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UNITED STATES V. MONSANTO: A "KINDER, GENTLER" INTERPRETATION OF THE COMPREHENSIVE FORFEITURE ACT OF 1984

I. INTRODUCTION

As a result of government frustration with drug trafficking,1 Congress amended the penalty provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the Drug Abuse Act)2 with the Comprehensive Forfeiture Act of 1984 (the Forfeiture Act).3 Prior to the Forfeiture Act amendment, the Drug Abuse Act contained a section entitled “Continuing Criminal Enter-

1. See infra notes 210-22 and accompanying text for a discussion of the legislative history of the Forfeiture Act.

§ 853. Criminal forfeitures
(a) Property subject to criminal forfeiture
Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

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

(b) Meaning of term “property”
Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and
(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers
All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide
prise,” (CCE),\(^4\) which empowered the government to seize any property a defendant obtained from violating its provisions upon the defendant's conviction.\(^5\) The Forfeiture Act, however, provided the government with two new and powerful tools: (1) pre-trial restraining orders against a defendant's assets; and (2) post-trial orders to reclaim specific assets that the defendant transferred to third parties.\(^6\) Thus, the Forfeiture Act contained three distinct procedures that the federal courts could use to seize all or part of a suspected drug trafficker's purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

\[\ldots\]

(c) Protective orders

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

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

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

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

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

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


5. Id. Prior to the Forfeiture Act's amendment to the Drug Abuse Act, the forfeiture provision of the Drug Abuse Act was contained in the CCE section. Id. The CCE section stated:

(2) Any person who is convicted . . . of engaging in continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any interest in, claim against, or property or contractual rights of any kind affording a source of influence over such enterprise.


Continuing criminal enterprise is defined as a "continuing series of violations of this subchapter . . . undertaken . . . in concert with five or more other persons . . . from which such person obtains substantial income or resources." 21 U.S.C. § 848(c).

The current version of the CCE forfeiture section states:

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to . . . the forfeiture prescribed in section 853 of this chapter . . .


property: (1) restraining orders at the pre-trial phase to preserve a defendant's property for forfeiture;\(^7\) (2) court orders for forfeiture of a defendant's property upon conviction;\(^8\) and (3) special forfeiture verdicts designed to confiscate property the convicted defendant transferred to third parties (the "relation-back provision").\(^9\)

The Forfeiture Act sparked a debate among scholars, lawyers and circuit courts.\(^10\) The debate centered on two issues: (1) if, upon conviction, a defendant faces possible forfeiture of assets, should a court have the power, at the pre-trial stage, to restrain, or freeze, assets of the defendant that the defendant wishes to use for attorneys' fees; and (2) if these assets are not restrained, and are used by a defendant who is subsequently convicted, should a court have the power to reclaim the attorneys' fees for the government under the relation-back provision? Interpreting the statute affirmatively for both questions raises a sixth amendment\(^11\) issue.\(^12\) If the statute is interpreted negatively for either of these questions, then the Forfeiture Act amendment to the Drug Abuse Act is effectively superfluous and the Drug Abuse Act has the same impact as when Congress enacted it in 1970.

The United States Supreme Court decided these issues in *United States v.*
Monsanto. In a five-to-four vote, the Court held that the Forfeiture Act clearly dictated, and Congress clearly intended, that: (1) pre-trial restraining orders include any assets allocated for attorneys' fees; and (2) the relation-back provision applies to reclaim any fees transferred from a convicted defendant to his or her attorney.

Using the same case law and legislative history that was before the Monsanto Court, this Note demonstrates that the most defensible interpretation of the Forfeiture Act is one which falls between a mandatory inclusion of attorneys' fees and a mandatory exception of attorneys' fees as forfeitable assets under the Forfeiture Act. Given the permissive language of the Forfeiture Act and Congress' purposes for enacting it, the federal district courts should retain their full equitable powers and be permitted to decide when attorneys' fees are subject to pre-trial restraining orders or post-trial forfeitures. This Note first introduces the background of forfeiture statutes in general and the Forfeiture Act in particular. Next, this Note sets forth the facts and the Supreme Court's holding in Monsanto. Lastly, this Note analyzes the Court's opinion and suggests an alternative interpretation of the statute.

II. BACKGROUND

A. Historical Background of Forfeiture Statutes

There are two types of forfeiture statutes: in rem and in personam.


14. Justice White authored the opinion of the Court in which Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy joined. Monsanto, 109 S. Ct. at 2659. Justice Blackmun authored the dissenting opinion and was joined by Justices Brennan, Marshall and Stevens. Caplin, 109 S. Ct. at 2661. The Monsanto dissenters were also the dissenters in Caplin; thus the justices authored one dissenting opinion which covered the Forfeiture Act issues in both cases. Id.

15. Monsanto, 109 S. Ct. at 2662.


17. See infra notes 210-22 and accompanying text for a discussion of the legislative intent behind the Forfeiture Act.

18. As Judge Winter noted, once a court exempts attorneys' fees from forfeiture, the court should continue to supervise the defendant to ensure that the defendant is transferring reasonable fees to attorneys for legitimate legal work. United States v. Monsanto, 852 F.2d 1400, 1410 (2d Cir. 1988) (en banc) (Winter, J., concurring), rev'd, 109 S. Ct. 2657 (1989).

19. A proceeding in rem is one taken against property, to dispose of the property, without referring to the title of individual claimants. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE, § 3.8, at 114-15 (1985). Actions in rem do not impose personal liability but, rather, affect the interests of persons in a specific thing or property. Id. § 3.8 at 115.

20. An in personam action is against a person or persons where the plaintiff seeks either a money judgment from the defendant or a court order preventing/requiring action on the defendant's part. See id. § 3.2 at 97-98. An in personam action requires personal service of process, but such service is not required for an in rem proceeding. Id.
Both have long histories in American jurisprudence. As early as 1827, the United States Supreme Court upheld the government's *in rem* seizure of property.\(^{21}\) *In rem* actions against property form the base of civil forfeiture statutes.\(^{22}\) In these cases, the property used in committing a crime is considered tainted. The property owner's guilt or innocence is irrelevant because, based on a legal fiction, the property itself committed the wrong.\(^{25}\) Under this premise, the government's interest in the property vests at the time of the wrongful act thus entitling the government to possession of the property.\(^{24}\)

Federal drug enforcement statutes are enforceable against illegally obtained property through this civil forfeiture process.\(^{25}\) Civil forfeiture, based on *in rem* principles, is widely used in the United States to confiscate virtually any type of property that a defendant uses in a criminal enterprise.\(^{26}\)

In contrast to civil forfeiture, criminal forfeiture is based on *in personam* principles and serves a different purpose — to punish a convicted defendant.\(^{27}\) Criminal forfeiture has its roots in England.\(^{28}\) English law required a convicted felon to forfeit to the crown all that he owned, not just the property used in committing the crime.\(^{29}\) However, criminal forfeiture never gained wide acceptance in the American colonies.\(^{30}\) From 1790 to 1970, Congress authorized only one criminal forfeiture statute;\(^{31}\) the Confiscation Act of 1862.\(^{32}\) The Supreme Court upheld the constitutionality of this act on two separate occasions.\(^{33}\)

### B. Modern Developments

In 1970, Congress reintroduced criminal forfeiture into federal law. The

\(^{21}\) The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

\(^{22}\) Id.


