

3-1-1989

## Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It

Bruce J. Winick

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. Miami L. Rev. 765 (1989)  
Available at: <https://repository.law.miami.edu/umlr/vol43/iss4/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# University of Miami Law Review

VOLUME 43

MARCH 1989

NUMBER 4

## Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It\*

BRUCE J. WINICK\*\*

I. INTRODUCTION .....	766
II. THE IMPACT OF FEE FORFEITURE ON THE STRUCTURE OF THE CRIMINAL JUSTICE SYSTEM .....	772
A. <i>The Financial Effects on Criminal Defense Attorneys</i> .....	772
B. <i>The Ethical Problems Created by Fee Forfeiture</i> .....	775
C. <i>The Impact on the Adversary System</i> .....	777
III. THE CONSTITUTIONAL DILEMMA .....	784
A. <i>Applying the Forfeiture Provisions to Bona Fide Attorneys' Fees and the         Sixth Amendment Right to Counsel of Choice</i> .....	784
1. THE FUNDAMENTAL RIGHT TO COUNSEL OF CHOICE: THE HISTORICAL ORIGINS .....	786
2. THE RIGHT TO COUNSEL OF CHOICE CONTRASTED WITH THE RIGHT TO APPOINTED COUNSEL: FURTHERING PARTICIPATORY AND AUTONOMY VALUES AS WELL AS THE INTEREST IN RELIABILITY .....	799
3. THE APPROPRIATE CONSTITUTIONAL STANDARD .....	806
B. <i>First Amendment Protection of the Right to Counsel of Choice</i> .....	818
C. <i>Scrutinizing the Governmental Interests Underlying the Forfeiture Statutes</i> ..	833
IV. AVOIDING THE CONSTITUTIONAL DILEMMA .....	838
A. <i>Avoiding the Dilemma Through Statutory Construction</i> .....	839
1. THE REQUIREMENT OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT WHEN AN INTERPRETATION OF A STATUTE IS ASSERTED THAT RAISES SERIOUS CONSTITUTIONAL PROBLEMS .....	839

\* Copyright 1989 by Bruce J. Winick. This Article benefitted substantially from the comments of my colleagues at a University of Miami School of Law faculty seminar at which I presented an earlier draft. Steve Winter was especially generous with his helpful insights and suggestions. I owe a special debt of gratitude to Joe Beeler, my co-counsel in the several amicus briefs we submitted on the issues.

\*\* Bruce J. Winick is a Professor of Law, University of Miami School of Law. He has contributed amicus curiae briefs on the issue of forfeiture of attorneys' fees in the Supreme Court and in several circuit courts on behalf of the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, and the National Network for the Right to Counsel.

2. THE STATUTORY LANGUAGE .....	843
3. THE LEGISLATIVE HISTORY .....	848
B. <i>Avoiding the Dilemma: Lessons from Administrative Law</i> .....	852
1. THE BROAD PROSECUTORIAL DISCRETION ASSERTED BY THE GOVERNMENT .....	852
2. THE DELEGATION DOCTRINE OF <i>KENT V. DULLES</i> .....	853
V. CONCLUSION .....	865

## I. INTRODUCTION

It came as no surprise that the Supreme Court of the United States recently granted *certiorari*<sup>1</sup> to consider the complex issues raised by application of the forfeiture provisions of the Racketeer Influenced and Corrupt Organization Act (RICO)<sup>2</sup> and the Continuing Criminal Enterprise Statute (CCE)<sup>3</sup> to attorneys' fees. The issues have raised fundamental questions concerning the meaning of the sixth amendment right to counsel and the very nature of our adversary system. Moreover, they have divided the circuit courts and the

---

1. *United States v. Monsanto*, 109 S. Ct. 363 (1988), *granting cert. to* 852 F.2d 1400 (2d Cir.) (en banc) (per curiam); *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 363 (1988), *granting cert. to* 837 F.2d 637 (4th Cir.) (en banc).

2. RICO, the Racketeer Influenced and Corrupt Organization Act, was title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901-904, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986)). To be convicted under RICO, the defendant must have participated in the affairs of an "enterprise" through a "pattern of racketeering activity." 18 U.S.C. § 1962. An "enterprise" is defined broadly and can include a legal entity, such as a company or a union, or an informal group of individuals who band together for the purpose of committing a pattern of crimes. 18 U.S.C. § 1961(4). The concept of "racketeering activity" is far broader than ordinary notions of organized crime behavior, extending to many traditional felonies, such as robbery and murder, as well as many types of "white collar" crime, including securities fraud and use of the telephone or mail for illegal purposes. *See* 18 U.S.C. §§ 1961-64. A "pattern" constitutes two or more acts of racketeering committed within ten years of each other, excluding time spent in prison, at least one of which acts must have occurred within the past five years. 18 U.S.C. § 1961(5). For extensive analysis of RICO, see 1 K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* §§ 7.01-.30 (1984); Bradley, *Racketeering, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987), *Parts III & IV, id.* at 920; Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983). The RICO criminal forfeiture provisions are contained in 18 U.S.C. § 1963.

3. CCE, the Continuing Criminal Enterprise statute, was part of the Controlled Substances Act, title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265-66 (codified at 21 U.S.C. § 848 (1982 & Supp. IV 1986)). To be convicted under CCE, the defendant must have received "substantial income" as the manager, organizer, or supervisor of a drug-related "continuing criminal enterprise . . . in concert with five or more other persons." 21 U.S.C. § 848(d). The criminal forfeiture provisions of the Controlled Substances Act are codified at 21 U.S.C. § 853 (1982 & Supp. IV 1986); however, these criminal forfeiture provisions are not limited to CCE cases, but rather, apply to all felony drug cases. 21 U.S.C. § 853(a)(1). The Controlled Substances Act also contains a civil forfeiture provision. 21 U.S.C. § 881(a) (1982 & Supp. IV 1986). For the distinction between criminal and civil forfeiture, see *infra* notes 6-8 and accompanying text.

circuit court judges as few recent issues have done.<sup>4</sup> Finally, these issues have been litigated with increased frequency as the incidence of federal prosecutions under RICO and CCE has expanded dramatically.<sup>5</sup>

Although the use of civil or *in rem* forfeiture has a long history in America,<sup>6</sup> criminal or *in personam* forfeiture, designed to punish the

---

4. Compare *United States v. Unit No. 7 & Unit No. 8 (Kiser)*, 853 F.2d 1445 (The government may not deprive a criminal defendant of the only assets he has with which to pay attorney's fees without first conducting a hearing on the question.), *mandate stayed* by 864 F.2d 1421 (8th Cir. 1988); *United States v. Jones*, 837 F.2d 1332 (Property pledged by the defendant to his attorneys for bona fide legal services rendered is exempt from forfeiture.), *reh'g en banc granted*, 844 F.2d 215 (5th Cir. 1988); *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (en banc) (per curiam) (A criminal defendant is entitled to access to restrained assets to the extent necessary to pay reasonable attorneys' fees.), *cert. granted*, 109 S. Ct. 363 (1988) and *United States v. Thier*, 801 F.2d 1463 (1986) (The ex parte restraining order freezing the defendant's assets until the completion of the trial was held to violate FED. R. CIV. P. 65.), *modified*, 809 F.2d 249 (5th Cir. 1987) with *United States v. Bissell*, No. 87-8246, slip. op. (11th Cir. March 2, 1989) (rejecting sixth amendment and procedural due process challenges to forfeiture of attorneys' fees); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (The restraining order issued pursuant to the forfeiture count of the indictment did not violate the defendant's sixth amendment right to counsel.), *petition for cert. filed* (U.S. Feb. 17, 1989); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988) (The forfeiture statute does not exempt attorney fees.) and *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.) (en banc) (Attorneys' fees are subject to forfeiture proceedings unless grounded in legitimate assets.), *cert. granted*, 109 S. Ct. 363 (1988). Other courts have confronted these issues less directly. See *United States v. Friedman*, 849 F.2d 1488 (D.C. Cir. 1988) (noting question but leaving it unresolved); *United States v. Henderson*, 844 F.2d 685 (9th Cir. 1988) (dismissing appeal for lack of jurisdiction over district court order that found civil forfeiture statute to be unconstitutional as applied to reasonable attorneys' fees). Many of the cases cited above were split decisions. See *Monsanto*, 852 F.2d 1400 (eight separate concurring and dissenting opinions following a brief per curiam order); *Nichols*, 841 F.2d 1485 (2-1 vote); *Jones*, 837 F.2d at 1336 (Davis, J., concurring, but stating a preference for the opposite result reached in *Caplin & Drysdale*); *Caplin & Drysdale*, 837 F.2d 637 (7-4 vote).

5. It is estimated that as many as twenty-five percent of the criminal cases brought in federal court now involve offenses subject to criminal forfeiture. See *Nichols*, 841 F.2d at 1488; see also Webb & Turow, *RICO Forfeiture in Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404, 406-07 (1983) (discussing increased use of RICO forfeiture provisions in indictments).

6. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); *Nichols*, 841 F.2d at 1486; *United States v. Sandini*, 816 F.2d 869, 872-73 (3d Cir. 1987); Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 493 n.1 (1986); Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 329 n.1 (1988); Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57, 60-69 (1983). Civil forfeiture proceedings are in rem actions against the property that the government seeks to obtain. *The Palmyra*, 25 U.S. at 14-15. The guilt or innocence of the owner or possessor is considered irrelevant in a civil forfeiture action, because under a legal fiction, the property itself has committed the wrong. O. HOLMES, *THE COMMON LAW* 7, 24-26 (1881). Moreover, because the property is considered "tainted" upon the commission of the wrongful act, the government's interest vests at the time of the act. *Nichols*, 841 F.2d at 1486. Civil forfeiture is widely used, typically for contraband or instrumentalities employed in the commission of a crime. *Id.* at 1486-87. Although considered "quasi-criminal" for certain

owner of the property to be forfeited as an incident to conviction for a crime, traditionally has been disfavored by our law and rarely has been authorized.<sup>7</sup> Under English common law, conviction of treason or a felony carried with it forfeiture to the Crown of the defendant's entire estate, without regard to whether the forfeited property was in any way involved in, or derived from, the crime.<sup>8</sup> Colonial hostility to the English practice resulted in the prohibition of the forfeiture of an estate for conviction of treason contained in article III of the United States Constitution.<sup>9</sup> The first federal criminal code, adopted in 1790, extended the prohibition against forfeiture of estate to the conviction of any crime.<sup>10</sup> Although the use of civil forfeiture continued, Congress used criminal forfeiture only once during the entire period from 1790 to 1970:<sup>11</sup> the Confiscation Act of 1862,<sup>12</sup> which authorized the seizure of the life estates of confederate soldiers.<sup>13</sup>

In 1970, Congress reintroduced criminal forfeitures as a new tool in the burgeoning war on organized crime and illegal drugs.<sup>14</sup> The failure of traditional criminal sanctions to control drug trafficking and

---

fourth and fifth amendment purposes, see *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697, 700-02 (1965), in rem forfeitures generally are viewed as civil proceedings. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *United States v. Henderson*, 844 F.2d 685, 688 (9th Cir. 1988).

7. *Nichols*, 841 F.2d at 1486-87; *Sandini*, 816 F.2d at 873.

8. *Calero-Toledo*, 416 U.S. at 682-83; *Nichols*, 841 F.2d at 1486-87; *Sandini*, 816 F.2d at 873; *United States v. Grande*, 620 F.2d 1026, 1038-39 (4th Cir.), cert. denied, 449 U.S. 830 (1980). The English practice was based on the notions that all property derived from society and that a member of the community who violated the law was deemed to have violated "the fundamental contract of his association" with society and thereby forfeit "his right to such privileges as he claims by that contract." 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*299. This reflected the basic premises of feudal society that the King owned all property and land and that a convicted felon's property would revert to the Crown and his lands would escheat to his lord as a consequence of his breach of the King's peace. See *Calero-Toledo*, 416 U.S. at 682.

9. U.S. CONST. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

10. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (codified at 18 U.S.C. § 3563 (1982)) ("[N]o conviction or judgement . . . shall work corruption of blood, or any forfeiture of estate.") repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 212(a)(2), 235 (a)(1), 98 Stat. 1837, 1987, 2031-32.

11. *Nichols*, 841 F.2d at 1487; *Sandini*, 816 F.2d at 873.

12. 12 Stat. 589.

13. The Civil War forfeiture was upheld in *Bigelow v. Forest*, 76 U.S. (9 Wall.) 339 (1869), and *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870).

14. See *United States v. Turkette*, 452 U.S. 576, 588-89 (1981); *Nichols*, 841 F.2d at 1487; *United States v. McKeithen*, 822 F.2d 310, 313 (2d Cir. 1987); S. REP. NO. 617, 91st Cong., 1st Sess. 78-79 (1969); Fried, *supra* note 6, at 330 ("the first new punishment for crime since the rise of the early nineteenth century"); *id.* at 335 ("an innovation virtually without precedent in American law"). The Controlled Substances Act also contained a civil forfeiture provision. 21 U.S.C. § 881(a) (1982 & Supp. IV 1986).

other organized crime activities concerned Congress. In order to combat the enormous profitability of these activities, Congress introduced criminal forfeiture to the RICO and CCE statutes as a device to eradicate the economic power bases that made possible the organized pursuit of such activities. A defendant convicted of a CCE offense was required to forfeit any "profits" thereby obtained,<sup>15</sup> and a defendant convicted of a RICO offense was required to forfeit any "interest" acquired through such conduct.<sup>16</sup>

These new tools, however, failed to stem the tide of illegal drug trafficking and organized crime. Few RICO or CCE cases were filed, and the amount of assets forfeited was negligible.<sup>17</sup> Congress held hearings to investigate the use of criminal forfeiture under RICO and CCE,<sup>18</sup> and many shortcomings in the existing statutes were identified. The most significant of these was the government's inability to prevent the concealment or transfer of forfeitable assets to third parties prior to conviction in order to evade forfeiture.<sup>19</sup> The government's inability to prevent these transfers was due, in part, to the absence of a statutory procedure permitting the issuance of a pre-indictment restraining order.<sup>20</sup>

Congress responded to these problems by enacting the Comprehensive Forfeiture Act of 1984,<sup>21</sup> which amended the RICO and CCE

---

15. 21 U.S.C. § 848(a)(2)(A).

16. 18 U.S.C. § 1963(a); see *Russello v. United States*, 464 U.S. 16 (1983) ("interest" construed to include the proceeds produced by the illegal enterprise). The jury in a criminal forfeiture proceeding must return a special verdict specifying the extent to which the interest or property is subject to forfeiture. FED. R. CRIM. P. 31(e). Criminal forfeiture under RICO or CCE can occur only after conviction of the underlying crime and entry of this special verdict of forfeiture. See, e.g., *United States v. Unit No. 7 & Unit No. 8 (Kiser)*, 853 F.2d 1445, 1451, *mandate stayed by* 864 F.2d 1421 (8th Cir. 1988); *United States v. Ambrosio*, 575 F. Supp. 546, 550 (E.D.N.Y. 1983).

17. See generally GENERAL ACCOUNTING OFFICE, *ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING* (1981). From 1970 to 1980, indictments seeking forfeitures under RICO and CCE were returned in only 98 cases with 258 named defendants, involving property valued at two million dollars. *Id.* at 10; Fried, *supra* note 6, at 339-40 n.55.

18. See *Forfeiture in Drug Cases: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981-82); *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980).

19. See S. REP. NO. 225, 98th Cong., 1st Sess. 194-97 (1982) [hereinafter S. REP. NO. 225], reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3377-80; S. REP. NO. 520, 97th Cong., 2d Sess. 4 (1982).

20. *United States v. Nichols*, 841 F.2d 1485, 1488 (10th Cir. 1988); S. REP. NO. 225 *supra* note 19, at 194, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3377.

21. Pub. L. No. 98-473, §§ 301-323, 98 Stat. 1837, 2040-57 (codified in scattered sections of 18, 19, 21, 26 & 28 U.S.C.).

forfeiture provisions.<sup>22</sup> The 1984 amendments expanded both the number of crimes subject to criminal forfeiture and the scope of property subject to forfeiture.<sup>23</sup> The amendments also added procedures for the issuance of a restraining order before, at the time of, or after the filing of an indictment.<sup>24</sup> In addition, the amendments borrowed the civil forfeiture notion that property became tainted at the time of the wrong<sup>25</sup> by including a "relation-back" provision that vested title to the property in the government upon the commission of the act giving rise to forfeiture.<sup>26</sup> The amendments made any such property subsequently transferred to a third party subject to a special verdict of forfeiture, unless the transferee could establish in a separate hearing that he was a bona fide purchaser for value who, at the time of purchase, was reasonably without cause to believe that the property was subject to forfeiture.<sup>27</sup>

The new tools provided by the 1984 amendments have been utilized with increased effectiveness. One result, not envisioned by Congress, has been to prevent defendants indicted in such cases from using their assets to hire attorneys to represent them in their criminal trials. Pretrial restraining orders, often obtained ex parte by prosecutors based solely on the allegation of forfeiture in the indictment, and the threat of postconviction forfeiture of assets transferred to attorneys as a fee, have deterred or prevented private criminal defense attorneys from taking such cases.<sup>28</sup> As a result, prosecutors have

---

22. The RICO and CCE forfeiture provisions are virtually identical. Compare 18 U.S.C. § 1963 (1982 & Supp. IV 1986) with 21 U.S.C. § 853 (1982 & Supp. IV 1986).

23. *Nichols*, 841 F.2d at 1488. For a description of the changes made by the 1984 amendments, see Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 750-76 (1985).

24. 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e); see *United States v. Harvey*, 814 F.2d 905, 910 (1987), *replaced on reh'g en banc on other grounds sub nom. United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 (10th Cir. 1986).

25. See *United States v. United States Coin & Currency*, 401 U.S. 715, 719-20 (1971); O. HOLMES, *supra* note 6, at 24-25.

26. 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c). Professor Fried suggests that this "relation back" provision was "the most remarkable innovation" in the 1984 amendments, and that, by going beyond the taint doctrine of civil forfeiture, Congress adopted a principle "essentially without historical support." Fried, *supra* note 6, at 346-47 & n. 92. Congress also retained the civil forfeiture provision contained in the Comprehensive Drug Abuse Prevention and Control Act of 1970, permitting prosecutors in drug cases the option of seeking civil forfeiture as well as criminal forfeiture and doing so either in conjunction with the criminal proceeding or in an independent civil proceeding. 21 U.S.C. § 881(a); see *United States v. Henderson*, 844 F.2d 685, 887-88 (9th Cir. 1988); *United States v. Dunn*, 802 F.2d 646, 647-48 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); S. REP. NO. 225, *supra* note 19, at 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3374, 3376, 3381.

27. 18 U.S.C. § 1963(c), (m); 21 U.S.C. § 853(c), (n).

28. See *infra* Sections II(A)-(B).

exercised almost unfettered discretion to deprive defendants of the use of their assets to hire counsel of choice, thereby relegating them to appointed counsel and producing the extensive litigation that has now led to Supreme Court review.

This Article examines the unanticipated effects of this application of the 1984 amendments to attorneys' fees. Section II analyzes the impact of fee forfeiture on the structure of the criminal justice system. More specifically, it examines the financial effects on criminal defense attorneys, the ethical problems created, and the overall impact on the nature of the adversary system. Section III analyzes the clash between the forfeiture provisions and the sixth amendment right to counsel of choice. It examines the historical origins of the right and contrasts it with the right to appointed counsel. It then analyzes the appropriate standard of constitutional review when government acts to prevent the defendant from retaining any private counsel. Section III then discusses a separate first amendment basis for a right to retain counsel for the assertion of rights in a criminal trial. This Section concludes with an analysis of Congress' expressed objectives underlying the 1984 amendments, in order to determine whether they may be accomplished without applying forfeiture to bona fide attorneys' fees, as distinguished from sham transfers to attorneys in order to evade forfeiture.

Although this Article concludes that this application of the forfeiture statutes is unconstitutional, the constitutional question that the Supreme Court granted *certiorari* to consider need not be resolved. Section IV suggests the use of two techniques by which the Supreme Court may avoid the constitutional dilemma: the canon of statutory construction that counsels that an act should not be interpreted to violate the Constitution if a constitutional interpretation is possible, and an administrative law technique that calls for close scrutiny of broad delegations of congressional authority to administrative officials when that discretionary authority is invoked in a manner that intrudes on fundamental constitutional values. In view of the serious constitutional problems under the sixth and first amendments presented by the application of the forfeiture statutes to bona fide attorneys' fees, this Article suggests that either of these techniques should be employed to construe the statute so that it does not authorize forfeiture of legitimate attorneys' fees.



## II. THE IMPACT OF FEE FORFEITURE ON THE STRUCTURE OF THE CRIMINAL JUSTICE SYSTEM

### A. *The Financial Effects on Criminal Defense Attorneys*

The facts of *United States v. Monsanto*,<sup>29</sup> one of the fee forfeiture cases now before the Supreme Court, illustrate the unanticipated problems of applying the forfeiture statutes to attorneys' fees. Peter Monsanto, together with eighteen others, was indicted in the United States District Court for the Southern District of New York for various violations of the narcotics and racketeering laws.<sup>30</sup> The indictment also sought forfeiture of several items of property alleged to have been obtained from the proceeds of illegal narcotics activities.<sup>31</sup> On July 8, 1987, with the unsealing of the indictment, the government obtained an ex parte, postindictment restraining order enjoining the sale or transfer by Monsanto of two parcels of real property—a \$335,000 home in Mount Vernon, New York and a \$30,000 cooperative apartment in the Bronx, New York.<sup>32</sup>

A Boston criminal defense attorney who planned to represent Monsanto attended the first pretrial conference in the case on July 31, 1987, but declined to enter a formal appearance.<sup>33</sup> At a later pretrial hearing held on August 6, 1987, a New York attorney entered a limited appearance on Monsanto's behalf to litigate a motion seeking to vacate or modify the restraining order so that Monsanto could use the restrained property to retain counsel of choice for his pending criminal trial and to exempt such legal fees from post-trial forfeiture.<sup>34</sup> Although the court concluded that the restraining order had rendered the defendant de facto indigent, it denied his motion, suggesting that retained counsel could be paid from his frozen assets, but only to the extent of rates established by the Criminal Justice Act (CJA).<sup>35</sup> In

---

29. *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (en banc) (per curiam), cert. granted, 109 S. Ct. 363 (1988).

30. *Id.* at 1401.

31. *Id.*

32. *Id.*

33. En Banc Brief for the United States at 6, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (No. 436, Docket 87-1397) (en banc) (per curiam), cert. granted, 109 S. Ct. 363 (1988).

34. Such limited appearances in RICO and CCE cases involving forfeitures have become increasingly common. See, e.g., *United States v. Ianniello*, 644 F. Supp. 452, 454 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1334 (D. Colo. 1985); Committee on Criminal Advocacy, *The Forfeiture of Attorneys' Fees in Criminal Cases: A Call for Immediate Remedial Action*, 41 REC. A.B. CITY N.Y. 469, 478-79 (1986); Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Right of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 134 (1986).

35. 18 U.S.C. § 3006A (1982 & Supp. IV 1986); see *infra* text accompanying note 38.

view of the unwillingness of the attorneys consulted by Monsanto to represent him at these rates, the court's order in effect prevented him from representation by counsel of choice. Because of his forced indigency, Monsanto was required to stand trial with an appointed counsel pursuant to the Criminal Justice Act.<sup>36</sup>

The *Monsanto* case illustrates the financial impact of the forfeiture provisions on the criminal defense bar.<sup>37</sup> Few, if any, private attorneys are willing to undertake the representation of a defendant in a complex RICO or CCE action without a fee, or even for a fee, at CJA rates and maximum amounts. Under CJA, attorneys are paid \$60 per hour for in-court time and \$40 per hour for out-of-court time, with a maximum fee of \$3,500, subject to a limited opportunity to obtain waiver of this maximum amount within the discretion of the trial court and with the further approval of the chief judge of the circuit.<sup>38</sup> Not only are these hourly rates substantially below those charged by experienced attorneys in most large cities—\$150-250 per hour and more—but they are only slightly higher than the \$39 per hour overhead costs of private practice in many districts, as calculated in 1985.<sup>39</sup> Indeed, Congress did not design the CJA to be compensatory, but merely to reduce financial burdens on assigned counsel.<sup>40</sup> In view of the complexity, duration, and intense time pres-

---

36. *Monsanto*, 852 F.2d at 1401-02; see Brief For the United States of America at 24, *United States v. Monsanto*, 836 F.2d 74 (1987) (No. 87-1397) [hereinafter *Monsanto* Panel Government Brief], replaced on reh'g en banc, 852 F.2d 1400 (2d Cir.) (per curiam), cert. granted, 109 S. Ct. 363 (1988). *Monsanto* was convicted on all counts, including the criminal forfeiture counts, on July 25, 1988, and his conviction is now on appeal.

37. Another recent illustration is the highly publicized case of E. Robert Wallach, former counsel to Attorney General Edwin Meese and former United States representative to the United Nations Human Rights Commission, indicted under RICO for allegedly peddling his influence with former Attorney General Meese. Nat'l L.J., April 4, 1988, at 2, col. 2. After Wallach's assets were frozen by court order, "his two high-profile defense attorneys dropped him. . . . Mr. Wallach, in seeking new counsel, is reported to have contacted four well-known New York and New Jersey defense attorneys, but had no luck." *Id.* Criminal defense lawyers described Wallach's search for counsel as "so extensive because he was looking for a miracle." *Id.*

38. 18 U.S.C. § 3006A(d).

39. *Criminal Justice Act Revision of 1985: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 3 (1985) (testimony of U.S. District Judge Thomas J. MacBride, Chairman of the U.S. Judicial Conference Comm. to Implement the Criminal Justice Act). By contrast, the federal government, which employs some 17,000 lawyers, sometimes pays outside counsel at the rate of \$285 per hour to represent it. Lefstein, *Keynote Address, Colloquium, Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 10 (1986).

40. H.R. REP. NO. 864, 88th Cong., 1st Sess. 11 (1963) (The limit "was conceded by virtually every witness at the hearings to be below normal levels of compensation in legal practice."); S. REP. NO. 346, 88th Cong., 1st Sess. 2 (1963) (referring to the \$10 to \$15 per hour limit of the original 1964 act as "less than the prevailing rates in many areas"); ATT'Y

tures of such cases, experienced defense counsel—even when well-paid—often find it impossible to undertake such cases and to maintain their practices at the same time.<sup>41</sup> Thus the economics of private law practice will preclude virtually all private practitioners from accepting such cases at CJA rates. Moreover, even when a preindictment or pretrial restraining order is not obtained, the possibility of a postconviction forfeiture of proceeds of a crime in the possession of a third party will discourage any private attorney from agreeing to represent the defendant for a fee in such a case.<sup>42</sup>

---

GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (Allen Committee) REPORT 49 n.71 (1963) (characterizing the \$15 per hour rate as "conservative and considerably below that which is charged by retained counsel for similar services" and observing that "[n]o member of the Committee believes the figure is genuinely compensatory"); REPORT OF COMM. TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964, 36 F.R.D. 285, 294 (1965) ("The payment . . . under the Act will, in most cases, be something less than compensatory."); Note, *Adequate Representation for Defendants in Federal Criminal Cases: Appointment of Counsel Under the Criminal Justice Act of 1964*, 41 N.Y.U. L. REV. 758, 774, 783-84 (1966).

41. See *United States v. Gallo*, 668 F. Supp. 736, 754 (E.D.N.Y. 1987); Tarlow, *RICO Report*, THE CHAMPION, Dec. 1987, at 18; Lefcourt & Horwitz, *The RICO Era: Megatrials, Megaproblems, Megabucks*, N.Y.L.J., Jan. 21, 1988, at 1, col. 2; see also *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985) ("[T]he defense of RICO accusations requires the marshalling of facts and information of vast quantities, perhaps constituting the whole of several worldwide business enterprises."). One such case involved a seventeen month trial, one of the longest federal jury trials on record, and lasted more than three years from indictment to verdict. See *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985) (the "Pizza Connection" case); S. ALEXANDER, THE PIZZA CONNECTION: LAWYERS, DRUGS, MONEY, MAFIA (1988). Although the attorney for the lead defendant accepted the case for a fee of \$250,000, in view of the length of the trial and its impact on his practice, he came to regard the case as a financial disaster. Conversation with the author in New York City (March 15, 1989). Another RICO "megatrial," involving twenty-six defendants, was halted before completion of the government's case after fifteen months of trial when counsel for the lead defendant became terminally ill. *United States v. Accetturo*, 842 F.2d 1408 (3d Cir. 1988); see Tarlow, *RICO Report*, THE CHAMPION, May 1988, at 22. By that point the government had introduced 201 tape recordings of intercepted communication and 320 of its 364 exhibits, and there were 27,000 pages of recorded testimony. *Id.* The trial was resumed later with local counsel who had no prior connection with the trial proceedings, being pressed into service as replacement counsel over both his and the defendant's objections. See *Accetturo*, 842 F.2d at 1408. After five additional months of trial, all defendants were acquitted. See also *United States v. Salerno*, No. 86-CR-245 (S.D.N.Y. Jan. 20, 1989) (WESTLAW 1989 WL 6640) (14 month trial).

42. *United States v. Moya-Gomez*, 860 F.2d 706, 720 (7th Cir. 1988), *petition for cert. filed*; *United States v. Monsanto*, 852 F.2d 1400, 1403 (2d Cir.) (Feinberg, C.J., concurring, joined by Oakes & Kearse, JJ.), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. Harvey*, 814 F.2d 905, 921 (1987), *replaced on reh'g en banc on other grounds sub nom. United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988). A defense lawyer, in the view of most courts, would find it virtually impossible to satisfy the "reasonably without cause to believe that the property was subject to forfeiture" standard of 18 U.S.C. § 1963(c), (m) and 21 U.S.C. § 853(c), (n). E.g., *Monsanto*, 852 F.2d at 1410 (Winter, J., concurring, joined by Meskill & Newman, JJ.); *Badalamenti*, 614 F. Supp. at 196. But see *United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987); *infra* notes 392-407 and accompanying text.

Application of the forfeiture statutes in this manner precludes representation by any criminal defense attorney with experience in the highly specialized RICO and CCE areas, indeed by any private attorney.<sup>43</sup> The availability of counsel in such cases would be totally chilled, not only by the preconviction and potential postconviction forfeiture of fees,<sup>44</sup> but also by the ethical problems resulting from the availability of forfeiture.

### B. *The Ethical Problems Created by Fee Forfeiture*

If an attorney agrees to represent a RICO or CCE defendant under the threat of fee forfeiture, his fee will depend upon winning the case. Not only would this impose a financial risk that few private attorneys could afford, but it also places the attorney in violation of Rule 1.5(d)(2) of the Model Rules of Professional Conduct, which prohibits contingent fees in criminal cases.<sup>45</sup> Such contingent fees are ethically banned because they pose inevitable conflicts of interest between attorney and client and, by making the defense attorney an interested party in the case, provide the potential for corrupting justice.<sup>46</sup>

---

43. The message of the forfeiture provisions to defense attorneys is clear: "Do not represent this defendant or you will lose your fee." That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation . . . . [The statute will] insure that no lawyer will accept the business." *Badalamenti*, 614 F. Supp. at 196. That defense lawyers have indeed received this message is revealed by a survey conducted by Professor William Genego, which included 1,648 defense attorney responses. Genego, *Report from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, THE CHAMPION, May 1986, at 7, 13.

The impact of fee forfeiture on the willingness of defense lawyers to take these cases was described in an amicus brief submitted in the *Monsanto* case by three organizations of defense attorneys:

Members of our organizations have been in the position where they have declined to represent prospective clients in need of counsel solely because they feared the impact of the forfeiture provisions. Moreover, given the economics of private practice in New York and the length of the time commitment that most RICO and CCE cases require, the exemption from forfeiture of funds to pay an attorney at CJA rates—as the district court proposed here—will in no way alleviate the problem that defendants in Monsanto's position are simply unable to retain counsel of their choice.

Joint Brief of Amici Curiae New York Council of Defense Lawyers, New York State Association of Criminal Defense Lawyers, and New York Criminal Bar Association at 29, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (en banc) (per curiam), cert. granted, 109 S. Ct. 363 (1988).

44. See Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 35-37, 44-46; *supra* note 43.

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1984); see also ABA STANDARDS FOR CRIMINAL JUSTICE § 4-3.3(e) (1980); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980).

46. See *United States v. Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985); *Badalamenti*,

Moreover, the forfeiture provisions inevitably place counsel in a number of additional ethical dilemmas. Counsel is placed in an untenable position when he represents a defendant knowing that the defendant's assets and previously paid legal fees may be the subject of forfeiture.<sup>47</sup> Although an attorney's duty is to represent his client zealously, this obligation may be undercut by his recognition that acquiring too much information from his client may adversely affect counsel's ability to retain his fee or to seek postconviction recovery of it as a bona fide purchaser for value.<sup>48</sup> In addition, this predicament profoundly burdens the attorney-client privilege.<sup>49</sup> Trial and grand jury subpoenas, increasingly issued to defense attorneys, may require defense counsel to testify about the amount and method of fee pay-

---

614 F. Supp. at 196-97; *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818, 823 (E.D. Pa. 1972); Cloud, *supra* note 44, at 49; Uelmen, *Converting Retained Lawyers Into Appointed Lawyers: The Ethical and Tactical Implications*, 27 SANTA CLARA L. REV. 1, 5 (1987); Note, *supra* note 34, at 140-42. Moreover, given the inevitable conflicts of interest caused by such contingent fee representation, a defendant represented by an attorney on this basis will be denied his sixth amendment right to the effective assistance of an attorney who is "free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978). The potential that such a conflict will affect the attorney's representation of his client to the client's detriment is heightened in the plea bargaining process, in which the attorney may be tempted to avoid plea discussions or recommend against a plea of guilty that may jeopardize his fee. As the Supreme Court has noted: "To assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway*, 435 U.S. at 491. In the sixth amendment context—a criminal prosecution at any stage after the right to counsel has attached, *see Gerstein v. Pugh*, 420 U.S. 103, 122 (1975); *United States v. Ash*, 413 U.S. 300, 306-14 (1973)—the mere existence of such a conflict of interest is sufficient to make out a constitutional violation, even absent a showing of resulting prejudice. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). By contrast, in non-sixth amendment criminal contexts—cases at stages prior to the focus of adversarial judicial proceedings—or in non-criminal contexts—cases in which the relevant constitutional limitation is due process rather than the sixth amendment—the existence of a conflict of interest without a showing of prejudice may not violate the Constitution. *See Manson v. Braithwaite*, 432 U.S. 98 (1977) (Prejudice is the "linchpin" of a due process violation.); *United States v. Lovasco*, 431 U.S. 783 (1977) (Prejudice is a necessary element of a due process claim.). For this reason, the Supreme Court's decision in *Evans v. Jeff D.*, 475 U.S. 717 (1986), upholding a settlement agreement in a class action civil rights case in which the defendant state offered a settlement conditioned upon a waiver of the plaintiffs' attorneys' claim to a statutory fee award, is distinguishable. Although the offer burdened the attorneys' ability to advise their clients free of divided loyalties, the attorneys nonetheless appeared able to disregard the conflict of interest, and their clients accepted the offer, which the attorneys had evaluated favorably. *Id.* at 728.

47. *See United States v. Rogers*, 602 F. Supp. 1332, 1348-49 (D. Colo. 1985); Cloud, *supra* note 44, at 57-58; Uelmen, *supra* note 46, at 5-8; Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime?"*, 39 STAN. L. REV. 663, 672-74 (1987).

48. *See* 18 U.S.C. § 1963(m); 21 U.S.C. §§ 853(n), 881(a)(6).

