute, the CFA language, as a whole, does not support the majority’s conclusion.

The majority’s opinion also misinterprets the purpose of the CFA. The legislative history accompanying the CFA indicates that Congress enacted the statute to curtail economic interest in illegal drug trafficking and racketeering operations. Specifically, Congress intended the CFA provisions to help preserve the availability of a RICO or CCE defendant’s assets for criminal forfeiture. Moreover, the majority’s forfeiture maximizing purpose seems to directly contradict Congress’ intent to permit district courts discretion in assessing the pretrial restraint and forfeiture of assets. If Congress intended to enact the CFA to maximize the forfeiture of RICO and CCE associated assets, it would not have allowed district courts to exercise any discretion that might reduce the government’s total post-conviction forfei-

235. Id. at 2664.
239. Id. at 196, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3379.
Rather than imposing an overly broad view of the Act's purpose, the Court should have interpreted the purpose of the CFA in accordance with its statutory provisions and its legislative history.

2. An Analysis of the Court's Constitutional Discussion of the CFA and a Criminal Defendant's Fifth and Sixth Amendment Rights

The majority's reasoning of the sixth amendment right to counsel of choice issue in Caplin & Drysdale and Monsanto is unconvincing. More than fifty years ago, the Supreme Court stated that the sixth amendment requires that a criminal defendant with sufficient private resources receive a fair opportunity to retain counsel of choice. Subsequently, the Court recognized various limits on a defendant's right to counsel of choice based on the government's interest in the orderly administration of justice. However, in Caplin & Drysdale and Monsanto, the Court employed the CFA's relation back doctrine to summarily limit a criminal defendant's right to counsel of choice. The majority's use of this doctrine to settle the sixth amendment issue is unsound in two respects.

First, the Court's use of the relation back doctrine to restrain a defendant's assets before trial deprives a defendant of valuable rights typically associated with property ownership. The CFA relation back provision provides that the government's interest in forfeitable property vests at the time of the offense giving rise to the forfeiture. Therefore, once a court convicts a defendant of a RICO or CCE violation and the government establishes a nexus between the defendant's illegal activity and the property, the relation back doctrine will operate to vest title of the defendant's property in the government. However, the majority's application of the relation back doctrine permits the government to restrain a defendant from transferring or alienating assets to retain private defense counsel, before proving the RICO or CCE allegations. While the Court's decisions do not vest title of the defendant's assets in the government prior to conviction, the decisions do prevent a defendant from exercising property rights at a critical time in the criminal process.

243. See United States v. Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium, 853 F.2d 1445 (8th Cir.) (permitting the defendant to alienate or transfer his property in order to hire an attorney of choice), mandate stayed, 864 F.2d 1421 (8th Cir. 1988).
244. 18 U.S.C. § 1963(c) (Supp. V 1987); 21 U.S.C. § 853(c) (Supp. V 1987); see also supra note 73 and accompanying text.
Second, the Court’s use of the relation back doctrine appears to conflict directly with the sixth amendment guarantee that a defendant receive a fair opportunity to retain counsel of choice. Under the Court’s rationale, if a defendant’s assets are potentially forfeitable, such assets are without clear title.\textsuperscript{245} Therefore, the Court suggests, if a defendant possesses only contested assets, the accused’s right to retain counsel of choice is not implicated because there are no legitimate assets at the defendant’s disposal.\textsuperscript{246} In practical effect, the Court’s use of this rationale precludes any opportunity for RICO or CCE defendants possessing only contested assets from ever exercising their right to retain counsel of choice. Certainly, the Court’s imposition of this objective rule depriving a certain class of defendants from any opportunity to exercise their rights to retain counsel of choice does not comport with the fair opportunity requirement of the sixth amendment enunciated by the Supreme Court fifty years ago.\textsuperscript{247}

In addition, the Court’s Monsanto decision incorrectly analogizes prior Supreme Court precedent as supporting the pretrial restraint of a defendant’s assets in RICO and CCE cases. In its rationale for dismissing the defendant’s constitutional claims regarding the pretrial restraint of assets, the majority failed to mention that the decisions it relied upon to prove Supreme Court endorsement of asset restraint based on a finding of probable cause involved civil forfeiture, not criminal forfeiture.\textsuperscript{248} Moreover, the majority overlooked an essential element of its decision upholding the pretrial detention of defendants when the Court analogized that opinion with its Monsanto pretrial restraint decision. The Court’s analysis correctly cited earlier Supreme Court precedent that a defendant may be restrained upon a finding of probable cause that the defendant committed the crime.\textsuperscript{249} Such restraint, the Court stated, ensures the defendant’s presence at trial and protects the community.\textsuperscript{250} However, the Court failed to recognize that its pretrial detention decision also required a district court to assess the alternatives to pretrial detention when detention would not reasonably assure the objectives of such restraint.\textsuperscript{251} Because the Court in Monsanto did not impose a comparable demonstration that the alternatives to pretrial judicial asset restraint would not reasonably assure both the appearance of the criminal defendant’s potentially forfeitable property for trial and the safety of the