\(^{24}\) United States v. Nichols, 841 F.2d 1485, 1486 (10th Cir. 1988).

\(^{25}\) See 21 U.S.C. § 881(a) (1988). The statute lists specific items that the United States may seize including aircraft, money, securities and real property. *Id.*


\(^{27}\) See supra note 20 for a discussion of *in personam* principles.

\(^{28}\) Nichols, 841 F.2d at 1486.

\(^{29}\) Id. English forfeiture law is premised on the idea that all property is derived from society, and a member of the community who violates the law forfeits his right to such property. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* *299*. Thus, the defendant's entire estate would be forfeited regardless of whether the property was involved in, or derived from, the crime. Calero-Toledo, 416 U.S. at 682-83.

\(^{30}\) Calero-Toledo, 416 U.S. at 682-83.

\(^{31}\) Nichols, 841 F.2d at 1487.

\(^{32}\) Pub. L. No. 37-113, 12 Stat. 589 (1862). This Act provided for the recovery of Confederate soldiers' life estates after the Civil War.

Racketeer Influenced and Corrupt Organizations Act (RICO),\textsuperscript{34} and the Drug Abuse Act\textsuperscript{35} provided specific measures aimed at controlling organized crime and drug trafficking. RICO established a new offense for "acts of racketeering activity,"\textsuperscript{36} These acts included continuing offenses for gambling, securities fraud and drug trafficking.\textsuperscript{37} The Drug Abuse Act defined illegal substances and prohibited activities involving such substances.\textsuperscript{38} The Drug Abuse Act contained a section entitled "Continuing Criminal Enterprise" (CCE), which in turn contained a penalty section.\textsuperscript{39} Congress intended that the CCE section of the Drug Abuse Act and RICO would control the distribution of illegal drugs through implementation of harsh penalties.\textsuperscript{40} Both RICO and the CCE section contained new methods to combat the enormous profitability organized crime and individuals gained from sales of illegal drugs.\textsuperscript{41} One of these new methods was criminal forfeiture.\textsuperscript{42} Criminal forfeiture empowered the courts to use in rem proceedings to seize property and profits derived from illegal acts.\textsuperscript{43}

At first, criminal forfeiture seemed a promising means of reducing crime. The Supreme Court stated that by "introducing forfeiture into federal criminal law, Congress sought to dissuade individuals from pursuing criminal gain and to eradicate the economic power bases making possible organized criminal and drug related activities."\textsuperscript{44} The forfeiture provisions attempted to penalize and deter criminal activity not merely by punishing convicted defendants, but also by attacking the economic base of criminal enterprise.\textsuperscript{45} For example, the RICO statute mandated the forfeiture of any "interest" obtained through racketeering activity.\textsuperscript{46} The possible penalties for a convicted defendant's violation of the statute were 10 years to life imprisonment, a penalty of up to $100,000 and forfeiture of profits obtained by violating the CCE provision. 21 U.S.C. § 848(a) (1982) (current version at 21 U.S.C. § 848(a) (1988)).

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\textsuperscript{36} 18 U.S.C. § 1961(1) (1988). "Racketeering activity" is defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year," or any offenses under titles 11, 18 and 29 of the United States Code or under the Currency and Foreign Transactions Reporting Act. 18 U.S.C. § 1961(1).
\textsuperscript{37} 18 U.S.C. § 1961(1).
\textsuperscript{40} Id. The possible penalties for a convicted defendant's violation of the statute were 10 years to life imprisonment, a penalty of up to $100,000 and forfeiture of profits obtained by violating the CCE provision. 21 U.S.C. § 848(a) (1982) (current version at 21 U.S.C. § 848(a) (1988)).
\textsuperscript{44} Russello v. United States, 464 U.S. 16, 26 (1983).
\textsuperscript{45} Id. at 26-29.
teering conduct. Congress believed the forfeiture provisions in both statutes would correct the ineffectiveness of the traditional penalties of imprisonment and fines.

Despite Congress' intentions, illegal drug trafficking and organized crime continued unabated and seemingly untouched by the new statutes. Between 1970 and 1980, the United States Attorney General filed only ninety-eight CCE and RICO cases and courts received only two million dollars in actual or potential forfeitable assets. During that same period, Congress estimated illegal drug activity as generating sixty billion dollars in annual profits.

Congress held hearings in response to the statutes' deficiencies. Through these hearings, Congress identified two major shortcomings in RICO and the CCE section of the Drug Abuse Act: (1) the trial courts' inability to prevent transfers of potentially forfeitable property to third parties; and (2) the difficulty in recovering the property once transferred. Because both statutes required the district courts to issue indictments listing the defendants' forfeitable property before issuing the pre-trial restraining orders, the defendants could transfer, and were transferring, assets prior to grand jury deliberations. Additionally, district courts could issue only mere contempt citations against defendants for transferring listed property against the courts' orders. Therefore, the ineffectiveness of the statutes stemmed from both the absence of a procedure for pre-indictment restraining orders and the lack of an adequate punishment for violations of such orders. As a result of these findings, Congress enacted the Forfeiture Act.

C. The Comprehensive Forfeiture Act of 1984

The Forfeiture Act affected the federal courts in four ways. First, the

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48. Id.

49. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE — A Seldom Used Tool in Combating Drug Trafficking 1, 10 (1981).