49. *See Rogers*, 602 F. Supp. at 1349; Cloud, *Government Intrusion into the Attorney-Client Relationship: The Impact of Fee Forfeiture on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L.J. 817, 827-28 (1987); Uelmen, *supra* note 46, at 8; Note, *supra*, note 34, at 142-46.

ments in an effort to demonstrate the forfeitability of the fee.<sup>50</sup> These subpoenas place counsel in the position of being a witness against his client, itself banned by the Model Rules of Professional Conduct,<sup>51</sup> and inevitably chill attorney-client communications.<sup>52</sup> Placing the attorney's own fee in the dock with the accused therefore necessarily deters all ethical criminal attorneys from representing defendants in such cases.<sup>53</sup>

### C. *The Impact on the Adversary System*

Applying the RICO and CCE forfeiture provisions to attorneys' fees will have an enormous impact on the structure of the criminal defense bar and on the nature of the adversary system, an impact that Congress plainly did not consider.<sup>54</sup> There is no indication that Congress intended to cede to the prosecutor the authority to eliminate chosen defense counsel and to alter profoundly the adversary system by the simple expedient of adding forfeiture claims in the indictment. Nor is there any hint in the legislative history of the original RICO and CCE forfeiture provisions enacted in 1970, or in the civil forfeiture amendments to CCE added in 1978, that Congress ever considered giving the executive branch such controversial power.

50. See, e.g., *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam), *aff'd by equally divided court*, 639 F. Supp. 117 (D. Mass. 1986); *In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick)*, 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986); *United States v. (Under Seal)*, 774 F.2d 624 (4th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26 (2d Cir. 1985); *In re Grand Jury Subpoena Duces Tecum (Shargell)*, 742 F.2d 61 (2d Cir. 1984); *In re Ousterhoudt*, 722 F.2d 591 (9th Cir. 1983); *In re Grand Jury Matters*, 593 F. Supp. 103 (D.N.H.), *aff'd*, 751 F.2d 13 (1st Cir. 1984); *Pierce & Coler Marino, Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigation*, 36 HASTING L.J. 821 (1985); *Stern & Hoffman, Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783 (1988); *Suni, Subpoenas to Criminal Defense Lawyers: A Proposal for Limits*, 65 OR. L. REV. 215 (1986); *Weiner, Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 27 AM. CRIM. L. REV. 95 (1985); *Note, A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145.

51. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1984); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1980); Uelmen, *supra* note 46, at 7-8.

52. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986) (Such inquiries will "chill the openness of attorney-client communications."), *aff'd on other grounds sub nom. United States v. Harvey*, 814 F.2d 905 (1987), *replaced on reh'g en banc sub nom. United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988); *Rogers*, 602 F. Supp. at 1349 ("[T]he threat of an attorney having to disclose information obtained from his client will chill the openness of those communications, thereby impinging on the right to counsel.").

53. See Cloud, *supra* note 44, at 57-65.

54. Committee on Criminal Advocacy, *supra* note 34, at 477; see *infra* notes 329-47, 409-24 and accompanying text.

Forfeiture of attorneys' fees presents a grave threat to the very nature of our adversary system.<sup>55</sup> The unrestricted discretion given to prosecutors under the government's interpretation of the forfeiture statutes creates a serious potential for prosecutorial abuse. Virtually any indictment charging a felony violation of federal law can be framed as a RICO indictment.<sup>56</sup> As a result, the government can gain the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses merely by appending a forfeiture indictment."<sup>57</sup> Thus the government can deprive a defendant of counsel already retained by making it unlikely that counsel will be paid or will be able to keep any fees already received.<sup>58</sup> Similarly, for the defend-

---

55. See generally Cloud, *supra* note 44 (Attorney fee forfeitures would restrict the ability of defense attorneys to perform their institutional role of guaranteeing that the adversary system operates properly.); Note, *supra* note 34, at 146-48 ("By discouraging privately retained, experienced lawyers from representing RICO defendants, the government's proposed interpretation of the Act threatens to disrupt the fair and balanced administration of justice.").

56. Rogers, 602 F. Supp. at 1340; Krieger & Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737, 738-39 (1985); Lynch, *supra* note 2, at 663 (describing RICO as "a weapon that could be used against virtually any kind of criminal behavior"); Note, *supra* note 34, at 147; see United States v. Davidoff, 845 F.2d 1151, 1154 (2d Cir. 1988) (referring to the "wide latitude accorded the prosecution to frame a charge [under RICO] that a defendant has 'conspired' to promote the affairs of an 'enterprise' through a 'pattern of racketeering activity'"); P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW 430 (2d ed. 1986) (describing RICO as "a sprawling and uncertainly defined criminalization of a broad range of actions"). For a discussion of the recent use of RICO for alleged violations of the federal securities fraud laws see Hagedorn, *Dread of RICO is Likely to Grow, May Bring Push for Mob Only Use*, Wall St. J., Dec. 22, 1988, at A7, col. 1; see also, e.g., United States v. Regan, 858 F.2d 115 (2d Cir. 1988). Moreover, not only are federal law violations within the purview of RICO, but "[i]n theory, RICO can serve as a device to obtain federal jurisdiction to prosecute common law crimes against a person or property that would normally be within the province of local law enforcement." Lynch, *supra* note 2, at 921; see also United States v. Turkette, 452 U.S. 576, 586-87 (1981) (RICO represents an expansion of federal jurisdiction over state crimes.). In short, RICO, in the words of Judge Learned Hand, describing the now simple conspiracy charge, has become the new "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925); see Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

57. Rogers, 602 F. Supp. at 1347; accord United States v. Monsanto, 852 F.2d 1400, 1404 (2d Cir.) (Oakes, J., concurring) ("The forfeiture statute puts too much power in the hands of the prosecution to determine who will not be defense counsel . . ."), cert. granted, 109 S. Ct. 363 (1988); United States v. \$70,476 in U.S. Currency, 677 F. Supp. 639, 646 (N.D. Cal. 1987) ("In effect, the prosecutor could have a role in selecting, influencing, or vetoing the defendant's choice of counsel."), appeal dismissed, 845 F.2d 329 (9th Cir. 1988). See generally Genego, *Prosecutorial Control Over a Defendant's Choice of Counsel*, 27 SANTA CLARA L. REV. 17 (1987) (examination of practices that provide prosecutorial control over the defendants' choice of counsel).

58. United States v. Thier, 801 F.2d 1463, 1476 (5th Cir. 1986) (Rubin, J., concurring) ("The tool of the restraining order, thus put into the hands of the prosecution, gives the Government power to exclude vigorous and specialized defense counsel."), modified on other grounds, 809 F.2d 249 (5th Cir. 1987); \$70,476 in U.S. Currency, 677 F. Supp. at 646 (Forfeiture "could be used by the government to discourage employment of vigorous and specialized defense counsel."); Committee on Criminal Advocacy, *supra* note 34, at 484 ("[I]f

ant who has not yet retained counsel, the government can use the forfeiture procedure virtually to eliminate the pool of private attorneys willing to provide representation, relegating the defendant to an appointed counsel.<sup>59</sup>

Should the forfeiture statutes be so broadly construed, the prosecutor would enjoy awesome power to affect the balance between the accused and the government in the criminal process.<sup>60</sup> The unfettered power to disqualify the defendant's selected champion and to render unavailable representation by private counsel provides the prosecutor an unfair tactical advantage that will transform our existing adversary system.<sup>61</sup> The private criminal defense bar provides a significant check on the power of the professional prosecutor and judge.<sup>62</sup> To serve this checking function, as the Supreme Court has repeatedly recognized, the defense attorney must be independent of the government.<sup>63</sup> Our existing system of criminal representation, placing sub-

---

the government wishes to exclude a lawyer from a particular case, it need only allege a RICO violation, add a forfeiture section to the indictment, and then inform the defendant's lawyer that it will seek forfeiture of his legal fees in the event of a conviction. Such unfettered power would strike at the heart of the adversary system."); Note, *supra* note 34, at 147-48; Note, *supra* note 47, at 678.

59. See *Monsanto*, 852 F.2d at 1402, in which the defendant was unable to retain any of a number of private counsel with whom he discussed representation under the cloud of a pretrial restraining order freezing his assets. The defendant was forced to go to trial with an attorney appointed from the court's Criminal Justice Act (CJA) panel. *Id.*

60. See *Herring v. New York*, 422 U.S. 853, 862 (1975) (Partisan advocacy on both sides best promotes the ultimate objective of discovery of the truth.); *Wardius v. Oregon*, 412 U.S. 470, 474-75 (1973) (Due process requires a "balance of forces between the accused and his accuser."); see generally *Cloud*, *supra* note 44 (Attorney fee forfeitures would restrict the ability of the defense attorney to perform his institutional role of guaranteeing that the adversary system operates properly.).

61. See *Richardson-Merell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring) ("When a trial court mistakenly disqualifies a party's counsel as the result of an abusive disqualification motion, the court in essence permits the party's opponent to dictate his choice of counsel. . . . [T]his result is in serious tension with the premises of our adversary system . . ."). Justice Brennan was referring to disqualification of counsel in civil cases. When the context is criminal rather than civil and the adversary is the government, already possessing a considerable advantage as a result of its virtually unlimited investigatory and prosecutorial resources, see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149-50 (1960), the threat to the adversary system is considerably more severe.

62. See Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 134-35, 137 (1987).

63. See, e.g., *United States v. Cronin*, 466 U.S. 648, 656 n.17 (1984) ("[A]n indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation." (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979))); *Polk County v. Dodson*, 454 U.S. 312, 322 (1981) ("There can be no fair trial unless the accused receives the services of an effective and independent advocate."). The trial of John Peter Zenger provides an early illustration of the value of an independent criminal defense bar. See *infra* notes 105-57 and accompanying text.



stantial reliance on the private bar, insures this essential independence—as well as its appearance—far more than would a system relying exclusively on attorneys paid by or employed by the government in certain classes of cases.<sup>64</sup> Yet the private bar effectively is excluded from these cases as a result of fee forfeiture. Moreover, those private lawyers willing to represent clients who have not yet had the use of their assets restrained will find their independence compromised by the prospect of continued representation only at the grace of prosecutors who are their adversaries in the proceeding.<sup>65</sup> As an inev-

---

64. Most public defender programs are government agencies or private nonprofit corporations under contract with the government or the court. Many of these programs are structured such that the trial judges directly or indirectly exercise a measure of control. See Singer & Lynch, *Indigent Defense Systems: Characteristics and Costs*, in THE DEFENSE COUNSEL 110 (W. McDonald ed. 1983). In such cases, "public defenders may be torn between their duty to the client and their duty to the court and its crowded calendar." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 6 (1973); see also A. BLUMBERG, CRIMINAL JUSTICE: ISSUES AND IRONIES 215 (1979); M. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS 79, 282 (1977); G. ROBIN, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 262 (1984); E. SILVERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 305 (1978). Discussing this threat to the independence of public defenders, Judge Bazelon noted:

I have been reliably informed that a director of one such agency periodically checked with trial judges to determine whether his staff attorneys were too aggressive or took too much of the court's time. Criticism of a trial judge was passed on to the offending lawyers. Such practices may be conducive to rapid and efficient processing of cases but are not conducive to diligent and conscientious advocacy.

Bazelon, *supra*, at 6. These pressures and the inherent contradiction of the public defender's role as a state-paid agent hired to frustrate the prosecution of those publically identified as enemies of the state make public defenders "social anomalies" and contribute to their popular conception as inept bureaucratic functionaries susceptible to coercion by judges and prosecutors. L. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOW OF REPUTE 1 (1987). See A. BLUMBERG, *supra*, at 234; L. MCINTYRE, *supra*, at 2, 45-48, 62-74; Sudnow, *Normal Crimes: Sociological Features of the Penal Code in the Public Defender's Office*, 12 SOCIAL PROBLEMS 255 (1965); Wice, *Private Criminal Defense: Reassessing an Endangered Species*, in THE DEFENSE COUNSEL 39, 40-41 (W. McDonald ed. 1983). When private counsel are appointed by the court to represent indigent defendants, similar threats to independence exist. See S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 32 (4th ed. 1983) ("[T]he dependency of attorneys on judicial favor for continued appointments jeopardizes the independence of counsel and the vigor of the adversary system . . ."). Not only is independence jeopardized by the attorney's interest in future judicial appointments, but in the case of representation under the CJA, it is further threatened by the fact that compensation in excess of the \$3,500 statutory limit is dependent on the approval of both the trial judge and the chief judge of the circuit. See *supra* note 38 and accompanying text. As a result of these problems, defendants tend to distrust both public defenders and appointed counsel. Like public defenders, appointed lawyers are perceived as paid by and therefore beholden to the government. See J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 31 (1978).

65. See *United States v. Estevez*, 645 F. Supp. 869, 871-72 (E.D. Wis. 1986), *aff'd on other grounds sub nom.* *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), *petition for cert. filed* (U.S. Feb. 17, 1989); Genego, *The Legal and Practical Applications of Forfeiture of Attorneys' Fees*, 36 EMORY L.J. 837, 841-43 (1987). The mere existence of this threat to

itable result of this, and other ethical and financial problems, many excellent attorneys will leave criminal defense work for more lucrative civil litigation practice.

Far too many young lawyers in the 1980's lack the dedication and public spirit of lawyers coming to age in the 1960's. The financial pressure on our best law students to go to Wall Street and earn four to five times the salaries of public defenders is hard to resist. Some of the best attorneys in the country traditionally have been members of the criminal defense bar. Not surprisingly, the rewards for the best criminal defense attorneys of their day have always been high. More than perhaps any other profession, law is a meritocracy, and more than any other profession, law is a marketplace. The best talent can command enormous fees in any of law's increasingly specialized fields. Prosecutors who employ the forfeiture tool effectively threaten the future financial viability of some of the highest paying and most difficult subspecialties of criminal defense—the white collar and the drug law bars. Many of the best attorneys choosing the speciality of criminal defense work undoubtedly are attracted by the prospect of practicing in these fields. The best attorneys in these subspecialties command shockingly high fees, although no more so than the most talented members of the securities, antitrust, commercial litigation, or personal injury bars. Though the law's gradual transformation from a profession into a business is lamentable, in a society governed by the marketplace as ours is, attorneys in these subspecialties who find their hourly rates slashed to the \$40 to \$60 per hour limits provided under the CJA will move to other fields or decline to enter criminal practice. The ethical conflicts created for attorneys subject to potential fee forfeiture,<sup>66</sup> coupled with these financial pressures, inevitably will have this effect.

This exodus of talented attorneys could devastate the criminal defense bar. Since the Supreme Court's 1963 landmark decision

---

independence of counsel may violate the sixth amendment. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); *cf. City of Lakewood v. Plain Dealer Pub. Co.*, 108 S. Ct. 2138, 2144 (1988) ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.").

66. *United States v. Monsanto*, 852 F.2d 1400, 1404 (2d Cir.) (Oakes, J., concurring) ("The forfeiture provisions infect the system with unavoidable conflict of interest and ethical dilemmas for the defense attorney that jeopardize the right to due process."), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985) ("A lawyer would find himself in inevitable positions of conflict."); *see Uelman, supra* note 46, at 6; *supra* notes 45-53 and accompanying text.

in *Gideon v. Wainwright*<sup>67</sup> and its progeny<sup>68</sup> extended the right to appointed counsel to all indigent defendants facing possible imprisonment, the criminal defense bar has expanded. Yet it is still too small to meet the needs of all defendants. Many public defender programs are badly overloaded and underfunded,<sup>69</sup> and increasingly depend on law student interns practicing under special court rules as part of a law school clinical program. Many of the nation's residents of death row are unrepresented.<sup>70</sup> If the financial top of the criminal defense market is destroyed by fee forfeiture, fewer and less capable lawyers will enter the field. Most criminal defense lawyers apprentice into the field, spending a year in law school in a criminal defense or prosecution clinic, working several years as a public defender or prosecutor, and ultimately moving into private criminal defense practice. The decimating effect of fee forfeiture on the opportunities in private criminal practice will deter law students from electing these clinical placements and young lawyers from working in the comparatively low paying public jobs in state public defender and prosecutor offices. The number of young lawyers entering the criminal justice system and

---

67. 372 U.S. 335 (1963).

68. See cases cited *infra* note 80.

69. See *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985). A 1982 survey of public defender programs concluded:

[M]eaningful compliance with the Constitution is often absent due to inadequate funding. Indeed, public defender and assigned counsel programs experience virtually every imaginable kind of financial deficiency. There are neither enough lawyers to represent the poor, nor are all the available attorneys trained, supervised, assisted by ample support staffs, or sufficiently compensated.

N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 56 (1982); see also R. COVER, O. FISS & J. RESNIK, PROCEDURE 777-79 (1988); Singer & Lynch, *supra* note 64, at 113 (survey of organized defender organizations showing that eight percent employed no secretaries or other support staff and only thirty-three percent employed both secretaries and investigators). For earlier studies demonstrating the lack of compliance with the constitutional mandate that all indigent defendants facing possible imprisonment receive appointed counsel, see S. KRANTZ, C. SMITH, P. FLOYD & J. HOFFMAN, THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *ARGERSINGER V. HAMLIN* 5-6 (1976); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 22 (1973). Although the resource problems discussed here are more prevalent at the state level, many federal districts lack defender programs, relying instead on CJA appointments. Additionally, many federal defender programs are inadequately funded to absorb complex RICO and drug conspiracy cases. The impact of RICO and CCE forfeiture, however, is not limited to the federal level. In view of the propensity of the states to follow the federal example, see N. ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 167 (1986) (RICO has become a statutory model for the states); Fried, *supra* note 6, at 332, n.26 (compilation of state RICO statutes), it is likely that if the federal forfeiture provisions are upheld, similar forfeiture practices will proliferate in the states, where the most serious resource problems exist for public defender programs. The impact of having to absorb a significantly increased caseload would be devastating.

70. Lefstein, *supra* note 39, at 7-8; Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513 (1988).

staffing the public sector positions in the field necessary to make the system work will be seriously diminished.

Moreover, the impact on the criminal defense bar's willingness to represent indigent defendants may be substantial. Given the limits on hourly rates and total compensation under CJA,<sup>71</sup> few experienced attorneys will agree to take appointments in RICO and CCE cases for what are frequently complex and lengthy trials.<sup>72</sup> Indeed, the forfeiture of attorneys' fees may seriously jeopardize the viability of the CJA panels of volunteer attorneys existing in many districts. Many lawyers will be reluctant to serve on such panels if it is possible that they will be appointed to a complex RICO or CCE case, the trial of which could take many months or even several years. This sentiment was voiced at a recent meeting of attorneys serving on the CJA panels for the United States District Courts for the Southern and Eastern Districts of New York.<sup>73</sup> One panel member also noted that her interest in performing *pro bono publico* work on behalf of indigent defendants animated her willingness to serve on the CJA panel, and that she would not feel this way about being appointed to represent a wealthy defendant who was indicted under RICO or CCE and who was rendered de facto indigent by a pretrial restraining order.<sup>74</sup> Therefore, not only does the application of the forfeiture provisions to attorneys' fees discourage private attorneys from serving on such panels to the ultimate detriment of all indigent defendants, but it also inevitably places unbearable strains on already poorly funded public defender programs.<sup>75</sup> The added burdens on these programs caused by the systematic substitution of appointed counsel for private counsel in complex cases ultimately will fall on the truly indigent, who will have to compete for these limited resources.

Preserving the private defense bar, which is severely threatened by fee forfeiture, particularly if extended beyond RICO and CCE, is essential to both litigant and societal acceptance of the outcome of criminal trials<sup>76</sup> and ultimately to public confidence in the administration of justice. Indigent defendants represented by public defenders

---

71. See *supra* note 38 and accompanying text.

72. See *supra* note 41 and accompanying text.

73. Meeting of March 28, 1988, in New York City, attended by the author.

74. Meeting of March 28, 1988, *supra* note 73.

75. See *Concerning Forfeiture of Attorney's Fees: Hearings before the Sen. Comm. on the Judiciary*, 99th Cong., 2d Sess. 17 (1986) (statement of Edward Marek on behalf of Federal Public Defenders and Federal Community Defenders); ABA CRIMINAL JUSTICE SECTION, REPORT NO. 125A TO THE HOUSE OF DELEGATES 7 (1986).

76. See, e.g., S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 33-34 (1988); *infra* note 186 and accompanying text.

often feel a diminished sense of participation in the proceedings.<sup>77</sup> Although for the indigent there may be no solution to this problem, we should not extend the problem to more defendants by decimating the private defense bar through fee forfeiture. The enormous variability in the quality of criminal defense attorneys may raise serious problems of equity, but we should not solve these problems by eliminating the most competent members of the bar, as we inevitably threaten to do with fee forfeiture. If anything, we should preserve the financial rewards the most capable criminal lawyers have historically earned, in order to maintain the incentive structures that attract talented lawyers to criminal work. By changing these incentive structures, fee forfeiture will restructure the criminal defense bar in a manner that inevitably will diminish its overall quality.

The net impact on the nature of the adversary system in the criminal area will be devastating. Private champions for the defendant will be replaced by attorneys paid for and in some cases also trained and supervised by the very government that seeks to deprive the defendant of his liberty. The quality of representation received by all criminal defendants inevitably will suffer. Giving the prosecutor this power through fee forfeiture cuts strongly against the grain of our adversary system and our basic concepts of fairness, impairing the criminal defense bar and its ability to provide quality representation. We simply cannot afford the loss of talented defense attorneys that forfeiture of bona fide attorneys' fees will bring, not in a society that is committed to procedural fairness, the presumption of innocence, and the adversary system, and that boasts that it is far better that ten guilty people go free than that one innocent person be falsely imprisoned.

### III. THE CONSTITUTIONAL DILEMMA

#### A. *Applying the Forfeiture Provisions to Bona Fide Attorneys' Fees and the Sixth Amendment Right to Counsel of Choice*

Congress undoubtedly has broad constitutional authority to punish crime and to enact measures designed to deter crime. Although the imposition of forfeiture as a criminal sanction after conviction is not a traditional criminal punishment in America, such forfeiture would be difficult to assail constitutionally. Imposing criminal forfeiture prior to conviction, however, raises serious constitutional issues. Preconviction restraint on the transfer or use of property in order to protect the government's ability to impose postconviction forfeiture

---

77. See *supra* note 64.

might seem reasonable as a provisional remedy to protect the status quo, but it imposes tremendous burdens on the accused that are in some ways more onerous than ultimate conviction. Despite probable cause to believe a defendant has committed a crime, an indicted defendant is presumed innocent in our system. Due process demands that, until a defendant has had his day in court, has put the prosecution to its proof, has had the opportunity to make his defense, and has had the benefit of the judgment of a jury reflecting the conscience of the community, he may not be punished.

Although forfeiture seems a routine provisional remedy, when its use prevents a defendant's assertion of his due process rights through counsel of choice, questions of fundamental constitutional proportion arise. The combination of pretrial restraining orders and post-trial forfeiture of assets in the possession of either the defendant or a third-party transferee raises special problems for the defendant's right to counsel and, as has been seen, for the future of the criminal defense bar. A defendant whose assets are restrained prior to trial suffers serious hardships. His prior ability to use his assets as he likes—to buy caviar, to travel to Europe, or even to go to the movies—is dramatically affected. But the impact that criminal accusation brings—a cloud on the defendant's reputation, potential loss of job and friends, pretrial detention—has always been severe. These burdens are inherent in criminal accusation. Yet none of them affect the defendant's opportunity to have his day in court, other than at most indirectly. Forfeiture applied to attorneys' fees, on the other hand, directly and severely affects the defendant's exercise of his rights due under our Constitution.

Moreover, purveyors of caviar, travel agents, and operators of movie theaters may suffer slightly as a result of losing customers under criminal indictment, although they presumably will be able to resist any government-initiated forfeiture proceeding directed at them to recover assets transferred to them by the defendant in exchange for goods or services, qualifying as bona fide purchasers without knowledge. Criminal defense attorneys, on the other hand, will be dramatically affected. Not only do they stand to lose their basic customers, but if their client is convicted, they risk loss of fees received for services provided in good faith. Unlike caviar dealers, travel agents, and movie theater owners, who rarely know or care about the source of their customers' payments, criminal defense lawyers are almost inevitably on notice that their clients' payments may be from the proceeds of crime.<sup>78</sup> Ironically, criminal defense attorneys are the only provid-

---

78. See *United States v. Monsanto*, 852 F.2d 1400, 1410 (2d Cir.) (Winters, J., concurring,

ers of legitimate preconviction services to the accused whose fees will be routinely subject to forfeiture, and this is so precisely because they are the only such providers whose relationship with the accused is constitutionally protected.

The combination of these financial effects and the inherent ethical problems created by fee forfeiture will deter private counsel from taking these cases. This will have a devastating effect on the criminal defense bar and on the very nature of our adversary system. Additionally, it will deprive defendants of the ability to be represented by counsel of choice.

# 1. THE FUNDAMENTAL RIGHT TO COUNSEL OF CHOICE: THE HISTORICAL ORIGINS

Like many fundamental constitutional rights, the right to counsel of choice is not absolute and may depend on the financial resources of the individual who seeks to exercise it. The right, however, is unquestionably an "essential component" or "essential element" of the sixth amendment.<sup>79</sup> Moreover, although the right to appointed counsel is now well-recognized,<sup>80</sup> the framers designed the sixth amendment primarily to protect the right to counsel of choice. This is revealed by an examination of the historical origins of the sixth amendment and of the most famous trial of the colonial period, the trial of John Peter Zenger,<sup>81</sup> which stands both as a vindication of the right to retain counsel of choice and an early demonstration of the importance of the right.

In essence, the sixth amendment was a reaction against the prior English practice of prohibiting counsel in serious criminal cases and requiring the defendant to "appear before the court in his own person and conduct his own cause in his own words."<sup>82</sup> The harshness of the

---

joined by Meskill & Newman, JJ.), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

79. *United States v. Phillips*, 699 F.2d 798, 801 (6th Cir. 1983), *overruled on other grounds*, *United States v. Tosh*, 733 F.2d 422 (6th Cir. 1984); *Linton v. Perini*, 656 F.2d 207, 208 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *see also United States v. Unit No. 7 & Unit No. 8 (Kiser)*, 853 F.2d 1445, 1450 (A defendant's sixth amendment "right to hire private counsel to aid in his defense" is an interest "among the highest in our constitutional hierarchy of values.") *mandate stayed by* 864 F.2d 1421 (8th Cir. 1988).

80. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 458 (1942)); *cf. Evitts v. Lucey*, 469 U.S. 387 (1985) (right to appointed counsel on first direct appeal); *Douglas v. California*, 372 U.S. 353 (1963) (same).

81. *See infra* notes 105-57 and accompanying text.

82. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 211 (2d ed. 1898), *quoted in Faretta v. California*, 422 U.S. 806, 823 (1975); *see also Argersinger*, 407 U.S.

practice is illustrated by one of the most famous English treason trials, the 1586 trial of Mary Stuart, Queen of Scots.<sup>83</sup> Mary, who faced charges of conspiring to assassinate Queen Elizabeth I, requested the assistance of counsel, but was refused on the ground that "forasmuch as it was a matter of de facto and not de jure, and altogether concerned a criminal cause, she neither needed nor ought to be allowed council in answering thereof."<sup>84</sup> As a result, Mary was forced to attempt to defend herself in a language that was not her own, making a mere naked denial of the charges.<sup>85</sup> She protested: "The laws and statutes of England are to me most unknown; I am destitute of counsellors, and who shall be my peers I am utterly ignorant. My Papers and Notes are taken from me, and no man dareth step forth to be my advocate."<sup>86</sup> The court ignored Queen Mary's protests, and she was convicted and executed by decapitation.<sup>87</sup>

The English common law practice of prohibiting a defendant from being represented by counsel in felony and treason cases was "so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers."<sup>88</sup> Under the pressure of

---

at 30; *Betts*, 316 U.S. at 466; *Powell v. Alabama*, 287 U.S. 45, 60 (1932); J. BEAL, A TREATISE ON PLEADING AND PRACTICE § 224, at 251-52 (1899); W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-10 (1955); J. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800 356 (1986); J. BELLANY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 166 (1986); 5 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, *supra* note 8, at \*345, 355-58; M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 228 (1936); G. WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 6-9 (3d ed. 1963).

83. Trial of Mary Queen of Scots, 1 How. St. Tr. 1161 (1586); see A. STEWART, TRIAL OF MARY QUEEN OF SCOTS (1951).

84. Letter from Sir Frances Walsingham to Sir Edward Stafford, *reprinted in* A. STEWART, *supra* note 83, at 192.

85. *Mary Queen of Scots*, 1 How. St. Tr. at 1170-88.

86. *Id.* at 1169.

87. *Id.* at 1190, 1195-1201, 1207. Another renowned illustration of the English practice was the 1649 trial of the Protestant dissenter and leveler, John Lilburne, for the treasonous act of writing a pamphlet calling for the impeachment of Oliver Cromwell. Trial of Lt. Col. John Lilburne, 4 How. St. Tr. 1269 (1649). Lilburne sought counsel: "I again humbly desire to have counsel assigned to me to consult with, what these formalities in law signify; so that I may not throw away my life ignorantly upon forms." *Id.* at 1294. His request was denied, and he challenged the court: "[T]hen order me to be knocked on the head immediately in the place where I stand, without any further trial, for I must needs be destroyed, if you deny me all the means of my preservation." *Id.* at 1297. Unlike Queen Mary, however, Lilburne successfully defended himself, declining to admit or deny his authorship of the pamphlet he was accused of having written. *Id.* at 1292. His case is credited with establishing the privilege against self-incrimination in English law. See L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 307 (2d ed. 1986).

88. *Powell v. Alabama*, 287 U.S. 45, 60 (1932). For example, Blackstone criticized the incongruity of the practice, asking: "Upon what face of reason can that assistance [of counsel]



criticism, the English rule began to change in the period preceding the American Revolution. The rule was relaxed in 1695 in order to permit counsel in treason cases.<sup>89</sup> It was mitigated in other felony cases in the early 1700's by the increased willingness of courts to permit counsel to argue points of law.<sup>90</sup>

The colonies clearly rejected the English rule<sup>91</sup> as obnoxious to basic principles of justice.<sup>92</sup> At the time of the adoption of the United States Constitution, the constitutions of the states guaranteed "that a defendant is not to be denied the privilege of representation by counsel of his choice."<sup>93</sup> The early colonial charters established that the "right to counsel" meant to the colonists "a right to choose between pleading through a lawyer and representing oneself."<sup>94</sup> At the time James Madison drafted the sixth amendment, some state constitutions guaranteed the right to be heard by counsel and others provided a right to be "allotted counsel."<sup>95</sup> Section 35 of the Judiciary Act of 1789, enacted by the First Congress and signed by President Washington one day before the framers proposed the sixth amendment, provided that "in all the courts of the United States, the parties may

---

be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" 5 W. BLACKSTONE, *supra* note 8, at \*355. The practice was defended by Chief Justice Coke, who argued that prohibition of counsel did not prejudice the accused because "first, the testimonies and proofs of the offense ought to be so clear and manifest, as there can be no defense of it; secondly, the court ought to be instead of counsel for the prisoner." G. WILLIAMS, *supra* note 82, at 8 (quoting *King v. Thomas*, 2 Bulstrode 147, 80 Eng. Rep. 1022 (1613)). Glanville Williams characterized this apology for the practice as "pure humbug." *Id.*

89. W. BEANEY, *supra* note 82, at 9 (citing 7 & 8 W. 3, c. 3, s. 1).

90. W. BEANEY, *supra* note 82, at 9-10; S. Landsman, *supra* note 76, at 16. The movement for reform culminated in legislation in 1836 granting the right to retain counsel in all cases. W. BEANEY, *supra* note 82, at 11 (citing 6 & 7 W. 4, c. 114, s. 1); T. COOLEY, CONSTITUTIONAL LIMITATIONS 698 (8th ed. 1927) ("[I]t has cost a long struggle, continuing into the present century, to rid the English law of one of its most horrible features.").

91. See *Holden v. Hardy*, 169 U.S. 366, 386 (1898) ("[To] the credit of [England's] American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."). Even before adoption of the federal Constitution, the English rule was rejected by the colonies and by both judicial practice and constitutional provision. *Faretta*, 422 U.S. at 827 ("Colonial judges soon departed from ancient English practice and allowed accused felons the aid of counsel for their defense."); *Betts v. Brady*, 316 U.S. 455, 466 (1942) (The constitutions of the colonies "were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions."); *Powell*, 287 U.S. at 61 ("The rule was rejected by the colonies."); *id.* at 64 ("[I]n at least twelve of the thirteen colonies the rule of the English common law . . . had been definitely rejected and the right to counsel fully recognized . . .").

92. See, e.g., Z. SWIFT, II A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 398-99 (J. Byrne printer 1795-96) ("We have never admitted that cruel and illiberal principle of the common Law of England that when a man is on trial for his life, he shall be refused counsel . . ."), quoted in *Powell*, 287 U.S. at 63 n\*.

93. *Betts*, 316 U.S. at 465-71.

94. *Faretta*, 422 U.S. at 828; see W. BEANEY, *supra* note 82, at 14-18.

95. *Faretta*, 422 U.S. at 831; see W. BEANEY, *supra* note 82, at 18-22.

plead and manage their own causes personally or by the assistance of . . . counsel."<sup>96</sup>

Therefore, the framers meant to protect the right to retain counsel when they guaranteed in the sixth amendment the right of the accused "to have the Assistance of counsel for his defense."<sup>97</sup> By rejecting the English practice that denied the accused the right to appear through counsel in felony and treason cases, "[t]he Sixth Amendment thus extended the right to counsel beyond its common law dimensions."<sup>98</sup> The sixth amendment, however, was not regarded as providing a right to appointed counsel.<sup>99</sup> The contemporaneous understanding was that "the right to counsel meant the right to retain counsel of one's own choice and at one's own expense."<sup>100</sup> Indeed, this was the understanding until the Supreme Court, in the 1938 case of *Johnson v. Zerbst*,<sup>101</sup> first read the sixth amendment to require that

96. 1 Stat. 73, 92 (1789); see *Faretta*, 422 U.S. at 805-06; W. BEANEY, *supra* note 82, at 28. This right is currently codified at 28 U.S.C. § 1654 (1982).

97. U.S. CONST. amend. VI; see W. BEANEY, *supra* note 82, at 22-24. The amendment generated little discussion, and there is no basis to believe that it was understood to go beyond the right to retain counsel. W. BEANEY, *supra*, at 24, 28-29.

98. *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972).

99. *Bute v. Illinois*, 333 U.S. 640, 660-66 (1948) ("[T]he right guaranteed [by the sixth amendment] is one of employing counsel, not one of having counsel provided by the Government." (quoting NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (Wickersham Commission), REPORT ON PROSECUTION 30 (1931))); Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L.Q. REV. 1, 7 (1944) ("[F]rom its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment . . . was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him"); see W. BEANEY, *supra* note 82, at 28-29. In his analysis of the original understanding of the sixth amendment, Professor Beane points to the action of Congress in adopting Section 35 of the Judiciary Act of 1789, 1 Stat. 73, signed the day the sixth amendment was proposed by Congress, and the federal criminal code of 1790, 1 Stat. 112, passed seven months before the amendment's ratification, as revealing that the amendment's drafters contemplated the right to retain counsel and not a right of appointed counsel. The 1789 statute provided that parties in federal courts could appear personally or by the assistance of counsel. 1 Stat. at 92. If the same Congress that proposed the sixth amendment believed that it "embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." W. BEANEY, *supra*, at 28. The 1790 statute provided for the appointment of counsel upon request of the defendant in capital cases in federal court. 1 Stat. 118. Beane asks:

If the proposed Sixth Amendment counsel provision included a guaranty of appointed counsel in all felony cases, why did Congress pass this halfway measure? It is logical to conclude that Congress passed the act because the Sixth Amendment was irrelevant, in its view, to the subject of appointment of counsel

. . . .

W. BEANEY, *supra*, at 28.

100. W. BEANEY, *supra* note 82, at 21. Justice Story described the sixth amendment right to counsel as "the right to have . . . counsel employed for the prisoner." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1788, at 665-66 (1833).