\textsuperscript{245} Caplin & Drysdale v. United States, 109 S. Ct. 2646, 2653 (1989).
\textsuperscript{246} Id.
\textsuperscript{249} Monsanto, 109 S. Ct. at 2666 (citing United States v. Salerno, 481 U.S. 739 (1987)).
\textsuperscript{250} Id.
\textsuperscript{251} Id.
community, the majority's decision does not present a situation analogous to the Court's pretrial detention decision.\footnote{252}{Caplin \\& Drysdale, 109 S. Ct. at 2677 (Blackmun, J., dissenting).}

Finally, the Court's decision is troublesome because it constructively imposes punishment upon a RICO or CCE defendant prior to any adjudication of guilt. A maxim of our judicial system states that punishment may not be inflicted upon a defendant until a court has decided the defendant's guilt or innocence. The RICO and CCE statutes provide for the loss of an offender's property through criminal forfeiture. However, the Court's decisions in Caplin \\& Drysdale and Monsanto permit the government to deprive a RICO or CCE defendant of assets needed to hire an attorney of choice before trial. The Court's decisions, in practice, inflict upon the defendant the punishment of restraining his sixth amendment right to counsel of choice before a court can render any determination of guilt.

3. An Analysis of the Court's Resolution of the Attorney-Client Issues

The Court's decisions in Caplin \\& Drysdale and Monsanto inadequately address potential ethical concerns which may arise in the RICO and CCE attorney fee forfeiture context. In Caplin \\& Drysdale, the Court, in a footnote, dismissed the defendant's claims that the CFA's forfeiture provisions jeopardize zealous client representation, attorney-client trust, and acceptable fee arrangements.\footnote{253}{Id. at 2656 n.10.} The majority's summary disposition of these claims leaves unresolved a number of important ethical issues.

First, the Court's rationale for dispelling any potential ethical conflict between effective representation of a RICO or CCE defendant and the CFA's bona fide purchaser exemption is unconvincing. In Caplin \\& Drysdale, the defendant claimed that the bona fide purchaser provision which requires a purchaser to be "reasonably without cause to believe that the property was subject to forfeiture,"\footnote{254}{Id. (citing 21 U.S.C. \$ 853(n)(6)(B) (Supp. \ V 1987)).} provided an incentive for an attorney to investigate inadequately a defendant's case to protect any fees received from forfeiture.\footnote{255}{Id. (citing FED. R. CRIM. P. 7(c)(2)).} The majority responded to the defendant's claim by reasoning that because the government must specify in the indictment any assets it wishes to have forfeited,\footnote{256}{Id. (citing FED. R. CRIM. P. 7(c)(2)).} only an attorney failing to read the indictment of a client could accurately claim the protection of the bona fide purchaser exemption. The Court asserted that the chances of an attorney making such a claim was unlikely.
Forfeiture of Attorney Fees

The Court's decision, however, does not consider that although an indictment must specify the defendant's assets subject to forfeiture, the government need only state in general terms that any of the defendant's assets with a nexus to the prohibited activity are subject to forfeiture.257 Thus, simply reading an indictment may not provide an attorney with sufficient notice to determine whether the listed assets are actually subject to forfeiture. Moreover, the Court's decision assumes that the attorney's act of reading the indictment precludes the lawyer from being "reasonably without cause to believe that the property was subject to forfeiture."258 Neither the CFA's language nor the CFA's legislative history indicate that the reasonable cause standard of the bona fide purchaser provision is met in all cases by simply reading an indictment.259

The Court's discussion of the potential ethical claims arising from attorney fee forfeiture also ignored the possible chilling effect such a policy could have on RICO and CCE representation. Once an attorney discovers that an indictment issued against a defendant contains a forfeiture count, the attorney must elect either to decline representation of the defendant or to perform substantial legal services without much prospect of compensation. Given the complex nature of most CCE and RICO cases, only a remote possibility exists that an attorney will assume the costs of representing such a client.