50. Id.


52. S. REP. No. 225, supra note 47, at 194-97.


54. Id.

55. S. REP. No. 225, supra note 47, at 194.


57. See infra notes 58-76 and accompanying text.
Forfeiture Act subjected all federal drug felonies to criminal forfeiture,\textsuperscript{58} thus increasing the number of crimes subject to forfeiture to an estimated twenty-five percent of all criminal cases brought in federal courts.\textsuperscript{59} Second, the Forfeiture Act expanded the definition of forfeitable property to include any property “used, or intended to be used” in the commission of a drug offense.\textsuperscript{60} Third, and most importantly, provisions of the Forfeiture Act authorized courts to seize property prior to convictions.\textsuperscript{61} For the first time, courts could issue restraining orders before the filing of an indictment.\textsuperscript{62}

Specifically, the Forfeiture Act permitted courts to issue restraining orders or injunctions at two different times: (1) concurrent with the filing of an indictment or information alleging the property is subject to forfeiture upon conviction; or (2) prior to filing the indictment if the court held a hearing for persons with an interest in the property.\textsuperscript{63} At either phase the court is required to determine that: (1) there is a “substantial probability that the United States will prevail on the issue of forfeiture;”\textsuperscript{64} (2) the defendant may remove the property and make it unavailable for forfeiture;\textsuperscript{65} and (3) the need to preserve the property outweighs the hardships placed on the restrained party.\textsuperscript{66} Even if these requirements are satisfied, however, and the court issues a restraining order, such an order is only effective for ninety days unless the government files an indictment or shows good cause for an extension.\textsuperscript{67}

Furthermore, the Forfeiture Act permitted federal district courts to issue pre-indictment temporary restraining orders without notice or the opportunity for a hearing under special circumstances.\textsuperscript{68} In this situation, the government must convince the court of two things: (1) there is probable cause to believe that the property would be subject to forfeiture on conviction; and (2) notifying the property owner would jeopardize the availability of the property.\textsuperscript{69} Such a temporary restraining order is effective for ten days unless the government shows good cause for an extension.\textsuperscript{70} The court may then hold a hearing to extend the

\textsuperscript{58} United States v. Nichols, 841 F.2d 1485, 1488 (10th Cir. 1988). Although the Forfeiture Act amendment to RICO and the Drug Abuse Act are virtually identical, this discussion focuses specifically on the Drug Abuse Act provisions.

\textsuperscript{59} Hughes & O’Connell, supra note 26, at 626. See Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 AM. CRIM. L. REV. 747, 750-76 (1985) for an in-depth discussion of the changes the Forfeiture Act made to criminal forfeiture law.

\textsuperscript{60} 21 U.S.C. § 853(a)(2).
\textsuperscript{61} Id. § 853(e).
\textsuperscript{62} Id.
\textsuperscript{63} Id. § 853(e)(1)(A), (B).
\textsuperscript{64} Id. § 853(e)(1)(B)(i).
\textsuperscript{65} Id.
\textsuperscript{66} Id. § 853(e)(1)(B)(ii).
\textsuperscript{67} Id. § 853(e).
\textsuperscript{68} Id. § 853(e)(2).
\textsuperscript{69} Id.
\textsuperscript{70} Id.
temporary restraining order.\textsuperscript{71}

The fourth effect of the Forfeiture Act on federal courts concerned its relation-back provision.\textsuperscript{72} Under the Forfeiture Act, the United States' title to forfeited property vested at the time the defendant committed an offense.\textsuperscript{73} Therefore, any property transferred from the defendant to a third party, prior to a conviction, could be subjected to a special verdict of forfeiture.\textsuperscript{74} Only by establishing that he or she is a bona fide purchaser for value, without reasonable cause to believe the property would be subject to forfeiture, could a third party keep title to the property.\textsuperscript{75} Thus, this provision effectively voided defendants' attempts to transfer assets to related parties and defeat the previous forfeiture statutes.\textsuperscript{76}

III. STATEMENT OF THE CASE

A. Introduction

The Forfeiture Act\textsuperscript{77} was silent as to whether "forfeitable assets" included a defendant's attorneys' fees or whether an exemption existed for such fees. Those who believed attorneys' fees were included as forfeitable assets argued that Congress intentionally omitted an exception for them.\textsuperscript{78} Alternatively, proponents for exempting attorneys' fees argued that the Forfeiture Act's silence, combined with the detrimental effects of non-exemption for attorneys' fees,\textsuperscript{79} signified that Congress intended an exception for such fees.\textsuperscript{80} The circuit courts were split in their interpretations of the Forfeiture Act. The Fourth, Seventh, Tenth and

\textsuperscript{71} Id.
\textsuperscript{72} Id. \S 853(e).
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. The Court of Appeals for the Tenth Circuit noted that "the relation back provision essentially borrows the concept of taint from civil forfeiture." \textit{Nichols}, 841 F.2d at 1489.
\textsuperscript{76} See S. REP. NO. 225, supra note 47, at 191, 200-01. See supra notes 34-47 for a discussion on forfeiture statutes existing prior to the Forfeiture Act.
\textsuperscript{79} Judge Winter's opinion mentioned some of the detrimental effects of restraining a defendant's assets. \textit{United States v. Monsanto}, 852 F.2d 1400, 1408 (2d Cir. 1988) (en banc) (Winter, J., concurring), \textit{rev'd}, 109 S. Ct. 2657 (1989). Judge Winter noted that preventing a defendant from making ordinary lawful expenditures constituted punishment imposed before conviction. \textit{Id.} (Winter, J., concurring). "Because a pre-conviction restraint on ordinary lawful expenditures is punishment, hardship is inflicted on a defendant to the extent of the restraint." \textit{Id.} (Winter, J., concurring). For example, the effects of a restraint render a defendant indigent, thus making access to assets for food, medical care, or shelter impossible. \textit{Id.} (Winter, J., concurring).
Eleventh Circuits held that the Forfeiture Act\(^\text{81}\) reached all the defendant's funds, including any funds allocated for attorneys' fees.\(^\text{82}\) However, the Second and Fifth Circuits opposed such a view and exempted attorneys' fees from a defendant's restrained assets.\(^\text{83}\)

In 1989, the United States Supreme Court heard two companion cases to decide the issue. In \textit{Caplin & Drysdale, Chartered v. United States},\(^\text{84}\) the Court decided the constitutional concerns surrounding the forfeiture of attorneys' fees.\(^\text{85}\) In \textit{United States v. Monsanto},\(^\text{86}\) the Court examined the construction of the Forfeiture Act and decided that: (1) the language of the Forfeiture Act does not permit an exemption for attorneys' fees; and (2) Congress did not intend the statute to have such an exemption.\(^\text{87}\) This Note focuses exclusively on the statutory interpretation and exemption questions of the Forfeiture Act as presented in \textit{Monsanto}, but not the constitutional issues discussed in \textit{Caplin}.\(^\text{88}\)

\textbf{B. Facts of Monsanto}

In \textit{United States v. Monsanto},\(^\text{89}\) the Assistant United States Attorney indicted Peter Monsanto for violating RICO, the CCE section of the Drug Abuse Act and various tax and firearm statutes.\(^\text{90}\) The indictment requested forfeiture, under the Forfeiture Act, of specific assets which Monsanto allegedly obtained through illegal activities.\(^\text{91}\) After unsealing the indictment, the district court granted the government's \textit{ex parte} motion to freeze Monsanto's assets pending trial.\(^\text{92}\) Monsanto moved to vacate the order and use a portion of the assets for his attorneys' fees.\(^\text{93}\) Monsanto also requested that the court not apply the rela-