101. 304 U.S. 458 (1938). The right to appointed counsel was not, however, held applicable to the states except in the more limited context in which due process required it to avoid an

counsel be appointed in any federal case in which the accused had no attorney and did not waive the assistance of counsel. Prior to *Zerbst*:

there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist the accused in his defense, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired.<sup>102</sup>

Justice Black's opinion in *Zerbst* for five members of the Court thus gave new meaning to the sixth amendment. Not surprisingly perhaps, in view of the absence in the historical record of any support for a constitutional right to appointed counsel, Black ignored history in announcing the existence of the new right.<sup>103</sup>

Not only did the Supreme Court understand the sixth amendment, from its adoption until 1938, as protecting the "right of the accused to be represented by counsel of his own if he so desired,"<sup>104</sup> but also the colonists would have been shocked at the notion that a defendant could be deprived of the right to retain his own counsel and instead ordered to stand trial with counsel appointed by the court. The most celebrated trial of the colonial era, and one that had a profound effect on the framers—the trial of John Peter Zenger, a New York printer charged with printing false and seditious articles criticiz-

---

unfair trial. *E.g.*, *Betts v. Brady*, 316 U.S. 455, 473 (1942); *Powell v. Alabama*, 287 U.S. 45 (1932). *Betts*, of course, was ultimately overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the sixth amendment right to appointed counsel is applicable to the states through the due process clause of the fourteenth amendment.

102. *Bute*, 333 U.S. at 661.

103. Professor Beane labeled Justice Black's opinion "notable" for its "indifference to the historical aspects of the right to counsel." W. BEANEY, *supra* note 82, at 42.

The probable intentions of the proponents or ratifiers of the Sixth Amendment were ignored. This rather cavalier treatment of the historical phases of a question presented for the first time to the Court suggests that the majority of the justices wished to gain some advantage from the lack of prior decisions which had direct relevance to the interpretation of the Sixth Amendment provision at the time. It was obvious that this particular judicial vacuum could not be filled as the justices wished by recourse to history. . . . If, in examining the Court's technique, one used the narrow historical approach to constitutional interpretation, he would find it difficult to justify this decision. Black, with a specific goal in view, wisely refrained from the type of historical reconstruction which the Court so frequently indulges in when history apparently supports the desired position. He ignored both the action of the first Congress in passing a law in 1790 which required the appointment of counsel in capital cases at the very time that the Sixth Amendment was being proposed and the generally accepted meaning of the counsel provision of the states in 1791, when the Amendment was ratified. In effect, the Court chose to adopt a more enlightened procedure because modern conditions and attitudes seemed to make such action desirable.

*Id.* at 42, 44.

104. *Bute*, 333 U.S. at 661.

ing the government<sup>105</sup>—stands as a vindication of the right to appear through chosen counsel, rather than one appointed by the court.

Zenger's newspaper, the *New York Weekly Journal*, criticized the despotic rule of William Cosby, who had been appointed Governor of the British colony of New York in 1731 by King George II.<sup>106</sup> Although appointed in July of 1731, Cosby did not arrive in New York until August of 1732.<sup>107</sup> In the intervening period, Rip Van Dam, a prominent New York politician, had served as acting governor.<sup>108</sup>

The "venal, tyrannical and overbearing" Cosby alienated a number of New York politicians soon after his arrival in the colony when he demanded that Van Dam relinquish half the salary he had earned as acting governor.<sup>109</sup> Van Dam refused, and Cosby filed suit in the New York Supreme Court, asking the court to sit as a court of exchequer.<sup>110</sup> This would have avoided a jury trial in which a jury of New York colonists presumably would have been more sympathetic to Van Dam than to the royal Governor.<sup>111</sup> Courts of exchequer, however, were despised in the colonies as arbitrary tribunals composed of high government officials who would not be as sympathetic to those who were not well-connected to the government as would common law courts in which trial by jury prevailed.<sup>112</sup> When Chief Justice Lewis Morris of the New York Supreme Court ruled against Governor Cosby's right to use the court in the suit against Van Dam,

---

105. A narrative of the trial with commentary, prepared by James Alexander, one of Zenger's attorneys, was printed by Zenger in 1736, shortly after the trial, and was widely distributed in colonial America. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (various eds.). The book has been reprinted many times, often as parts of longer works on the trial. See, e.g., J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (S. Katz 2d ed. 1972) [hereinafter Katz]; L. RUTHERFURD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER'S IMPRINTS (1904) (containing an exact reproduction of Alexander's original narrative); THE TRIAL OF PETER ZENGER (V. Buranelli ed. 1957) [hereinafter Buranelli]. My description of the trial, *infra* notes 98a-155 and accompanying text, is drawn from the original narrative, from the works cited above, and from Finkelman, *The Zenger Case: Prototype of a Political Trial*, in AMERICAN POLITICAL TRIALS 21 (M. Belknap ed. 1981). Citation to the Alexander narrative is to the Katz edition and is referred to as *Narrative*.

106. Finkelman, *supra* note 105, at 24.

107. *Id.*

108. *Id.* at 25.

109. *Id.* at 24.

110. *Id.* at 25.

111. Katz, *Introduction*, in Katz, *supra* note 105, at 3.

112. *Id.* at 25; Katz, *The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 401-23 (S. Katz 2d ed. 1976).

Cosby dismissed Morris from office.<sup>113</sup> In order to ensure the Governor's control over the court, he replaced Morris with James DeLancey, then a young judge on the court.<sup>114</sup> Morris then organized a number of prominent New Yorkers, including Van Dam and attorneys James Alexander and William Smith, into an anti-Cosby political faction.<sup>115</sup>

The *New York Weekly Journal*, formed in November of 1733 in response to these and other incidents of corruption by the Cosby administration, functioned as an "instrument of propaganda" in the growing political war between the Morris faction and the Governor.<sup>116</sup> Its founders were Zenger, attorney James Alexander, and several other Morris supporters.<sup>117</sup> With Zenger as its editor and publisher, the newspaper became an important weapon in the heightening political battle waged against the Governor.<sup>118</sup> The *Journal* pointedly criticized the Governor, often using innuendo, allegory, and satire.<sup>119</sup> In response, the Governor ordered four issues of the *Journal* to be burned publicly and had Zenger arrested.<sup>120</sup>

Two noted New York attorneys who had been leaders in the opposition movement, James Alexander and William Smith, came to Zenger's defense.<sup>121</sup> Judge DeLancey, the Cosby lieutenant appointed to replace Lewis Morris as Chief Justice, rebuffed the lawyers'

---

113. The Lords of the Board of Trade in London later declared that the removal of Morris had been illegal. Finkelman, *supra* note 105, at 31.

114. Buranelli, *Introduction*, in Buranelli, *supra* note 105, at 38 ("Cosby had hand-picked his judge to insure control of the court."); Finkelman, *supra* note 105, at 24 (referring to DeLancey as "the governor's handpicked jurist").

115. Finkelman, *supra* note 105, at 25.

116. In 1733 the Morrisites won sweeping victories in various local elections. Morris himself defeated a Cosby appointee in an election as representative of Westchester County to the Provincial Assembly notwithstanding the attempt of the local sheriff, a Cosby partisan, to corrupt the balloting. Finkelman, *supra* note 105, at 23, 26; Katz, *Introduction*, in Katz, *supra* note 105, at 1-2.

117. Zenger, a German immigrant who had opened a printshop in 1726, was selected as the *Journal's* publisher and nominal editor. Zenger was one of only two printers in New York at the time, and the other, William Bradford, with whom Zenger had earlier apprenticed, then served as Governor Cosby's official printer. Finkelman, *supra* note 105, at 41 n.17 (citing I. THOMAS, *THE HISTORY OF PRINTING IN AMERICA* (1810 & reprint 1970)).

118. Katz, *Introduction*, in Katz, *supra* note 105, at 11.

119. Finkelman, *supra* note 105, at 26. It also introduced to its readers the Whig ideology of the early eighteenth century, with philosophical and ideological essays written by Alexander and Morris and reprintings of essays by English writers such as Joseph Addison, Richard Steele, and the authors of "Cato's letters," John Tranchard and Thomas Gordon. *Id.* The newspaper advocated constitutional checks on arbitrary rulers, the virtues of representative government, and freedom of the press. *Id.*

120. Finkelman, *supra* note 105, at 27.

121. *Id.* at 31. James Alexander was also an editor of the *Journal*. *Id.* at 26.

attempts to win Zenger's release and set an excessive bail,<sup>122</sup> which kept Zenger in jail for nearly nine months.<sup>123</sup> When two grand juries refused to indict him, Attorney General Richard Bradley filed an information charging Zenger with seditious libel.<sup>124</sup> The printer was brought to trial in August of 1735 before Judge DeLancey.<sup>125</sup>

When defense attorneys Alexander and Smith challenged DeLancey's authority to act as judge by questioning the validity of his commission and the fairness of his presiding in the case,<sup>126</sup> DeLancey responded by disbarring them.<sup>127</sup> This unprecedented<sup>128</sup> order disbarring Alexander and Smith "well illustrates the intense and bitter partisanship that characterized the action of the government party."<sup>129</sup> Cosby and his allies, including Judge DeLancey, were determined to

---

122. Although under English law DeLancey was required to set bail "according to the quality of the prisoner, and the nature of the offense," he demanded a bail for Zenger, accused of a relatively minor offense, of ten times the printer's net worth. Finkelman, *supra* note 105, at 27. The high bail seemed designed to keep Zenger, one of the only two printers in colonial New York at the time, *see supra* note 117, in jail and away from his printshop; indeed he was jailed for nearly nine months and "denied the use of pen, ink and paper, and the liberty of speech with any persons." Finkelman, *supra* note 105, at 27. Thus, although largely a pawn in the game between the Morrisites and the Governor's forces, Zenger became a martyr. During Zenger's detention his family continued to publish the *Journal* with Alexander's help. *Id.* at 30.

123. *Id.* at 27.

124. Cosby's counterattacks against the *Journal* had been rebuffed by a number of colonial political institutions. Finkelman, *supra* note 105, at 26-29. When two successive grand juries declined to indict Zenger, Cosby asked the legislature to order various issues of the *Journal* to be publicly burned. The popularly elected Assembly refused, so Cosby had the order issued by the Governor's Council, which he dominated. However, the popularly elected and Morris dominated New York city council, known as the Court of Quarter Sessions, refused the sheriff's request to direct the common hangman or whipper to conduct the public burning of the newspapers. As a result, the sheriff himself, together with several other Cosby appointees, publicly burned the papers. Charging Zenger in an information after the representative grand jury refused to return an indictment was unpopular in colonial America, both because it frustrated the grand jury's role as a popular check on arbitrary government and because Attorney General Bradley was known for abusing the power for pecuniary gain. Finkelman, *supra*, at 28-29.

125. Finkelman, *supra* note 105, at 33.

126. *See Narrative*, in Katz, *supra* note 105, at 50-51; Finkelman, *supra* note 105, at 31-32. Among the grounds for challenge was the fact that Cosby had appointed DeLancey to serve "during pleasure" instead of "during good behavior," as required by English and colonial law. *Id.*

127. DeLancey told attorney Smith in open court: "You have brought it to that point that either we [DeLancey and associate Judge Philipse, also challenged by the lawyers] must go from the bench or you from the bar: Therefore we exclude you and Mr. Alexander from the bar . . . ." *Narrative*, in Katz, *supra* note 105, at 53. The judge labelled the actions of the attorneys as contempt. *Id.* at 54.

128. L. RUTHERFORD, *supra* note 105, at 51 ("It is the only instance in legal history of such an order being issued for such a reason.").

129. *Id.*; *see* Finkelman, *supra* note 105, at 32 ("This was undoubtedly the most highhanded action by any member of the Cosby administration.").

defeat the growing populist opposition to their regime, and the upcoming trial of Zenger was an important battle they needed to win.<sup>130</sup> The disbarment was "a shrewd move," calculated to increase the likelihood of Zenger's conviction<sup>131</sup> by depriving him of his chosen counsel when "there were no attorneys in the province who would be so vigorous and bold in defense of the printer as Alexander and Smith."<sup>132</sup>

Following the disbarment of his attorneys, Zenger, without funds, immediately petitioned the court for appointment of counsel.<sup>133</sup> DeLancey obliged him by appointing John Chambers, "a competent lawyer but a Governor's man."<sup>134</sup> Chambers "was a young man without much experience in the law, and had been one of the signers of [an] address complimenting Cosby's administration, and was really affiliated with the court party."<sup>135</sup> Chambers had Zenger plead not guilty and was successful in avoiding an attempt to pack the jury.<sup>136</sup> He certainly lacked the zeal of Alexander and Smith, however.<sup>137</sup> Zenger's friends had little confidence in the court-appointed attorney,<sup>138</sup> Alexander was "apparently skeptical of Chambers' ability to defend Zenger properly"<sup>139</sup> and, along with Smith, began to look for another lawyer to try the case.<sup>140</sup>

At the trial, Chambers' opening statement asserted that Zenger's statements were not specific enough to be libelous, and that the proof the jury would hear would be deficient to establish libel.<sup>141</sup> Although his strategy was not as bold as that planned by Alexander, "it was

---

130. Katz, *Introduction* in Katz, *supra* note 105, at 20.

131. Finkelman, *supra* note 105, at 32; see L. RUTHERFORD, *supra* note 105, at 56; accord Katz, *Introduction*, in Katz, *supra* note 105, at 21 (The disbarment "can probably be explained as a tactic to deprive Zenger of competent legal counsel, since there were few lawyers in New York at the time and probably none so skilled as Smith and Alexander.").

132. Finkelman, *supra* note 105, at 32.

133. L. RUTHERFORD, *supra* note 105, at 56.

134. Katz, *Introduction*, in Katz, *supra* note 105, at 21; Finkelman, *supra* note 105, at 32 ("a competent attorney, but a member of the pro-Cosby faction").

135. L. RUTHERFORD, *supra* note 105, at 57.

136. "He prevented a stacked jury when the clerk offered a selected list of jurors instead of the names listed in the freeholders book. Later, when the sheriff altered the list of possible jurors, Chambers again interceded on his client's behalf." Finkelman, *supra* note 105, at 32.

137. L. RUTHERFORD, *supra* note 105, at 56. For example, Chambers declined to press the point that his exceptions should be part of the record.

138. Katz, *Introduction*, in Katz, *supra* note 105, at 22.

139. *Id.* at 220 n.60.

140. *Id.*

141. Chambers' opening statement is only summarized in Alexander's narrative of the trial. *Narrative*, in Katz, *supra* note 105, at 61. His brief for the opening statement is reprinted, however, in an appendix to the Katz edition. *John Chambers' brief*, in Katz, *supra*, at 148-51 app. B.

competent and indicated that he proposed a conscientious defense of his controversial client."<sup>142</sup> However, "the stage seemed to be set for a weak defense of the printer."<sup>143</sup> Alexander, although disbarred, had continued to work on the case and developed a more daring strategy than the conventional one conceived by Chambers.<sup>144</sup> The plan was to base Zenger's defense on the truth of the *Journal* articles, thereby trying Cosby in the process, and on that basis to seek a jury acquittal on the libel charges.<sup>145</sup>

With the financial backing of Lewis Morris, Alexander engaged Andrew Hamilton, a distinguished attorney from the neighboring colony of Pennsylvania and reputedly the best lawyer in North America, to execute the defense plan.<sup>146</sup> Following Chambers' opening statement, Hamilton, appearing unannounced, came forward to represent Zenger.<sup>147</sup> Judge DeLancey, undoubtedly aware of Hamilton's reputation and "startled" by his sudden appearance,<sup>148</sup> took no action to prevent Hamilton from taking over the defense.<sup>149</sup>

Hamilton made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing the truth.<sup>150</sup> Admitting that Zenger had published the statements in question, he asserted that the printer could not, however, be convicted of libel for printing the truth, and that the jury should determine not only whether Zenger had printed the statements, but also whether they constituted libel. These were novel contentions unsupported by English common law.<sup>151</sup> Attorney General Bradley, trying the case for the government, argued that truth was no defense under British law.<sup>152</sup> Judge DeLancey agreed and instructed the jury that it was to determine only whether Zenger had published the statements, leaving

---

142. *John Chambers' brief*, in Katz, *supra* note 105, at 148.

143. Katz, *Introduction*, in Katz, *supra* note 105, at 23.

144. Finkelman, *supra* note 105, at 33.

145. Buranelli, *Introduction*, in Buranelli, *supra* note 105, at 70.

146. Katz, *Introduction*, in Katz, *supra* note 105, at 22; L. RUTHERFORD, *supra* note 105, at 58-59. Hamilton, "perhaps the most famous and competent attorney in the mainland colonies," had previously "been involved in political disputes in Pennsylvania that were similar to the Morris-Cosby rivalry in New York . . . ." Finkelman, *supra* note 105, at 33.

147. Finkelman, *supra* note 105, at 33.

148. *Id.*

149. *Id.*

150. *Id.* at 22, 33, 40 n.1.

151. *Id.* Indeed, not only was truth not a defense to libel at the time, but it was considered an aggravation of the crime. *Id.* at 34, 40 n.1. Because the doctrine that he was trying to overturn had originated in the Star Chamber, abolished by Parliament during the English Civil War, Hamilton could argue that it should no longer be followed. *Id.*

152. Katz, *supra* note 105, at 74.



the law of libel to the court.<sup>153</sup> Hamilton's speech therefore was an invitation to jury nullification. The New York jury, striking a blow for colonial self-government and freedom from despotic rulers, rebuffed the court and acquitted Zenger.<sup>154</sup> Hamilton was honored for his stirring defense, and Alexander and Smith later won reinstatement to the bar after an appeal to the New York legislature.<sup>155</sup>

The trial of John Peter Zenger, widely known, read about, and debated in eighteenth century England and America, was an important political and ideological precedent that made possible the American Revolution some forty years later.<sup>156</sup> It played an important role in forging many of the principles later enshrined in the Constitution and Bill of Rights, including freedom of speech and of the press, the independent jury as a bulwark against government tyranny, and the right to self-government.<sup>157</sup> Among them surely was the indepen-

---

153. *Id.* at 69 ("A libel is not to be justified; for it is nevertheless a libel that it is *true*."); *id.* at 75, 78, 100.

154. Finkelman, *supra* note 105, at 35.

155. L. RUTHERFORD, *supra* note 105, at 139-40.

156. Zenger's case was seen as "a victory of democracy and of the people over tyranny," and an "important *political* precedent" for both "the American Revolution and the Bill of Rights." Finkelman, *supra* note 105, at 22, 36, 38. The trial "helped create a climate of civil disobedience in which the idea of political independence was conceived and nurtured." *Id.* at 22 (quoting R. MORRIS, *FAIR TRIAL: FOURTEEN WHO STOOD ACCUSED FROM ANNE HUTCHINSON TO ALGER HISS* 69 (rev. ed. 1967)). It became "an important ideological and political precedent." Finkelman, *supra* note 105, at 22. The impact of the Zenger trial on colonial America was significantly augmented by the publication in 1736 of Alexander's *Narrative* of the trial, *see supra* note 105, and by its constant reprinting in America and England during the colonial period. Finkelman, *supra*, at 24, 36-37. By 1738 there were probably five editions of the *Narrative* in print. *Id.* at 37. Other editions appeared in England in 1750, 1752, 1765, and 1784, and in America in 1756, 1770, and 1799. *Id.* The *Narrative* became the most famous publication issued in the period before the Revolution. *Id.* It was, "with the possible exception of *Cato's Letters*," the "most widely known source of libertarian thought in England and America during the eighteenth century." *Id.* (quoting L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICA* 133 (1960)). Thus, the *Narrative* was widely available throughout the colonial period. It was well known in colonial America, "for each generation had read reprints of the case." *Id.* at 39. Moreover, the case provoked several articles critical of the principles it represented and a series of defenses written by James Alexander and published in Benjamin Franklin's *Pennsylvania Gazette*. *Id.* at 36-37. The colonists "had been reading and learning about" the principles of Zenger's case "for decades," and the case "was important to the lawyers and political thinkers of eighteenth-century England and America" and "had a lasting impact on the development of a libertarian ideology" in both countries. *Id.* at 39, 36, 37.

157. Finkelman, *supra* note 105, at 38 ("Zenger's case helped lead to . . . the creation of the Bill of Rights and freedom of the press."); *id.* at 22 (Zenger's trial was a precedent for the Bill of Rights, represents "a great victory for liberty and freedom of the press," and was "one of the landmarks in the development of freedom of the press."). The wide "availability of the Zenger *Narrative* and the memory of Zenger's victory were important factors in the creation of the new republic and the securing of a free press." *Id.* at 39. "[I]n the revolutionary period [Zenger's legacy] was always there as a guiding light for those who were gradually developing an ideology of freedom of expression." *Id.* at 40. Zenger's trial was "[t]he most famous

dence of the defense bar and its role as a significant check against a partisan or corrupt judge or prosecutor.

Imagine Zenger's trial, however, if Judge DeLancey had prohibited Hamilton from representing him, or if Attorney General Bradley had had such power and Chambers alone represented Zenger. If this had happened, Zenger would not have received a defense by a lawyer in whom he had confidence. Even though it appeared that the young attorney would have provided a competent defense by attacking the sufficiency of the proof on the publication charge, he would not have raised the arguments, unknown at the time under English law, that truth should constitute a defense and that the jury's role should extend to the determination of whether the statements published were libelous. The result of Zenger's trial presumably would have been quite different. Moreover, had DeLancey prohibited Zenger's representation by counsel of choice and insisted on Zenger appearing through the young court-appointed lawyer as a tactic to gain adversarial advantage—as he apparently had done earlier in disbarring Alexander and Smith,<sup>158</sup> the impact on the appearance of justice would have been severe. Can there be any doubt that the colonists, who in their colonial charters had rejected the English practice of prohibiting representation by counsel and affirmed the defendant's right to appear through his own chosen counsel, would have been outraged at such an attempt to force an appointed attorney on a defendant who wished to appear through counsel of his own choosing? Happily this is not what occurred, and Zenger's trial stands as a triumph for the institution of the independent criminal defense bar and a vindication of the right to counsel of choice. These lessons were fresh in the minds of the framers when they drafted the sixth amendment.<sup>159</sup>

That the framers were intent on protecting the right to appear through chosen counsel is further demonstrated by the actions of Congress in enacting the federal criminal code of 1790,<sup>160</sup> seven months after the sixth amendment was proposed but before it was ratified. The Act provided that a defendant in a treason or other capital case "shall be allowed to make his full defense by counsel," and further authorized the court "*upon his request, [to] assign to him such counsel not exceeding two, as he may desire.*"<sup>161</sup> Thus, although the

---

historical example of jury nullification in the United States." Gobert, *In search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 300 n.140 (1988).

158. See *supra* notes 126-32 and accompanying text.

159. Finkelman, *supra* note 105, at 40.

160. 1 Stat. 112; see *supra* note 99; W. BEANEY, *supra* note 82, at 28.

161. 1 Stat. 118 (emphasis added).

defendant could defend by counsel, one would not be appointed to represent him absent his assent.

Long before courts regarded the sixth amendment as a source for the right to appointed counsel,<sup>162</sup> the sixth amendment guaranteed the fundamental right to retain counsel of choice.<sup>163</sup> Appearance through retained counsel was the model the framers had in mind. Indeed, in 1932 when the Supreme Court first recognized a qualified right to appointment of counsel in capital cases as a matter of due process, it referred to this qualified right as "a logical corollary from the constitutional right to be heard by counsel."<sup>164</sup> Furthermore, in 1942, when discussing the right to self-representation,<sup>165</sup> the Court referred to the sixth amendment as embodying "the correlative right to dispense with a lawyer's help."<sup>166</sup> If the right to appointment of counsel and the right to self-representation are "corollaries," then the right to retain counsel of one's own choosing must be the primary right. It is this basic right to retain counsel that Judge Cooley, author of the most widely used nineteenth century constitutional law treatise, referred to as "perhaps [the defendant's] most important privilege."<sup>167</sup> Furthermore, it is this basic right that Justice Story referred to in his influential *Commentaries on the Constitution*, which equated the "right to counsel employed for the prisoner" with the right to trial by jury.<sup>168</sup>

This fundamental component of the sixth amendment right to counsel therefore is separate and distinct from the right to appointed counsel that it significantly predates. The right to counsel "includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to 'a fair opportunity to secure counsel of his own choice.'"<sup>169</sup> Furthermore, "a defendant must be given a reasonable opportunity to employ and consult with

---

162. *Johnson v. Zerbst*, 304 U.S. 458 (1938); see *supra* notes 101-103 and accompanying text.

163. See *supra* notes 79-105 and accompanying text.

164. *Powell v. Alabama*, 287 U.S. 45, 72 (1932).

165. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942).

166. *Id.* at 279, cited with approval in *Faretta v. California*, 422 U.S. 806, 815 (1975).

167. 1 T. COOLEY, *supra* note 90, at 700, quoted in *Powell*, 287 U.S. at 70. Cooley plainly was referring to the constitutional right to retain counsel, as the United States Supreme Court had not yet recognized a constitutional right to appointed counsel. Moreover, he accepted Story's earlier definition of the sixth amendment right to counsel, see *supra* note 100, as "the right to have . . . counsel employed for the prisoner." W. BEANEY, *supra* note 82, at 28-29. Indeed, Cooley retained Story's definition unchanged in his subsequent edition of Story's treatise on constitutional law. See 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION* § 1794 (T. Cooley ed. 1873).

168. 3 J. STORY, *supra* note 100, § 1788, at 665-66.

169. *Crooker v. California*, 357 U.S. 433, 439 (1958) (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932)).

counsel; otherwise, the right to be heard by counsel would be of little worth."<sup>170</sup> The right to counsel of choice has been widely recognized by both the Supreme Court,<sup>171</sup> and by the circuit courts.<sup>172</sup>

2. THE RIGHT TO COUNSEL OF CHOICE CONTRASTED WITH THE  
RIGHT TO APPOINTED COUNSEL: FURTHERING  
PARTICIPATORY AND AUTONOMY VALUES AS  
WELL AS THE INTEREST IN  
RELIABILITY

Would this right to counsel of choice, so dignified by our constitutional history and traditions, be satisfied by the provision of appointed counsel? In the context of forfeiture litigation, the government has contended that giving a defendant who is rendered impecunious by a pretrial restraining order an appointed attorney satisfies the

170. *Chandler v. Fretag*, 348 U.S. 3, 10 (1954).

171. See, e.g., *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment . . ."); *Crooker*, 357 U.S. at 439; *Chandler*, 348 U.S. at 9-10; *Bute v. Illinois*, 333 U.S. 640, 661 (1948); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

172. See, e.g., *United States v. Romano*, 849 F.2d 812, 818-19 (3d Cir. 1988); *United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987); *United States v. Diozzi*, 807 F.2d 10, 16 (1st Cir. 1986); *United States v. Rankin*, 779 F.2d 956, 958-60 (3d Cir. 1986); *In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick)*, 781 F.2d 238, 250-51 (2d Cir. 1985) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986); *Wilson v. Mintzes*, 761 F.2d 275, 285 (6th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir.), *cert. denied sub nom. Milburn v. United States*, 474 U.S. 994 (1985); *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984); *Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984); *United States v. James*, 708 F.2d 40, 44 (2d Cir. 1983); *United States v. Phillips*, 699 F.2d 798, 801 (6th Cir. 1983), *overruled on other grounds*, *United States v. Tosh*, 733 F.2d 422 (6th Cir. 1984); *United States v. Cicale*, 691 F.2d 95, 106 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *United States v. LaMonte*, 684 F.2d 672, 673 (10th Cir. 1982); *United States v. Curcio*, 680 F.2d 881, 884 (2d Cir. 1982); *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982); *United States v. Hobson*, 672 F.2d 825, 827-28 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); *United States v. Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979); *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978); *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *In re Taylor*, 567 F.2d 1183, 1186 n.1 (2d Cir. 1977); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); *United States v. Pigford*, 461 F.2d 648, 649 (4th Cir. 1972); *United States v. Seale*, 461 F.2d 345, 358 (7th Cir. 1972); *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215-16 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970); *United States ex rel. Davis v. McCann*, 386 F.2d 611, 618 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); *United States v. Mitchell*, 354 F.2d 767 (2d Cir. 1966); *United States v. Johnston*, 318 F.2d 288, 291 (6th Cir. 1963); *Releford v. United States*, 288 F.2d 298, 301-02 (9th Cir. 1961); *Lee v. United States*, 235 F.2d 219, 221 (D.C. Cir. 1956).

requirements of the sixth amendment.<sup>173</sup> Although a number of courts have accepted the government's argument,<sup>174</sup> even assuming that appointed counsel would provide the effective assistance of counsel mandated by the sixth amendment, this contention fundamentally misconceives the separate and distinct nature of the right to counsel of choice.<sup>175</sup>

The "essential aim" of the sixth amendment, as Mr. Chief Justice Rehnquist recently stated in *Wheat v. United States*,<sup>176</sup> may be "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."<sup>177</sup> A criminal justice system relying on appointed rather than retained counsel, however, is not the adversary system contemplated by the sixth amendment, no matter how effective such appointed advocates are. When the government seeks to deprive a defendant not of a particular preferred counsel as in *Wheat*,<sup>178</sup> but of the opportunity to select any private counsel, giving

---

173. See, e.g., Brief for the United States at 22, *United States v. Unit No. 7 & Unit No. 8* (Kiser), 853 F.2d 1445 (8th Cir. 1988) (Nos. 87-2499 to -2502) [hereinafter *Unit No. 7* Government Brief] ("[I]f [the] defendant is rendered indigent by the lawful seizure of certain property pursuant to the forfeiture statute, his constitutional rights will be fully protected by appointed counsel."); *Monsanto* Panel Government Brief, *supra* note 36, at 49 (Appellant's "constitutional rights would be fully protected by appointed counsel.").

174. *United States v. Moya-Gomez*, 860 F.2d 706, 725 (7th Cir. 1988), *petition for cert. filed* (U.S. Feb. 17, 1989); *United States v. Nichols*, 841 F.2d 1485, 1506-08 (10th Cir. 1988); *United States v. Caplin & Drysdale*, Chartered, 837 F.2d 637, 646 (4th Cir.) (en banc), *cert. granted*, 109 S. Ct. 363 (1988); *In re Grand Jury Duces Tecum* (Payden), 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979); Brickey, *supra* note 6, at 517-19.

175. In *United States v. Unit No. 7 & Unit No. 8* (Kiser), 853 F.2d 1445, *mandate stayed by* 864 F.2d 1421 (8th Cir. 1988), the court stated:

[W]e reject the government's argument that even if its action should push Kiser into indigency, the Sixth Amendment would be fully vindicated by offering him appointed counsel . . . This is an extraordinarily impoverished view of the non-indigent's right. In essence it collapses the two distinct rights into one, the lesser.

*Id.* at 1451.

176. 108 S. Ct. 1692 (1988).

177. *Id.* at 1697.

178. *Wheat* upheld, by a 5 to 4 vote, the trial court's refusal to permit the defendant to be represented at his individual trial by an attorney who represented two of his co-conspirators and thus was found to be subject to an actual conflict of interest. *Id.* at 1698. The majority found the sixth amendment right to "choose one's own counsel" to be "circumscribed." *Id.* at 1697. In addition to the situation presented by the facts in *Wheat*, the Court cited other situations in which the defendant's choice of counsel could be rejected, such as when the counsel chosen is not a member of the bar, when the defendant cannot afford to hire the attorney, or when the attorney has a previous or ongoing relationship with the government. *Id.* The Court found that the actual conflict of interest confronting the defendant's preferred counsel was justification for the district court's refusal to permit his selection, even though the defendant was willing to waive his right to conflict-free counsel. The Court determined that the societal interests in ensuring the conduct of trials within the legal profession's ethical

him a competent appointed lawyer will not satisfy the principles of the sixth amendment.<sup>179</sup>

In contexts other than fee forfeiture, lower federal courts have rejected the contention that deprivation of the right to counsel of choice can be cured by provision of appointed counsel.<sup>180</sup> These courts have adopted the view that denial of the right to counsel of choice does not require a showing of prejudice, but that the right is "so fundamental that any interference cannot be deemed harmless error" and must result in automatic reversal, even when the defendant was provided the effective assistance of counsel through appointed counsel.<sup>181</sup>

This view is grounded in the recognition that the right to counsel of choice serves substantial interests in addition to the general interest in accuracy in adjudication. As the Supreme Court recognized in *Flanagan v. United States*,<sup>182</sup> the right to counsel of choice "reflects constitutional protection of the defendant's free choice independent of

---

standards and in promoting the appearance of fairness in the criminal process outweighed the defendant's interest in asserting his right to representation by counsel of his choice. *Id.* at 1697-98.

179. See *infra* notes 225-39 and accompanying text.

180. See, e.g., *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986). The *Rankin* court stated:

The government argues that Rankin was competently represented by appointed counsel at trial. That, however, is not a relevant consideration. A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice. "Obtaining reversal for violation of such a right does not require [a] showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Flanagan v. United States*, 465 U.S. 259, 268 (1984). In this respect, the denial of one's selected lawyer is quite different from a claim of ineffective counsel where a harmless error test is appropriate. The right at stake here is similar to that of self-representation. "The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 . . . (1984).

*Id.* at 960-61; see also *United States v. Laura*, 607 F.2d 52, 58 (3d Cir. 1979) (The defendant "need not show that the dismissal [of counsel] was prejudicial.").

181. *United States v. Romano*, 849 F.2d 812, 820 (3d Cir. 1988); accord *United States v. Panzardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987); *United States v. Diozzi*, 807 F.2d 10, 16 (1st Cir. 1986); *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986); *Rankin*, 779 F.2d at 960-61; *Wilson v. Mintzes*, 761 F.2d 275, 285-86 (6th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1326-27 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984); *Linton v. Perini*, 656 F.2d 207, 211-12 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *Laura*, 607 F.2d at 58; *Gandy v. Alabama*, 569 F.2d 1318, 1323-25 (5th Cir. 1978); *United States ex rel. Ferenc v. Brierley*, 320 F. Supp. 406, 409 (E.D. Pa. 1970); *Stacy & Dayton, Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 111 n.132 (1988); see also *People v. Holland*, 23 Cal. 3d 77, 87, 588 P.2d 765, 770, 151 Cal. Rptr. 625, 630 (1978) (en banc).

182. 465 U.S. 259 (1984).

concern for the objective fairness of the proceeding.”<sup>183</sup> Allowing the defendant free choice in the critical matter of who will represent him at trial fosters both the reliability of the outcome and values unrelated to truth determination.<sup>184</sup> Thus the right to counsel of choice is critical to the basic trust between counsel and client that is a cornerstone of the adversary system.<sup>185</sup> This basic trust, indispensable to an effective attorney-client relationship, both increases the reliability of the trial and serves a crucial participatory function, “generating the feeling, so important to a popular government, that justice has been done.”<sup>186</sup> Like the right to self-representation, which exists in large

---

183. *Id.* at 267-68.

184. See Stacy & Dayton, *supra* note 181, at 107 n.109, 111 n.132.

185. *Linton*, 656 F.2d at 209; see *Polk County v. Dodson*, 454 U.S. 312, 324 n.17 (1981) (“Our adversary system functions best when a lawyer enjoys the whole-hearted confidence of his client.”); ABA STANDARDS FOR CRIMINAL JUSTICE § 4-3.1 commentary, at 4-29 (2d ed. 1980) (“Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence.”). In *Morris v. Slappy*, 461 U.S. 1 (1983), the Supreme Court rejected the contention that the defendant’s sixth amendment rights were violated by the denial of a continuance necessary to allow the defendant’s court-appointed counsel to represent him at trial. *Id.* at 14. The Court’s opinion ridiculed the court of appeals’ description of the sixth amendment as embracing a right to a “meaningful attorney-client relationship.” *Id.* at 1, 13-14 & n.6 (quoting *Slappy v. Morris*, 649 F.2d 718, 720 (9th Cir. 1981)). This dictum sufficiently disturbed four members of the Court to provoke them to voice their concern separately. *Id.* at 15 (Brennan, J., concurring, joined by Marshall, J.); *id.* at 29 (Blackmun, J., concurring, joined by Stevens, J.). The Court’s dictum should not be taken to mean that the sixth amendment does not value a meaningful attorney-client relationship, but merely that the amendment protects no separate right to such a relationship. See *id.* at 19-28 (Brennan, J., concurring, joined by Marshall, J.). Any sensible construction of the sixth amendment cannot ignore this underlying value. The majority of the Court found the value of a meaningful attorney-client relationship of limited importance in the context of *Slappy*, in which the defendant, although denied the continuance necessary for his preferred counsel to appear on his behalf, was represented by an appointed lawyer and the defendant did not assert that any particular problems arose that interfered with a meaningful attorney-client relationship. *Slappy* did not, of course, involve the right to retain counsel of choice, so honored by the history and traditions of the sixth amendment, but rather, the novel claim of a right to the appointment of counsel of choice, a claim the acceptance of which inevitably would have raised considerable administrative difficulties. *Id.* at 13; see *Tague, An Indigent’s Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 74-75 (1974). The dictum in *Slappy*, therefore, should not be read to disparage the wisdom of construing the sixth amendment with a view to fostering a meaningful relationship between attorney and client, but merely to reject the notion that the amendment protects a separate right to such a relationship.

186. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring); see also *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980) (One of the “central concerns of procedural due process” is “the promotion of participation and dialogue by affected individuals in the decisionmaking process.”); *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Codd v. Velger*, 429 U.S. 624, 636 (1977) (Stevens, J., dissenting); *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970); J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 177-80 (1985) (discussing “the claim that the dignity and self-respect of the individual can be protected only through processes of government in which there is meaningful participation by affected interests”); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 666 (2d ed. 1988) (“[I]ntrinsic” values of due process include a “chance to participate” by

part to "affirm the dignity and autonomy of the accused" by affording him some control over the proceeding,<sup>187</sup> the right to counsel of choice "is premised on respect for the individual."<sup>188</sup> The defendant's basic right to choose the type of defense he wishes to present, itself a fundamental constitutional right<sup>189</sup> supported by participatory and autonomy as well as reliability values, also supports the right to select counsel of choice, "[f]or the most important decision a defendant makes in shaping his defense is his selection of an attorney."<sup>190</sup> The defendant's choice of counsel also serves an important advocacy interest that falls within the protection of the first amendment.<sup>191</sup> A criminal defendant engages in communicative activity in the public forum of the courtroom largely through the attorney he chooses to advocate his positions. A crucial aspect of the participatory and autonomy values served by the right to counsel of choice is the selection and employment of the advocate who will assert the defendant's legal rights.

Giving the defendant the ability to select his own counsel therefore furthers both truth-seeking goals and participatory and auton-

---

affected individuals, "an opportunity that expresses their dignity as persons."); LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 153 (1978) (empirical showing that adversarial procedures are favored because they give disputants more "process control"); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976) ("[A] lack of participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable."); Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126, 127-28 (1977) (Due process vindicates values of "participation."); Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 20-21 (1974). The right to counsel of choice plays a critical role in fulfilling these participatory values. Thibaut and Walker's classic empirical work on litigant perceptions of alternative modes of process demonstrates that free choice of attorney contributes significantly to litigant satisfaction and perceived fairness. J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 83-84, 94-95, 118 (1975).

187. *McKaskle v. Wiggins*, 465 U.S. 168, 174, 176-77 (1984).

188. *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985); see *Faretta v. California*, 422 U.S. 806, 834 (1975) (recognizing right of self-representation out of "that respect for the individual which is the lifeblood of the law").

189. See *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Washington v. Texas*, 388 U.S. 14, 19 (1967); Clinton, *The Right to Present a Defense: An Emerging Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 716 (1976); Stacy & Dayton, *supra* note 181, at 110-13; Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 613 (1978).

190. *United States v. Laura*, 607 F.2d 52, 56 (3d. Cir. 1979). As Justice Marshall recently stated, a "primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense. . . . An obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative." *Wheat v. United States*, 108 S. Ct. 1692, 1700 (1988) (Marshall, J., dissenting, joined by Brennan, J.).

191. See *infra* Section III(B).



omy values.<sup>192</sup> None of these nontruth-seeking values underlying the right to counsel of choice is satisfied by substituting for it the right to an appointed counsel meeting the effective assistance of counsel standard. In addition, "unlike the right to counsel of choice, 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'"<sup>193</sup>

In this respect, the right to counsel of choice is like the right to self-representation,<sup>194</sup> and like that right, its deprivation cannot be remedied by the provision of appointed counsel, no matter how competent such appointed counsel may be.<sup>195</sup> Forcing a public defender or other appointed counsel on a defendant who is otherwise able to hire his own counsel and who desires to do so, without compelling justification, violates the sixth amendment. Requiring such an unwanted counsel instead of the counsel of defendant's choice is as offensive to the sixth amendment as insisting on unwanted counsel when defendant has chosen self-representation: "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not his defense."<sup>196</sup>

Permitting the defendant to select his own counsel honors his right to free choice and autonomy in a matter of vital concern to him.<sup>197</sup> In addition, it best effectuates the values underlying the right

---

192. *Laura*, 607 F.2d at 57. The right permits the defendant to "choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." *Id.* Recognition of the importance of uninhibited communication between an accused and his counsel is reflected in the privilege generally accorded attorney-client communications. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

193. *Wilson*, 761 F.2d at 285 (quoting *United States v. Cronin*, 466 U.S. 648, 658 (1984)).

194. See *United States v. Rankin*, 779 F.2d 956, 960-61 (3d Cir. 1980).

195. See *Faretta v. California*, 422 U.S. 806, 820 (1975) ("To thrust counsel upon the accused against his considered wish, thus violates the logic of the [sixth a]mendment."); *id.* at 833 ("[T]he notion of compulsory counsel was utterly foreign" to the Founders.).

196. *Id.* at 821.

197. See *id.* at 833-34 ("[T]hose who wrote the Bill of Rights . . . understood the inestimable worth of free choice."). Respect for individual autonomy is deeply rooted in American constitutional history and tradition, which were heavily influenced by Enlightenment views of popular sovereignty and limited government. See generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982). Thus, due process has been read to protect a liberty interest "in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (a woman's right to end a pregnancy); *id.* at 781 (Stevens, J., concurring); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (same); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (right to direct upbringing and education of children); *Meyer v. Nebraska*, 262 U.S.

to assistance of counsel by maximizing the trust and confidence between client and attorney that are preconditions to its successful exercise. Permitting the accused to select his own counsel also promotes his interest in having assistance independent of the sovereign that is prosecuting and judging him. It further promotes the public interest in preserving an independent, private criminal defense bar. The American tradition of an independent criminal defense bar functioning as a significant check on judicial and prosecutorial abuses of power predates the Revolution, as the trial of John Peter Zenger demonstrates.<sup>198</sup> In our system of justice it is essential that judges be independent,<sup>199</sup> that juries be more independent,<sup>200</sup> and that defense counsel be most independent. Indeed, independent counsel is institutionally indispensable to an independent judiciary and jury system.

The attorney's role in our society, and particularly in our criminal justice system, is essential to the safeguarding of our constitutional values. As Mr. Justice Frankfurter described it, "all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. . . . [The lawyer] stands 'as a shield' . . . in defense of right and to ward off wrong."<sup>201</sup> In the criminal process, when that shield must be wielded against government itself, restricting the defendant to a

---

390, 402 (1923) (same). As *Faretta* indicates, the Constitution's protection of autonomy values has been recognized in the criminal context. See *Faretta*, 422 U.S. at 834.

198. See *supra* notes 105-57 and accompanying text.

199. See U.S. CONST. art. III, § 1 (granting federal judges life tenure, subject to good behavior, and freedom from reductions in salary); 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 34 (rev. ed. 1966) (Madison); *The Federalist No. 78*, at 226 (A. Hamilton) (R. Fairfield ed. 1961); Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970); Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Kurland, *The Constitution and the Tenure of the Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); see also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Chandler v. Judicial Council*, 398 U.S. 74, 143 (1970) (Black, J., dissenting); *id.* at 137 (Douglas, J., dissenting); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-16 (1955) (dictum).

200. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968); *Bushell's Case*, 124 Eng. Rep. 1014 (C.P. 1670); 4 W. BLACKSTONE, *supra* note 8, at \*348.

201. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring); see also *Penson v. Ohio*, 109 S. Ct. 346, 352 (1988) ("[I]t is through counsel that all other rights of the accused are protected."); *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("[I]t is through counsel that the accused secures his other rights."); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."), quoted in *Penson*, 109 S. Ct. at 352, and *Kimmelman*, 477 U.S. at 377.

government-issued shield significantly undermines this protective function.

Forcing the accused to have an attorney selected and paid for by the sovereign—and in the case of attorneys employed by public defender offices, also recruited, trained, and supervised by it—instead of one chosen by the defendant, defies the value of free choice, jeopardizes independence, diminishes the defendant's trust in the system, and undermines his ability to reconcile himself to any adverse results of the proceeding. Furthermore, in the long run, permitting the prosecution to keep private defense counsel out of major criminal trials will destroy public confidence in the impartiality and integrity of our system of justice.

A defendant's sixth amendment rights may be exercised in one of three ways: he may choose a private counsel, an attorney may be appointed for him, or he may decline counsel and represent himself. Of the three, the first is the primary method; it is the one envisioned by the framers of the sixth amendment and the one with the longest history of constitutional recognition. Moreover, of the three, it is the preferred method. Neither appointed counsel nor self-representation conform as closely to our model of the adversary system,<sup>202</sup> nor do they effectuate the goals of promoting accuracy, fairness, and public acceptance of the criminal justice process that the sixth amendment seeks to serve.

### 3. THE APPROPRIATE CONSTITUTIONAL STANDARD

The right to counsel of choice is a fundamental right, honored by our history and traditions and protected by the sixth amendment. Like other fundamental constitutional rights, denial of this right should require compelling justification.<sup>203</sup> Although enjoyment of the right to choose counsel is available only to those with sufficient resources to exercise it, the conditional nature of the right cannot jus-

---

202. See *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

203. *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir.) (Feinberg, C.J., concurring, joined by Oakes & Kearse, JJ.), *cert. granted*, 109 S. Ct. 363 (1988). Chief Judge Feinberg stated:

The sixth amendment right to counsel of choice is a fundamental right that serves to protect other constitutional rights. It is a key element in our system of criminal justice and distinguishes that system from others that do not allow individuals the chance to resist in a meaningful way the imposition of government power upon them. Therefore, the right to counsel of choice cannot be infringed unless a compelling governmental purpose outweighs it.

*Id.*

tify governmental deprivation of the resources that the defendant would otherwise possess in order to exercise the right.

Virtually all constitutional rights cost money to exercise. The right to free speech is dependent upon the individual having sufficient resources to reach his audience. A listener's first amendment right to receive ideas is similarly dependent upon his ability to travel to a demonstration, purchase a book, pamphlet or newspaper, or own a television. A pregnant woman's right to choose an abortion is contingent upon her having the resources to afford one. Even the free exercise of religion may cost money. The absence of state action ordinarily precludes an assertion of a constitutional claim by an individual whose only bar to the exercise of these fundamental rights is a lack of financial resources.<sup>204</sup>

Constitutional rights generally tend to be negative in nature, restricting governmental intrusions on liberty. They impose on the government a duty to refrain from action preventing or burdening exercise of the right, not an affirmative obligation to facilitate its exercise by providing funds to those lacking sufficient resources to enjoy the right.<sup>205</sup> When, however, the individual possesses sufficient resources to exercise the right, but for the government's action in

---

204. See, e.g., *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state.' " (quoting *Cammarano v. United States*, 358 U.S. 515 (1959))); *Harris v. McRae*, 448 U.S. 297 (1980) (The constitutional right to choose to have an abortion does not require the government to fund abortions for poor women.). For this reason, the Fourth Circuit was wrong in *Caplin & Drysdale* when it equated "purely private predicaments [such as financial inability, that] may leave a defendant without the counsel of his choice" with government imposed forfeiture. *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 644, 645 (4th Cir.) (en banc) (rejecting a sixth amendment challenge to application of the forfeiture provisions to attorneys' fees), cert. granted, 109 S. Ct. 363 (1988); see also Brickey, *supra* note 6, at 533. The Eighth Circuit's analysis in *United States v. Unit No. 7 & Unit No. 8 (Kiser)*, 853 F.2d 1445, 1451, *mandate stayed by* 864 F.2d 1421 (8th Cir. 1988), is more compelling:

The government's action here cannot be equated to other "vagaries of life" which may deplete a defendant's resources. It is one thing for a person to be unable to pay his other lawyer because he or she lost money in bad investments, spent it in other ways, or never had it to begin with. It is an entirely different matter for the government . . . purposefully to deprive the defendant of the very assets he needs to pay his lawyer. This is more like a preemptive strike than a vagary of life.

*Id.*

205. See Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Negative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985). My citation of *Harris v. McRae* as an illustration of this principle in the preceding footnote should not be taken as an endorsement of the result reached in that case. Indeed, I believe that *McRae* was wrongly decided, see Tribe, *supra*, at 337-39, although I do think that constitutional rights generally should be regarded as negative in nature. In any event, whatever the arguments may be for declining to impose a constitutional duty on government to provide the resources needed by the poor to enable them to exercise rights, these arguments do not justify depriving those with

interfering with the use of those resources, the governmental action must be justified.<sup>206</sup> Thus it is no answer that the defendant, after forfeiture, is left without sufficient assets to retain counsel of choice. Rather, the constitutional issue is whether the government's pretrial restraint of his assets can be justified when balanced against the significant individual and societal interests underlying the right to counsel of choice.

To perform this balancing of competing interests it is necessary to identify the appropriate constitutional standard of review. Like other constitutional rights, the right to counsel of choice is not absolute.<sup>207</sup> Although not absolute, governmental actions intruding on fundamental constitutional rights—freedom of expression,<sup>208</sup> free exercise of religion,<sup>209</sup> right to choose an abortion,<sup>210</sup> right to vote,<sup>211</sup> or right to travel,<sup>212</sup> for example—receive heightened scrutiny. To be constitutional, such actions must be shown to be *necessary* to achieve a *compelling* governmental interest.<sup>213</sup> This heightened standard of constitutional scrutiny should apply to governmental action that renders it impossible for a defendant to exercise the fundamental sixth amendment right to retain counsel for his defense.

What is at stake in the forfeiture of attorney's fees context is more than a mere regulation of the right to counsel of choice or a postponement of its exercise, for which lesser scrutiny may suffice.<sup>214</sup> Rather, it is the wholesale abridgment of the right to counsel of

---

resources of the funds needed to exercise fundamental rights, at least in the absence of some other compelling justification.

206. *E.g.*, *United States ex rel. Ferenc v. Brierley*, 320 F. Supp. 406 (E.D. Pa. 1970) (Government restraint of the defendant's funds, only part of which were alleged to have been proceeds of the crime, violated the sixth amendment right to counsel of choice. The defendant, who otherwise would have used the funds to hire an attorney, was forced to accept an appointed counsel.).

207. *See Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988) ("The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects."). Even the first amendment is not absolute. *See L. TRIBE, supra* note 186, § 12-2, at 792-93, § 12-8, at 832-41; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1420 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

208. *E.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978).

209. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

210. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 154-55 (1973).

211. *E.g.*, *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

212. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

213. *See, e.g.*, cases cited *supra* notes 208-12.

214. *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (Feinberg, C.J., concurring, joined by Oakes & Kearse, JJ.) ("Many of the cases that allow limitations on the right to counsel of choice deal only with partial limitations or infringements, such as preventing a defendant from substituting counsel once the trial has begun . . . or disqualifying a particular lawyer . . ." (citations omitted)), *cert. granted*, 109 S. Ct. 363 (1988)).

choice. When a defendant is stripped of all his assets, his right to retain counsel of choice is not merely postponed or its exercise limited by the need to accommodate the demands of the administration of justice. Rather, his ability to exercise the right is totally abridged.<sup>215</sup>

Such a distinction in the level of scrutiny applied, based upon the extent of the intrusion on the right involved—with lesser scrutiny applied to regulation of the exercise of the right and more stringent scrutiny applied to more serious invasions—typically is made in contexts involving other fundamental constitutional rights. For example, content-based abridgments of speech are subject to exacting scrutiny.<sup>216</sup> On the other hand, content-neutral time, place, and manner regulations on the exercise of first amendment rights are subject to lesser scrutiny.<sup>217</sup> In the abortion context, strict scrutiny is applied to prohibitions on abortion, resulting in the invalidation of laws banning first-trimester abortions.<sup>218</sup> Lesser scrutiny, however, is applied to mere regulations of the exercise of the right, such as requirements that second-trimester abortions be performed in hospitals or that certain records be kept in connection with the procedure.<sup>219</sup>

To uphold the total abridgment of the fundamental right to counsel of choice presented by application of the forfeiture statutes, the most compelling of justifications must be required.<sup>220</sup> The assertion of an important or significant governmental interest should not suffice. This is the teaching of *Faretta v. California*,<sup>221</sup> which held that the sixth amendment right of self-representation outweighs a number of significant interests that militate against it.<sup>222</sup> These include the interest in judicial economy and efficiency that would be furthered by requiring counsel rather than permitting an uncounseled defendant to conduct the defense, as well as the societal interests in

---

215. *Id.* (The right in this case “is destroyed almost completely by depriving the defendant of the means to retain counsel of choice prior to the commencement of trial.”).

216. *E.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S. Ct. 2138 (1988); *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *Carey v. Brown*, 447 U.S. 455 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Dep’t v. Mosely*, 408 U.S. 92 (1972).

217. *E.g.*, *Frisby v. Schultz*, 108 S. Ct. 2495, 2500-01 (1988); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981); see Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

218. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

219. *Id.*; see *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

220. *Monsanto*, 852 F.2d at 1402 (Feinberg, C.J., concurring, joined by Oakes & Kearse, JJ.) (“[T]he governmental justification for such drastic action” should be “overwhelmingly persuasive.”).

221. 422 U.S. 806 (1974).

222. *Id.* at 835-36.

accurate adjudication and the appearance of fairness that inevitably would suffer by the adversarial imbalance when an uncounseled defendant alone faces a professional prosecutor. *Faretta* resolved the conflict between these significant interests and the defendant's sixth amendment rights in favor of the sixth amendment right to self-representation.<sup>223</sup> In like manner, the right to counsel of choice, which in the fee forfeiture context similarly runs the risk of being totally abridged, calls for the same level of sixth amendment scrutiny and protection.<sup>224</sup>

The Supreme Court in *Wheat v. United States*,<sup>225</sup> distinguished the right of self-representation protected in *Faretta* from the right of the defendant to choose a particular preferred counsel.<sup>226</sup> The Court noted in a footnote that the "holding" in *Faretta* did not "encompass" the right asserted in the case before it.<sup>227</sup> The treatment of *Faretta* in *Wheat*, however, does not call into question the propriety of applying its strict scrutiny approach to fee forfeiture, which constitutes a wholesale abridgment of the right to choose any counsel. The failure of the "holding" of *Faretta* to "encompass" the distinct issue presented in *Wheat*, of course, is not surprising. *Faretta* did not deal with the right to counsel of choice, but rather dealt with the separate question of whether a defendant could waive counsel and represent himself.<sup>228</sup> As a result, its holding unquestionably cannot "encompass" the counsel of choice issue presented in *Wheat*. For the same reason, the Court's holding in *Wheat*—that a defendant could not choose representation by an attorney found to be subject to an actual conflict of interest<sup>229</sup>—does not "encompass" the discrete question of whether the government may deprive a defendant of the opportunity to select any private counsel, let alone one subject to a disqualifying condition such as conflict of interest.

Although neither the holding of *Faretta* nor the holding of *Wheat* encompasses this separate question, the strict scrutiny approach of *Faretta*, rather than the balancing test employed in *Wheat*, is appropriate to its resolution. Both in this context and that of *Faretta*, denial of the defendant's contention would destroy completely the right in question—self-representation in *Faretta*, represen-

---

223. *Id.*

224. *United States v. Rankin*, 779 F.2d 956, 961 (3d Cir. 1986); *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985).

225. *Wheat v. United States*, 108 S. Ct. 1692 (1988).

226. *Id.* at 1697 n.3.

227. *Id.*

228. *Faretta v. California*, 422 U.S. 806, 807 (1974).

229. *Wheat*, 108 S. Ct. at 1700.

tation by some private counsel of choice here. By contrast, rejection of the defendant's assertion in *Wheat*—of a right to be represented by a particular counsel found to labor under an actual conflict of interest<sup>230</sup>—still preserves the defendant's opportunity to be represented by a counsel of choice, albeit not his first choice. *Wheat*, therefore, is a case involving necessary and reasonable regulation of the exercise of the right to counsel of choice, rather than its total abridgment.<sup>231</sup>

The question raised by the forfeiture statutes is not whether exercise of the right to counsel of choice can be regulated, such as by restrictions on the choice of a counsel who is otherwise engaged in order to prevent undue delay, or on the choice of an attorney disqualified by a factor such as a conflict of interest. Rather, it is whether the right may be completely destroyed by governmental action that renders the defendant unable to choose any private counsel. The balance struck in *Wheat*, between the need to preserve the appearance of fairness and the ethical standards of the profession, on the one hand, and the defendant's interest in choosing a particular counsel on the other,<sup>232</sup> concededly comes at the expense of the values underlying the right to counsel of choice. Trust and confidence, essential to the attorney-client relationship,<sup>233</sup> will not be assured as readily if the defendant's first choice as his attorney is disqualified. The effect on these values that results from requiring the defendant to appear through his second choice of attorneys rather than his first, however, must be regarded as marginal.

There is a vast difference between overriding a defendant's choice of a particular lawyer and preventing him from employing any lawyer at all. The latter subverts many important values underlying the sixth amendment: diminishing the potential for trust and confidence that are essential to a meaningful attorney-client relationship,<sup>234</sup> depreciating respect for individual choice and autonomy that serve as a basic

---

230. *Id.* at 1695.

231. As Chief Judge Feinberg wrote in his post-*Wheat* concurring opinion in *Monsanto*:

[T]he right to counsel of choice cannot be infringed unless a compelling governmental purpose outweighs it. Many of the cases that allow limitations on the right to counsel of choice deal only with partial limitations or infringements, such as preventing a defendant from substituting counsel once the trial has begun, . . . or disqualifying a particular lawyer . . . . In contrast, the right in this case is destroyed almost completely by depriving the defendant of the means to retain counsel of choice prior to the commencement of the trial. Therefore, one would suppose that the governmental justification for such drastic action is overwhelmingly persuasive.

*Monsanto*, 852 F.2d at 1402 (Feinberg, C.J., concurring, joined by Oakes & Kears, JJ.).

232. *Wheat*, 108 S. Ct. at 1697-98.

233. *Supra* note 185 and accompanying text.

234. *See supra* note 185 and accompanying text.



premise of the right,<sup>235</sup> undermining the defendant's sense of participation in the proceedings,<sup>236</sup> thereby both lessening its appearance of fairness<sup>237</sup> and his ability to accept its outcome,<sup>238</sup> and ultimately jeopardizing public confidence in the administration of justice. For all these reasons, the balancing approach employed in *Wheat* for measuring the effect of the minor regulation of the exercise of the sixth amendment right at issue in that case should be rejected here in favor of the more stringent scrutiny of *Faretta*.<sup>239</sup>

Fee forfeiture presents a problem quite distinct from the more limited intrusions on the sixth amendment involved in prior counsel of choice cases. Typically, cases that deal with the right to counsel of choice involve questions of continuances to enable the defendant to retain or substitute counsel, or to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court.<sup>240</sup> These judicial attempts involve

---

235. See *Faretta*, 422 U.S. at 835; *Wilson v. Mintzes*, 761 F.2d 275, 285-86 (6th Cir. 1985); S. LANDSMAN, *supra* note 76, at 35.

236. See *Faretta*, 422 U.S. at 821 ("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not *his* defense."); *supra* note 186 and accompanying text.

237. See *Liljeberg v. Health Servs. Acquisition Corp.*, 108 S. Ct. 2194, 2204 (1988) ("[J]ustice must satisfy the appearance of justice.") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955); *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Indeed, the Supreme Court has recognized that a central value of the sixth amendment is that "legal proceedings appear fair to all that observe them." *Wheat*, 108 S. Ct. at 1692.

238. See S. LANDSMAN, *supra* note 76, at 33-34 ("Party control [over the litigation] . . . promotes litigant and societal acceptance of decisions rendered by the courts. Adversary theory holds that if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not.")

239. A number of other Supreme Court cases apply the stringent scrutiny approach taken in *Faretta* to resolve conflicts between various significant governmental interests and the sixth amendment in favor of the sixth amendment. In *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); and *Massiah v. United States*, 377 U.S. 201 (1964), the Court found that the sixth amendment had been violated when, after adversary proceedings had begun, the state used an undercover agent or informant to obtain inculpatory statements from the defendant in the absence of counsel. In *Moulton*, even though the government had urged that the gathering of such evidence was necessitated by the police "interest in the thorough investigation" of both the indicted crimes and new ones, the Court rejected this plainly significant interest, holding that "the Government's investigative powers are limited by the sixth amendment rights of the accused." *Moulton*, 474 U.S. at 180. These cases recognize that a defendant's sixth amendment interests are sufficiently weighty that a routine and valuable investigative technique may not be employed during that crucial period when a citizen is guaranteed the assistance of counsel. See also *Geders v. United States*, 425 U.S. 80 (1976) (applying strict scrutiny to invalidate a ban on defendant's consulting with counsel during an overnight recess in the trial).

240. See, e.g., *Wheat*, 108 S. Ct. at 1697-99; *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Leis*

regulations on the exercise of the right, not its total abridgment. Yet, even in these contexts, the courts have protected the right to counsel of choice from any "unnecessary or arbitrary" interference, holding that it will yield only when required by the "fair and proper administration of justice."<sup>241</sup>

Unlike these trial-related instances in which the defendant's right to counsel of choice is balanced against the demands of the efficient administration of justice, the RICO and CCE forfeiture provisions involve governmental action to strip a defendant of all his assets, thereby completely precluding his ability to retain counsel. A higher level of scrutiny therefore should be applied. If Congress were to pass a statute depriving all RICO or CCE defendants of the right to counsel of choice, that statute would be subjected to strict scrutiny and found unconstitutional. Can the same result be achieved indirectly

---

v. Flynt, 439 U.S. 438 (1979); *United States v. Nichols*, 841 F.2d 1485, 1502-04 (10th Cir. 1988) (survey of counsel of choice cases); *In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick)*, 781 F.2d 238, 250-51 (2d Cir. 1985) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986) (survey of counsel of choice cases).

241. See, e.g., *United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987) (The right "cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice."); *United States v. Rankin*, 779 F.2d 956, 958 (3d Cir. 1986) (The right "may not be hindered unnecessarily."); *United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir. 1985) ("[I]n general, defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." (quoting *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979))), *cert. denied*, 474 U.S. 994 (1985); *Linton v. Perini*, 656 F.2d 207, 211 (6th Cir. 1981) (The defendant may not be denied the right "arbitrarily and without adequate reason."), *cert. denied*, 454 U.S. 1162 (1982); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) ("[T]he arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel."); *John Doe, Esq. (Slotnick)*, 781 F.2d at 250 (quoting *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979)); *Magee v. Superior Court*, 8 Cal. 3d 949, 951-52, 506 P.2d 1023, 1025, 106 Cal. Rptr. 647, 649 (1973) (en banc) (per curiam) (The defendant's choice of counsel may yield only if it "will result in significant prejudice to the defendant himself or in a disruption of the orderly process of justice unreasonable under the circumstances."). The Supreme Court indicated in *Wheat* that trial judges must be afforded wide latitude in determining, for example, whether a sufficiently serious potential for conflict of interest exists to outweigh the defendant's choice of a particular counsel. *Wheat*, 108 S. Ct. at 1699-1700; *id.* at 1704 (Stevens, J., dissenting, joined by Blackmun, J.). However, the Court's deferential approach should not be read to alter the standards invoked by the courts cited *supra* to measure asserted infringements on the right to counsel of choice, but merely to caution that deference is owed to trial courts in the application of these standards. See *id.* at 1699 ("In the circumstances of this case the District Court relied on instinct and judgment based on experience in making its decision."). Indeed, the Court's standard for determining if a defendant's choice of counsel may be outweighed by the need to avoid a conflict of interest is fully consistent with the typical circuit court standard prohibiting "unnecessary or arbitrary" interference with the defendant's choice. If an actual conflict of interest or the presence of a serious potential for such conflict has been demonstrated, prohibiting the defendant's choice is neither unnecessary nor arbitrary. *Id.* at 1700 ("The District Court must recognize a presumption in favor of petitioner's counsel of choice," which can be overcome by a "demonstration of actual conflict" or by "a showing of a serious potential for conflict.").

through stripping the defendant of his assets either by pretrial seizure or by post trial forfeiture of assets transferred to an attorney as a bona fide fee? Is the governmental interest attempted to be achieved by such forfeiture sufficient to outweigh the defendant's fundamental right to counsel of choice? Is the application of a forfeiture statute to legitimate attorneys' fees an "unnecessary or arbitrary" interference with the right to counsel of choice? Are other means available to accomplish the government's interests underlying the forfeiture provisions that would render unnecessary the forfeiture of legitimate attorney's fees?

The government in these cases has sought to avoid this burden of justification by equating the situation involving forfeiture of property and other assets in the possession and control of a defendant with the situation in which a defendant is apprehended in possession of assets or property that are manifestly the property of some third party. The argument invokes the specter of the defendant being arrested outside a bank with the proceeds of a bank robbery.<sup>242</sup> The bank robbery proceeds, of course, may not be used to hire an attorney. How then, the government asks, can other property that constitutes the proceeds of crime be used for that purpose, particularly in view of the "relation-back" provisions of the statute that vest title to the property in the government as of the time of the crime?

This is a false analogy, however. The cash proceeds of a bank robbery belong to the bank or to its depositors; this is true even in the absence of a forfeiture statute. These wrongfully deprived owners have a common law right to the return of their property, and government has a compelling interest in obtaining its return that plainly outweighs the robber's claim to use it for any purpose, even to hire an attorney.<sup>243</sup> Moreover, this interest simply cannot be accomplished in

---

242. See Supplemental Brief for the United States on Rehearing En Banc at 28-29, *United States v. Jones*, 844 F.2d 215 (5th Cir. 1988) (Nos. 87-5556 & 87-5575) [hereinafter *Jones En Banc Government Brief*]; *Unit No. 7 Government Brief*, *supra* note 173, at 23-24; *In Banc Brief for the United States* at 45-46, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.) (No. 436, Docket 87-1397) (en banc) (per curiam), *cert. granted*, 109 S. Ct. 363 (1988); *Monsanto Panel Government Brief*, *supra* note 36, at 50-51; see also Brickey, *Attorneys' Fees Forfeitures: On Defining "What" and "When" and Distinguishing "Ought" from "Is,"* 36 EMORY L.J. 761, 770-72 (1987). Several courts have been persuaded by the bank robbery proceeds hypothetical. *E.g.*, *United States v. Moya-Gomez*, 860 F.2d 706, 725 (7th Cir. 1988), *petition for cert. filed* (U.S. Feb. 17, 1989); *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 653, 645-46 (4th Cir.) (en banc), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. Monsanto*, 836 F.2d 74, 81 (1987), *replaced on reh'g en banc*, 852 F.2d 1400 (2d Cir.) (per curiam), *cert. granted*, 109 S. Ct. 363 (1988).

243. In *United States v. Nichols*, Judge Logan wrote in dissent:

The government's interest in the property allegedly subject to criminal forfeiture is of a different nature than the interest of a bank seeking to recover stolen

any way other than the return of the property. In the forfeiture situation, however, the government's interest in stripping the accused of his property is not frustrated by permitting a portion of the property to be transferred to defense counsel.

---

currency . . . . The latter claims are based upon traditional common law property ownership concepts embraced in the Constitution. . . . The government's interest in forfeited property, on the other hand, does not derive from a common law ownership right to the property, for the government neither owned the property before the crime nor gave value for the property as a creditor or purchaser does.

841 F.2d 1485, 1510 (10th Cir. 1988) (Logan, J., dissenting). A similar argument distinguishes the jeopardy tax assessment authorized by 26 U.S.C. § 6861 (1982). See *Caplin & Drysdale*, 837 F.2d at 646; *Unit No. 7* Government Brief, *supra* note 173, at 16-17; *Monsanto* Panel Government Brief, *supra* note 36, at 41-42; Brickey, *supra* note 6, at 525-29; see also *United States v. Brodson*, 241 F.2d 107 (7th Cir.) (en banc) (upholding jeopardy tax assessment against right to counsel claim based on deprivation of funds needed to hire expert accountant), *cert. denied*, 354 U.S. 911 (1957). The jeopardy assessment is a sequestration of funds that the Secretary of the Treasury may impose upon an individual taxpayer to secure in advance payment of taxes that will be due from the taxpayer, if the Secretary finds that the taxpayer intends to leave the United States. See 26 U.S.C. § 6861. As in the case of the robbery of property belonging to a third party, the jeopardy assessment situation involves a claim to property, in this case by the government, that has a source independent of the statute authorizing the assessment and arising prior to the acts justifying the assessment or attachment. See *Nichols*, 841 F.2d at 1510 (Logan, J., dissenting) (equating government's interest in jeopardy tax assessment with the common law property interest of a creditor claiming a lien against a debtor's property); *United States v. Harvey*, 814 F.2d 905, 926 (1987) ("The critical distinction, if one be needed, is that the jeopardy assessment has as its purpose the preservation of property already owed and wrongfully withheld from the government."), *replaced on reh'g en banc sub nom. United States v. Caplin & Drysdale*, Chartered, 837 F.2d 637 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988). The government interest in pursuing its claim and in preserving its ability ultimately to have it satisfied justifies the jeopardy assessment. In the forfeiture situation, by contrast, the government's claim is based on the forfeiture statute itself, rather than on an independent source, and does not precede the defendant's possession of the property. In addition, the tax laws are designed to raise revenues, something the government cannot function without. The criminal forfeiture laws, however, are not designed for this purpose. See *Monsanto*, 852 F.2d at 1407 n.1 (Winters, J., concurring, joined by Meskill & Newman, JJ.) (noting government's concession on this point at oral argument). As a result, the government's purpose, to strip racketeering and drug trafficking offenders and organizations of their economic power, can fully be achieved even if part of the forfeiture goes to a defense lawyer rather than to the government itself. See *id.* (distinguishing cases involving "the seizure of property where revenue raising purposes are implicated"); *infra* notes 358-60 and accompanying text.

A similar argument also would justify forfeiture of contraband that a defendant sought to use to purchase the services of an attorney, see *Jones En Banc* Government Brief, *supra* note 242, at 29, but not of money or other property that the government may believe to be the proceeds of the sale of contraband. Contraband, such as unlicensed narcotics, unregistered firearms, counterfeit currency and counterfeiting devices, and smuggled cigarettes, is property that itself is manifestly unlawful to possess. See 49 U.S.C. § 781 (1982); BLACK'S LAW DICTIONARY 291 (5th ed. 1979) ("In general, any property which is unlawful to produce or possess."). Plainly the government's interest in recovering such property is so compelling that it outweighs a claim by the possessor of the property to use it to hire an attorney. This interest in removing such property from circulation does not extend as well, however, to the alleged proceeds of the sale of such contraband.

In addition, let us assume that the property in question consists of a parcel of improved real estate owned by the accused for a substantial period of time, that he has title, and that he is in possession. Assume further that no third party, such as a bank or a creditor, asserts a manifest or undisputed claim of ownership. Finally, assume that the only challenge to the accused's ownership of the property is brought by the government, and that its claim of entitlement is based not on a common law ownership right to the property, but on a legal fiction—*forfeiture*—that the law disfavors and that cannot divest the accused of ownership until and unless he is convicted. In these circumstances, the government's interest in fee forfeiture cannot be equated with the bank's interest in the bank robbery proceeds.

