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SUBSTANTIAL CONNECTION AND THE ILLUSIVE FACILITATION ELEMENT FOR CIVIL FORFEITURE OF NARCOBAND IN DRUG FELONY CASES*

I. INTRODUCTION

When Stanford Bradshaw returned home from the mall, Halifax County, Virginia, police officers arrested him for possession of cocaine. A subsequent search of his residence produced forty-nine grams of cocaine, a set of scales and a little over \$17,000 in cash stuffed in a bank bag. Bradshaw was a cocaine addict who occasionally sold drugs from his house. Although he knew he had committed a serious crime, Bradshaw did not imagine the ultimate consequence of his criminal activity. The Commonwealth's Attorney seized Bradshaw's house and instituted forfeiture proceedings:¹ the most powerful weapon in its arsenal.² As a result of his drug dealing, Bradshaw faced the loss of all rights, title, and interest in his house as well as its interior furniture.

John Greenbacker, the Commonwealth's Attorney in the Bradshaw case, confronted several uncertainties. Since this was the first time the facilitation provision of the civil forfeiture statute was at issue, the Commonwealth had no leading cases. Greenbacker had no guide for the amount of evidence he needed to put on to win the case. He only knew that he was required to prove that Bradshaw's house was "used in substantial connection" with the illegal distribution of drugs. He had to prove Bradshaw's property "facilitated" a drug deal. Greenbacker grappled with the same dilemma as attorneys across the country: What was the appropriate standard for the "facilitation" element in drug felony civil forfeiture cases? The awesome scope and power of civil forfeiture made the lack of direction on this important aspect of the Bradshaw case frightening.

A. *Substantive Facilitation Definition Needed*

The dilemma facing Commonwealth Attorney Greenbacker, not surprisingly, has led courts to disfavor civil forfeiture law.³ In 1980, Judge

* The author gratefully acknowledges Professor John Paul Jones and Olivia L. Norman for their deft and patient editing of this Note.

1. Commonwealth v. Bradshaw (Halifax County Cir. Ct. Feb. 13, 1989) (Matthews, J., presiding; no docket number), *appeal withdrawn*, No. 0941-89-2 (Va. App. Jan. 24, 1990); Commonwealth v. Real Property & Furnishings located at 1402 Irish St., South Boston, Va., No. CL58-7836 (Halifax County Cir. Ct. Mar. 6, 1990) (McCormick, J., presiding).

2. See Russello v. United States, 464 U.S. 16, 26 (1983).

3. United States v. One 1981 Cadillac Eldorado, 535 F. Supp. 65 (N.D. Ill. 1982). One

Edward Dumbauld stated "in many cases forfeiture is a harsh and oppressive procedure. . . ."⁴ He concluded that many aspects preserved in the modern law of forfeiture constitute vestiges of "old, forgotten, far-off things and battles long ago."⁵

Nothing about the course of the civil forfeiture juggernaut is more obscured than the rule of law relating to the concept of "facilitation." The government must prove that the narcoband⁶ was "used in any manner to facilitate" an illegal drug transaction. The meaning of "facilitation," therefore, is central to the government's burden of proof. Judicial interpretation, however, has done little to clarify the illusive standard. Courts are currently split regarding proper interpretation of the "facilitation" concept.⁷ This split among the circuits reverberates throughout the federal and state judiciary. The United States Supreme Court has refused to certify civil forfeiture cases⁸ and has yet to define the "facilitation" element. Without a Supreme Court standard, the circuit courts continue to decide cases interpreting facilitation in polar opposition to one another.⁹

Federal civil forfeiture of narcoband is governed by the provisions of 21

commentator called federal civil forfeiture an "ill-conceived" plan. Note, *Federal Civil Forfeiture: An Ill-Conceived Scheme Unfairly Deprives an Innocent Party of its Property Interest*, 62 U. DET. L. REV. 87 (1984).

4. *United States v. One 1976 Mercedes-Benz 280S*, 618 F.2d 453, 454 (7th Cir. 1980).

5. *Id.* at 461.

6. Narcoband is property in which a person has a pre-existing legitimate interest at the time that it is used in, or is related to his illegal conduct. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 (1974). This term describes all forms of property, but it is limited to legitimate pre-existing property interests used in the commission of a criminal offense. It may encompass the instrumentalities and proceeds of crime, *United States v. Russello*, 464 U.S. 16 (1983), as well as tainted property used to pay legitimate expenses, such as food, shelter, medical and attorney's fees. *United States v. Monsanto*, 109 S. Ct. 2657 (1989) (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

However, this term does not include contraband, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), which the government may seize, and which is summarily forfeitable under such statutes as The Contraband Seizure Act, 49 U.S.C. § 782 (1988) because the law does not recognize a right to possess it, *i.e.*, cocaine, or stolen money. Property used for transportation of contraband or facilitation of drug deals is narcoband unless it is wholly derived from contraband. See *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979). For instance, a car purchased with stolen money and which is subsequently used in connection with a drug transaction would *not* be narcoband.

7. *United States v. One Parcel of Real Property*, 712 F. Supp. 810, 812-13 (D. Or. 1989).

8. See, *e.g.*, *United States v. \$228,536.00 in U.S. Currency*, 895 F.2d 908, 916 (2d Cir.), *cert. denied*, 110 S. Ct. 2564 (1990).