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\textsuperscript{83} \textit{Monsanto}, 852 F.2d at 1402; \textit{United States v. Jones}, 837 F.2d 1332, 1333, (5th Cir.) \textit{reh'g granted}, 844 F.2d 215 (5th Cir. 1988).
\textsuperscript{84} 109 S. Ct. 2646 (1989).
\textsuperscript{85} \textit{Id.} at 2651. The Court held that a defendant's sixth amendment and due process rights would not be violated by the Forfeiture Act if attorneys' fees were forfeited. \textit{Id.} at 2655-57.
\textsuperscript{86} 109 S. Ct. 2657 (1989).
\textsuperscript{87} \textit{Id.} at 2662.
\textsuperscript{88} Under the analysis of this Note, it is not necessary to address directly the constitutional issues because the statute is interpreted as avoiding such a conflict. See infra notes 189-222 and accompanying text.
\textsuperscript{89} 109 S. Ct. 2657 (1989).
\textsuperscript{90} \textit{Id.} at 2659-60.
\textsuperscript{91} \textit{Id.} These assets were two parcels of real property valued at $335,000 and $30,000 each, and a bank account containing $35,000. \textit{United States v. Monsanto}, 852 F.2d 1400, 1401 (2d Cir. 1988) (en banc), \textit{rev'd}, 109 S. Ct. 2657 (1989).
\textsuperscript{93} \textit{Monsanto}, 109 S. Ct. at 2660.
tion-back provision of section 853(c) to reclaim the fees if he was allowed to use the assets to compensate his attorneys. In support of his motion, Monsanto raised various statutory challenges to the restraining order and a sixth amendment claim that it denied him counsel of his choice. The district court denied the motion.

On appeal, the Second Circuit Court of Appeals also denied Monsanto's statutory and constitutional claims. However, the circuit court remanded the case for a district court hearing so that the government could prove "the likelihood that the assets are forfeitable." If the government failed to satisfy its burden of proof, then the district court could exempt all of Monsanto's attorneys' fees from the forfeiture statute. Nevertheless, the government met its burden and the district court upheld the restraining order. The case went to trial and a court-appointed attorney represented Monsanto.

During the time of the district court's hearing, the Second Circuit Court of Appeals vacated its prior opinion and heard Monsanto's appeal en banc. In an eight-to-four decision, the en banc court held that the district court should modify its order and permit Monsanto access to his assets for payment of attorneys' fees. No dominant rationale prevailed in the en banc decision. Three judges found that the order violated the sixth amendment, three judges questioned the order on statutory grounds, and the remaining two judges supporting the decision questioned it under the due process clause of the fifth amendment. Because the Second Circuit's decision created a conflict among the courts of appeals in interpreting the Forfeiture Act, the Supreme Court granted certiorari.

94. Id. at 2660; see 21 U.S.C. § 853(c). See supra notes 72-75 and accompanying text for a discussion of this provision.
95. Monsanto, 109 S. Ct. at 2660-61.
96. Id. at 2661.
97. Id.
98. Id. (citation omitted).
99. Id.
100. Id.
101. Id. Monsanto was convicted and the jury returned a special finding that the assets in question were forfeitable beyond a reasonable doubt. Id. at 2661 n.4. The Supreme Court noted that this finding did not render the pre-trial restraining order moot. Id. The dispute remained alive because the restraining order continued to be effective pending Monsanto's appeal of his conviction. Id.
102. Monsanto, 109 S. Ct. at 2661. Monsanto's trial began after the court of appeals vacated its opinion and agreed to hear the case en banc. Id. at 2661 n.5. Four and a half months into Monsanto's trial, the court of appeals rendered its decision in his favor. Id. The district court offered Monsanto part of his assets to hire a private attorney. Id. Given the late stage of his trial, however, Monsanto chose to remain with his court-appointed attorney. Id. The jury returned a guilty verdict three weeks later. Id.
103. Monsanto, 852 F.2d at 1402.
104. Id. at 1402; see U.S. CONST. amend. VI.
106. Monsanto, 852 F.2d at 1411 (Winter, J., concurring); see U.S. CONST. amend. V.
IV. THE SUPREME COURT'S OPINION

In *United States v. Monsanto*, the Supreme Court examined the issue of whether the Forfeiture Act amendment to the Drug Abuse Act required forfeiture of assets that a defendant designates for attorneys' fees. Justice White began the majority opinion by examining the statute's language. The Court acknowledged that the relevant provision of the Forfeiture Act stated that "a[ny] person convicted of [a drug offense] 'shall forfeit ... any property' that was derived from the commission of [the offense]." Additionally, this same section provided that "upon conviction a sentencing court 'shall order' forfeiture of all property described in [section] 853(a)." The Court stated, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory . . . or broader words to define the scope of what was to be forfeited." Additionally, the Court emphasized that the "broad definition of property [in the statute] included 'real property . . . tangible and intangible personal property, including rights, privileges, interests, claims, and securities.'" Based on this language, nothing in the statute "even hints" that assets marked for attorneys' fees "are not 'property' within the statute's meaning." The Court concluded that "the language of [section] 853 is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees — or anything else, for that matter."

After concluding that the statute, on its face, did not contain an exemption for attorneys' fees, the Court examined Monsanto's arguments for creating a judicial exception. Monsanto urged the Court to imply an exemption because: (1) the statute did not expressly include attorneys' fees as forfeitable property; and (2) Congress did not intend that it should reach attorneys' fees. The Court concluded that although the House and Senate debates were silent on the issue, this silence did not support exempting attorneys' fees from the statute. The Court summarized its position by stating that the "congressional debates are similarly silent on the use of forfeitable assets to pay stockbrokers' fees, laundry bills, or country club memberships; no one could credibly argue that, as a result, assets to be used for these purposes are similarly exempt from the statute's definition of forfeitable property."