These distinctions are also reflected in principles of professional ethics. In the bank hypothetical, an attorney is ethically obligated to return the property, manifestly that of a third party, to its owner.<sup>244</sup> In the case of property that does not appear to belong to another, that does not constitute the direct fruits or instrumentalities of a crime, and that bears all the indicia of common law title in the defendant, however, an attorney is not ethically prohibited from accepting it in payment of his fee.<sup>245</sup>

The government seeks to equate these two disparate situations by invoking the "relation-back" provisions of the forfeiture statutes,<sup>246</sup> under which forfeiture relates back to the time of the act that gives rise to the forfeiture, and title to the property vests in the United States upon commission of that act.<sup>247</sup> But unlike the loot from the hypothetical bank robbery, which belongs to the bank or its depositors, the property forfeited under the relation-back rule "belongs" to the government only under a legal fiction embodied in the statute. Use of this legal fiction to deprive the defendant of his common law property rights and of his sixth amendment right to counsel of choice must be justified by some compelling governmental interest. Legal fictions,<sup>248</sup> like metaphors,<sup>249</sup> are so widely used and often have so

---

244. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5), DR 7-102(A)(3), (7) (1980); Cloud, *supra* note 44, at 56; Morgan, *An Introduction to the Debate Over Fee Forfeitures*, 36 EMORY L.J. 755, 756 (1987); see also *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd per curiam*, 381 F.2d 713 (4th Cir. 1967).

245. See Cloud, *supra* note 44, at 56; Morgan, *supra* note 244, at 756-57.

246. 18 U.S.C. § 1963(c) (1982 & Supp. IV 1986); 21 U.S.C. § 853(c) (Supp. IV 1986); 21 U.S.C. § 881(h) (Supp. IV 1986).

247. See *Jones En Banc Government Brief*, *supra* note 242, at 15-16; *Nichols*, 841 F.2d at 1498-1501; *Caplin & Drysdale*, 837 F.2d at 640; *Monsanto Panel Government Brief*, *supra* note 36, at 50.

248. For discussion of the phenomenon of legal fictions, see generally L. FULLER, *LEGAL FICTIONS* (1967); Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986).

powerful an effect on cognition that they tend to color and control our subsequent conceptions.<sup>250</sup> A fiction, however, should not be employed to substitute for analysis or to obfuscate reality. When its use is invoked to rationalize a legal result, it "must seek its justification in considerations of social and economic policy."<sup>251</sup>

249. Metaphor has been the subject of a developing body of scholarship on human cognition which, drawing on extensive empirical work in experimental psychology, linguistics, and anthropology, demonstrates that metaphor is a fundamental component of human reasoning. See generally M. JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987); G. LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987); G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* (1980); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1382-87 (1988).

250. In my view, legal fiction plays a similar role in legal reasoning to that played by metaphor in human cognition. Like the metaphor, legal fiction often is grounded in physical experience or objects and is a cognitive device by which we construct and understand legal concepts by a form of projection or extension. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913). Thus, legal fiction structures our understanding of the legal concept in a way that sometimes makes it difficult to evaluate the legal concept on its own terms, much as the metaphor often has a great potential to mislead. See Berggren, *The Use and Abuse of Metaphor*, I, 16 Rev. Metaphysics: Phil. Q. 236, 244-45 (1962-63); Winter, *supra* note 249, at 1386-87. The "relation-back" doctrine, as used in the fee forfeiture context, provides a good illustration of the power of a legal fiction, the nature of its metaphoric dimension, and its potential to mislead.

251. L. FULLER, *supra* note 248, at 71; see *id.* at 10, 70-71. The Courts of Appeals for the Fourth, Tenth, and Eleventh Circuits, in rejecting the sixth amendment attack on the forfeiture statutes, were blinded by the power of the relation-back fiction, employing it as a substitute for the balancing of interests that the Constitution demands. *United States v. Bissell*, No. 87-8246, slip. op. at 1594-95 (11th Cir. March 2, 1989); *United States v. Nichols*, 841 F.2d 1485, 1498-1501 (10th Cir. 1988); *Caplin & Drysdale*, 837 F.2d at 640. Judge Phillips of the Fourth Circuit, dissenting on behalf of himself and three of his brethren, saw the issue more clearly:

[T]he majority points out that a defendant does not have the resources to exercise the right [to counsel of choice], hence has no right, when the government has already, by the relation-back feature of these forfeiture provisions, asserted a paramount interest in the resources. With all respect, this simply begs the constitutional question rather than answering it. Indeed, the ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. If the right must yield here to countervailing governmental interests, the relation-back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them. Under developed principles defining the qualified right to counsel of choice, the dispositive issue is whether there are countervailing governmental interests that do justify the drastic expedient of freezing and ultimately forfeiting the assets of RICO and CCE defendants to the point that they cannot retain private counsel for their defense.

*Id.* at 651-52 (Phillips, J., dissenting, joined by Winter, C.J., Sprouse & Ervin, JJ.). In another context, the Tax Court recently rejected the relation-back fiction when a taxpayer contended that assets forfeited to the government under RICO should not be included in his gross income for tax purposes because title vested in the government at the time of the crime. *Gambina v. Commissioner*, 91 T.C. [1988 Transfer Binder] Tax Ct. Rep. (CCH) Dec. 45,140 (Oct. 20, 1988).

### B. *First Amendment Protection of the Right to Counsel of Choice*

The heightened burden of strict scrutiny is required by sixth amendment principles in order for the government to justify the total abridgement of the right to counsel of choice presented by fee forfeiture. Strict scrutiny is also demanded by first amendment principles, which in the context of the right to use counsel to assert legal rights, overlap with those of the sixth amendment. The use of counsel by a criminal defendant to assert rights on his behalf is protected by the first amendment right "to hire attorneys on a salary basis to assist . . . in the assertion of . . . legal rights."<sup>252</sup> Although the Supreme Court cases that recognize this right have arisen in the context of organizations, such as labor unions or political action groups, there is no reason in principle to limit the right to such situations.

Whenever an individual defendant associates with counsel to communicate ideas in the public forum of the courtroom, first amendment values are implicated. The applicability of the first amendment freedom of association, the right primarily vindicated by these cases,<sup>253</sup> turns on the purpose of the association rather than its size. Whenever an individual associates with "others" for "the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," the protection of the first amendment is afforded.<sup>254</sup> It should make no difference whether those "others" are a law firm or an individual attorney, as long as the purpose of the association comes within the purview of the first amendment.<sup>255</sup>

---

252. *United Mine Workers Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967); *accord* *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972); *United Transp. Union v. Michigan*, 401 U.S. 576, 585 (1971); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia Bar Ass'n*, 377 U.S. 1, 5-6 (1964); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963); *In re Abrams*, 62 N.Y.2d 183, 465 N.E.2d 1, 476 N.Y.S.2d 494 (1984) (The first amendment protects the criminal defendant's right to counsel of choice.); *see also* *In re Primus*, 436 U.S. 412 (1978).

253. Although these cases invalidated restrictions found to violate the "associational rights" of the group involved, *e.g.*, *United Mine Workers*, 389 U.S. at 225; *see* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 334-35 (1985) (plurality opinion) ("[T]he First Amendment interest at stake [in these cases] was primarily the right to associate collectively for the common good."); L. TRIBE, *supra* note 186, § 16-45, at 1640 (treating these cases as "invalidating, as contrary to the first amendment freedom of association, various state prohibitions against concerted legal action"), they also separately mention freedom of speech and petition. *E.g.*, *United Mine Workers*, 389 U.S. at 221; *Brotherhood of R. R. Trainmen*, 377 U.S. at 5.

254. *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 622 (1984).

255. Support for the proposition that the first amendment freedom of association applies to an association composed of as few as two people can be found in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In recognizing a constitutional right of privacy protecting the marital relationship, Justice Douglas' opinion for the Court grounded the new right in "penumbras,

Certain speech within the courtroom—that of spectators, for example, or of demonstrators within hearing distance<sup>256</sup>—may be limited or even prohibited. But speech by the parties and their witnesses, provided it is within the bounds of the rules of evidence and of decorum,<sup>257</sup> as well as the arguments of counsel, are the essence of the proceedings and, at most, can be regulated as to time, place, and manner.<sup>258</sup> Indeed, so important is such speech that the Constitution itself protects the criminal defendant's ability to compel testimony from witnesses by compulsory process.<sup>259</sup> Not only is the advocacy of the attorney on behalf of his client protected speech within the meaning of the first amendment, but also it is an exercise of the right to petition

---

formed by emanations" from various Bill of Rights protections, including "the right of association contained in penumbras of the First Amendment . . ." *Id.* at 482-83. Indeed, political theorists as diverse as Aristotle and Freud have shown that the man-woman relationship and then the family served as the "first form of association," which ultimately evolved into the *polis* or state. See THE POLITICS OF ARISTOTLE 3-4 (E. Barker trans. 1962) ("first form of association"); S. FREUD, *Civilization and Its Discontents*, in 21 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 59 (1962). Although freedom of association claims may not arise often in the context of associations composed of only two individuals, there can be no doubt that the first amendment freedom of association would extend to a husband and wife who come together for the purpose of exercising their religion or to engage in other intimate communication, *cf.* G. ORWELL, 1984 (1949) (fictional account of a negative utopia that does not recognize freedom of intimate association), or to an individual and his priest or rabbi who associate for these purposes. An individual and his attorney who associate for the purpose of engaging in first amendment protected expression in the courtroom or to petition government also should receive the same additional protection deriving from their association that is afforded in the marital and religious relationships. Indeed, in all three of these contexts, the privacy of the communications of these groups of two are protected by common law and modern statutory evidentiary privileges precisely to protect the existence and vitality of these associations.

Although I argue that the right of an individual defendant to hire an individual lawyer to advocate his rights in a criminal case should be within the protection of these freedom of association cases, it is perhaps ironic that the RICO and CCE cases in which government forfeiture practices have interfered with exercise of the right to counsel of choice almost always have been multi-defendant cases in which the defendants, both individually and collectively, have resisted charges that they conspired together or engaged in an "enterprise" or "pattern of racketeering activity" with one another. See *supra* notes 2-3. Although each defendant typically will have separate counsel, counsel inevitably will need to coordinate their defense efforts in resisting the prosecutorial attack. As a result, the defendants and their attorneys can properly be seen as "associat[ing] collectively for the common good" during trial. *Walters*, 105 S. Ct. at 3196. To the extent that they can be regarded as an association, the right of each defendant to retain counsel of his choosing serves not only individual but also associational interests.

256. See *Cameron v. Johnson*, 390 U.S. 611 (1968) (upholding narrowly drawn court picketing statute); *Cox v. Louisiana*, 379 U.S. 559 (1965).

257. See *Illinois v. Allen*, 397 U.S. 337 (1970); N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* (1973); Hazard, *Securing Courtroom Decorum*, 80 YALE L.J. 433 (1971).

258. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); cases cited *supra* note 217.

259. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"); see *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14 (1967).



the government for the redress of grievances, also protected by the first amendment.<sup>260</sup> The right of a defendant to use his own funds to choose the attorney with whom he wishes to associate for the purpose of engaging in these first amendment protected activities therefore should be deemed to be within the purview of the first amendment freedom of association and the cases that apply it in order to protect the right to hire counsel to assert rights.

This conclusion is also supported by the policies that underly the first amendment freedom of expression. Among the places in which first amendment speech occurs, the American courtroom is an historically important one. What is said there influences government action, not only in the case before the court, but also frequently in other cases for which it will become a legal or political precedent. Moreover, the courtroom has always served as an important forum for the discussion and dramatization of ideas and, consequently, as an important forum for political expression and action.<sup>261</sup> What is said in court may make an enormous contribution to public attitudes and political discourse, thereby furthering the core political values of the first amendment freedom of speech.<sup>262</sup> This is particularly true in the case

---

260. See U.S. CONST. amend. I (right "to petition the Government for a redress of grievances"); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1982) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right to petition."); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963) (Harlan, J., dissenting) (The first amendment protects not only the right to petition the legislature for the redress of grievances, but also "the right to join together for purposes of obtaining judicial redress.").

261. See O. KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 47 (1961) ("Throughout the modern era, whatever the dominant legal system, both governments and private groups have tried to enlist the support of the courts for upholding or shifting the balance of political power."); Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. A.B. CITY N.Y. 320, 320 (1974) ("In recent decades courts have caused or helped to generate much of the important social change in America."); Rothman, *The Courts and Social Reform: A Postprogressive Outlook*, 6 LAW & HUM. BEHAV. 113, 113 (1982) ("[T]he judiciary has become a forum in which attorneys have pressed for social change.").

262. The first amendment "is indispensable to decisionmaking in a democracy . . ." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Stromberg v. California*, 283 U.S. 359, 369 (1931); T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 10 (Vintage Books ed. 1967). See A. MEIKLEJOHN, *Free Speech and Its Relation to Self Government*, in *POLITICAL FREEDOM* 3-93 (Galaxy ed. 1965); F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 35-46 (1982); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-28 (1971); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14-20 (1965). The Supreme Court has described "the central meaning of the First Amendment" as the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see

of criminal trials, which are so widely covered by the press<sup>263</sup> and electronic media,<sup>264</sup> thereby providing a wide audience for speech. Indeed, the Supreme Court bases its reading of the first amendment as protecting a right of access by the press to criminal trials<sup>265</sup> on "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs' . . . to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."<sup>266</sup> This is a recognition not only that what goes on in the criminal trial itself constitutes "governmental affairs," but that the public needs to know what is said there in order that the "'discussion of governmental affairs' be an informed one."<sup>267</sup>

These first amendment policies are most clearly implicated in "political" trials, which have always been part of our history.<sup>268</sup> When, in 1735, Andrew Hamilton advocated for his client John Peter

Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10. Fostering such public debate serves a "central purpose" of the amendment, "to protect the free discussion of governmental affairs." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). The "primary aim" of the first amendment is "the full protection of speech upon issues of public concern . . ." *Connick v. Myers*, 461 U.S. 138, 154 (1983), which "occupies the 'highest rung of the hierarchy of First Amendment values.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *Connick*, 461 U.S. at 145; *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Such speech is "the essence of self-government." *Dun & Bradstreet*, 472 U.S. at 759 (quoting *Connick*, 461 U.S. at 145; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

263. See *Globe Newspaper*, 457 U.S. at 596; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

264. See *Chandler v. Florida*, 449 U.S. 560 (1981); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

265. See cases cited *supra* note 263.

266. *Globe Newspaper*, 457 U.S. at 604.

267. *Id.* at 605.

268. See *Illinois v. Allen*, 397 U.S. 337, 352 (1970) (Douglas, J., concurring) ("[P]olitical trials . . . frequently recur in our history . . ."); O. KIRCHHEIMER, *supra* note 261, at 47 ("Political trials are inescapable."); J. SINK, *POLITICAL CRIMINAL TRIALS: HOW TO DEFEND THEM* vii (1974) ("[P]olitical trials are an [sic] historical constant of Anglo-American law."); Belknap, *Introduction*, in *AMERICAN POLITICAL TRIALS* 3 (M. Belknap ed. 1981) ("Throughout United States history, from pre-Revolutionary time to the post-Vietnam era, war, economic conflict, racial and ethnic tensions, fundamental disagreements about the organization of government, and occasionally even simple partisan competition for office have spawned political trials."). See generally *AMERICAN POLITICAL TRIALS* (M. Belknap ed. 1981) (collection of essays on the role of political trials in American history); N. DORSEN & L. FRIEDMAN, *supra* note 257, at 72-89 (analyzing disruptive and disorderly political trials); O. KIRCHHEIMER, *supra* note 261 (analyzing the difference between a typical criminal trial and a political trial); *POLITICAL TRIALS* (T. Becker ed. 1971) (survey of notable political trials); Friedman, *Political Power and Legal Legitimacy: A Short History of Political Trials*, 30 ANTIOCH REV. 157 (1970) (discussing the trials of uncommon criminals, principally Susan B. Anthony); Hakman, *Political Trials in the Legal Order: A Political Scientist's Perspective*, 21 J.

Zenger, in a colonial New York courtroom, he advanced ideas that reverberated throughout the colonies and planted the seeds of revolution and of the new order.<sup>269</sup> When abolitionist John Brown was prosecuted for his 1859 raid on the Harpers Ferry arsenal, intended to incite a slave revolt, his moving speech to the court converted many Northerners to the abolitionist cause.<sup>270</sup> When Judge Henry R. Selden argued that the recently adopted fourteenth amendment protected the right of women to vote in his defense of Susan B. Anthony during her 1873 prosecution for voting in a federal election when it was illegal for women to vote, his advocacy "arrested the attention of legal minds as no popular discussion had done."<sup>271</sup> When Clarence Darrow used the pulpit of the courtroom to dramatize the plight of labor in its battle to unionize the railroads in his representation of Eugene V. Debs, tried for criminal conspiracy in federal court in 1895,<sup>272</sup> to attack the Tennessee law forbidding the teaching of evolution on behalf of biology teacher John Thomas Scopes in the 1925 Dayton, Tennessee "monkey trial,"<sup>273</sup> and to plead for an end to capital punishment in his defense of Leopold and Loeb in their prosecu-

---

PUB. L. 73 (1972) (Trials can be explained in terms of the political, social and economic interests involved.).

269. See Finkelman, *supra* note 105, at 80-82; *supra* notes 105-59 and accompanying text.

270. O. KIRCHHEIMER, *supra* note 261, at 232-33; S. OATES, *PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN* 308-09 (1970); Belknap, *supra* note 268, at 8, 13; Finkelman, *supra* note 105, at 79-80.

271. 2 HISTORY OF WOMAN SUFFRAGE 691 (S. Anthony, E. Stanton & M. Gage eds. 1882 & photo reprint 1985). The trial of Susan B. Anthony "was in many ways advantageous to the cause of freedom. Her trial served to awaken thought, promote discussion, and compel investigation of the principles of government." *Id.* A narrative of the trial with commentary by Ms. Anthony, Elizabeth Cady Stanton and Matilda Joslyn Gage is reported in *id.* at 647-91. Anthony, with the aid of several Rochester, New York election officials, had registered and voted in open defiance of the law in order to set up a test case of the issue and "to use her trial as a political forum." Belknap, *supra* note 268, at 7, 101. The constitutional challenge to the denial of the vote that Anthony sought to raise in her trial was rejected by the Supreme Court of the United States in another case. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). The woman's suffrage movement was not to succeed in obtaining constitutional recognition for the right of women to vote until 1920, when the nineteenth amendment was adopted. U.S. CONST. amend. XIX.

272. *United States v. Debs*, 63 F. 436 (C.C.N.D. Ill. 1894); see Novak, *The Pullman Strike Case: Debs, Darrow, and the Labor Injunction*, in AMERICAN POLITICAL TRIALS 129 (M. Belknap ed. 1981). The criminal trial was aborted when a juror fell ill; Debs was not reprosecuted. *Id.* at 131. Darrow's strategy of putting George Pullman and the railroad association on trial had succeeded, but the success was short-lived. Convinced their efforts would not succeed before a jury, the railroads shifted to a new tool, the labor injunction—equitable relief to be granted by the court, thereby avoiding jury trial. See *id.* at 147-48.

273. See *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927) (reversing conviction on state law grounds); A. HAYS, *LET FREEDOM RING* 26 (1925 & repr. ed. 1972); Belknap, *supra* note 268, at 9. For a novelistic account of the case, later made into a popular film, see J. LAWRENCE & R. LEE, *INHERIT THE WIND* (1955). Such limits on what can be taught in the public schools were later held unconstitutional under the Establishment Clause. *Edwards v.*

tion for the 1924 "thrill killing" of little Bobby Franks,<sup>274</sup> the nation watched closely, and a public dialogue about these controversial issues was sparked. During the civil rights struggle in the 1960's, when civil rights activists, who found the ordinary political process closed to them, resorted to such protest techniques as "sit-in" demonstrations that courted criminal prosecution in order to dramatize their cause and press their constitutional claims in the courts, their efforts helped to produce passage of the Civil Rights Act of 1964.<sup>275</sup> The

---

Aguillard, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Daniel v. Waters*, 515 F.2d 485 (5th Cir. 1975).

274. See J. KAPLAN, *CRIMINAL JUSTICE* 12-15 (1973); I. STONE, *CLARENCE DARROW FOR THE DEFENSE* 414-17 (1941). The two defendants received life imprisonment, rather than the death penalty. J. KAPLAN, *supra*, at 12 n.†. Although Löeb died in prison several years later, Leopold was paroled after thirty-one years. *Id.* He became a social worker and is cited frequently as an example of the possibility of redemption for capital defendants, and proof of the merits of Darrow's argument. *Id.* For a novelistic account of the trial, later made into a popular film, see M. LEVIN, *COMPULSION* (1956).

275. An important part of the civil rights struggle was carried out in criminal trials of civil rights demonstrators challenging discriminatory laws and practices in the Southern states. Denied access to the ordinary political process in these states and with the prospects of Congressional remedies stalled by the filibuster, activists often disobeyed the law and deliberately provoked prosecution in order to call attention to the struggle for racial equality and try to obtain redress in the Supreme Court. One civil rights lawyer commented:

The Negro demonstrator is testing the validity of laws he feels in good faith are unconstitutional or are being unconstitutionally applied. By refusing to obey these laws he is introducing a bill for their repeal or for a fair application of these laws in the only way he can: by deliberately letting himself be prosecuted and appealing any conviction to the Supreme Court where they can be judicially repealed. Since the ordinary political processes are closed to him, he is pursuing an alternate peaceful way of bringing about an orderly change in his society's laws.

Friedman, *Introduction*, in *SOUTHERN JUSTICE* 5-6 (L. Friedman Meridian Books ed. 1967); see also J. GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE* 121 (1977) ("The legal effort of the 1960's to extend the Fourteenth Amendment protections to public accommodations was inextricably interwoven with the . . . 'sit-in' demonstrations . . ."); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 47 (1983). See generally *SOUTHERN JUSTICE*, *supra* (accounts and commentary by civil rights lawyers, many of whom came from the North and other parts of the country to represent defendants in such cases when members of the local bar in the Southern states would not do so). The technique of provoking a criminal prosecution as a test case to attack racial discrimination did not, of course, originate in the 1960's. For an early, and constitutionally disastrous, example, see *Plessy v. Ferguson*, 163 U.S. 537 (1896) (legitimizing racial segregation through the separate but equal doctrine), which was a test case on the part of a civil rights organization in New Orleans brought to attack the constitutionality of the Jim Crow laws then spreading throughout the South. See Greenberg, *supra* note 261, at 323-26. During the early 1960's a common tactic for challenging the widespread practice of refusing service to blacks in restaurants, lunch counters, hotels, and similar service establishments was the "sit-in" demonstration. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965) (demonstration outside of a courthouse); *Griffin v. Maryland*, 378 U.S. 130 (1964) ("sit-in" demonstration in an amusement park that refused to admit blacks); *Bell v. Maryland*, 378 U.S. 226 (1964) ("sit-in" demonstration in a restaurant); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) ("sit-in" demonstration at a drug store lunch counter that refused to serve blacks); *Peterson v. Greenville*, 373 U.S. 244 (1963) ("sit-in" demonstration at a lunch-counter);

messages conveyed in the courtroom in the late 1960's by the defendants and their attorneys in a series of celebrated criminal trials that arose out of the defendants' militant activities against the war in Vietnam, were also provocative in the court of public opinion. The trials of Daniel Ellsberg,<sup>276</sup> the Chicago Conspiracy,<sup>277</sup> the Fort Hood Three,<sup>278</sup> Dr. Benjamin Spock and the other members of the Boston Five,<sup>279</sup> the Oakland Seven,<sup>280</sup> the Harrisburg Seven,<sup>281</sup> the Gainesville Eight,<sup>282</sup> and the Catonsville Nine<sup>283</sup> dramatized the antiwar movement, stimulating a broad public dialogue concerning the war

---

Edwards v. South Carolina, 372 U.S. 229 (1963) ("sit-in" demonstration on State House grounds); Garner v. Louisiana, 368 U.S. 157 (1961) ("sit-in" demonstration by black protesters in "whites only" section of a lunch counter); Boynton v. Virginia, 364 U.S. 454 (1960) (black bus passenger's refusal to leave the section of a bus terminal restaurant reserved for whites only); see J. GREENBERG, *supra*, at 121; P. LOW, J. JEFFRIES, & R. BONNIE, *supra* note 56, at 99; Pollitt, *Dime Stores Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 319. Groups of blacks would seek to obtain service in "whites-only" facilities, refusing to leave when denied service. In their ensuing prosecutions for criminal trespass, breach of the peace, or disorderly conduct, they would press the claim of a constitutional right to equal treatment at such facilities, hoping ultimately to succeed in the Supreme Court. *Id.* at 322 (The Supreme Court faced thirty-three such cases in the years 1960-1963.). The Court had avoided deciding the constitutional question for years by reversing such convictions on a variety of alternative grounds, such as vagueness, overbreadth, and statutory construction. Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1528-29 (1968); e.g., *Bouie*, 378 U.S. at 355 (Retroactive application of the new construction of the statute at issue deprived petitioners of their right of fair warning.); *Boynton*, 364 U.S. at 462-64 (The black petitioner had a federal right to remain in the white portion of the restaurant under the Interstate Commerce Act.). When, however, it appeared that the Court was about to confront the issue in a series of cases that arose in its 1963 Term, the political process finally responded and Congress passed the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1982), extending the right to non-discriminatory treatment in public accommodations. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 56, at 99-100. The "sit-in" demonstrations and the trials they produced were "the focus and cutting edge of the black civil rights movement" in the early 1960's and succeeded in "arous[ing] support for passage of the Civil Rights Act of 1964 . . . ." J. GREENBERG, *supra*, at 121.

276. *United States v. Russo*, No. 9373-WMB-CD (C.D. Cal. 1973); Belknap, *supra* note 268, at 11; Ely, *The Chicago Conspiracy Case*, in AMERICAN POLITICAL TRIALS 265 (M. Belknap ed. 1981). See generally P. SCHRAG, *TEST OF LOYALTY* (1974).

277. *United States v. Dellinger*, 357 F. Supp. 949 (N.D. Ill. 1969), *rev'd*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); see THE CONSPIRACY TRIAL (J. Clavir & J. Spitzer eds. 1970); N. DORSEN & L. FRIEDMAN, *supra* note 257, at 56-64; J. EPSTEIN, *THE GREAT CONSPIRACY TRIAL* (1970); Ely, *supra* note 276, at 287.

278. See Belknap, *supra* note 268, at 11; Ely, *supra* note 276, at 265.

279. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969); J. MITTFORD, *THE TRIAL OF DR. SPOCK* (1969); Ely, *supra* note 276, at 266.

280. See Belknap, *supra* note 268, at 11; Ely, *supra* note 276, at 265.

281. See Belknap, *supra* note 268, at 11; Ely, *supra* note 276, at 265; Hakman, *supra* note 268, at 73.

282. See Belknap, *supra* note 268, at 11; Ely, *supra* note 276, at 266.

283. See *United States v. Berrigan*, 437 F.2d 750 (4th Cir. 1971); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968); D. BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* (1970).

and playing a significant role in ending it. Finally, can there be any doubt that the trial of Col. Oliver North for his role in the Iran-Contra affair, just beginning at this writing, will affect public discourse about that political controversy, particularly with the prospect that former President Reagan may be called to testify now that the district court has declined to quash a subpoena served upon him by the defense?<sup>284</sup>

First amendment protection, however, should extend to the advocacy of counsel and the defendant's choice of counsel, not only in "political" cases. In an important sense, all criminal trials are political. As noted by Otto Kirchheimer, one of the foremost scholars of the political trial, "political issues may well pervade trials involving common crimes."<sup>285</sup> What Kirchheimer called "political coloring" could "be imparted to such garden variety criminal trials by the motives of the prosecution, or by the political background, affiliation, or standing of the defendant."<sup>286</sup> Or, we might add, by the issues the case may happen to produce, sometimes quite unpredictably. Clarence Darrow's impassioned plea against the death penalty in the Leopold and Loeb case<sup>287</sup>—not a political trial by any ordinary measure—serves as an illustration. The criminal trial therefore is inherently an important "marketplace of ideas,"<sup>288</sup> deserving of first amendment protection. Moreover, as Zenger's case and many of our historic "political" trials demonstrate, the criminal trial serves the "checking value" of the first amendment, limiting the abuse of power by public officials.<sup>289</sup>

---

284. *United States v. North*, No. CR. 88-0080-02 (D.D.C. filed Mar. 16, 1988); see *N.Y. Times*, Jan. 31, 1989, at A20, cols. 3-6.

285. O. KIRCHHEIMER, *supra* note 261, at 52.

286. *Id.*

287. See *supra* note 274 and accompanying text.

288. The marketplace of ideas metaphor, originating in Justice Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919), has become a dominant motif in first amendment jurisprudence. *E.g.*, *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985); *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); see Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 137-38, 298 (1946); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 82-89 (1948); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *DUKE L.J.* 1.

289. See generally Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521 (free speech as a restraint on the abuse of power by government); see Goodpaster, *supra* note 62, at 134-35, 137. The United States Supreme Court has been most explicit in its recognition of the "checking value" of the criminal trial in its discussion of the role of news reporting of the trial as "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

In addition, criminal trials are an important part of the governmental process "and by their very nature are of interest to those concerned with the administration of government."<sup>290</sup> Some political scientists, defining "politics" as the authoritative allocation of values in a society or system, contend that all trials can be considered political.<sup>291</sup> Because courts are the "governmental arenas or sub-systems in which a distribution of power is achieved," Professor Nathan Hakman suggests that all courtroom participants are acting politically "when their legal activities are seen as involving other members of society."<sup>292</sup> Thus, Hakman contends, court cases can be seen as political, whether the litigants are seeking to affect merely their own interests or are using the courts "as instruments for changing legal symbols (*i.e.*, applicable rules of law)" or as "means of organizing and/or suppressing movements for social or economic control."<sup>293</sup> Even considering only this last function—the most clearly "political" of those listed—all criminal trials would qualify as political because their basic purpose is to effect social control through the deterrent, retributivist, educational, and rehabilitative aims of criminal law and punishment.<sup>294</sup> Frequently occurring in the glare of extensive media coverage, criminal trials are our public morality plays. This is particularly true for the high visibility RICO and CCE cases for which criminal forfeiture is sought. Conceived of more broadly, the criminal trial is political in the sense that it constitutes an important governmental institution where public business is conducted. As such, the information generated there is vital to first amendment values because it is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."<sup>295</sup>

Moreover, the advocacy of defense lawyers in the courtroom is addressed not only to judges—public officials exercising governmental power—but also to juries, which play a unique role in our democratic

---

290. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 464, 495 (1975).

291. Hakman, *supra* note 268, at 81 (citing D. EASTON, *THE POLITICAL SYSTEM* (1953)).

292. *Id.*

293. *Id.*

294. See generally G. EZORSKY, *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* (1972) (philosophical analysis of theories of punishment); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 296-324 (1960) (justification for punishment); H. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968) (discussion of the impact of punishment and retribution on social responsibility); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-61 (1968) (discussing theories of punishment); Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983) (moral principles of punishment).

295. *Cox Broadcasting*, 420 U.S. at 495; see also *supra* notes 266 & 267 and accompanying text.

traditions. The Supreme Court has long recognized that criminal juries are "instruments of public justice," that accordingly must be "truly representative of the community."<sup>296</sup> Community participation in the jury system comports with "our basic concepts of a democratic society and a representative government"<sup>297</sup> and allows the jury to serve its essential purpose of interposing the "common sense judgment of the community as a hedge against the over-zealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."<sup>298</sup> To serve this crucial "checking function,"<sup>299</sup> the jury must not be shut off from the advocacy of the defendant's counsel of choice. In short, as deTocqueville recognized more than one hundred fifty years ago, the jury plays a significant role in the American system of government.<sup>300</sup> Advocacy addressed to the criminal jury is political in every meaningful sense and should be within the purview of the first amendment.

In addition, now that the death penalty is a potential punishment for many federal drug offenses for which RICO and CCE forfeiture is sought,<sup>301</sup> all such cases involving a killing that trigger a possible death sentence can be considered political in still another sense. In the death penalty context, the Supreme Court frequently emphasizes the special role of the jury in capital sentencing as an indication of community values.<sup>302</sup> Under the Court's eighth amendment jurispru-

---

296. *Smith v. Texas*, 311 U.S. 128, 130 (1940). *Smith* was an equal protection case involving racial discrimination in state jury selection, but the Court has since subsumed the jury representativeness principle within the sixth amendment fair "cross section of the community" requirement. *Duren v. Missouri*, 439 U.S. 357 (1979); *Ballew v. Georgia*, 435 U.S. 223, 230, 239 (1978); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); see also Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 62-77 (1982) [hereinafter, Winick, *Prosecutorial Peremptory Challenge*]; Winick, *Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825, 856-62 (1983) [hereinafter, Winick, *Witherspoon in Florida*].

297. *Smith*, 311 U.S. at 130; see also *Taylor*, 419 U.S. at 530 ("our democratic heritage").

298. *Taylor*, 419 U.S. at 530; see also *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

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

300. A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 127-28 (New American Library ed. 1956); see also Levine, *The Legislative Role of Juries*, 1984 AM B. FOUND. RES. J. 605, 606 (The jury system allows "citizens to express their ideas about public policy and actually put them into practice.").

301. 21 U.S.C. § 848 (1982), as amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001.1, 1988 U.S. CODE CONG. & ADMIN. NEWS 4387 (signed into law Nov. 18, 1988) (adding death penalty for a CCE defendant who "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual" and for any defendant who in the course of a violation of the Controlled Substances Act, 21 U.S.C.A. §§ 802-966 (West 1981 & Supp. 1988), intentionally kills any federal, state, or local law enforcement officer).

302. See, e.g., *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2691 (1988) (plurality opinion).



dence, the constitutionality of the death penalty depends on its continued acceptance by society. The Court reads the cruel and unusual punishment clause as an evolving constitutional norm that reflects society's changing moral judgments concerning the limits of appropriate punishment.<sup>303</sup>

In upholding capital punishment under this standard in 1976,<sup>304</sup> the Court relied not only on the actions of legislatures in revealing the society's standards of decency, but also stressed the conduct of capital juries acting as reflectors of community sentiment on the death penalty question.<sup>305</sup> Noting that some 460 death sentences were imposed in less than four years following its decision in *Furman v. Georgia*,<sup>306</sup> which invalidated the nation's then-existing death penalty statutes, the Court found that these jury determinations served as a "significant and reliable objective index of contemporary values"<sup>307</sup> and indicated that the community had not rejected, the death penalty as an appropriate punishment. Using the same approach, the Court has rejected, as cruel and unusual, statutes that mandate capital punishment for conviction of certain crimes,<sup>308</sup> and that make capital punishment available for rape,<sup>309</sup> for certain types of felony murder,<sup>310</sup> and for offenses committed when the defendant is under 16 years of age.<sup>311</sup> In each instance, the Court has relied on the reluctance of capital juries to convict or to impose death in such cases. Thus, the jury plays a crucial constitutional role concerning the continued validity of capital punishment. Advocacy in a capital RICO or CCE case addressed to the jury—the political institution to which the life or

---

303. As early as 1910, the Court recognized that the eighth amendment is "progressive" and "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). Because the language of the prohibition against cruel and unusual punishment is not precise and its scope is not static, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *accord Thompson*, 108 S. Ct. at 2691; *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

304. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg*, 428 U.S. at 173.

305. *Gregg*, 428 U.S. at 181; *see also Thompson*, 108 S. Ct. at 2691-92, 2697-98; *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion); *Woodson*, 428 U.S. at 293; *Furman v. Georgia*, 408 U.S. 238, 299-300 (1972) (Brennan, J., concurring); Winick, *Prosecutorial Peremptory Challenge*, *supra* note 296, at 3-4, 78-82; Winick, *Witherspoon in Florida*, *supra* note 296, at 830-31, 862-64.

306. 408 U.S. 238 (1972) (per curiam).

307. *Gregg*, 428 U.S. at 181.

308. *Woodson*, 428 U.S. at 293.

309. *Coker*, 433 U.S. at 596-97.

310. *Enmund*, 458 U.S. at 795-96.

311. *Thompson*, 108 S. Ct. at 2691-92, 2697-98.

death question is assigned—is therefore speech that is inherently political and that affects both the defendant's fate and the future validity of capital punishment for these offenses.