Finally, attorney fee forfeiture may substantially chill essential attorney-client communication. Under the Court's interpretation of the CFA, the benchmark for an attorney decision regarding representation of RICO or CCE defendants is notice of possible asset forfeiture. The majority's reading of the statute provides a strong incentive to RICO and CCE defendants to withhold relevant information from potential attorneys. Thus, the Court's interpretation of the CFA forfeiture provisions to include attorney fees undermines the trust necessary for effective and quality representation of RICO and CCE defendants.260

259. See also DOJ Guidelines, supra note 257, § 9-111.520 ("However, the mere fact that an indictment alleges that 'all profits or proceeds of the criminal activity' are subject to forfeiture will not meet the level of proof required to demonstrate reason to know.").
260. See Caplin & Drysdale, 109 S. Ct. 2667, 2675 (Blackmun, J., dissenting). The dissent recognized the possible chilling effect attorney fee forfeiture poses to attorney client communication. The dissent noted that "[t]he attorney's interest in knowing nothing is directly adverse
B. Proposals for Judicial and Congressional Reform of the CFA

1. Judicial Response to Caplin & Drysdale and Monsanto

In the Supreme Court's *Monsanto* decision, the majority declined consideration of whether the due process clause requires that a hearing be held before a pretrial restraining order may issue.261 Given the Court's decision to include attorney fees within the scope of property subject to forfeiture under the CFA, the Court must now decide what type of legal process is due a RICO or CCE defendant prior to the issuance of a pretrial restraining order.

A review of the *Caplin & Drysdale* and *Monsanto* decisions suggests that the Act's forfeiture provisions may indeed violate a criminal defendant's right to procedural due process. The fifth amendment provides that a person may not be "deprived of life, liberty, or property, without due process of law."262 Under the fifth amendment, the Court must assess whether the CFA forfeiture provisions deprive a RICO or CCE defendant of a property interest and whether the statute permits such deprivation without due process of law.263

The Court's decisions in *Caplin & Drysdale* and *Monsanto* permit the government to assert a property interest in the defendant's assets through the relation back doctrine and to restrain such assets prior to trial, even though title to the property remains vested in the defendant until conviction. Clearly, the defendant's inability to alienate his property indicates some deprivation of property rights.264 Moreover, the CFA does not permit a defendant to argue the merits of the government's forfeiture allegations before the

to his client's interest in full disclosure. The result of the conflict may be less rigorous investigation of the defendant's circumstances, leading in turn to a failure to recognize or pursue avenues of inquiry necessary to the defense." *Id.; see also* Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960) ("there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense"); cf. *Model Code of Professional Responsibility* EC 4-1 (1981) ("A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.").

261. United States v. Monsanto, 109 S. Ct. 2657, 2666 n.10 (1989). Specifically, the Court stated that it did not address the due process issue for two reasons. First, the Court did not consider the issue because the government, requesting consideration of the issue, won its case in the district court despite the imposition of a hearing. *Id.* Second, the majority noted that the Second Circuit Court of Appeals did not address the due process issue in its en banc decision, thus the Supreme Court did not need to consider the issue. *Id.*

262. U.S. CONST. amend. V.


264. *Id.* at 725-26.
issuance of a restraining order,\textsuperscript{265} nor does the statute require a district court to hold a pretrial restraint hearing.\textsuperscript{266} Therefore, the Court's interpretation of the CFA appears to permit the government to deprive a RICO or CCE defendant of property to hire an attorney of choice, without guaranteeing the defendant an adequate opportunity to respond to the government's restraint allegations within a meaningful time and in a meaningful manner as required by the due process clause.\textsuperscript{267} Given the impact of the Court's decisions on a criminal defendant's sixth amendment rights, the Supreme Court must now settle the fifth amendment procedural due process issue.

2. Congressional Response to Caplin & Drysdale and Monsanto

The Supreme Court's decisions in \textit{Caplin & Drysdale} and \textit{Monsanto} also disturb the delicate balance between protecting the criminal defendant's constitutional rights and furthering the public's vital interest in deterring racketeering and illegal drug operations which Congress forged in the criminal forfeiture provisions of the CFA.\textsuperscript{268} In practical effect, the majority's opinion rewrites the discretionary provisions of the CFA nearly to eliminate their operation. At a minimum, Congress should amend the CFA to clarify the discretion accorded district courts in determining the pretrial restraint and the forfeiture of assets under the RICO and CCE provisions. Specifically, the amendment should reiterate Congress' intent that district courts retain the authority to exempt from RICO and CCE post-indictment restraint and forfeiture provisions assets that a criminal defendant needs to retain private counsel. The amendment should also state that it is within the discretion of the district courts to supervise any transfers of potentially forfeitable assets in order to determine whether the attorney fees are made in good faith. This amendment would permit the RICO and CCE forfeiture provisions to function as Congress originally intended.