110. Monsanto, 109 S. Ct. at 2662.
111. Id. (quoting 21 U.S.C. § 853(a) (1988)).
112. Id. (quoting 21 U.S.C. § 853(a) (1988)).
113. Id.
114. Id. (quoting 21 U.S.C. § 853(b) (1988)).
115. Id.
117. Monsanto, 109 S. Ct. at 2662.
118. Id.
119. Id. at 2662-63.
120. Id. at 2663.
While examining the legislative history of the Forfeiture Act, the Court noted a House report which stated, "'Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person’s right to retain counsel in a criminal case.'"\(^{121}\) Monsanto argued that this statement indicated Congress' intent not to include attorneys' fees under the forfeiture provision.\(^{122}\) The Supreme Court, however, stated that this "ambiguous passage" could support the opposite interpretation as well.\(^{123}\) Without giving any weight to the House report, the Court concluded that the Forfeiture Act's plain language was within legal boundaries and was controlling on the issue of attorneys' fees.\(^{124}\)

The Court then addressed Monsanto's argument that certain prudential doctrines for statutory exemptions, created by the Supreme Court, applied to section 853(a).\(^{125}\) In particular, Monsanto urged the Court to follow its own doctrine of construing statutes to avoid constitutional issues.\(^{126}\) The Court acknowledged this argument and stated that this canon was useful, but inapplicable in cases where the statutory language is clear.\(^{127}\) This canon is "'not a license for the judiciary to rewrite language enacted by the legislature.'"\(^{128}\) Because the Court had previously determined that the language of section 853(a) was unambiguous, Monsanto's argument for creating an exemption based on this doctrine failed.\(^{129}\)

Next, the Court considered the pre-trial forfeiture provision of section 853(e)(1)(A).\(^{130}\) Here, Monsanto requested that the Court create an exemption for attorneys' fees at the pre-trial stage.\(^{131}\) The Court focused on Judge Winter's separate opinion in the Second Circuit's en banc decision for its analysis.\(^{132}\)

The restraining order section of the Forfeiture Act\(^ {133} \) provided that a court "may" enter a restraining order upon the filing of an indictment in order to preserve the availability of a defendant's property for forfeiture.\(^ {134} \) Judge Winter interpreted the permissive language of this section as authorizing the district

\(^{121}\) Id. at 2663 n.8 (quoting H.R. REP. No. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984)).
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{127}\) Monsanto, 109 S. Ct. at 2664.
\(^{128}\) Id. (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)).
\(^{129}\) Id.
\(^{131}\) Monsanto, 109 S. Ct. at 2664.
\(^{134}\) Id.
courts to employ "traditional principles of equity" when deciding whether to issue a restraining order. Judge Winter held that the potential hardships on a defendant weighed heavily against freezing any assets allocated for attorneys' fees. Additionally, he concluded that payment of attorneys' fees from potential forfeitable assets was immune from the relation-back provision of section 835(c). Thus, Judge Winter established that payments transferred to an attorney are free from forfeiture to the government under the Forfeiture Act, even if the defendant is subsequently convicted.

The Supreme Court overturned Judge Winter's position. The Court reasoned that section 853(a) of the Forfeiture Act is absolute; it contained no qualification that its reach could be limited by another section of the statute. Under section 853(e)(1), a district court "may" enter a restraining order at the government's request, but it is not required to do so if posting a bond or an alternate means of preserving the defendant's property is available. Therefore, the Court reasoned that section 853(e)(1) implements section 853(a) and cannot be read to give the district courts "discretion to permit the dissipation of the very property that [section] 853(a) requires be forfeited upon conviction." Additionally, the Court found that sections 853(e) and 853(a) were consistent, thus, there was no need to limit section 853 to assets exclusive of attorneys' fees.

The Court continued its opinion by criticizing Judge Winter's interpretation of equitable discretion. The Court concluded that Judge Winter's use of equitable discretion was not discretionary at all because the judge had stated that attorneys' fees must be excluded from restraining orders. The discretion Judge Winter advocated for section 853(e) "becomes a command to use that subsection (and [section] 853(c)) to frustrate the attainment of [section] 853(a)'s ends." The Court explained its rationale by stating:

Whatever discretion Congress gave the district courts in [sections] 853(e) and 853(c), that discretion must be cabined by the purposes for which Congress created it: "to preserve the availability of property . . . for forfeiture." We cannot believe that Congress intended to permit the effectiveness of the powerful "relation-back" provision of [section] 853(c), and the comprehensive "any property . . . any proceeds" language of [section] 853(a), to be nullified by any other construction of

135. Monsanto, 852 F.2d at 1406 (Winter, J., concurring).
136. Monsanto, 109 S. Ct. at 2664.
137. Id. at 2664-65; see 21 U.S.C. § 853(c).
138. Monsanto, 109 S. Ct. at 2665.
139. Id.
140. Id.; see 21 U.S.C. § 853(a).
142. Monsanto, 109 S. Ct. at 2665.
143. Id.
144. Id.
145. Id.
146. Id.
Although recognizing the severity of its decision, the Court believed that neither the language of the Forfeiture Act nor the congressional intent in enacting it mandated exempting attorneys' fees from forfeiture.\textsuperscript{148}

V. ANALYSIS OF THE MONSENTO COURT'S OPINION

A. Construing the Language of Sections 853(e)(1)(A) and 853(c)

1. The language of the Forfeiture Act

At trial, Monsanto opposed an interpretation of section 853(e)(1)(A) which would freeze all of his assets, without an exemption for his attorneys' fees, prior to trial.\textsuperscript{149} Monsanto also objected to the Court's application of section 853(c) to reclaim any fees legitimately paid to his attorney if he was convicted of violating the Drug Abuse Act.\textsuperscript{150} Under its own precedent, the Supreme Court should have concluded that both sections of the Forfeiture Act provide an exemption for attorneys' fees. Alternatively, the Court, at a minimum, should have allowed the district courts to retain their equitable jurisdiction over the issue.\textsuperscript{151}

In previous cases, the Supreme Court has determined the scope of a statute by first looking at its language.\textsuperscript{152} The Court has proposed a general guideline: "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"\textsuperscript{153} Thus, clear language of a statute will control the statute's meaning unless there is opposing legislative intent. The Court applied this test in \textit{United States v. Monsanto}\textsuperscript{154} and concluded that section 853 is plain and unambiguous on its face; therefore, Monsanto must forfeit to the government all his assets that fell within its scope.\textsuperscript{155}

This argument, however, contains a factual flaw. The Court based its opinion primarily on an interpretation of section 853(a).\textsuperscript{156} That section reads, "Any person \textit{convicted} of a violation of this subchapter . . . shall forfeit . . ."\textsuperscript{157}

\textsuperscript{147} Id.; see 21 U.S.C. § 853(a), (c), (e).
\textsuperscript{148} \textit{Monsanto}, 109 S. Ct. at 2664.
\textsuperscript{150} Id. at 1401.
\textsuperscript{151} For an explanation of equitable jurisdiction, see \textit{infra} note 169.
\textsuperscript{152} \textit{See}, \textit{e.g.}, United States v. Turkette, 452 U.S. 576, 580 (1980) (scope of criminal "enterprise" under RICO statute).
\textsuperscript{154} 109 S. Ct. 2657 (1989).
\textsuperscript{155} Id. at 2664.
\textsuperscript{156} Id. at 2662 n.7.
Read in conjunction with section 853(b), which defines forfeitable property in broad terms, a defendant would have difficulty convincing a court that Congress intended an exception for attorneys' fees upon conviction. Indeed, every court of appeals, except for one, that has considered this issue agreed that the statute clearly failed to exclude assets allocated for attorneys' fees from forfeiture at the conviction stage.