In any event, the first amendment is not limited to political speech, and the right to hire an attorney to assert rights is not limited to political cases. Although *NAACP v. Button*,<sup>312</sup> the case originally recognizing the right as protected by the first amendment, involved a civil rights organization using litigation not as “a technique of resolving private differences,” but as a means of securing racial equality and as “a form of political expression,”<sup>313</sup> the Court has declined to limit the principle to such plainly political contexts. In applying the right to cases involving the settlement of private civil damage claims,<sup>314</sup> the Court noted that, although the litigation in question was not political as in *Button*, “the First Amendment does not protect speech and assembly only to the extent it can be characterized as political.”<sup>315</sup> As a result, the Court rejected the contention “that the principles announced in *Button* were applicable only to litigation for political purposes.”<sup>316</sup> The right therefore should apply in all criminal cases without regard to their “political” nature.

Use of the forfeiture statutes to disqualify a defendant's chosen counsel and therefore render unavailable all but public defenders

---

312. 371 U.S. 415 (1963).

313. *Id.* at 429.

314. *E.g.*, *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964).

315. *United Mine Workers*, 389 U.S. at 223; *accord Connick v. Myers*, 461 U.S. 138, 147 (1983).

316. *United Mine Workers*, 389 U.S. at 223; *see also Brotherhood of R.R. Trainmen*, 377 U.S. at 8 (rejecting this contention, which was made in the dissent of Justice Clark, *see id.* at 10 (Clark, J., dissenting)). Four members of the Court have appeared to question this principle more recently. In *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), the Court reversed a district court's nationwide preliminary injunction in a case raising a due process and first amendment challenge to the statutory ten dollar maximum fee that a veteran could pay his attorney for representing him in connection with a benefits claim before the Veterans Administration. A footnote in the Court's opinion suggested that a higher level of constitutional scrutiny would be appropriate for restrictions on “core political speech” than for those on the pursuit of an individual claim for government benefits in an administrative agency. *Id.* at 335 n.13. However the opinion in *Walters* occurred in the context of reviewing a preliminary injunction granted on likelihood of success, in which an appellate decision may “intimate no view as to the ultimate merits,” *e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975); furthermore, a majority of the Court did not determine the constitutional issues. *Walters*, 473 U.S. at 355 n.37 (Brennan, J., dissenting); *see id.* at 336 (“[S]uch claims remain open on remand.”) (O'Connor, J., concurring, joined by Blackmun, J.); *id.* at 358-72 (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.). In any event, regardless of whether the informal and essentially nonadversary administrative claim procedure designed by Congress for the handling of veterans' benefit claims, *see id.* at 325, constitutes a forum for first amendment expression, the high visibility and inherently political criminal trial surely does.

implicates these important first as well as sixth amendment concerns. Consequently, it must meet the "exacting scrutiny" traditionally applied in the first amendment area.<sup>317</sup> What, in other contexts, plainly will qualify as important governmental interests justifying a variety of regulatory measures will not, accordingly, suffice when the government's actions infringe on the defendant's ability to hire counsel of choice, as they inevitably do in the forfeiture context.<sup>318</sup>

Such strict first amendment scrutiny is also mandated by the Court's approach in a number of cases that involve restrictions on participation in the political process. Once it is recognized that the criminal trial is an important aspect of the political process, cases that strictly scrutinize a variety of statutory and regulatory limitations on expenditures for political campaigns become applicable. In *Buckley v. Valeo*<sup>319</sup> and its progeny,<sup>320</sup> the Supreme Court reviewed, under the stringent standards of the first amendment, such limits placed on expenditures that an individual, a corporation, or a political action

---

317. *E.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *NAACP v. Button*, 371 U.S. 415, 429 (1963). To meet this standard the government must show "a subordinating interest which is compelling." *Bellotti*, 435 U.S. at 786; *Bates v. City of Little Rock*, 361 U.S. 516 (1960). The governmental interest advanced "must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Bellotti*, 435 U.S. at 786; *see Elrod*, 427 U.S. at 362. "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; urgent; strong." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Even when this heavy burden is carried, the government is required to employ means "narrowly tailored," *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 19 (1986) (plurality opinion); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1986); *Bellotti*, 435 U.S. at 786, or "closely drawn to avoid unnecessary abridgment" of the first amendment interest in question. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 (1982); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Bellotti*, 435 U.S. at 786; *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). "[T]he limitation of first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *see also NAACP v. Clairborne Hardward Co.*, 458 U.S. 886, 912 (1982). To justify an infringement on first amendment rights, it must be found that the state interest "cannot be achieved through means significantly less restrictive" of the right involved. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Elrod*, 427 U.S. at 363; *Buckley*, 424 U.S. at 25; *United Mine Workers*, 389 U.S. at 223-25; *Button*, 371 U.S. at 438; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

318. *See United Mine Workers*, 389 U.S. at 222-25; *id.* at 225-26 (Upholding the right "cuts deeply into one of the most traditional of state concerns, the maintenance of high standards within the state legal profession.") (Harlan, J., concurring); *Brotherhood of R.R. Trainmen*, 377 U.S. at 6-8.

319. 424 U.S. 1 (1976).

320. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Bellotti*, 435 U.S. at 765.

committee could make to influence the election of a political candidate or the outcome of a referendum.<sup>321</sup> If statutory limitations on expenditures for such political speech are subject to strict scrutiny, then limitations on political speech in the courtroom imposed by restraining orders issued pursuant to the forfeiture provisions should be as well.<sup>322</sup> The total abridgment of the right to counsel of choice accomplished by an order restraining the defendant's use of his assets to hire any advocate is a form of prior restraint,<sup>323</sup> substantially more restrictive on expression than the limitations on expenditures involved in the political campaign cases. Like a prior restraint, such a restraining order has "an immediate and irreversible" impact that irretrievably prevents exercise of the right.<sup>324</sup> As a result, such a restraining order should bear "a 'heavy presumption' against its constitutional validity."<sup>325</sup>

Advocacy in the court—as public a forum as there is<sup>326</sup>—is a

---

321. *Massachusetts Citizens for Life*, 479 U.S. at 251-52; *National Conservative Political Action Comm.*, 470 U.S. at 496-97; *First Nat'l Bank*, 435 U.S. at 786-87; *Buckley*, 424 U.S. at 11.

322. A footnote in the Court's opinion in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 n.13 (1985), appears to cast doubt on this conclusion. *Walters* dealt with a due process and first amendment challenge to the statutory ten dollar maximum fee that may be paid an attorney for representing a veteran in his claim for benefits before the Veterans Administration. *Id.* at 308. In responding to the argument of the dissent that Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (The limitation of a political action committee's expenditures to propagate its political views is a restriction on first amendment speech.), was controlling, *Walters*, 473 U.S. at 364 n.13 (Stevens, J., dissenting), the Court's opinion stated that "the constitutional analysis of a regulation that restricts core political speech, such as the regulation at issue in [*National Conservative Political Action Comm.*], will differ from the constitutional analysis of a restriction on the available resources of a claimant in government benefit proceedings." *Walters*, 473 U.S. at 335 n.13. As indicated previously, this statement is not only an inappropriate expression of views concerning the merits of a controversy reviewed only on the grant of a preliminary injunction, but it also reflects the views of only four of the justices. See *supra* note 316. Moreover, the advocacy occurring in a criminal trial, not infrequently affecting the course of the law and stimulating political debate on public issues, is considerably closer to the "core political speech" occurring in political campaigns than is that occurring in a low visibility, essentially nonadversary veterans' benefits hearing.

323. See, e.g., *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S. Ct. 2138 (1988); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-59 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). See generally Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

324. See *Nebraska Press Ass'n*, 427 U.S. at 559.

325. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

326. See *In re Oliver*, 333 U.S. 257, 270 (1948) ("[E]very criminal trial is subject to contemporaneous review in the forum of public opinion . . ."); *Craig v. Harvey*, 331 U.S. 367, 374 (1947) ("A trial is a public event."); see also U.S. CONST. amend. VI (affording the accused "the right to a . . . public trial"). Although the sixth amendment right to public trial belongs

matter of vital first amendment concern. From the John Peter Zenger trial to this very day, who appears in court and what he advocates there makes an enormous difference to our system of justice and to our entire society. By keeping the advocate chosen by the accused from ever entering the door of the courtroom, the government in effect bars from this important marketplace of ideas the communications of the defendant—the object of the controversy—in the form and by the advocate he has chosen to make them. Instead of the free market of ideas that the right to counsel of choice best promotes, the government would be substituting the public monopoly of appointed counsel, thereby producing a serious structural distortion in the market. Restricting this marketplace to public defenders or appointed lawyers would be analogous to permitting newspapers to report whatever a political candidate wished to communicate to the public, but requiring that all reporters be either government employees or free-lance reporters selected by the government and paid fees substantially below market rates. Clearly it would be inconsistent with our traditions of free choice, with free enterprise, and with basic first amendment values to restrict expression to such state-controlled channels.<sup>327</sup>

---

to the defendant rather than the public, *Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979), historically it has been "the universal requirement of our federal and state governments that criminal trials be public . . ." *Oliver*, 333 U.S. at 273; see also *DePasquale*, 443 U.S. at 384 ("common law rule of open civil and criminal proceedings"); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1150 (1966) (judicial recognition of a common law right of the public to a public trial). Moreover, the Court has recognized that the first amendment protects the general public's right of access to criminal trials. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558-81 (1980) (plurality opinion). This public right of access coupled with the Court's recognition of first amendment protection for the news media in the reporting of criminal matters constitutes both an acknowledgement of the importance of the criminal trial as a public forum and an assurance that it will remain an important forum of public opinion. See, *e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 3-4 (1986); *Waller v. Georgia*, 467 U.S. 39, 45-46 (1984); *Press-Enterprise v. Superior Court*, 464 U.S. 501, 505 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 601 (1982); *Richmond Newspapers*, 448 U.S. 555 (surveying the tradition of openness of courts); *Nebraska Press Ass'n*, 427 U.S. at 548-50.

327. Indeed, even though the public schools are "the primary vehicle for transforming the values on which our society rests," *Plyler v. Doe*, 457 U.S. 202, 221 (1982), the state may not exercise a monopoly over the education of children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (It is unconstitutional to require compulsory education in public schools only.); see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents could remove their children from school after the eighth grade on religious grounds.); M. YUDOFF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 233 (1983) (The right of parents to educate their children at home is recognized in many states. States commonly provide for parental control over attendance in controversial courses like sex education.). And even within the public school, the Supreme Court has "long recognized certain constitutional limits upon the power of the State to control even the curriculum and

### C. *Scrutinizing the Governmental Interests Underlying the Forfeiture Statutes*

Both sixth and first amendment principles support the view that the burden of justification required for this total abridgment of the right to counsel of choice should be framed in terms of the usual test of strict scrutiny invoked whenever fundamental constitutional rights are violated, thereby requiring a compelling governmental interest and the use of least restrictive means.<sup>328</sup> What, then, are the justifications asserted to support the infringement upon sixth and first amendment rights that result from application of the forfeiture statutes to legitimate attorneys' fees?

Congress designed the criminal forfeiture provisions to deprive criminal organizations of their economic bases, which, if left intact, could sustain their operations despite conviction of their individual members.<sup>329</sup> Congress designed the civil in rem forfeiture provision of the Controlled Substances Act<sup>330</sup> to impose a penalty upon those who were significantly involved in a criminal enterprise and to remove the operating tools of crime from criminals.<sup>331</sup> In 1978, Congress amended this statute "to strike at the profits of illegal drug trafficking,"<sup>332</sup> by adding language designed to reach proceeds traceable to an

---

classroom." *Board of Educ. v. Pico*, 457 U.S. 853, 861 (1982) (plurality opinion); e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (declaring unconstitutional a state law forbidding the teaching of evolution unless accompanied by instruction in the theory of "creation science"); *Pico*, 457 U.S. 853 (Local school boards may not remove books from a school library only because they dislike the ideas that the books convey.); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (declaring unconstitutional a state law prohibiting the teaching of Darwin's theory of evolution); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a state law forbidding the teaching of modern foreign language in public and private schools). The Court has stressed that public schools may not be "enclaves of totalitarianism" and that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503, 511 (1969).

328. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (first amendment right to freedom of expression); *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (substantive due process right to abortion); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (first amendment right to free exercise of religion).

329. S. REP. NO. 225, *supra* note 19, at 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3374; see also *United States v. Turkette*, 452 U.S. 576, 585 (1981) (RICO was designed "to divest the [criminal] association of the fruits of its ill-gotten gains.").

330. 21 U.S.C. § 881(a) (1982 & Supp. IV 1986); see *supra* notes 14 & 26.

331. See *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383, 1390-91 (W.D. Pa. 1979).

332. 124 CONG. REC. 34,667 (1978) (statement of Sen. Culver); see also 124 CONG. REC. 36,946 (1978) (statement of Rep. Rogers) (strike at profits of illicit trafficking); 124 CONG. REC. 23,055 (1978) (statement of Sen. Nunn) (striking out against profits from drug trafficking).

exchange for a controlled substance.<sup>333</sup> Senator Nunn, who sponsored this amendment, described it as enhancing the "punitive and deterrent purposes"<sup>334</sup> of the Controlled Substances Act.<sup>335</sup> Senator Nunn complained that, under prior law, drug agents had been "compelled to return seized money to defendants even though it had been apparent the money is the profit from illicit drug trafficking or has been used or intended to be used in drug trafficking. . . . [or] to replenish their stock of drugs that were seized at the time of arrest."<sup>336</sup> The basic purpose of the 1978 amendment therefore was to prevent forfeitable assets from being used to further the drug enterprise.

The RICO and CCE forfeiture provisions, as originally drafted, enjoyed only limited success, in part because defendants were able to transfer or conceal forfeitable assets prior to conviction.<sup>337</sup> The Comprehensive Forfeiture Act of 1984,<sup>338</sup> amending the original RICO<sup>339</sup> and CCE<sup>340</sup> forfeiture provisions, allowed for issuance of preindictment restraining orders to prevent transfers of assets prior to trial,<sup>341</sup> and for forfeiture of assets received by third parties from defendants in transactions following the commission of the crime.<sup>342</sup> The amendments also provided for a postconviction hearing at which a third party with a legal interest in forfeitable property could avoid forfeiture by showing that he held title superior to that of the defendant, or by showing that he was a bona fide purchaser, which Congress defined as one reasonably without cause to believe the property was subject to forfeiture.<sup>343</sup>

The legislative history strongly suggests that the preconviction transfers sought to be prevented or voided were those made to parties who were not dealing at "arms' length" with a defendant, in other words, "sham" transactions. The Senate Report explains the relationship amendments as follows:

The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in a

---

333. Pub. L. No. 95-533 § 301(a), 92 Stat. 1276 (1978) (codified as amended at 21 U.S.C. § 881(a)(6) (1982 & Supp. IV 1986)).

334. 124 CONG. REC. 23,055 (1978).

335. 21 U.S.C. § 801 (1982).

336. *Id.*

337. S. REP. NO. 225, *supra* note 19, at 195, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3378; *see supra* notes 19-20 and accompanying text.

338. Pub. L. No. 98-473, §§ 301-323, 98 Stat. 1837, 2040-57 (codified in scattered sections of 18, 19, 21, 26 & 28 U.S.C.).

339. 18 U.S.C. § 1963 (1982 & Supp. IV 1986).

340. 21 U.S.C. § 853 (1982 & Supp. IV 1986).

341. 18 U.S.C. § 1963(d)(2); 21 U.S.C. § 853(e)(1)(B).

342. 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c).

343. 18 U.S.C. § 1963(cc); 21 U.S.C. § 853(n).

current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arms' length" transactions. On the other hand, this provision should not operate to the detriment of innocent bona fide purchasers of the defendant's property.<sup>344</sup>

Elsewhere, the Senate Report states that the third party provisions "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions."<sup>345</sup> The legislative history reveals that Congress' only stated objective in adopting the relation-back provisions was "setting out clear authority for voiding improper pre-conviction transfers of assets subject to criminal forfeiture."<sup>346</sup> As to what constitutes an "improper transfer," the legislative history refers only to transfers not at arms' length terms or in which the transferee actually is serving as the defendant's nominee.<sup>347</sup>

Do the governmental interests underlying the 1984 amendments justify application of the forfeiture provisions to legitimate as opposed to "sham" attorneys' fees? Plainly, these governmental interests outweigh any interest by a defendant in transferring tainted properties to his counsel as a sham transaction to prevent forfeiture. Such sham or fraudulent transfers, in the view of the panel opinion in *United States v. Harvey*,<sup>348</sup> since reversed en banc, "define the permissible constitutional reach of the Act in permitting the forfeiture of attorney fees."<sup>349</sup> Exempting bona fide attorneys' fees from preconviction restraint, like exempting necessary living expenses, does not undermine the legislative purpose of stripping drug dealers of their economic bases. As the United States Court of Appeals for the Fifth Circuit concluded in rejecting the government's contention that such exemptions would allow the defendant to benefit economically from crime:

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

---

344. S. REP. NO. 225, *supra* note 19, at 200-01, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3383-84.

345. *Id.* at 209 n.47, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3392 n.47.

346. *Id.* at 197, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3380.

347. *See id.* at 209 & n.47, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3392 & n.47.

348. 814 F.2d 905 (1987), replaced on reh'g en banc sub nom. *United States v. Caplin & Drysdale*, Chartered, 837 F.2d 637 (4th Cir.), cert. granted, 109 S. Ct. 363 (1988).

349. *Id.* at 924.



in order to pay a reasonable fee to the attorney he chooses to assist in his defense is sophistry.<sup>350</sup>

Freeing legitimate attorneys' fees from forfeiture does not permit the defendant "to retain his ill-gotten economic power after conviction," nor "to shelter untainted assets by paying a lawyer with tainted property first."<sup>351</sup> Although it will permit defendants who later are found guilty to use what turns out to have been ill-gotten economic power to hire an attorney, the legitimate governmental interests in preventing such use are small. The government's legitimate interest in deterring crime is met, as the prospect of hiring an attorney with the proceeds of crime alone does not provide an incentive to commit crime.<sup>352</sup> The government's legitimate interest in punishing crime is not implicated, as punishment constitutionally may be imposed only after conviction.<sup>353</sup> The government's legitimate interest in preventing the proceeds of crime from being used to fuel additional crime either by the defendant or a criminal organization with which he is associated is fully satisfied. The government interest in forfeiture is not to raise revenue; therefore, the government may not assert a financial interest in attorneys' fees.<sup>354</sup> Nor may the government assert a

---

350. *United States v. Thier*, 801 F.2d 1463, 1474-75 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (1987).

351. *United States v. Monsanto*, 852 F.2d 1400, 1403 (2d Cir.) (Feinberg, C.J., concurring, joined by Oakes & Kearse, JJ.), *cert. granted*, 109 S. Ct. 363 (1988).

352. *See supra* note 350 and accompanying text.

353. *E.g.*, *United States v. Unit No. 7 & Unit No. 8 (Kiser)*, 853 F.2d 1445, 1451-52 (8th Cir. 1988) *mandate stayed* by 864 F.2d 1421; *Monsanto*, 852 F.2d at 1408 n.3 (Winters, J. concurring, joined by Meskill & Newman, JJ.); *United States v. Salerno*, 481 U.S. 739, 746-47 (1987); *Jones v. United States*, 463 U.S. 354, 369 (1983); *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Moreover, the legislative history of the forfeiture statutes reveals that Congress, in enacting the pre-trial restraint provisions, was concerned not with punishing the defendant prior to conviction, but merely with preventing fraudulent transfers, improper dispositions, or concealment of assets that might be subject to forfeiture postconviction. *Monsanto*, 852 F.2d at 1407-08 (Winters, J., concurring, joined by Meskill & Newman, JJ.).

354. *See Monsanto*, 852 F.2d at 1407 (Winters, J., concurring, joined by Meskill & Newman, JJ.) ("[T]he government expressly disclaimed at oral argument any interest in criminal forfeitures under the Act as a means of raising revenue. The mere fact that the assets ultimately forfeited after conviction may be less than if a total preconviction restraint had been imposed does not, therefore, contravene any purpose of the Act.") Any financial interest the government may assert in forfeiting attorneys' fees would in any case be modest, because the government's gain would need to be offset to some extent by the expenses of paying for appointed counsel. *United States v. \$70,476 in U.S. Currency*, 677 F. Supp. 639, 646 (N.D. Cal. 1987), *appeal dismissed*, 845 F.2d 329 (9th Cir. 1988). In any event, under traditional principles, this financial interest would be insufficient to outweigh the defendant's fundamental right to counsel of choice. In other contexts the Supreme Court repeatedly has rejected financial interests as sufficient justification for government infringement upon fundamental constitutional rights. *E.g.*, *Burch v. Louisiana*, 441 U.S. 130, 139 (1979); *Ballew v. Georgia*, 435 U.S. 223, 244 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977);

legitimate interest in the adversarial advantage it will gain by preventing the defendant from hiring his chosen counsel.<sup>355</sup> As a result, the interest in preventing the use of "ill-gotten economic power" to hire attorneys is "weak" in the context of bona fide fees and cannot outweigh the defendant's constitutional right to counsel of choice.<sup>356</sup> The "small societal cost" of exempting such bona fide fees from forfeiture "is the price we must pay for protecting the rights of the innocent, who might otherwise be deprived of legitimate economic power in waging a full defense."<sup>357</sup>

Applying the forfeiture statutes to legitimate attorneys' fees will not promote the predominant congressional interest asserted in the legislative history of the 1984 amendments—the avoidance of fraudulent transfers. So long as it can be assured that the fee paid to the attorney is a bona fide and reasonable one, rather than a sham or fraudulent transfer designed to avoid forfeiture, Congress' stated purpose is not frustrated. Indeed, exempting legitimate attorneys' fees from forfeiture would serve Congress' interest in stripping drug dealers and racketeers of their "economic power bases."<sup>358</sup>

One of the primary reasons to strip criminals and their organizations of their "economic power bases" is to prevent the profits of crime from being used to sustain the criminal enterprise, even after the conviction of individual members. The use of otherwise forfeitable assets to pay legitimate attorneys' fees does not frustrate this interest, but instead furthers it. Funds that the defendant pays to his attorney for his services are thereafter unavailable to the defendant or to any criminal organization to which he may belong.<sup>359</sup> The congressional

---

Bounds v. Smith, 430 U.S. 817, 825 (1977); Bullock v. Carter, 405 U.S. 134, 147-49 (1972); Mayer v. Chicago, 404 U.S. 189, 196-97 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

355. See *Monsanto*, 852 F.2d at 1403 (Feinberg, C.J., concurring, joined by Oakes & Kearse, JJ.) ("Of course, weakening the ability of an accused to represent himself at trial is an advantage for the government. But it is not a legitimate government interest that can be used to justify invasion of a constitutional right.").

356. *Id.*

357. *Id.*

358. As Professor Cloud points out:

Payment of fees to defense counsel actually guarantees that a defendant will "lose" the asset. Even if the defendant is acquitted, the asset is conveyed to the attorney. Conversely, a defendant represented by appointed counsel who prevails on the forfeiture counts will retain all title to the assets, even if convicted on some substantive counts. In other words, exempting legitimate defense counsel fees from forfeiture guarantees that the defendant will be deprived of the asset used to pay the fees with more certainty than does the forfeiture mechanism itself.

Cloud, *supra* note 49, at 832.

359. \$70,476 in *U.S. Currency*, 677 F. Supp. at 646; Note, *supra* note 34, at 139.

interest in deterring crimes by depriving criminals of the economic incentives to engage in them therefore would be fully satisfied without applying the forfeiture provisions to legitimate attorneys' fees.<sup>360</sup>

As a result, because the interests asserted by Congress in support of the forfeiture provisions are not furthered by the forfeiture of legitimate as opposed to sham or fraudulent attorneys' fees, application of the forfeiture provisions to such fees is gratuitous and unnecessary. Whatever the result would be if Congress were to seek to further other compelling interests through forfeiture, the application of the forfeiture provisions of RICO and CCE to legitimate attorneys' fees constitutes an arbitrary and unreasonable intrusion on the defendant's right to counsel of choice and should be held unconstitutional.

#### IV. AVOIDING THE CONSTITUTIONAL DILEMMA

The foregoing analysis demonstrates that application of the forfeiture statutes to legitimate attorneys' fees violates the sixth and first amendment right to counsel of choice. At the very least, such application raises extremely serious constitutional questions. Need these difficult constitutional questions be resolved by the Supreme Court in the cases pending before it? A number of legal principles counsel in favor of avoiding the constitutional dilemma and therefore avoiding or at least deferring the necessity of judicial imposition of constitutional constraints on Congress' ability to deal with difficult questions of social policy. As Justice Scalia recently reminded the Court: "Striking down a law approved by the democratically elected representatives of the people is no minor matter."<sup>361</sup>

The Court predictably and properly will wish to give Congress a wide berth when dealing with such pressing social problems as the war on organized crime and illicit drugs. These avoidance principles reflect "the prudential concern that constitutional issues not be need-

---

360. *United States v. Thier*, 801 F.2d 1463, 1474-75 (1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987); Genego, *supra* note 65, at 849-50 (Including attorneys' fees within the scope of the forfeiture law advances neither of the objectives underlying the 1984 amendments.); Cloud, *supra* note 49, at 833 ("It appears that if legitimate defense attorneys' fees are exempted from forfeiture, the government's valid law enforcement interests survive unimpeded."); Note, *supra* note 34, at 138 ("[T]he government interest allegedly furthered by forfeiture is not hindered by the exclusion of [legitimate] attorneys' fees from forfeiture.").

361. *Edwards v. Aguillard*, 482 U.S. 578, —, 107 S. Ct. 2573, 2600 (1987) (Scalia, J., dissenting); *see also* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (Rehnquist, C.J.) ("Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform . . .'" (quoting *Rustker v. Goldberg*, 453 U.S. 57, 64 (1981); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

lessly confronted.”<sup>362</sup> These methods of prudence, “passive virtues” as Alexander Bickel called them,<sup>363</sup> involve techniques of remanding these admittedly complex issues to the Congress for what Dean Calabresi called a “second look.”<sup>364</sup> Two such techniques are especially appropriate here—the canon of statutory construction that counsels that an act should not be construed to violate the Constitution if a constitutional interpretation is possible, and a principle drawn from administrative law that broad delegations of legislative authority to administrative officials must be scrutinized closely when such discretionary authority is invoked to intrude on fundamental constitutional values, potentially finding such assertions to be *ultra vires*.

### A. *Avoiding the Dilemma Through Statutory Construction*

#### 1. THE REQUIREMENT OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT WHEN AN INTERPRETATION OF A STATUTE IS ASSERTED THAT RAISES SERIOUS CONSTITUTIONAL PROBLEMS

It is a cardinal principle of statutory construction that, if possible, statutes should be construed to avoid an unconstitutional interpretation.<sup>365</sup> Although like other canons of construction, this principle is not always consistently applied,<sup>366</sup> the Supreme Court has

362. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988). This “fundamental rule of judicial restraint,” which is “more deeply rooted than any other in the process of constitutional adjudication,” requires that courts not “pass on questions of constitutionality . . . unless such adjudication is unavoidable.” *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (citing *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g*, 467 U.S. 138, 157 (1984); *Larson v. Valente*, 456 U.S. 228, 257 (1982) (Stevens, J., concurring); *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 737 (1950)). “Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.” *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

363. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

364. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 135-36 (1982).

365. See, e.g., *DeBartolo Corp.*, 108 S. Ct. at 1397; *Lowe v. SEC*, 472 U.S. 181, 190 (1985); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Johnson v. Robison*, 415 U.S. 361, 367 (1974); *Gutknecht v. United States*, 396 U.S. 295, 307 (1970); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569 (1947); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). This canon of statutory construction is an application of the prudential principle that courts should not decide constitutional issues unnecessarily. See *supra* note 362 and accompanying text.

366. *DeBartolo Corp.*, 108 S. Ct. at 1397; see *Catholic Bishop*, 440 U.S. at 500.

invoked it with special force when it found that the application of the statute in question raised "serious constitutional problems."<sup>367</sup>

The Court's approach in one such case, *NLRB v. Catholic Bishop of Chicago*<sup>368</sup> is highly instructive. In *Catholic Bishop*, the issue before the Supreme Court was whether the jurisdiction of the National Labor Relations Act extended to teachers in church-operated parochial schools who taught both religious and secular subjects.<sup>369</sup> The statutory definition of "employer" was exceedingly broad, covering "any person acting as an agent of an employer, directly or indirectly," with eight specified exceptions that did not include church-related organizations of any kind.<sup>370</sup> The Court had previously read the statute as evincing Congress' intent to "vest in the [National Labor Relations] Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause,"<sup>371</sup> holding that employers within the reach of Congress' interstate commerce power were covered by the Act, regardless of the nature of their activity.<sup>372</sup> The Court was concerned, however, that applying the statute to church-operated schools would present "a significant risk that the first amendment [free exercise clause would] . . . be infringed."<sup>373</sup>

Given that serious constitutional concern, the Court strove to avoid the constitutional question through statutory construction. Paraphrasing Chief Justice Marshall, the Court noted that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."<sup>374</sup> When "serious constitutional questions" were raised concerning application of a statute, the Court held that it "must first identify 'the affirmative intentions of the Congress clearly expressed' before concluding that the

---

367. See, e.g., Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950); see also Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-75, 880 (1930) (Maxims of statutory construction are either vacuous or contrary to ordinary usage.); *id.* at 885 (Traditional doctrines of statutory construction are "cardboard structures" that function as post hoc rationalizations of decisions.).

368. 440 U.S. 490 (1979).

369. *Id.* at 491.

370. *Id.* at 505 (citing 29 U.S.C. § 152(2) (1970) (presently codified as amended at 29 U.S.C. § 152(2) (1982))); see *id.* at 511 (Brennan, J., dissenting, joined by White, Marshall & Blackmun, JJ.).

371. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (citing *Guss v. Utah Labor Board*, 353 U.S. 1, 3 (1957); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 647-48 (1944); *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939)).

372. *Polish Nat'l Alliance*, 322 U.S. 643 (1944) (nonprofit fraternal organization); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (nonprofit newsgathering organization).

373. *Catholic Bishop*, 440 U.S. at 502; see *id.* at 501-04.

374. *Id.* at 500 (citing *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Act" applies.<sup>375</sup> Applying this approach, the Court, although admitting that Congress used "very broad terms" in defining the Board's jurisdiction over "employers,"<sup>376</sup> found "no clear expression," in either the explicit language of the statute or its legislative history, "of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act."<sup>377</sup> Based on the language of the statute and its legislative history, the Court found that there was "nothing to indicate an affirmative intention that such schools [should] be within the Board's jurisdiction,"<sup>378</sup> and "that Congress

---

375. *Id.* at 501. The Court quoted from *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963), a case involving the NLRB's assertion of jurisdiction over foreign seamen. The *Catholic Bishop* Court summarized the holding of *McCulloch* as follows:

[T]he Court declined to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations. The international implications of the case led the Court to describe it as involving "public questions particularly high in the scale of our national interest." Because of those questions the Court held that before sanctioning the Board's exercise of jurisdiction "there must be present the affirmative intention of the Congress clearly expressed."

*Catholic Bishop*, 440 U.S. at 500 (citations omitted) (quoting *McCulloch*, 372 U.S. at 17, 21-22; *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

The Court, in a recent application of the *Catholic Bishop* approach, described it as the "traditional rule." *DeBartolo Corp.*, 108 S. Ct. at 1398. This approach requires that if the Court concludes that an application of a statute raises serious constitutional questions, the Court will construe the statute to avoid the application unless it finds a clear expression of congressional intent to support it. The rule often is invoked in the context of statutes purported to preclude judicial review of constitutional claims. *E.g.*, *Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237-38 (1968); *id.* at 240-43 (Harlan, J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *id.* at 128 (Murphy, J., concurring); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-37 (1932); Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55, 58-59, 68-70 (1978) (discussing availability of judicial review in *Oestereich* and *Estep*). Moreover, the Court sometimes invokes the approach where serious non-constitutional questions are raised. *See, e.g.*, *Liparota v. United States*, 471 U.S. 419 (1985) (declining to construe the federal statute governing food stamp fraud to omit a mens rea requirement in the absence of an explicit and unambiguous indication in either its language or legislative history, to avoid a departure from a basic assumption of the criminal law). The *Catholic Bishop* rule is an illustration, in the context of a statute in derogation of the Constitution, of what has been termed "the policy of clear statement." *See* A. BICKEL, *supra* note 363, at 156-69; H. HART & A. SAKS, *THE LEGAL PROCESS* 1240 (tent. ed. 1958).

376. *Catholic Bishop*, 440 U.S. at 504.

377. *Id.*

378. *Id.* at 505.

simply gave no consideration to church-operated schools."<sup>379</sup> The Court concluded that, "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the first amendment Religion Clauses."<sup>380</sup>

In view of the "serious constitutional questions" that application of the forfeiture statutes to attorneys' fees raises under the sixth and first amendments, the "traditional rule followed in *Catholic Bishop*"<sup>381</sup> should be applied in construing them. Applying this approach leads to a result similar to that reached by the Supreme Court in *Catholic Bishop*. In order to avoid the serious constitutional difficulties presented by the application of the forfeiture statutes to bona fide attorneys' fees, the Supreme Court should read these statutes as applicable only to sham or fraudulent attorneys' fees, and not to legitimate fees that are the product of arms' length arrangements.

Several district courts have reached this conclusion based on the legislative history of the forfeiture provisions, although without explicitly applying the *Catholic Bishop* approach.<sup>382</sup> On the other hand, several circuit courts have rejected this conclusion, finding the legislative history ambiguous.<sup>383</sup> None of these circuit court opinions, however, cited *Catholic Bishop*, and none appear even to have consid-

379. *Id.* at 504.

380. *Id.* at 507.

381. *DeBartolo Corp.*, 108 S. Ct. at 1398. In this recent application of the *Catholic Bishop* rule, the Court avoided a serious first amendment freedom of expression question by construing the NLRB's jurisdiction to deal with unfair labor practices under section 8(b)(4) of the National Labor Relations Act as not extending to a union's peaceful distribution of handbills at the entrances to a shopping mall. The handbills urged customers not to shop at any stores in the mall until the mall's owner promised that all construction there would be performed by contractors paying fair wages. *Id.* at 1397.

382. See, e.g., *United States v. Truglio*, 660 F. Supp. 103, 105-06 (N.D. W. Va. 1987); *United States v. Figueroa*, 645 F. Supp. 453, 455 (W.D. Pa. 1986); *United States v. Bassett*, 632 F. Supp. 1308, 1312-14 (D. Md. 1986); *United States v. Ianniello*, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1339-45 (D. Colo. 1985).

383. *United States v. Bissell*, No. 87-8246 slip op. at 1593 (11th Cir. March 2, 1989); *United States v. Moya-Gomez*, 860 F.2d 706, 722-23 (7th Cir. 1988), *petition for cert. filed* (U.S. Feb. 17, 1989); *United States v. Nichols*, 841 F.2d 1485, 1491-96 (10th Cir. 1988); *United States v. Harvey*, 814 F.2d 905, 913-18 (1987), *replaced on other grounds on reh'g en banc sub nom. United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637, 641 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988). But see *United States v. Monsanto*, 852 F.2d 1400, 1405-11 (2d Cir. 1988) (Winters, J., concurring, joined by Meskill & Newman, JJ.), *cert. granted*, 109 S. Ct. 363 (1988); *United States v. Jones*, 837 F.2d 1332, *reh'g en banc granted*, 844 F.2d 215 (5th Cir. 1988); *United States v. Thier*, 801 F.2d 1463 (1986), *modified*, 809 F.2d 249 (5th Cir. 1987).

ered the *Catholic Bishop* approach.<sup>384</sup> Viewing the statutory language and legislative history of the forfeiture provisions through the lens of *Catholic Bishop* supports the conclusion reached by the district courts, not because the legislative history clearly contemplates the exemption of bona fide attorneys' fees, but because neither the language nor the legislative history clearly reveal the "affirmative intention" that such fees are subject to forfeiture.