Moreover, Congress should amend the CFA to require district courts to conduct expedited adversarial hearings to consider the scope of any pretrial restraint order freezing a criminal defendant's assets. Presently, the CFA provides that courts "may" enter a restraining order or injunction, or require a bond, or take any other action to preserve a criminal defendant's assets that are subject to forfeiture.\textsuperscript{269} The legislative history accompanying

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{265} S. REP. NO. 225, supra note 9, at 202, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3385-86.
\item \textsuperscript{267} See Moya-Gomez, 860 F.2d at 729.
\item \textsuperscript{268} See supra notes 68-87 and accompanying text.
\item \textsuperscript{269} 18 U.S.C. § 1963(d)(1); 21 U.S.C. § 853(e)(1).
\end{itemize}
\end{footnotesize}
this provision states that Congress did not "exclude . . . the authority to hold a hearing subsequent to the initial entry of the order." Amending this provision to require district courts to hold an adversary pretrial hearing would provide a forum in which courts could exercise their discretion as to whether and to what extent a defendant's assets should be restrained.

Enactment of an amendment requiring an adversary restraint hearing also would protect a RICO and CCE defendant's right to counsel of choice both on an individual and an institutional level. First, a pretrial adversary hearing would promote participation by private attorneys to represent RICO and CCE defendants. The Caplin & Drysdale and Monsanto majority's decisions chill any defense counsel initiative to represent RICO and CCE defendants in extended trials because of the possibility that the defendant's assets will be subject to forfeiture after trial. An adversary pretrial hearing would reintroduce an incentive for defense attorneys to represent aggressively and zealously RICO and CCE defendants in short pretrial proceedings wherein a court would determine whether the defendant may utilize restrained assets to retain counsel of choice for trial.

Second, a pretrial restraint hearing would provide an important procedural check on the government's power to obtain a restraining order limiting a RICO and CCE defendant's choice of counsel by including a forfeiture count in the indictment. Requiring the government to present the merits of its restraint allegations in a pretrial adversary hearing would provide additional judicial control over the government's ability to affect a RICO and CCE defendant's choice of counsel. Similarly, such a hearing would permit district courts to balance issues such as the government's interest in the restraint, the relative hardships on the parties should a restraint order issue, the only restriction Congress specifically imposed on courts with regard to conducting a restraint hearing was that courts were not to look behind the validity of the government's indictment. Id.

270. S. REP. NO. 225, supra note 9, at 203, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3386. The only restriction Congress specifically imposed on courts with regard to conducting a restraint hearing was that courts were not to look behind the validity of the government's indictment. Id.

271. See United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987) ("The court is not free to question whether the grand jury should have acted as it did, but it is free, and indeed required, to exercise its discretion as to whether and to what extent to enjoin based on all matters developed at the hearing.").

272. United States v. Monsanto, 836 F.2d 74, 82 n.6 (2d Cir. 1987), vacated, 852 F.2d 1332, 1350 (D. Colo. 1988); rev'd, 109 S. Ct. 2657 (1989); see also Nat'l L.J., Aug. 28, 1989, at 3, col. 1. The article notes that a prominent Miami criminal attorney stopped taking international drug cases for fear of fee forfeiture. Id. (citing Nat'l L.J., Aug. 14, 1989, at 2, col. 3). In addition, the new president of the National Association of Criminal Defense Lawyers stated that he has heard from a dozen criminal defense lawyers who are also quitting criminal practice due to the possibility of attorney fee forfeiture. Id. at 9.

and the public's interest in the restraint.\textsuperscript{274} An adversary pretrial hearing to assess these issues would reestablish a RICO and CCE defendant's "fair opportunity" to secure defense counsel of choice. Thus, such hearings would ensure adequate protection of a RICO and CCE defendant's sixth amendment rights on an individual and institutional level.

\textbf{IV. CONCLUSION}

Congress enacted criminal forfeiture provisions in the RICO and CCE statutes in order to deter racketeering and drug trafficking operations. In 1984, Congress passed the CFA, amending the RICO and CCE statutes to improve the scope and efficiency of the criminal forfeiture provisions. The CFA amendments generated substantial controversy concerning whether the government could apply the Act's forfeiture provisions to assets a criminal defendant needs to retain defense counsel of choice.

In \textit{Caplin & Drysdale v. United States} and \textit{United States v. Monsanto}, the United States Supreme Court held that the federal forfeiture provisions constitutionally encompass assets that a criminal defendant uses or intends to use to hire private counsel. In addition, the Court decided that the pretrial restraint provisions of the statutes can be applied to a defendant's assets needed to retain counsel of choice. These decisions accord the Federal Government a powerful weapon for use in the fight against illegal drug trafficking and racketeering operations.

Unfortunately, the Court's decisions confer more enforcement power than necessary to federal prosecutors. The majority's interpretation bestows little protection for a criminal defendant's sixth amendment right to counsel of choice and fifth amendment due process right. In deciding \textit{Caplin & Drysdale} and \textit{Monsanto}, the Supreme Court distorted the balance between the public's interest in deterring illegal drug and racketeering enterprises and a criminal defendant's constitutional rights. Therefore, the Supreme Court and Congress must take steps to restore the balance between those interests.

\textit{Kathleen C. Van Olst}