The basis of Monsanto's appeal, however, was not section 853(a) or section 853(b), but sections 853(e)(1)(A) and 853(c). These sections govern forfeiture at the pre-trial phase or as a result of a third-party transfer. Both of these sections contain the flexible and somewhat ambiguous term "may forfeit" in their text. The Court failed to apply its plain-language test to sections 853(e)(1)(A) and 853(c): the sections Monsanto was actually challenging. If the Court had done a plain-language analysis of these two sections, it would have reached a different conclusion.

According to the Supreme Court, the first step when determining the scope of a statute is to look at the statutory language. If the language is unambiguous, then it is conclusive. The text of section 853(e)(1) states, "Upon application of the United States, the court may enter a restraining order or injunction ...." Similarly, section 853(c) states, "All right, title, and interest in property ... vests in the United States upon the commission of the act. ... Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture ...." If, as the Supreme Court reasoned, forfeiture is clearly mandated at the conviction phase under section 853(a) due to the words "shall forfeit," then the permissive language of sections 853(e)(1)(A) and 853(c) mandate a discretionary review of forfeiture at the pre-trial stage or when a defendant transfers property to a third party.

158. Id. § 853(b). The statute defines property as "real property, including things growing on, affixed to, and in land ... tangible and intangible personal property, including rights, privileges, interests, claims, and securities." Id.
159. See, e.g., United States v. Bissell, 866 F.2d 1343, 1350 (11th Cir. 1989) (section 853 reaches all illegal funds including those earmarked for attorneys' fees); United States v. Moya-Gomez, 860 F.2d 706, 731 (7th Cir. 1988) (no exception for attorneys' fees under section 853); United States v. Nichols, 841 F.2d 1485, 1496 (10th Cir. 1988) (attorneys' fees are not exempt from criminal forfeiture under section 853). The Fifth Circuit does not agree with this interpretation, but it is currently reconsidering its ruling en banc. United States v. Jones, 837 F.2d 1332, 1333, (5th Cir.) reh'g granted, 844 F.2d 215 (5th Cir. 1988) (property pledged for attorneys' fees is exempt from forfeiture under section 853).
160. Monsanto, 852 F.2d at 1401; see 21 U.S.C. § 853(a)-(c), (e)(1)(A).
162. See id.
164. Id. at 2662.
165. Turkette, 452 U.S. at 580.
167. Id. § 853(e).
168. Monsanto, 109 S. Ct. at 2662.
2. District courts’ historical retention of equitable discretion

In addition to the plain-language analysis, federal common law favored permitting district courts to retain their full equitable powers.\textsuperscript{169} There is an established canon of statutory construction throughout the Supreme Court’s opinions that endorses a lower court’s retention of discretionary power if there is no clear, contrary legislative intent.\textsuperscript{170} Unless Congress “in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”\textsuperscript{171} This canon first appeared in 1836 when the Court stated, “[T]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.”\textsuperscript{172} Indeed, the Supreme Court has admonished federal courts for dispensing with the “requirements of equity practice” and their “background of several hundred years of history.”\textsuperscript{173} This is “history of which Congress is assuredly well aware.”\textsuperscript{174}

In 1944, the Supreme Court extended this rationale to include a situation where Congress used the mandatory “shall” language in a statute. In \textit{Hecht Co. v. Bowles},\textsuperscript{175} the Supreme Court held that when Congress uses the word “shall” instead of “may,” the federal courts are still required to exercise equitable discretion.\textsuperscript{176} In \textit{Hecht}, the Court construed a portion of the Emergency Price Control Act of 1942.\textsuperscript{177} A section of that act provided that, in certain circumstances, “a permanent or temporary injunction, restraining order, or other order \textit{shall} be granted without bond.”\textsuperscript{178} The defendant in \textit{Hecht} argued that the mandatory character of this section was clear from its language, therefore, the trial court was required to issue one of the orders.\textsuperscript{179}

The Supreme Court disagreed and concluded that “shall be granted” is

\begin{itemize}
\item \textsuperscript{169} Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). Equity is generally defined as justice administered according to fairness as opposed to justice administered through the strictly formulated rules of common law. Gilles v. Department of Human Resources Dev., 11 Cal. 3d 313, 322 n.10, 521 P.2d 110, 116 n.10, 113 Cal. Rptr. 374, 380 n.10 (1958). Originating in England, it is based on a system of rules and principles aimed at doing what is fair in a particular situation. \textit{Id.} One sought relief under this system in a court of equity (also called courts of chancery) rather than a court of law. \textit{Id.} The term equity is equated with the spirit of fairness, justness, and right which regulates the relationships in society. \textit{Id.} Currently, federal courts and most state courts administer equitable and legal rights in the same court. \textit{Id.; see also Fed. R. Civ. P. 2.}
\item \textsuperscript{170} Porter, 328 U.S. at 398.
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} Brown v. Swann, 35 U.S. (10 Pet.) 496, 503 (1836).
\item \textsuperscript{173} Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).
\item \textsuperscript{174} Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).
\item \textsuperscript{175} 321 U.S. 321 (1944).
\item \textsuperscript{176} \textit{Id.} at 328.
\item \textsuperscript{177} \textit{Id.} at 321-22; see Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (1942).
\item \textsuperscript{178} \textit{Hecht}, 321 U.S. at 327 (emphasis added).
\item \textsuperscript{179} \textit{Id.} at 326.
\end{itemize}
"less mandatory than a literal reading might suggest." As the Court stated:

We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it . . . . [W]e do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.

Summing up its position in strong language, the Hecht Court stated, "[W]e cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." Therefore, unless Congress explicitly stated, or obviously implied, that a court's equitable discretion yields to a statute, a federal court retains its full powers of equitable discretion. Not only does the Supreme Court in Monsanto ignore Hecht and its progeny, but it effectively overruled these cases by strictly construing the Forfeiture Act, which mandated equitable relief, as being a statute that removed equitable relief from the federal courts' jurisdiction.