## 2. THE STATUTORY LANGUAGE

The plain language of the criminal forfeiture statutes does not provide explicitly that attorneys' fees are forfeitable; it provides only for the forfeiture of "any property" obtained as a result of the crime.<sup>385</sup> "Property" is broadly defined to include two concepts: "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities."<sup>386</sup> Although Congress defined the "property" subject to forfeiture in very broad terms, there is no indication in the language of the statutes that attorneys' fees are deemed to be covered. The language of the civil forfeiture statute likewise does not cover attorneys' fees explicitly.<sup>387</sup> Under the approach taken in *Catholic Bishop*,<sup>388</sup> the broad statutory definition of "property" does not, without a strong manifestation of intent in the legislative history, constitute the "clear expression of an affirmative intention of Congress"<sup>389</sup> necessary to find the statutes applicable to bona fide attorneys' fees.

---

384. See cases cited *supra* note 383. The opinions rejecting this contention do not acknowledge the principle that requires a finding of an affirmative intention of Congress, clearly expressed, before interpreting a statute to apply in circumstances that raise serious constitutional questions. An examination of the briefs filed in these cases reveal that *Catholic Bishop* was neither cited nor argued to these courts. The first time *Catholic Bishop* was raised in the attorneys' fee forfeiture context was in an amicus brief submitted by the author in the en banc reconsideration in *United States v. Jones*, 844 F.2d 215 (5th Cir. 1988) (Nos. 87-5556, 87-5575), granting *reh'g en banc* to 837 F.2d 1332, filed on August 29, 1988. *Jones* was argued en banc on September 19, 1988, but in light of the Supreme Court's grant of certiorari in *Monsanto and Caplin & Drysdale*, the Fifth Circuit has decided to withhold decision in *Jones* pending the Supreme Court decision in the cases before it. Letter from the Clerk of the Court of Appeals for the Fifth Circuit to the author (Jan. 9, 1989).

385. 18 U.S.C. § 1963(a)(3); 21 U.S.C. § 853(a)(1). The criminal forfeiture statutes also reach "any interest the person has acquired or maintained in violation of" RICO, 18 U.S.C. § 1963(a)(1); "any . . . property" used to facilitate commission of a felony drug law violation, 21 U.S.C. § 853(a)(2); and "any . . . interest in" and "any . . . property . . . affording a source of control over" a criminal enterprise. 18 U.S.C. § 1963(a)(2); 21 U.S.C. § 853(a)(3).

386. 18 U.S.C. § 1963(b), 21 U.S.C. § 853(b).

387. See 21 U.S.C. § 881(a).

388. See *supra* notes 368-80 and accompanying text.

389. *Catholic Bishop*, 440 U.S. at 504.



The statute construed in *Catholic Bishop* had a very broad provision defining basic coverage and numerous specific exceptions. Yet the Court, in effect, carved out another exception for teachers in church schools. The Comprehensive Forfeiture Act of 1984<sup>390</sup> contains a broad forfeiture provision that reaches "any property" and provides exemptions for both owners with superior title and bona fide purchasers.<sup>391</sup> It would be perfectly proper under *Catholic Bishop* to carve out a further exemption for legitimate attorneys' fees in order to protect the sixth and first amendments. It may not be necessary to go that far, however, because of the language employed in the existing provisions defining the exemptions.

The criminal forfeiture statutes provide for a postconviction hearing at which third parties may challenge a forfeiture judgment concerning property transferred to them,<sup>392</sup> but again fail to refer to attorneys' fees. Indeed, not only do these third party exemption provisions fail explicitly to refer to attorneys' fees, but also the plain language of these provisions leaves ample room for exempting legitimate attorneys' fees from forfeiture. Several of the circuit courts rejecting the argument that the forfeiture provisions should be construed to exempt legitimate attorneys' fees have found these third party provisions to evince a contrary intent.<sup>393</sup> They point to the general inclusiveness of the statutory language and to the fact that the only conceivable statutory exception to forfeiture in these cases is the provision for bona fide purchasers.<sup>394</sup> Their conclusion is based on the premise that attorneys who are on notice that forfeiture claims are pending against their clients' property by virtue of the indictment are unlikely to qualify under the bona fide purchaser exception contained in these third party provisions. These courts, however, fail to examine closely the definition of bona fide purchaser contained in these provisions.

In order to qualify for exemption under the third party provisions, an individual must show that he is a "bona fide purchaser for

---

390. Pub. L. 98-473, §§ 301-323, 98 Stat. 1837, 2040-57 (codified in scattered sections of 18, 19, 21, 26 & 28 U.S.C.) (The Comprehensive Forfeiture Act of 1984, also called the "1984 Amendments," amended RICO, CCE, and other federal forfeiture provisions.).

391. *Id.* (The same provisions are repeated in various parts of the Act because the Act amends several parts of the United States Code in similar ways.).

392. See 18 U.S.C. §§ 1963(c), 1963(l)(6)(B), 21 U.S.C. §§ 853(c), 853(n)(6)(B).

393. See *United States v. Nichols*, 841 F.2d 1485, 1493 & n.5 (10th Cir. 1988); *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637, 641-42 (4th Cir.) (en banc), *cert. granted*, 109 S. Ct. 363 (1988); see also *United States v. Monsanto*, 852 F.2d 1400, 1413 (2d Cir.) (Mahoney, J., dissenting, joined by Cardamone & Pierce, JJ.), *cert. granted*, 109 S. Ct. 363 (1988); Brickey, *supra* note 6, at 503.

394. 21 U.S.C. § 853(c).

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*.”<sup>395</sup> What did Congress mean when it used the italicized language to define the bona fide purchaser exception it created? It is possible to read this language as expressing Congress’ intent that purchasers with *some* cause to believe the property was subject to forfeiture may nonetheless qualify for exemption. Congress, after all, did not exclude those providers of legitimate services or other valuable consideration who were “without cause to believe” the property was subject to forfeiture.<sup>396</sup> Had Congress used this language, any type or degree of knowledge would have been disqualifying. By placing the word “reasonably” before this phrase, Congress must have intended to modify the phrase in order to characterize the kind of “cause to believe” that would not disqualify the purchaser or provider from being classified as bona fide. Forfeiture results in a severe and inequitable hardship when applied in such a way that the provider of legitimate services or hard cash loses the benefit of his good faith bargain, even though he had nothing whatsoever to do with the actions that serve as the basis for the forfeiture. Congress presumably recognized this and provided that such third parties would gain exemption from forfeiture, not only if they were totally without knowledge that they were dealing with someone whose property might be the subject of a criminal forfeiture proceeding, but also if they were “reasonably” without such knowledge.

The term “reasonably” connotes conduct bounded by reason: conduct that is performed in a reasonable manner; a condition that

---

395. 18 U.S.C. § 1963(l)(6)(B), 21 U.S.C. § 853(n)(6)(B) (emphasis added).

396. The government has suggested in fee forfeiture litigation that the bona fide purchaser exception is an exceedingly narrow one that defense attorneys cannot meet if they are defending a criminal defendant against charges that include a forfeiture claim. See *Jones En Banc* Government Brief, *supra* note 242, at 19. This argument relies on *E.D. Systems Corp. v. Southwestern Bell Tel. Co.*, 674 F.2d 453 (5th Cir. 1982). In *E.D. Systems*, the court found that a claimant to property could not be considered a bona fide purchaser if at the time of the alleged purchase the claimant had actual notice of a competing claim to the property. *Id.* at 459. The court remanded the litigation to the trial court to decide the factual issue of whether there was actual notice. *Id.* at 459-60. The government’s reliance on *E.D. Systems* is misplaced, however, because that case was a dispute between two private parties, applying Texas law on the status of bona fide purchasers under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), because it was a federal court diversity action. *E.D. Systems*, 674 F.2d at 459. Furthermore, the court was not construing the third party forfeiture provisions of RICO or CCE. *Id.* Unlike the generous “reasonably without cause” bona fide purchaser exception created in these provisions, see *supra* note 395 and accompanying text, Texas law restrictively limits the bona fide purchaser doctrine to one “without knowledge (actual or imputed),” *E.D. Systems*, 674 F.2d at 459 (quoting *Carter v. Converse*, 550 S.W.2d 322, 329 (Tex. Civ. App. 1977)), and broadly defines the concept of “notice.” *Id.* (quoting *Hexter v. Pratt*, 10 S.W.2d 692, 693 (Tex. Comm’n App. 1928)).

exists moderately; a proposition that is somewhat or fairly sufficiently true, is rational and sensible, is governed by logic or justice, or is subject to a rule of reason.<sup>397</sup> All these shades of meaning import the idea of flexibility into the statutory scheme. When Congress exempted persons who were "reasonably without cause to believe" that property might be forfeited, Congress may have intended to include those persons, such as defense lawyers, whose knowledge that the property might be subject to forfeiture does not amount to *reasonable* cause to visit the hardship of forfeiture upon them.

Congress' definition of the bona fide purchaser exception under RICO and CCE is an unusual one. Comparison to the definition of bona fide purchaser typically used in other statutes is instructive. In defining the bona fide purchaser exception under RICO and CCE, Congress did not speak of persons who were "without reason to believe"<sup>398</sup> or who were "without reasonable cause to believe"<sup>399</sup> that property was subject to forfeiture. Instead, Congress exempted persons who were "reasonably without cause to believe" that the property might be forfeited.<sup>400</sup> The word "reasonably" can only be read to modify the "without cause to believe" phrase that follows it. Moreover, the choice to locate this "reasonableness" modifier at the beginning of the phrase, rather than later as descriptive of the quantum of "cause" needed to defeat the purchaser's claim—"without cause reasonably to believe"—indicates that the modifier serves a purpose other than to define a standard of proof. The purpose arguably is to introduce a rule of reason into the determination of the forfeiture of the interests of those who acquire a defendant's property in good faith.

The United States Court of Appeals for the Fifth Circuit, without engaging in the analysis of the language of the third party excep-

---

397. See II THE OXFORD ENGLISH DICTIONARY 2432 (Compact Ed. 1971); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1608 (2d ed. unabridged 1987); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (unabridged ed. 1976); WORDFINDER DICTIONARY THESAURUS (Model WF-220, 1987) (electronic dictionary/thesaurus compiled for Xerox Corporation and Microlytics, Inc.).

398. Cf. 18 U.S.C. § 3668(b) (1982 & Supp. IV 1986) (A claimant for remission or mitigation of forfeiture under the liquor laws must show "that he had at no time any knowledge or reason to believe that [the property at issue] was being or would be used in the violation of laws."); 15 U.S.C. § 714(p) (1982) (A buyer in the ordinary course is released from any claim by the Commodity Credit Corporation provided he "did not know or have reason to know" of a defect in the seller's authority to sell.).

399. Cf. 28 U.S.C. § 2465 (1982) (In an action for return of property seized pursuant to an act of Congress, the existence of "reasonable cause" for the seizure bars the victorious claimant from an award of costs and confers immunity upon both the prosecutor and the person who made the seizure.).

400. See *supra* note 392 and accompanying text.

tion performed here, recognized this in *United States v. Thier*,<sup>401</sup> when it held that "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services."<sup>402</sup> The attorney's "necessary knowledge" should not defeat his interest in payment for his legitimate services because it would be unreasonable to do so. Indeed, it is unreasonable and unjust for a defense attorney who provides bona fide services for his client to be barred from receiving a reasonable fee merely because of what the lawyer needed to know in order properly to represent the defendant. By establishing a "reasonably without cause to believe" exception, Congress arguably authorized the courts to avoid this unreasonable result by finding that the attorney's "necessary knowledge" is not disqualifying.

This analysis provides a textual basis in the language of the statutes for the Fifth Circuit's conclusion in *Thier* that Congress did not intend "to exclude attorneys from bringing a third-party claim for a reasonable attorneys fee against potentially forfeitable assets in a post-conviction hearing."<sup>403</sup> On the other hand, this analysis permits the forfeiture of sham or fraudulent payments to attorneys that are not genuine fees, but are attempts to evade forfeiture. The forfeiture of such sham fees is not unreasonable and fulfills Congress' intent to prevent the defendant from circumventing forfeiture by laundering his ill-gotten gains through transfers to others.

This reading of the unusual "reasonably without cause to believe" language used by Congress in defining the bona fide purchaser exception therefore is both plausible and consistent with congressional intent. Even if this reading is rejected, however, at the least

---

401. 801 F.2d 1463 (1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987).

402. *Id.* at 1474. The court adopted the distinction made in *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986), *aff'd sub nom. United States v. Harvey*, 814 F.2d 905 (1987), *replaced on rehearing en banc sub nom. United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.), *cert. granted*, 109 S. Ct. 363 (1988), that although the attorney is not "innocent" of knowledge that the money with which he is paid might be tainted, he "is certainly not, however, just a bogus conduit for this money when providing *bona fide* legal services." *Thier*, 801 F.2d at 1474 (quoting *Bassett*, 632 F. Supp. at 1315-16). Thus, the court recognized that a defense lawyer's knowledge of the charges against the client does not ipso facto disqualify the attorney's claim to be a bona fide purchaser under the RICO and CCE forfeiture provisions. *Id.* at 1472, 1474. The Fifth Circuit recently followed the logic of *Thier* in *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988), but is currently reconsidering the issue en banc. *United States v. Jones*, 844 F.2d 215 (5th Cir. 1988) (granting rehearing en banc) (argued September 19, 1988).

403. *Thier*, 801 F.2d at 1474. The court did not ground this conclusion in the language of the statutes, but rather in its finding that there is "no indication in the statute or the legislative history that Congress intended to exclude" attorneys from eligibility as bona fide purchasers. *Id.*

this language must be regarded as ambiguous. As such, it should be viewed through the lens of the "rule of lenity," as appropriate in the forfeiture context,<sup>404</sup> as it is in that of the criminal prohibition.<sup>405</sup> Given this ambiguity, the language of the forfeiture statutes certainly cannot be said to evince the clearly expressed, affirmative intention of the Congress<sup>406</sup> that attorneys' fees be covered.<sup>407</sup>

### 3. THE LEGISLATIVE HISTORY

Because of the lack of clarity in the statutes and the serious constitutional difficulties that are raised by construing the statutes to cover legitimate attorneys' fees, it is appropriate to look at the legislative history to determine whether it can provide the needed "affirmative intention . . . clearly expressed."<sup>408</sup> As the discussion of

---

404. See *United States v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); *United States v. \$38,000.00 in U.S. Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) (paraphrasing same proposition); *United States v. One 1976 Ford F-150 Pick-Up VIN F14YUB03797*, 769 F.2d 525, 527 (8th Cir. 1985) (quoting *One 1936 Model Ford*, 307 U.S. at 226). This view, expressed in the civil forfeiture context, is even more appropriate when criminal forfeiture is involved. See *United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987).

405. See, e.g., *McNally v. United States*, 483 U.S. 350 (1987); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Chiarella v. United States*, 445 U.S. 222 (1980); *United States v. Campos-Serrano*, 404 U.S. 293 (1971). The liberal construction clause contained in the RICO criminal forfeiture provisions, 21 U.S.C. § 853(o) (Supp. IV 1986) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes."), should not be relied upon to cure the ambiguity here. As the Eighth Circuit has found, "[t]he extent of judicial deference" owed such a clause "stands unclear" in view of the countervailing force of the constitutionally based rule of lenity. *United States v. Anderson*, 626 F.2d 1358, 1369-70 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). In any case, the "remedial" purpose of the forfeiture provisions can be effectuated fully without construing them to apply to legitimate attorneys' fees. See *supra* Section III(c).

406. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).

407. When the Senate Report briefly described the bona fide purchaser exemption, it paraphrased the statutory requirement in more traditional wording than the language actually employed in the statute. The Report states that property in the hands of a third party would not be subject to forfeiture if "the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture." S. REP. NO. 225, *supra* note 19, at 209, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3392. The Report does not elaborate what Congress meant by its "reasonably without cause to believe" wording of the bona fide purchaser provision. Moreover, the Report stresses that the basic purpose of the 1984 amendments was to prevent sham transfers to nominees. *Id.* at 209 n.47, reprinted in U.S. CODE CONG. & ADMIN. NEWS at 3392 n.47. As a result, the statutory language supports the exemption for legitimate fees urged in this Article, or at least is ambiguous. In either event, the statute is fairly amenable to the interpretation suggested here.

408. *Catholic Bishop*, 440 U.S. at 501, 504; see also *Russello v. United States*, 464 U.S. 16, 20 (1983) (A "clearly expressed legislative intent to the contrary" may justify disregarding even unambiguous statutory language.); *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940) (When the plain meaning of a statute has led to an "absurd or futile result[ ]"

legislative history in Section III(C) of this Article makes clear, Congress, in enacting the 1984 amendments, expressed its intention to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of third party transfers prior to conviction.<sup>409</sup> The district court opinions construing the statutes not to reach legitimate attorneys' fees concluded that Congress intended the forfeiture provisions to reach only fraudulent third-party transfers, such as "sham" attorneys' fees.<sup>410</sup>

The legislative history demonstrates that Congress did not contemplate the application of the statute to legitimate as opposed to fraudulent attorneys' fees. A footnote in a House Report accompanying an earlier draft of the 1984 amendments states that "[n]othing in this section is intended to interfere with a person's sixth amendment right to counsel."<sup>411</sup> This footnote, in its next sentence, states that "[t]he Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case."<sup>412</sup> Although some courts have construed this sentence to mean that Congress "simply left the question for the courts,"<sup>413</sup> a careful reading of the two sentences, in sequence, suggests a more plausible conclusion: Congress did not contemplate application of the forfeiture statute to legitimate attorneys' fees. In view of the clear disclaimer in the first sentence that the statute not be read "to interfere with a person's sixth amendment right to counsel," it would be unnecessary to resolve the conflict in the district courts concerning the constitutionality of the statute because Congress did not contemplate that the statute would

---

or to "an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."); 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.01 (Sands 4th ed. rev. 1984).

409. See S. REP. NO. 225, *supra* note 19, at 200-01, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3383-84; *supra* notes 337-47 and accompanying text.

410. See cases cited *supra* note 382.

411. H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. I, at 19 n.1 (1984).

412. *Id.*

413. *United States v. Nichols*, 841 F.2d 1485, 1496 (10th Cir. 1988); *accord United States v. Moya-Gomez*, 860 F.2d 706, 722-23 (7th Cir. 1988), *petition for cert. filed* (U.S. Feb. 17, 1989); *In re Grand Jury Subpoena Duces Tecum Dated January 1, 1985* (Payden), 605 F. Supp. 839, 850 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); see also Brickey, *supra* note 6, at 501-02. Note that Congress repeated the first sentence but omitted the second sentence in a 1986 Conference Report to a bill adding espionage to those offenses punishable by criminal forfeiture. H.R. REP. NO. 783, 99th Cong., 2d Sess. 90 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1865, 1963. This deletion appears to have been deliberate, intended to express agreement with the district court cases concluding that the Comprehensive Forfeiture Act does not reach attorneys' fees. See 132 CONG. REC. H9,509 (1986) (statement of Rep. Edwards, Chairman of the House Subcommittee on Civil and Constitutional Rights).

be applied in this way. Rather, Congress expected the statute to be applied only to sham fees. At the least, to apply it to legitimate fees potentially would interfere with the right of counsel, which Congress stated it did not intend to do. The use of the word "therefore" in the second sentence indicates that Congress did not merely announce that it intended to leave the constitutional question to the courts. The word "therefore" refers to the first sentence and links Congress' statement that it would not resolve the question with its earlier expressed intention not to interfere with sixth amendment rights. Because of this expressed intention, it "therefore" would be unnecessary to resolve the question.

The Senate Report, in discussing the bona fide purchaser exception to forfeiture, states that "[t]he provision is to be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions."<sup>414</sup> The same Senate Report states that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions."<sup>415</sup> A Senate Report declaring the "purpose" of a legislative provision and directing how it "is to be construed" argues strongly against an interpretation authorizing greater mischief than required by that purpose. This is particularly true when the House Report declares what is not "intended"—interference with sixth amendment rights. Hence, the legislative history plainly supports the view that forfeiture of legitimate attorneys' fees was not intended.

In any event, the legislative history fails to demonstrate a "clear expression of an affirmative intention of Congress"<sup>416</sup> to subject bona fide attorneys' fees to forfeiture. The fairest conclusion is that "Congress simply gave no consideration"<sup>417</sup> to the application of these provisions to legitimate as opposed to sham attorneys' fees<sup>418</sup> and, as the

---

414. S. REP. NO. 225, *supra* note 19, at 209 n.47, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3392.

415. S. REP. NO. 225, *supra* note 19, at 200-01, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3384.

416. *Catholic Bishop*, 440 U.S. at 504.

417. *Id.*

418. Although the Senate Report cited with approval a pre-1984 amendment case holding that some of a defendant's property was forfeitable even though it was transferred to his attorney prior to conviction, S. REP. NO. 225, *supra* note 19, at 200 n.28, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3383 n.28 (citing *United States v. Long*, 654 F.2d 911 (3d Cir. 1981)), it has been observed that "the facts in this case suggest that the transfer was part of a sham." Note, *Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?*, 62 NOTRE DAME L. REV. 734, 741 n.72 (1987). The conclusion that attorneys' fees were never contemplated as subjects of

House Report stated, had no intention of interfering with defendants' sixth amendment rights.<sup>419</sup> Indeed, the United States Court of Appeals for the Tenth Circuit, in *United States v. Nichols*,<sup>420</sup> conceded that Congress failed to consider the issue.<sup>421</sup> In *Nichols*, the Tenth Circuit rejected the contention that the statutes should not be construed to cover legitimate attorneys' fees.<sup>422</sup> After an independent "review of the hearings and the rest of the legislative history," the court could find "only a few oblique references to payments of attorneys,"<sup>423</sup> and concluded that "[n]one of these passages indicate that Congress specifically considered whether payments made to attorneys should be subject to forfeiture."<sup>424</sup> In order to avoid the difficult sixth and first amendment problems that otherwise would result, the statutes accordingly should be construed not to reach legitimate attorneys' fees, but to apply only to those that are sham or fraudulent transfers.

---

forfeiture is supported by the post-enactment statement of Senator Patrick Leahy, a member of the Senate Judiciary Committee and a co-sponsor of the 1984 amendments: "During the entire debate in Congress, there was never any discussion of using these statutes as the government is using them now [to forfeit attorneys' fees]. In fact, if there had been any suggestion that they would be used that way, the bill never would have passed." Viles, *Attorney's Fees Forfeiture and Subpoenaing Defendant's Attorneys*, 1986 ANN. SURV. OF AM. L. 335, 341 n.43. This conclusion also is supported by the post-enactment statements of several members of the House Judiciary Committee's Subcommittee on Crime, who participated in the drafting of the statute. See *Field Hearings on Federal Drug Forfeiture Activity: Hearings Before House of Representatives, Subcomm. on Crime, Comm. on the Judiciary*, 100th Cong., 2d Sess. 177, 181 (1986) (statement of Rep. Shaw and Chairman Hughes); *Forfeiture Issues: Hearings Before House of Representatives Subcomm. on Crime, Comm. on the Judiciary*, 99th Cong., 1st Sess. 178 (1985) (statement of Rep. Shaw); Miami Review, July 31, 1986, at 4 (statement of Rep. E. Clay Shaw) ("Attorney's fees were never discussed in the original legislation. I can say with all certainty that I don't think we ever contemplated that it would be applied in that manner."); *id.* (statement of Rep. Larry Smith) ("We share a common goal of eliminating drugs, but the way to get at it is not by going after lawyers.").

419. See *supra* notes 411-13 and accompanying text.

420. 841 F.2d 1485 (10th Cir. 1988).

421. *Id.* at 1489.

422. *Id.* at 1509.

423. *Id.* at 1496 n.6.

424. *Id.* Where the majority of the panel in *Nichols* went wrong was in failing to consider the principles of statutory construction represented by *Catholic Bishop*. See *supra* note 368-80 and accompanying text. The majority also failed to recognize the natural reconciliation between the government's interest in bringing about forfeiture and the defendant's interest in having the property go to a defense lawyer. See *supra* notes 358-60 and accompanying text.



B. *Avoiding the Dilemma: Lessons from  
Administrative Law*

1. THE BROAD PROSECUTORIAL DISCRETION ASSERTED  
BY THE GOVERNMENT

As has been shown, the broad discretion asserted by prosecutors under the RICO and CCE forfeiture provisions raises profound questions about the future of the adversary system.<sup>425</sup> Because prosecutors easily can allege many crimes as RICO offenses<sup>426</sup> and have unrestrained authority to seek forfeiture and to freeze the defendant's assets through pretrial restraining orders, the forfeiture tool can easily be abused to gain adversarial advantage and to "punish" particular defendants or, indeed, particular lawyers. Lodging such unfettered power in the hands of any governmental authority raises troubling questions. When such wide power to tamper with the adversary process is placed in the hands of one of the adversaries in the contest—the prosecutor—the resulting potential for abuse is simply too great.<sup>427</sup> Moreover, the potential for abuse is magnified when, as here, neither the statute nor any guidelines issued by the Attorney General<sup>428</sup> set standards for the exercise of this awesome power. Because prosecutors alone decide whether to invoke fee forfeiture in a particular case, this "unilateral, discretionary authority" provides them with "a means to retaliate, even if only unconsciously, against their most vigorous and successful adversaries."<sup>429</sup>

Congress could not have foreseen these possibilities when it

425. See *supra* Section II(C).

426. See *supra* note 56 and accompanying text.

427. See *Tumey v. Ohio*, 273 U.S. 510 (1927) (Any pecuniary interest of the judge in the outcome of proceedings results in per se bias that is ground for reversal, even without a showing that the bias affected the judge's conduct of the trial.); cf. *Liljeberg v. Health Servs. Acquis. Corp.*, 108 S. Ct. 2194 (1988) (A district judge must recuse himself in a suit involving a University of which he is a trustee.); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (An appellate judge who is pressing his own suit against a party to a second suit may not adjudicate the second suit.); *Connally v. Georgia*, 429 U.S. 245 (1977) (A warrant is invalid if issued by an officer of the court who is paid per warrant issued.); *Withrow v. Larkin*, 421 U.S. 35 (1975) (The combination of investigatory and adjudicative functions is a due process violation.); *Ward v. Monroeville*, 409 U.S. 57 (1972) (A mayor who is responsible for village finances can not judge a traffic violation if the fine goes into the village coffers.).

428. Speaking on behalf of the American Bar Association in 1986 testimony before the Senate Judiciary Committee, former Attorney General Elliot L. Richardson acknowledged the existence of Department of Justice Guidelines on Forfeiture of Attorneys' Fees, see 38 Crim. L. Rep. (BNA) 3001-08 (Oct. 2, 1985), but noted that they "play no role in the decision to seek a pre-trial restraining order which affects fees. They are invoked only when a prosecutor seeks an order requiring counsel to give up fees already paid." Statement of Elliot L. Richardson, May 13, 1986, at 5. Moreover, by their own terms, the guidelines are not legally enforceable. 38 Crim. L. Rep. at 3003.

429. Genego, *supra* note 65, at 847-48.

enacted and amended the RICO and CCE forfeiture provisions, and would not have approved them had it done so. Congress did not contemplate in authorizing forfeitures that it was giving prosecutors a vast discretion to invade the sixth amendment rights of defendants and impair the very nature of our adversary system. Without mentioning attorneys' fees, these provisions simply authorize the forfeiture of "any property" that is obtained as a result of the crime and that is in the hands of the defendant or transferred to third parties.<sup>430</sup> The 1984 legislative history merely addresses the sham or fraudulent transfer and does not mention legitimate attorneys' fees, other than to disclaim any intention to interfere with sixth amendment rights of defendants.<sup>431</sup> Obviously Congress was not thinking of attorneys' fees, an exceptional kind of transfer, that arise out of the necessity to defend and that must occur after indictment but before conviction. Moreover, the 1970 and 1978 legislative history is entirely devoid of any intent to unleash forfeiture against defense counsel.

## 2. THE DELEGATION DOCTRINE OF *KENT V. DULLES*

Can the general language contained in the forfeiture statutes support such a broad assertion of prosecutorial discretion, which impinges so heavily on individual liberties and alters so dramatically the nature of our adversary system? In other contexts, when a government agent or agency purports to have authority to infringe upon fundamental rights, the Supreme Court has insisted upon an explicit legislative expression of that authority.<sup>432</sup>

The leading case is *Kent v. Dulles*,<sup>433</sup> which involved the fundamental administrative law problem—the control of official discre-

430. See 18 U.S.C. § 1963(a), (c); 21 U.S.C. §§ 853(a), (c), 881(a)(6); *supra* notes 385-86 and accompanying text.

431. H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. I, at 19 n.1 (1984); see *supra* notes 409-13 and accompanying text.

432. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308-09 (1973) (opinion of Powell, J., stating judgment of the Court); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105-14 (1976); *United States v. Robel*, 389 U.S. 258, 275-76 (1967) (Brennan, J., concurring); *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); see J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 83-85 (1978); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 72-73 (abr. ed. 1965); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 2.9, at 49-50 (2d ed. 1984); L. TRIBE, *supra* note 186, § 5-17, at 365-66; Stewart, *The Transformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1680-81 (1975); cf. *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S. Ct. 2138, 2143-44 (1988) (The delegation of power to restrict first amendment rights requires more than broad legislative directives to guide the restricting authority.); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (same).

433. 357 U.S. 116 (1958).

tion.<sup>434</sup> The official involved was a high level one, the Secretary of State.<sup>435</sup> The Passport Act of 1926 had given the Secretary of State authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe."<sup>436</sup> At the time of Congress' delegation, a passport was regarded as a mere privilege to which no one had a claim of entitlement.<sup>437</sup> At this time, though undoubtedly a convenience, a passport was not a requirement for travel abroad.<sup>438</sup> This began to change after World War II, however, and by the early 1950's most countries required a passport for entry.<sup>439</sup> This increased importance of the passport made its possession essential to the exercise of the constitutional right to travel abroad and led to the recognition that, although once a privilege, the passport had become a right.<sup>440</sup> Starting in 1952, the courts began to recognize that withholding or revoking a passport infringed on the right to travel and therefore required notice and an opportunity to be heard.<sup>441</sup>

In 1952, the Cold War was at its peak. The tide of post-war anti-communism had been steadily rising since 1948.<sup>442</sup> Senator Joseph McCarthy had not yet been exposed as the witch-hunting demagogue

434. *Id.* at 124-25; see K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 1.07, 1.08, 2.09, 2.10 (3d ed. 1972); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 54-57 (6th ed. 1974); B. SCHWARTZ, *supra* note 432, § 1.13.

435. *Id.* at 117.

436. Ch. 772, 44 Stat. 887-88 (codified as amended at 22 U.S.C. § 211a (1982)), *cited in Kent*, 357 U.S. at 123.

437. B. SCHWARTZ, *supra* note 432, § 15.14, at 233.

438. *Kent*, 357 U.S. at 121; B. SCHWARTZ, *supra* note 432, § 5.14, at 233.

439. *Kent*, 357 U.S. at 124, 128 (Congress made a passport necessary for foreign travel in 1952.); *Schactman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955); L. JAFFE, *supra* note 432, at 72.

440. *Kent*, 357 U.S. at 125-27.

441. See *Bauer v. Acheson*, 106 F. Supp. 445, 450-52 (D.D.C. 1952) (three-judge court); see also *Dulles v. Nathan*, 225 F.2d 29, 30-31 (D.C. Cir. 1955).

442. For discussion of anti-communist activity during this period, see generally C. BELFRAGE, *THE AMERICAN INQUISITION: 1945-1960*, at 117-52 (1973); A. LINK & W. CATTON, *AMERICAN EPOCH* 682-87 (2d ed. 1963); *THE NEW AMERICAN RIGHT* (D. Bell ed. 1955); Millis, *The Rise and Fall of the Radical Right*, 44 VA. L. REV. 1291 (1958) (discussing the rise of the radical right in the mid 1940's as the latest reoccurrence of a historical cycle). For an autobiographical account, see L. HELLMAN, *SCOUNDREL TIME* (1976). See also *Carlson v. Landon*, 342 U.S. 524, 534-35 (1952) ("[T]he Internal Security Act of 1950 marked [a] change of attitude toward . . . the Communist Party of the United States."). The passage of the Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (requiring registration of communist organizations and other measures to protect the United States against "subversive activities") was spurred by the abundant expressions of popular anti-communist sentiment reaching Congress. Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383, 408 & n.121 (1951) (citing 96 CONG. REC. 12,904 (1950)). This sentiment was manifested at all levels of government by the application of new laws that curbed the rights of Communists. No fewer than thirty-eight anti-communist measures were introduced in the 81st Congress. *Id.* at 388-89 & nn.25-27.

America observed in what perhaps was our first national video event—the 1954 Army-McCarthy hearings. In 1952, McCarthy, at the top of his power, was reelected to the Senate. This was the heyday of the House Un-American Activities Committee,<sup>443</sup> and a time of national paranoia—the “second Red Scare.”<sup>444</sup> President Truman earlier had introduced a new loyalty-security program that provided for investigation of all federal employees, an extraordinary step not even taken during the war. The Justice Department prosecuted Communists under the Smith Act<sup>445</sup> for conspiring to teach the overthrow of the government.<sup>446</sup> J. Edgar Hoover, Director of the Federal Bureau of Investigation (FBI), appeared before the House Committee to denounce Communists as a “fifth column,” justifying expanded FBI espionage activities.<sup>447</sup> State Department employees were dismissed as loyalty risks without a hearing.<sup>448</sup> The fear of communism intensified with Mao’s conquest of China, Russia’s attainment of atomic capacity, and the continuation of the Korean War. This was the political environment at the time the Secretary of State issued the regulations that led to *Kent v. Dulles*.<sup>449</sup>

Freedom to travel abroad had become one of the first casualties of the Cold War.<sup>450</sup> Artists, writers, scientists, and other groups were

---

443. See C. BELFRAGE, *supra* note 442, at 117-52; A. LINK & W. CATTON, *supra* note 442, at 682-87; P. STEINBERG, *THE GREAT ‘RED MENACE’: UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS 1947-1952*, at 3-14 (1984); Sutherland, *supra* note 442, at 383, 408 & n.121; see also *Barenblatt v. United States*, 360 U.S. 109 (1959) (overturning on first amendment grounds a contempt of Congress conviction for refusing to answer questions about alleged communist infiltration in education); *Watkins v. United States*, 354 U.S. 178 (1957) (overturning on first amendment grounds a contempt of Congress conviction for refusing to answer questions about alleged communist infiltration in organized labor).

444. See A. LINK & W. CATTON, *supra* note 442, at 682-87. The first “Red Scare” occurred in 1919-1920, after World War I. See *id.* at 237-40. This period of public hysteria and xenophobia followed the Bolshevik revolution in Russia in 1917, the spread of communism into parts of Europe, and several domestic incidents of labor unrest, political bombings, and assassination plots that came to be viewed as parts of an international communist conspiracy. *Id.* It culminated in the attack by members of the American Legion on a local headquarters of the Industrial Workers of the World, Attorney General Palmer’s raids on alleged communist front organizations, and the trial of anarchists Sacco and Vanzetti. *Id.*

445. Ch. 439, §§ 2, 3, 54 Stat. 670, 671 (1940) (current version at 18 U.S.C. § 2385 (1982)).

446. See *Dennis v. United States*, 341 U.S. 494 (1951); *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954) *cert. denied*, 348 U.S. 909 (1955); A. LINK & W. CATTON, *supra* note 442, at 686-87; P. STEINBERG, *supra* note 443, at 13, 235, 240.

447. See P. STEINBERG, *supra* note 443, at 183.

448. See, e.g., *Service v. Dulles*, 354 U.S. 663 (1957); see also A. LINK & W. CATTON, *supra* note 442, at 683-86.

449. *Kent*, 357 U.S. at 124 & n.7.

450. Farber, *National Security, The Right to Travel, and the Court*, 1982 SUP. CT. REV. 263, 263.

singled out for special restrictions on foreign travel.<sup>451</sup> In 1952, invoking the broad power conferred by the Passport Act, the Secretary of State adopted regulations prohibiting issuance of passports to members of the Communist Party.<sup>452</sup> This was the first time the 1926

---

451. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 66 (1956); Farber, *supra* note 450, at 263-64; Jaffee, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFF. 17, 24 (1956); Parker, *The Right to go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 853, 858 (1959); Comment, *Passport Refusals for Political Reasons*, 61 YALE L.J. 171, 176-78 (1952).