In addition to neglecting the above analysis in its opinion, the Monsanto Court fell into the same trap it accused Judge Winter of setting in his Second Circuit concurring opinion in United States v. Monsanto. As noted above, sections 853(e)(1)(A) and 853(c) of the Forfeiture Act both contained the word "may." Judge Winter, using the court's equitable jurisdiction, balanced the hardships faced by a defendant, when a court restrains his property, against the government's interest in ensuring the post-conviction availability of the property. Judge Winter concluded that: (1) the Forfeiture Act's language permitted the federal courts to exercise their equitable discretion to decide if a defendant could use his assets for reasonable attorneys' fees; and (2) a court should always permit a defendant to use their assets for reasonable expenditures because the government has no countervailing interest in restraining the assets. The Supreme Court stated that a federal court's equitable discretion "turns out to be no discretion at all" because Judge Winter has predetermined

180. Id. at 328.
181. Id. at 329-30.(quoting Meredith v. Winter Haven, 320 U.S. 228, 235 (1943)).
182. Id. at 329.
185. Monsanto, 852 F.2d at 1408 (Winter, J., concurring). See supra note 79 for Judge Winter's discussion of the hardships faced by a defendant rendered indigent by a restraining order.
186. Monsanto, 852 F.2d at 1408 (Winter, J., concurring).
the outcome in every case.\textsuperscript{187} The Court eventually concluded that section 853, in all circumstances, does not exempt assets to be used for attorneys' fees from its forfeiture provisions.\textsuperscript{188}

Irrationally, the Court's holding that attorneys' fees must be included in a pre-trial restraining order effectively removed all equitable discretion from the federal courts in exactly the same manner that Judge Winter's holding stated that the fees must be released. As a result, the Supreme Court has predetermined the outcome in every forfeiture case and, therefore, is guilty of the same evil it detected in Judge Winter's analysis.

3. The Supreme Court ignored its own doctrine that courts should construe statutes to avoid constitutional issues

In the second half of the \textit{Monsanto} opinion, the Supreme Court analyzed whether a restraining order violated a defendant's right to counsel of choice as protected by the sixth amendment and the due process clause of the fifth amendment.\textsuperscript{189} There is, however, a long-standing principle espoused by the Supreme Court which states that courts should construe statutes to avoid constitutional questions.\textsuperscript{190} The Court has stated:

\[\text{W} \text{hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.}\textsuperscript{191}

This principle was first stated by the Court in 1804.\textsuperscript{192}

Thirteen months before the \textit{Monsanto} opinion, the Court reiterated the importance of this doctrine in \textit{Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council}.\textsuperscript{193} In \textit{DeBartolo}, authored by Justice White, the Court upheld an Eleventh Circuit decision which construed section 158(b)(4) of the National Labor Relations Act (NLRA).\textsuperscript{194} The Court held that this section of the NLRA did not prevent a labor union from peacefully distributing handbills that urged a consumer boycott of certain stores.\textsuperscript{195} The Court acknowledged that construing the statute to prohibit such conduct would raise serious first amendment issues.\textsuperscript{196} To avoid interpreting the first amendment, the Court stated that its duty was to “construe the statute to avoid such

\begin{itemize}
  \item \textsuperscript{187} \textit{Monsanto}, 109 S. Ct. at 2665.
  \item \textit{Id.} at 2665.
  \item \textsuperscript{188} \textit{Id.} at 2665-67; see U.S. CONST. amends. V; VI.
  \item \textsuperscript{189} \textit{See, e.g., Lucas v. Alexander, 279 U.S. 573, 577 (1929); Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346 (1928); Missouri Pac. R.R. v. Boone, 270 U.S. 466, 471-72 (1926); Panama R.R. v. Johnson, 264 U.S. 375, 390 (1924).}
  \item \textsuperscript{190} \textit{Crowell v. Benson}, 285 U.S. 22, 62 (1932).
  \item \textsuperscript{191} Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
  \item \textsuperscript{192} \textit{Id.} at 1396; see 29 U.S.C. §§ 141-169 (1988).
  \item \textsuperscript{193} \textit{DeBartolo}, 108 S. Ct. at 1396.
  \item \textsuperscript{194} \textit{Id.} at 1397.
\end{itemize}
problems unless such construction is plainly contrary to the intent of Congress.”

Thus, Congress must have clearly intended a specific construction of a statute to raise constitutional issues before the Court will meet the constitutional challenge. Justice White stressed the importance of this principle when he stated, “This cardinal principle... has for so long been applied by this Court that it is beyond debate.” Justice White then cited seven cases in the text of his opinion to emphasize his point. He also gave examples of two past cases, with facts, to illustrate how the Court applied this principle in the past and interpreted the NLRA to avoid constitutional conflicts. Justice White allocated two and one-half pages of the opinion, or roughly one-third of his analysis, to emphasizing the Court’s duty to interpret statutes following this time-honored principle.

A year later, Justice White’s opinion in Monsanto dismissed the doctrine of avoiding constitutional interpretations in one paragraph. Clearly admitting that the Forfeiture Act presented a sixth amendment issue if courts restrained assets allocated for attorneys’ fees, Justice White ignored his own opinion in DeBartolo and met the constitutional conflict head-on. Citing DeBartolo, Justice White stated, “[W]e respect these canons, and they are quite often useful in close cases, or when statutory language is ambiguous. . . . Here, the language is clear . . . .” This statement is flawed because Justice White mistakenly focused on section 853(a), which is the post-conviction section of the statute cast in mandatory and precise terms of “shall forfeit,” rather than section 853(e)(1)(A) which is the pre-conviction section cast in the permissive and ambiguous language of “may forfeit.” Justice White did not address the difference between the two sections and their different terms.

Additionally, Justice White’s opinion in Monsanto had previously admitted the existence of some ambiguity in the Forfeiture Act. His opinion examined a footnote in a House report concerning the Forfeiture Act which explicitly mentioned attorneys’ fees. The footnote stated, “Nothing in this section is intended to interfere with a person’s sixth amendment right to counsel. The

197. Id.
198. Id.
201. Monsanto, 109 S. Ct. at 2664.
202. Id. at 2665. See supra notes 193-200 and accompanying text for a discussion of Justice White’s opinion in DeBartolo.
203. Monsanto, 109 S. Ct. at 2664.
204. 21 U.S.C. § 853(a), (e)(1)(A).
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.\footnote{206} The committee's disclaimer seemed to indicate a belief that
legitimate attorneys' fees should not be restrained under the statute.\footnote{207} The
Supreme Court disagreed and said that "this ambiguous passage" could stand
for the opposite proposition since the House expressly refrained from resolving
the conflict among the federal courts.\footnote{208}

A better alternative to definitively deciding whether the statute does or does
not allow an exemption for attorneys' fees is available. The House report footnote referred to section 853(e)(1)(A), the pre-trial permissive language section of
the Forfeiture Act.\footnote{209} The Court could have decided that district court judges
have equitable discretion to exempt attorneys' fees at the pre-trial stage. Additionally, the Court could have suggested some guidelines for when attorneys' fees are exempt. Given the language of the statute and the judicial doctrine to
avoid constitutional issues when construing a statute, this interpretation satisfies
both areas.

B. Congress' Intent Behind the Statute Also Supports a More Moderate
Interpretation of the Forfeiture Act than the Interpretation Offered
by the Monsanto Court

The discretionary language of section 853(e)(1)(A) of the Forfeiture Act
leads to some ambiguity in its interpretation.\footnote{210} If Justice White had followed
the principles detailed in DeBartolo,\footnote{211} he could have interpreted the statute to
avoid a constitutional conflict but yet fulfill Congress' purposes in enacting it. A
close examination of the Act's legislative history shows that Justice White could
have reasonably allowed federal courts to exempt attorneys' fees from forfeiture
at their discretion. This interpretation would not have raised constitutional is-
issues and is not "plainly contrary to the intent of Congress."\footnote{212}

The dissenting opinion in Monsanto noted that the legislative history of the
Forfeiture Act is silent as to whether attorneys' fees are subject to forfeiture
under the Forfeiture Act or if they are exempt.\footnote{213} There are, however, indica-
tions and reasonable inferences that exempting attorneys' fees from forfeiture
would be consistent with the purpose of the Forfeiture Act. It appears that
Congress enacted the Forfeiture Act for the specific purpose of preventing pro-
ceeds from criminal activity from re-entering and funding the cycle of illegal
activity.\footnote{214} For example, a Senate report explained:

\begin{footnotes}
\item[206] Id.
\item[207] See Monsanto, 109 S. Ct. at 2662 n.8.
\item[208] Id.
\item[209] H.R. REP. No. 845, supra note 205, at 19 n.1.
\item[211] See supra notes 193-200 and accompanying text for a discussion of this case.
\item[214] See S. REP. No. 225, supra note 47, at 191.
\end{footnotes}
Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows. More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.\textsuperscript{215}

The above passage indicates that Congress' intent in enacting the statute was to prevent illegally obtained money from funding future crimes. Money transferred to attorneys for legitimate fees does not conflict with this purpose. Unlike transfers of money to relatives or friends, which the defendant may subsequently recover, payment of legitimate attorneys' fees has a permanent, adverse economic impact on the defendant. Once paid to an attorney, the money is kept by the attorney whether or not the defendant is convicted, thus keeping the funds out of future criminal activity in the case of a convicted defendant.

The \textit{Monsanto} Court examined the legislative history of the Forfeiture Act but concluded that Congress' intent was to prevent a defendant's assets from funding high-priced attorneys.\textsuperscript{216} By concentrating on one section of a House report, and taking it out of context, the Court concluded that Congress intended to include attorneys' fees in forfeiture proceedings because defendants spent large sums of money on hiring attorneys.\textsuperscript{217} The section of the House report examined by the Court contained an example used to illustrate the government's frustration under previous forfeiture laws.\textsuperscript{218} The text of the example stated:

One highly publicized case... is illustrative of the problem. That case was \textit{United States v. Meinster}... In this prosecution... a Florida based criminal organization had... grossed about $300 million over a 16-month period. The Federal Government completed a successful prosecution in which the three primary defendants were convicted and

\begin{itemize}
  \item \textsuperscript{215} See \textit{id.}
  \item \textsuperscript{216} Monsanto, 109 S. Ct. at 2662 n.8.
  \item \textsuperscript{217} \textit{Id.}
  \item \textsuperscript{218} \textit{Id.}
\end{itemize}
this major drug operation was aborted. However, forfeiture was attemp-
ted on only two [residences] worth $750,000. . . .

Of the $750,000 for the residences, $175,000 was returned to the wife of one of the defendants, and $559,000 was used to pay the defendant's attorneys. . . .

The Government wound up with $16,000.

It is against this background that the present Federal forfeiture procedures are tested and found wanting.

The Court responded to the excerpt by stating, "This passage suggests, at the very least, congressional frustration with the diversion of large amounts of assets to pay attorney's fees that would otherwise be subject to forfeiture. It certainly does not suggest an intent on Congress' part to exempt from forfeiture such fees."219

The full text of the House report presents a strong argument that Congress was concerned with the general inability of the government, through previous statutes, to capture the full amount of a particular defendant's assets (300 million dollars as opposed to 16 thousand dollars), and not with the general cost of attorneys' fees.220 The full text of the report stated:

One highly publicized case, although anecdotal, is illustrative of the problem. That case was United States v. Meinster . . . . In this prosecution, commonly called the "Black Tuna" case, a Florida based criminal organization had imported over a million pounds of marijuana and grossed about $300 million over a 16-month period. The Federal Government completed a successful prosecution . . . [however, forfeiture was attempted] on only two residences worth $750,000, an auto auction business used as a "front" and five yachts.

Of the $750,000 for the residences, $175,000 was returned to the wife of one of the defendants, and $559,000 was used to pay the defendant's attorneys. The auto auction business was worthless and the five yachts were never found.

The Government wound up with $16,000.

This was an organization that lived in the "fast lane" of privately owned jets, half million dollar yachts and $60,000 in restaurant bills. Although there are many interrelated reasons for the Government's lack of success on the economic level, it is obvious that a considerable amount of "proceeds" of this drug operation are elsewhere, probably funding future "Black Tunas."

It is against this background that present Federal forfeiture procedures are tested and found wanting . . . .221

219. Id.

220. The attorneys' fees were approximately 0.2% of the assets in this case: $559 thousand for attorneys' fees versus $300 million the organization was estimated as grossing. H.R. REP. No. 845, 98th Cong., supra note 205, at 3.

221. Id. (emphasis added).
The report also contained a chart for the year 1979 showing that over fifty-four billion dollars of narcotics income was retained by illegal distributors while the Drug Enforcement Agency was able to seize only approximately thirty-three million dollars—or about 0.06%—of the total income from illegal drug activity.\(^2\)

One can properly characterize the House report’s message as containing a two-fold concern that: (1) the Government could effectively combat illegal drug activity with stronger and more frequent use of forfeiture laws; and (2) the money escaping forfeiture was funding future illegal activities. Nowhere does Congress express a concern that attorneys’ fees are intruding on the government’s “take.” As stated above, once a defendant transfers assets to an attorney, the assets are permanently removed from the criminal activity cycle. An interpretation of the Forfeiture Act which exempts attorneys’ fees is consistent with the concerns voiced in the House report.

VI. CONCLUSION

The Forfeiture Act clearly gives the government the power to strip the accused of economic power gained from illegal activities once the accused is convicted. At the pre-conviction stage, the statute is ambiguous. The government would certainly have an advantage at trial by weakening the ability of the accused to defend himself at this stage, but such behavior raises constitutional issues. By seizing the assets at the pre-conviction stage and granting the trial courts equitable powers to free those assets for legitimate attorneys’ fees, the purpose of the Forfeiture Act will be fulfilled. Furthermore, such an interpretation is more consistent with the Supreme Court’s own principles concerning statutory construction, equitable powers of courts and Congress’ intent in enacting the Forfeiture Act than is the one offered in *Monsanto*.

Jean R. Hutar*

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222. *Id.* at 3-4.

* This note is dedicated to my parents, William and Mildred Hutar, for their constant love and support, and my sisters, Susan and Nancy, for their constant patience and encouragement.