452. Dep't Reg. No. 108.162, 17 Fed. Reg. 8013 (1952) (effective Aug. 28, 1952) (codified at 22 C.F.R. § 51.135-.143 (1957 Supp.)), *cited in Kent*, 357 U.S. at 117-18 & nn.1-2, 124 & n.7. Several factors converged to prompt the Secretary to use the Passport Act, *see supra* note 436 and accompanying text, instead of the more comprehensive passport provision of the Internal Security Act of 1950, ch. 1024, § 6, 64 Stat. 987, 993 (codified as amended at 50 U.S.C. § 785 (1982)) [hereinafter ISA]. Most significantly, the Executive Branch resented any legislative encroachment upon the issuance of passports. The Executive had always claimed this area as its exclusive province. *See* Brief for the Respondent at 29-42, *Kent v. Dulles*, 357 U.S. 116 (1958) (No. 481) (tracing lengthy history of Secretary of State's unhindered discretion in this area). The ISA, however, curtailed the Secretary's discretion, making it a crime for any government official to issue or renew the passport of a member of a "communist-action organization." *See* Note, *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606, 625 (1954) (citing ISA § 6(b)). Thus, not surprisingly, the Executive had opposed passage of the Act. Veto Message of President Truman, H.R. DOC. NO. 708, 81st Cong., 2d Sess. (1950); *see also* 96 CONG. REC. 15,672 (1950). Hence it was the Passport Act that the Secretary relied on as his authority for the new regulations.

In *Kent*, the government argued that the Secretary could exercise discretion over passports under the authority of the Passport Act, notwithstanding the ISA's specific standards regulating the same subject. Brief for the Respondent at 73-74, *Kent* (No. 481). It claimed that the Act had not "occupied the field." *Id.* In response, the petitioners asserted that "[w]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis . . ." Reply Brief for Petitioners at 6 & n.5, *Kent* (No. 481) (citing Justice Clark's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 884 (1952)). The Secretary's intransigence in not opting for the standards prescribed by Congress in the ISA must be interpreted as a test of executive power because, in all likelihood, the Executive Branch could have achieved the same goal under the ISA.

The government, arguing in the alternative, also contended that the ISA had not as "yet become effective because the full administrative and judicial process [had] not yet been completed with respect to any organization" and that consequently, the Secretary possessed complete discretion pending effectiveness. Reply Brief for Petitioners at 5 n.4, *Kent* (No. 481). The Supreme Court flatly rejected this argument, although conceding that the ISA had not yet become effective. *Kent*, 347 U.S. at 130 & n.14, 121 & n.3. Because of the procedural safeguards incorporated into the ISA, the average proceeding lasted roughly two years, exclusive of possible additional time for appeals. Note, *supra*, at 616 & n.116, 657-58; *see, e.g.*, *Communist Party of the United States v. Subversive Activ. Control Bd.*, 367 U.S. 1, 19-21 (1961) (The proceeding, which began November 22, 1950, ended on April 30, 1953 when the Board determined the Party was a "communist-action organization" requiring registration.); *see also* 1 N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 74-85 (4th ed. 1976) (tracing history of proceeding against Communist Party from 1950 to unsuccessful conclusion in 1967). Thus, the ineffectiveness of the ISA provided the government with excellent support for its argument that the Secretary's regulations were necessary to fill the void inadvertently created by the ISA, while simultaneously attempting to enhance executive authority.

Act or any predecessor passport statute had been invoked to justify a regulation imposing a substantive limit on the issuance of a passport; prior regulations were of a routine administrative nature, prescribing, for example, the identifying information required on passport applications or the size of passport photographs.<sup>453</sup> The 1952 regulations amounted to a wholesale abrogation of the right of Communists to travel outside the United States. Could the broad language of the Passport Act of 1926 support this new assertion of authority, particularly at a time when the passport had been transformed from a privilege into a right?

The Supreme Court, in *Kent*, confronted the issue in 1958, after McCarthy had been discredited and public opinion had shifted.<sup>454</sup> The case involved Rockwell Kent, an artist and writer who had sought a passport to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland.<sup>455</sup> Kent was alleged to be a Communist.<sup>456</sup> When he refused to swear that he was not, the Secretary of State denied him a passport.<sup>457</sup> He then brought an action challenging the Secretary of State's denial

---

453. See Brief for Petitioners at 27, *Kent* (No. 481); see also *id.* at 27 n.18 (citing the routine regulations that had been issued previously).

454. See A. LINK & W. CATTON, *supra* note 442, at 744-46.

455. *Kent*, 357 U.S. at 117.

456. Frances G. Knight, Director of the Passport Office, wrote to Kent stating that Kent was "a consistent and prolonged adheren[t] to the Communist Party line," had been "affiliated" with numerous "Communist front organizations," and had an "interest in and espousal of the Communist cause . . ." Brief for Petitioners at 7, *Kent* (No. 481) (quoting Knight's letter). She cited as evidence in support of these conclusions Kent's "prolific writings" expressing his "interest in Communism" and "sympathetic support for the Soviet;" his speaking at a dinner in 1954 in honor of Paul Robeson; a 1952 speech in which he allegedly "urged that Communists in the United States must be defended;" his sponsorship of a petition to Attorney General Brownell "criticizing the use of paid informers;" his signing of a petition sponsored by the Peace International Center "urging ban on use of atomic bomb;" his alleged seeking of "the repeal of the Walter-McCarran Law;" his urging of clemency for Ethel and Julius Rosenberg, who were convicted of giving atomic bomb secrets to the Soviet Union; his urging of "release on bail of Steve Nelson who was convicted of sedition in Pennsylvania;" his alleged subscription to the *Daily Worker*, *The Worker*, and the *U.S.S.R. Information Bulletin*; and his "repeatedly includ[ing] nationally known Communists among [his] friends and house guests." *Id.* at 7-8.

457. *Kent*, 357 U.S. at 116; Brief for Petitioners at 10, *Kent* (No. 481). Kent was given an "informal hearing" at which the State Department produced no witnesses, but offered in evidence Kent's autobiography, R. KENT, *IT'S ME O LORD* (1955), to show that he had joined organizations on the Attorney General's list of communist front organizations, and a transcript of a hearing before a congressional committee at which Kent had declined to answer questions, asserting his fifth amendment privilege against self-incrimination. Brief for Petitioners at 9, *Kent* (No. 481); *Kent v. Dulles*, 248 F.2d 600, 600-01 (D.C. Cir. 1957) (en banc), *rev'd*, 357 U.S. 116 (1958). Kent declined to provide a sworn statement as to whether he was a Communist and stated that "because I am an American citizen I am entitled to a passport . . ." *Id.* at 601.

of the passport.<sup>458</sup>

The Supreme Court began its analysis by noting that, if a regulation affects the exercise of a constitutionally protected right, the Court "will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."<sup>459</sup> The Court further noted that any regulation of such a constitutional liberty "must be pursuant to the law-making functions of the Congress,"<sup>460</sup> which if delegated, must be delegated pursuant to an adequate standard.<sup>461</sup> Although the delegation doctrine had not been applied strictly in this period to invalidate broad congressional delegations,<sup>462</sup> the Court invoked it with renewed seriousness in *Kent* in view of the constitutional liberties at stake: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel are involved, we will construe narrowly all delegated powers that curtail or dilute them."<sup>463</sup> Referring to the Passport Act, the Court was hesitant "to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."<sup>464</sup> The Court thereby avoided what it characterized as the "important constitutional questions"<sup>465</sup> that would have been raised if Congress had given authority to the Secretary of State "to withhold passports to citizens because of their beliefs or associations."<sup>466</sup> Noting that "Congress has made no such provision in explicit terms" in the Passport Act, the Court held that "absent one," the Secretary of State could not enforce the regulations.<sup>467</sup>

This approach therefore requires a more explicit delegation of authority when an agent of Congress asserts power to act in a constitutionally sensitive area than is required under usual circum-

---

458. *Kent*, 357 U.S. at 119.

459. *Id.* at 129.

460. *Id.*

461. *Id.* (invoking the delegation doctrine by citation to *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-30 (1935)).

462. See, e.g., *Secretary of Agriculture v. Central Roig Ref. Co.*, 338 U.S. 604 (1950) (upholding delegation to Secretary of Agriculture of authority to make sugar allotments); *Lichter v. United States*, 334 U.S. 742 (1948) (holding authority to determine existence and definition of excessive profits not to be excessively broad); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (upholding delegation to Federal Home Loan Bank Board of authority to proscribe terms and conditions of the appointment of a conservator); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding delegation to Executive of power to control prices); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation to FCC of authority to regulate broadcasting in the public interest).

463. *Kent*, 357 U.S. at 129.

464. *Id.*

465. *Id.* at 130.

466. *Id.*

467. *Id.*

stances.<sup>468</sup> Although the broad delegation contained in the Passport Act easily could have been read to cover the asserted authority, the Court properly hesitated to conclude that Congress had intended to confer this power on its agent. The Court did not treat *Kent* simply as a case of statutory construction. The broad language of the Passport Act was not ambiguous, and the congressional history did not negate this application. *Kent* was an administrative law case in which the agency asserted an "unbridled discretion" to act in a constitutionally questionable manner.<sup>469</sup> The Court quite sensibly avoided deciding

---

468. The function of requiring those delegated power by Congress to adhere to congressional policy is to assure that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); L. JAFFE, *supra* note 432, at 33-34; Stewart, *supra* note 432, at 1672-73, 1694. Nevertheless, modern delegation cases allow the delegation of congressional power to the Executive Branch with undetailed expressions of congressional policy. See cases cited *supra* note 462; L. JAFFE, *supra* note 432, at 57-72; B. SCHWARTZ, *supra* note 432, § 2.6, at 43-44. If, however, the statute delegates power to regulate a personal right, more detailed delegation and clearer expression of congressional policy will be required. See *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness narrows, however, when the regulation . . . potentially affects fundamental rights . . . [V]ague legislative directives . . . to an executive officer . . . are far more serious when liberty and the exercise of fundamental rights are at stake.") (citations omitted). In *Greene v. McElroy*, 360 U.S. 474 (1967), the Court stated:

[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

*Id.* at 507.

There has been much recent judicial and scholarly interest in a revival of the delegation doctrine. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.); *Industrial Union Dep't*, 448 U.S. at 685 (Rehnquist, J., concurring); *Arizona v. California*, 373 U.S. 546, 625-26 (1963) (Harlan, J., dissenting, joined by Stewart & Douglas, JJ.); J. FREEDMAN, *supra* note 432, at 93-94; T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 129-46 (1979); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 17 (1982); Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV., 646, 647-50, 659-61 (1988); Lowi, *Two Roads to Serfdom*, 36 AM. U.L. REV. 295, 296-98 (1987); Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355 (1987); Stewart, *supra* note 432, at 1697; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-86 (1972). Whatever the merits of these proposals to revitalize the delegation doctrine generally, they carry special weight when the delegation in question affects the exercise of fundamental liberties.

469. 357 U.S. at 129. In a number of other contexts in which similarly "unbridled discretion" was applied in constitutionally questionable ways, the Supreme Court used what can be seen as related approaches. In a case that had the effect of invalidating the nation's then-existing death penalty statutes, the Court was concerned primarily with the unfettered discretion, allowing arbitrariness and discrimination, that such largely standardless statutes left in the hands of capital juries making the life or death decision. *Furman v. Georgia*, 408



## whether Congress had the constitutional power to withhold passports

U.S. 238 (1972) (*per curiam*) (holding unconstitutional death penalty statutes in Georgia and Texas). Justice Brennan, for example, wrote that the essence of the eighth amendment's prohibition of cruel and unusual punishments is the "condemnation of the arbitrary infliction of severe punishments." *Id.* at 274 (Brennan, J., concurring). The state, in Justice Brennan's view, "does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." *Id.* For Brennan, this potential for arbitrariness was inherent in capital punishment, but a majority of the Court could not be mustered to support the proposition that the death penalty was always cruel and unusual punishment. The separate concurring opinions of Justice Stewart and Justice White turned on the absence of standards to guide the jury decision. The lack of standards permitted "this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice Stewart found death sentences imposed pursuant to such broad and unfettered delegation to juries to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309. Justice White found the unlimited discretion of capital juries unconstitutional because "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). The Supreme Court thus invalidated the death penalty statutes in *Furman* because the statutes delegated total discretion over the crucial life or death decision to juries. The Court did not use the broad approach urged by Justices Brennan and Marshall that would have recognized the death penalty as *per se* cruel and unusual. That approach would have deprived the states of the power to use the death penalty, a preemptive step the Court was not prepared to take. Instead, the Court in effect remanded the question to the state legislatures, leaving open the question of whether differently written death penalty statutes would pass constitutional muster. When the states responded by reenacting death penalty statutes that contained criteria channeling the exercise of jury discretion, the Court upheld such laws against eighth amendment challenge. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Another approach akin to that employed in *Kent v. Dulles* was applied in *Delaware v. Prouse*, 440 U.S. 648 (1979). *Prouse* invalidated random police stops of motor vehicles to check operator licenses and car registrations. *Id.* at 663. The total absence of standards regarding which cars to stop permitted arbitrary and discriminatory use of investigatory power in violation of the privacy interests protected by the fourth amendment's prohibition against unreasonable search and seizure. 440 U.S. at 655-57, 663. The Court did not, of course, hold that all police stops of vehicles for these purposes would be unconstitutional. *Id.* at 663. The Court suggested that spot check decisions based on either observed violations or more individualized factors that give rise to articulable suspicion would be permissible, as would other methods "that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.*

Another application of a similar approach can be found in a series of void-for-vagueness cases occurring in first amendment contexts. *E.g.*, *Smith v. Goguen*, 415 U.S. 566 (1974) (voiding, as unconstitutionally vague, a prohibition against contemptuous treatment of the flag); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (voiding a vagrancy ordinance for vagueness); *Cox v. Louisiana*, 379 U.S. 536 (1965) (voiding a breach of peace statute for vagueness). In *Smith*, for example, the Court overturned the conviction of a youth for wearing an American flag sewn to the seat of his blue jeans. The statute, making it a crime to publicly treat the flag "contemptuously," *Smith*, 415 U.S. at 568-69, was found too vague, the Court expressing concern that its imprecision allowed "arbitrary and discriminatory enforcement" action by police, perhaps to punish dissenting youths but not others using the flag carelessly, unceremoniously, or commercially. *Id.* at 572-76. Below, the First Circuit Court of Appeals had agreed with the defendant's contention that the statute was both impermissibly vague and overbroad, in violation of the first amendment. *Goguen v. Smith*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974). The Supreme Court, however, declined to determine the first amendment question of whether the state could punish the activity in question if it acted with

based on citizens' beliefs or associations, either directly or through authority granted to an agency. A constitutional holding would have been preemptive. Instead, the Court, in effect, expressed to Congress its uncertainty as to whether Congress had intended to delegate this constitutionally questionable power to its agent, thereby remanding the issue to Congress for clarification.

This sensible approach has strong support in agency law. Assume someone known to be the agent of a wealthy principal presents a general power of attorney in his favor from the principal. Asserting the power of attorney as his authority, the agent offers to sell one of the principal's major assets, perhaps a mansion worth several million dollars. Assume further that the principal executed the power many years before, at a time when the principal was not yet wealthy. Although unexpired, and by its terms purporting to vest the agent with full general powers, among other things, to sell or otherwise dispose of assets, it certainly would seem reasonable for an offeree in this situation to raise the question of the agent's authority and to request from the principal further clarification as to whether he really intends to permit the agent to dispose of the major asset in question.<sup>470</sup> This use of the power of attorney, originally granted

---

more specificity, *Smith*, 415 U.S. at 583 n.32, in effect agreeing with a concurring opinion in the court of appeals that had seen "no need to reach the 'far broader constitutional ground' relied on by the First Circuit majority, noting the 'settled principle of appellate adjudication that constitutional questions are not to be dealt with unless this is necessary to dispose of the appeal.'" *Id.* at 572 (quoting *Goguen*, 471 F.2d at 105 (Hamley, J., concurring)).

Thus, *Smith*, *Prouse*, and *Furman* all are applications of an approach similar to that used in *Kent*. In these differing contexts, the Supreme Court was concerned with the potential that delegations of unbridled discretion pose for arbitrary and discriminatory applications of the law in ways that trench upon constitutional liberties. The Court did not, however, altogether remove the constitutional ability of the government actor to exercise the power in question. Instead, it proceeded more narrowly and invalidated the delegation of unchannelled discretion in a constitutionally sensitive area.

470. See, e.g., *Chicago Title Ins. Co. v. Progressive Housing, Inc.*, 453 F. Supp. 1103, 1106-07 (D. Colo. 1978) (A general power of attorney was held insufficient to authorize an agent to execute a guaranty agreement binding the principal. "[R]epresentatives, [dealing with the agent] as persons of ordinary prudence in business matters, should have perused the instrument granting . . . [the agent] a general power of attorney and should have insisted upon more than was furnished by him as evidence of his authority to enter into the specific transaction."); *GitTINGS, Neiman-Marcus, Inc. v. Estes*, 440 S.W.2d 90, 93 (Tex. Civ. App. 1969) (A broad power of attorney authorizing an agent "to sell, transfer and convey all lands that I may have in the said state of Texas, and generally to do and to perform all acts and deeds for me and in my name concerning any and all property that I now own in said State of Texas" was said, in dictum, to be insufficient to authorize the agent to barter or exchange the principal's land.). The same principle applies in construing corporate bylaw provisions granting officers broad authority. See *General Overseas Films, Ltd. v. Robin Int'l, Inc.*, 542 F. Supp. 684, 691-92 (S.D.N.Y. 1982) (A bylaw provision granting a treasurer "power on behalf of the company to sign checks, notes, drafts, bills of exchange and other evidences of indebtedness" was held not to authorize him to execute a guaranty binding the corporation.

some years earlier when conditions were different, may not evince the principal's authorization of the agent to assert the power claimed, even though the power of attorney purports to accomplish this. The concern is heightened when, as here, the power asserted is a significant one.<sup>471</sup> Demanding clarification from the principal in this situation does not deny the principal the right to act consistent with his agent's assertions. It merely provides a prudent check to avoid a potential abuse of power. The principal's authority is not being questioned—just his agent's—and this questioning is being carried out in a manner that the principal may well appreciate.

The analogy here is a strong one. Like the agent in our hypothetical and the Secretary of State in *Kent*, the prosecutor in the forfeiture situation is an agent asserting authority delegated by a principal.<sup>472</sup> In all three situations, the delegation is exceedingly broad, and in all three, questions are raised about whether the power asserted is within the contemplation of the principal's delegation. The forfeiture provisions give prosecutors the broad authority to forfeit assets generally, much like the broad language of the Passport Act involved in *Kent*, or the general power of attorney involved in the agency law hypothetical. Moreover, the forfeiture provisions do not name attorneys' fees any more than the Passport Act mentioned the possibility that passports could be denied based on political party affiliation, or the hypo-

---

"Such a contract is unusual and extraordinary and so not normally within the powers accruing to an agent by implication, however general the character of the agency; ordinarily the power exists only if expressly given." (quoting 2A C.J.S., *Agency* § 181 (1979)), *aff'd*, 718 F.2d 1085 (2d Cir. 1983).

471. See *Chicago Title Ins. Co.*, 453 F. Supp. at 1106 ("Courts have recognized that a guaranty agreement imposes serious obligations upon a guarantor and have generally required evidence of specific authorization before finding that an agent has the authority to bind his principal in a guaranty agreement.").

472. The prosecutor's charging discretion and his activities in presenting the evidence may be deemed quasi-judicial. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); see also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Butz v. Economou*, 438 U.S. 478 (1978); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Such prosecutorial action is subject to only limited review. See *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Nixon*, 418 U.S. 683 (1974); *Blackledge v. Perry*, 417 U.S. 21 (1974). But when the prosecutor exercises other kinds of discretionary authority—performing investigatory or national security functions, for example, see *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and as in this situation, administering a forfeiture scheme—the prosecutor is exercising executive power, and it is appropriate to regard him as an administrative agency. See K. DAVIS, *DISCRETIONARY JUSTICE* (1971); R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 6.4.11 (1985); cf. *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (agency prosecutorial discretion). In any event, the question here is not whether individual acts of discretion in applying forfeiture are reviewable. Rather, the question is whether prosecutors possess the statutory power to apply forfeiture to legitimate attorneys' fees. Whether such a claim of authority is ultra vires is a question of statutory construction traditionally subject to independent judicial review.

thetical's general power of attorney mentioned the disposition of major assets.

In addition, the practice under the forfeiture provisions prior to the 1978 amendments did not involve attorneys' fees at all. Although there were several cases involving forfeiture of attorneys' fees prior to the 1984 amendments, the practice was rare and appeared mainly to involve sham or fraudulent fees rather than bona fide fees.<sup>473</sup> The burgeoning application of the forfeiture provisions to attorneys' fees occurred only after the 1984 amendments gave prosecutors expanded powers, including pretrial restraining orders and various procedures for the forfeiture of assets in the hands of third parties.<sup>474</sup> The possibility that the forfeiture provisions could be invoked to prevent defendants from retaining counsel simply had not occurred to Congress when it enacted the original provisions in 1970 and then amended them in 1978.<sup>475</sup> Moreover, there is no evidence that, when it amended these provisions in 1984, Congress thought it was authorizing prosecutors to expand the use of forfeiture of attorneys' fees as they thereafter did.<sup>476</sup> The 1984 amendments added a number of tools designed to provide prosecutors with broader opportunities for forfeiture, and designed in particular to end the fraudulent transfers that had frustrated the forfeiture provisions of RICO and CCE.<sup>477</sup> Neither the language nor the legislative history of these amendments, however, suggests a widening of forfeitures to legitimate attorneys' fees. This troubling assertion of authority did not occur to Congress in 1970, in 1978, or in 1984, any more than the Secretary of State's regulation occurred to the Congress that enacted the broad Passport Act of 1926,<sup>478</sup> or any more than the hypothetical agent's claim of broad authority to sell major assets occurred to the principal who first executed the power of attorney when his possessions were far more modest.

All three assertions of power—the passport regulations, the attempt to sell the mansion, and the application of forfeiture to attorneys' fees—raise troubling questions. All three invoke concern about whether the principal's broad and perhaps careless use of delegating language contemplated the assertion of authority. In all three, the consequences of error are exceedingly high: the intrusion on the right

---

473. *E.g.*, *United States v. Long*, 654 F.2d 911 (3d Cir. 1981) (transfer of plane to attorneys prior to indictment); *see* Note, *supra* note 418, at 741 n.72.

474. *See supra* notes 21-27 and accompanying text.

475. *See supra* notes 14-20 & 329-36 and accompanying text.

476. *See supra* notes 409-24 and accompanying text.

477. *See supra* notes 337-47 and accompanying text.

478. *See supra* notes 464-67 and accompanying text.

to travel and the threat to first amendment rights presented in *Kent*, the sale of a major asset, perhaps worth several million dollars, in the agency hypothetical, and the intrusion on the constitutional right to counsel of choice and the threat to the nature of our adversary system in the forfeiture situation. In all three contexts, remanding the question to the principal for a more explicit expression of authority is appropriate.

Particularly when, as in the fee forfeiture context, courts are faced with broad assertions of discretionary power that could seriously invade constitutional rights, a general legislative delegation should be found insufficient to support the claimed assertion of authority.<sup>479</sup> This technique allows courts to avoid deciding difficult constitutional issues and, in effect, to remand the underlying policy questions to the legislature for decision with the knowledge that its choice will implicate fundamental values and will be subjected to searching constitutional scrutiny.<sup>480</sup> Given the dubious constitutionality of applying the forfeiture statutes to bona fide attorneys' fees and the absence of considered congressional judgment, this legislative remand, or "second look" approach, seems especially appropriate. The Supreme Court therefore should invoke the doctrine of *Kent v. Dulles*<sup>481</sup> and hold that the asserted discretion of prosecutors to use the forfeiture statutes against legitimate attorneys' fees is *ultra vires*.

Congress plainly has not thought sufficiently about the problem of applying these statutes to attorneys' fees. The United States Court of Appeals for the Fourth Circuit, in *United States v. Caplin & Drysdale, Chartered*,<sup>482</sup> a case pending before the United States Supreme Court, virtually acknowledged that Congress had not thought sufficiently about these troubling questions. Although the Fourth Circuit noted that the issue "does indeed raise many complex problems,"<sup>483</sup> and that "[t]he interests on each side of this controversy are weighty and profound,"<sup>484</sup> it concluded that "Congress . . . is the proper body

---

479. Cf. W. SELL, AGENCY § 39, at 31 (1975) (Authority of an agent to perform a tortious or illegal act "will not usually be inferred.").

480. See A. BICKEL, *supra* note 363, at 111-98; J. FREEDMAN, *supra* note 432, at 83; Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 442-43 (1977); Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331, 406-07 (1981); see also G. CALABRESI, *supra* note 364, at 135-56.

481. 357 U.S. 116 (1958); see *supra* notes 459-69 and accompanying text.

482. *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637, 648 (4th Cir.) (en banc), cert. granted, 109 S. Ct. 363 (1988).

483. *Id.* at 648.

484. *Id.* at 649.

to deal with these issues,"<sup>485</sup> and "that this is not a debate that should be silenced by judicial fiat."<sup>486</sup> This suggested approach has the virtue of giving to Congress the responsibility of balancing these weighty and profound interests, as well as resolving these complex problems.<sup>487</sup> Thus judicial fiat does not silence the debate. Instead, it stimulates the debate on an issue that obviously has not been sufficiently debated.

## V. CONCLUSION

Application of the forfeiture provisions to legitimate attorneys' fees, as opposed to sham or fraudulent attorneys' fees, should be held unconstitutional as an infringement of the right to counsel of choice, protected by both the sixth and first amendments. This fundamental right to use one's own property to hire one's own counsel is the primary and preferred right protected by the sixth amendment.<sup>488</sup> The trial of John Peter Zenger,<sup>489</sup> which provides an early illustration of the exercise of that right, was the model the Framers had in mind.<sup>490</sup> Moreover, the advocacy of the defendant's chosen counsel in the public forum of the courtroom is also protected by first amendment principles. This fundamental right to retain an advocate of choice may not be totally abridged absent the most compelling of justifications. Criminal forfeiture, long disfavored in our law, should not be permitted to reach this far, particularly when there is no evidence that Congress intended this application of forfeiture, and when Congress' expressed purpose can be met fully by limiting application of such forfeiture to sham or fraudulent attorneys' fees.

Rhetoric about the war on crime and the drug crisis should not be permitted to destroy this basic constitutional right. In moments of hysteria that from time to time grip this country, vigilance is needed to protect our basic constitutional values. This is the lesson of *Kent v.*

---

485. *Id.* at 648.

486. *Id.* at 649.

487. See A. BICKEL, *supra* note 363, at 165-66.

Judicial avoidance of the constitutional questions raised by fee forfeiture is especially appropriate in view of the fact that Congress presently is considering the possibility of amending the forfeiture statutes to provide clearly that legitimate attorneys' fees are not subject to forfeiture. See Robinson, *Legislative & Legal Developments*, CRIM. JUST., Summer 1988, at 35, 37 (reporting testimony of Samuel J. Buffone, on behalf of the American Bar Association, urging such legislation at a March 4, 1988 hearing of the House Judiciary Subcommittee on Crime); see also *Forfeiture Issues: Hearings on H.R. 1193 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *supra* note 428.

488. See *supra* notes 79-172 and accompanying text.

489. See *supra* notes 105-57 and accompanying text.

490. See *supra* notes 156-59 and accompanying text.

Dulles.<sup>491</sup> The McCarthy era that produced *Kent* was an ugly chapter in American life—one in which for too long the nation was willing to forsake the values of the Constitution out of fear of the great “Red Menace” of the day. *Kent* serves as a triumph for the rule of law and a reminder that the country must not lose sight of its basic values in times of crisis. The drug problem of today is undeniably demanding of innovative measures, but the measures utilized—criminal forfeiture, pretrial restraining orders, and the “relation-back” doctrine—should not be permitted to undermine the sixth and first amendments and our basic commitment to the adversary system. The “relation-back” doctrine is invoked as if punishment followed by trial<sup>492</sup> was an acceptable procedure.<sup>493</sup> This theory not only “completely begs the question,”<sup>494</sup> but by hampering the accused in making his defense, it also threatens to become a self-fulfilling prophecy.

The right to hire counsel of one's own choosing is distinct and separate from the right to have counsel appointed by the court. The former's commitment to participatory autonomy and advocacy values independent of the concern for reliability is not satisfied by the appointment of counsel, no matter how competent counsel may be. In the short run, the government's theory will remove private counsel from many of those cases in which their skills are most needed. Not only are drug cases affected, but also all prosecutions that can be brought as RICO cases are affected as well. In the long run, the government's use of forfeiture against attorneys' fees threatens to undermine the adversary system of justice. If the government can use forfeiture theory to freeze or to seize assets before they can be wielded in defense of accusations, or to void the payment of legitimate fees to counsel after the trial is over, it will expand the use of forfeiture beyond drug or racketeering cases. Soon the prosecution will assert the necessity of seizing a defendant's assets to ensure their availability to pay fines or make restitution. Given the dramatic expansion in the size of federal felony fines in 1984—to \$250,000 per count for individuals<sup>495</sup>—and the authorization of alternative fines based on a doubling

---

491. 357 U.S. 116 (1958); see *supra* notes 433-69 and accompanying text.

492. Cf. L. CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 148 (Grosset & Dunlap ed. 1983).

493. See *United States v. Monsanto*, 852 F.2d 1400, 1404 (2d Cir.) (Oakes, J., concurring), cert. granted, 109 S. Ct. 363 (1988).

494. *United States v. Unit No. 7 & Unit No. 8 (Kiser)*, 853 F.2d 1445, 1451 (8th Cir. 1988), mandate stayed by 864 F.2d 1421; accord *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637, 652 (4th Cir.) (Phillips, J., dissenting, joined by Winter, C.J., Sprouse & Ervin, JJ.) (“With all respect, this simply begs the constitutional question rather than answering it.”), cert. granted, 109 S. Ct. 363 (1988).

495. 18 U.S.C. § 3571(b) (Supp. IV 1986).

of the pecuniary gain to the defendant or loss to the victim,<sup>496</sup> few criminal defendants will be able to enjoy the assistance of retained counsel. Given the penchant of the states to follow the federal example, this pernicious practice will spread. Eventually, prosecutors will be able to exclude private counsel for almost any person accused of any felony in any court. When that day arrives, we will return to a form of the former English practice rejected by the sixth amendment—the right to appear with chosen counsel in misdemeanor cases, but with only appointed counsel in felony cases.

The sixth amendment demands repudiation of this use of forfeiture. In addition, the first amendment mandates rejection of the prior restraint on protected advocacy and association effectuated by the use of pretrial restraining orders that prevent the defendant from hiring the advocate of his choice. These serious constitutional questions may be avoided, however, by construing the forfeiture provisions so that they do not reach legitimate attorneys' fees. The absence of an affirmative congressional intention, clearly expressed either in the statutory language or in the legislative history, that forfeiture extend to bona fide fees permits a construction that will leave the constitutional questions for another day.

Alternatively, the interpretation of the forfeiture provisions advocated by the government—vesting in prosecutors the vast discretion to invade sixth and first amendment rights and to threaten the nature of the adversary system—should be rejected as an assertion of authority *ultra vires* the statute. Congress may generally use broad grants of delegated power to accomplish its purposes, but when the power asserted intrudes on fundamental constitutional values in a manner that seems not to have been contemplated by Congress, the Supreme Court should find the delegation wanting and should, in effect, remand the issue to Congress for reconsideration.

The two techniques of avoiding the constitutional dilemma discussed here bear a striking kinship. The statutory construction doctrine of *Catholic Bishop*<sup>497</sup> and the administrative law doctrine of *Kent*<sup>498</sup> are both children of the prudential desire to avoid unnecessary constitutional clashes with a coordinate branch of government,<sup>499</sup> particularly when it is not at all clear that the branch in question, the

---

496. 18 U.S.C. § 3571(d) (Supp. IV 1986).

497. See *supra* notes 368-80 and accompanying text.

498. See *supra* notes 459-69 and accompanying text.

499. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988); *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1946); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); see generally A. BICKEL, *supra* note 363.



legislature, intended the action invoked in its name. Indeed, they are both applications of what has been termed "the policy of clear statement."<sup>500</sup> When administrative officials clothed with wide discretion assert a power of dubious constitutionality, as is the case here, the two doctrines converge. *Catholic Bishop*, it will be recalled, involved an agency, the NLRB, which asserted such a power,<sup>501</sup> and *Kent* involved a statute, the Passport Act, that lacked a clear expression in either its language or legislative history to provide affirmative support that Congress clearly intended the controversial interpretation asserted.<sup>502</sup> *Catholic Bishop* therefore easily could have been decided using the *ultra vires* approach employed in *Kent*, and *Kent* easily could have been decided invoking the canon of statutory construction employed in *Catholic Bishop*. As techniques to limit arbitrary and unconstitutional exercises of discretion by politically nonresponsive administrative officials who seek to justify their constitutionally questionable actions by invoking a broad congressional delegation, these two sister doctrines coalesce with heightened power in the context of fee forfeiture.

A recent and closely related use of what can be seen as a combination of both of these doctrines occurred in Justice O'Connor's concurring opinion in *Thompson v. Oklahoma*,<sup>503</sup> the child death penalty case. A plurality of four Justices concluded that the cruel and unusual punishment clause of the eighth amendment prohibited execution of a defendant for a murder committed when he was fifteen years old.<sup>504</sup> Justice O'Connor, the swing vote, came close to joining in this opinion, but instead she avoided reaching the constitutional question.<sup>505</sup> Although the statute authorized capital punishment for murder without setting any minimum age limit at which the commission of the crime could lead to the death penalty, Justice O'Connor construed the statute as not reaching crimes committed by fifteen-year-olds.<sup>506</sup> She found "considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering fifteen-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the

---

500. See A. BICKEL, *supra* note 363, at 156-59; H. HART & A. SAKS, *supra* note 375, at 1242; Stewart, *supra* note 432, at 1680-81, 1697.

501. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); see *supra* notes 368-80 and accompanying text.

502. *Kent v. Dulles*, 357 U.S. 116 (1958); see *supra* notes 433-67 and accompanying text.

503. 108 S. Ct. 2687, 2706-11 (1988) (O'Connor, J., concurring).

504. *Id.* at 2700 (plurality opinion).

505. *Id.* at 2711 (O'Connor, J., concurring).

506. *Id.*

explicit choice of some minimum age for death eligibility.”<sup>507</sup> In the absence of such specificity, Justice O’Connor found that the statute presented the Court with a serious constitutional dilemma—“a result that is of very dubious constitutionality, and . . . without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty.”<sup>508</sup> This result, she noted, was dictated not only by the Court’s eighth amendment jurisprudence, but “[i]t is also supported by the familiar principle—applied in different ways in different contexts—according to which we should avoid unnecessary, or unnecessarily broad, constitutional adjudication.”<sup>509</sup>

In this manner, Justice O’Connor applied the prudential principles of legislative remand reflected in both *Catholic Bishop* and *Kent*, in a context not involving the need to check the actions of administrative officials, but rather the comparable need to check the potential for abuse of similarly non-politically responsive juries acting under broad legislative delegations. Justice O’Connor wrote:

By leaving open for now the broader Eighth Amendment question that both the plurality and the dissent would resolve, the approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people’s elected representatives.<sup>510</sup>

Similarly, Congress, in the first instance, should address the complex issues presented by the application of the RICO and CCE forfeiture provisions to attorneys’ fees and should reach a solution that strikes an appropriate balance between the public interest in punishing and deterring crime and the cherished constitutional right to counsel of choice.

---

507. *Id.*

508. *Id.*

509. *Id.* (citing *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring)).

510. *Id.* at 2711 (O’Connor, J., concurring).