9. To illustrate this point, compare *United States v. All Right, Title & Interest in Real Property & Appurtenances Known as 288-290 North St., Middleton, N.Y.*, 743 F. Supp. 1068 (S.D.N.Y. 1990) (the intent of the forfeiture provision, section 881, is to seize all property that has a "substantial connection" to the illegal drug activity) (quoting *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990)) with *United States v. All Right, Title & Interest in Property & Premises Known as 710 Main St., Peekskill, N.Y.*, 744 F. Supp. 510 (S.D.N.Y. 1990) (the government need not establish a substantial connection between the criminal activity and the property; the government need only show a "sufficient nexus").

U.S.C. section 881 ("section 881").¹⁰ The federal scheme, more or less, is emulated in the fifty states.¹¹ Section 881 subjects to forfeiture narcoband that is "used in any manner to *facilitate*" an illegal drug transaction.¹² In *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Illinois*,¹³ the Seventh Circuit stated "Congress intended to reach all real property used to promote the drug trade. [Section 881] is a broad sweeping amendment which grants wide powers to the executive branch for the limited purpose of combating the flow of illegal drugs."¹⁴

This Note demonstrates that forfeiture powers under Section 881 are not so "broad" and "sweeping" as to be virtually unlimited in scope, as the Seventh Circuit asserts. Property should be regarded as forfeitable under the common scheme of federal and state drug enforcement statutes only where the government can prove by a preponderance of the evidence that the narcoband was used in "substantial connection" with the illegal manufacture, sale, or distribution of a controlled substance.¹⁵ Courts should define the limitation of "substantial connection" as the routine, repeated, and intentional use of the narcoband to conduct the illegal manufacture, sale, distribution of a controlled substance. The issue of what constitutes the most appropriate definition of the facilitation element should turn on the definition of "substantial connection."

After a detailed review of the widely varying standards applied across the circuits, this Note examines the legislative history and shows that Congress intended for the "substantial connection" standard to apply to these sensitive cases. This Note outlines reasons why courts should apply the "substantial connection" standard based on traditional canons of statutory interpretation. In addition, precedent supports the "substantial connection" standard for facilitation in federal civil forfeiture cases. This Note demonstrates how this standard for "facilitation" can ensure judicial consistency by properly balancing the competing interests of the government and of the private citizen, and thus, allow citizens to reasonably

10. 21 U.S.C. § 881 (1988).

11. See, e.g., VA. CODE ANN. § 19.2-386 (Cum. Supp. 1990).

12. "Given the language of [section 881] and the determination of Congress to punish drug traffickers harshly, there is no reason for courts to go out of their way to restrict the scope of forfeiture." Comment, *The Scope of Real Property Forfeiture for Drug-Related Crime Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303, 327 (1988). This Note disputes such a contention.

13. *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Ave., Elgin, Ill.*, 903 F.2d 490 (7th Cir. 1990).

14. *Id.* at 493.

15. See, e.g., VA. CODE ANN. § 19.2-386.10. (1990); *United States v. \$22,287.00 in U.S. Currency*, 709 F.2d 442 (6th Cir. 1983). *Accord* *United States v. 1966 Beechcraft Aircraft Model King Air*, 777 F.2d 947 (4th Cir. 1985); *Smith v. Commonwealth*, 707 S.W.2d 342 (Ky. 1986) (acquittal on trafficking charge sufficient to rebut presumption that \$2,000.00 found on defendant was used to facilitate an illegal drug transaction).

conform their behavior to the laws.

B. *The Utility of the "Substantial Connection" Standard*

The "substantial connection" standard is a bright-line test allowing courts to fully and fairly adjudicate forfeiture actions. A overview of the mechanics of federal and state processes, showing how civil forfeiture differs from criminal forfeiture, demonstrates how the important substantive concept of "facilitation" interfaces with "substantial connection."

1. Substantive Law

Two types of forfeiture exist in modern law: criminal and civil. Civil forfeiture is a statutory,¹⁶ in rem action,¹⁷ reflecting the legal fiction that the property itself is the defendant.¹⁸ By contrast, criminal forfeiture is an in personam action against the criminal defendant.¹⁹

a. Deodand and Drug Traffic

The logical origin of the fiction that the *property* is the defendant probably is deodand. Justice Holmes quoted one medieval writer regarding deodand: "[W]here a man killeth another with the sword of John at Stile, the sword shall forfeit as deodand, and yet no default is in the owner."²⁰ Derived from the Latin *Deo Dandum*, the term literally means "to be given to God."²¹ Deodand dates back as far as biblical scripture, where it is written in Exodus 21:28 that if "an ox gore a man or a woman, and they die, [it] shall be stoned: and his flesh shall not be eaten."²² The practice of deodand, thus, was a sort of "religious expiation."²³

Deodand exemplified the origins of a forfeiture doctrine that touched all aspects of English culture.²⁴ When the religious and eleemosynary pur-

16. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-38 (1943).

17. *United States v. \$280,505.00 in U.S. Currency*, 655 F. Supp. 1487 (S.D. Fla. 1986).

18. *United States v. \$152,160.00 in U.S. Currency*, 680 F. Supp. 354 (D. Colo. 1988); *United States v. One Mercedes-Benz 380 SEL*, 604 F. Supp. 1307 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985). For a case that stretches this legal invention to the limits, see *Dobbins Distillery v. United States*, 96 U.S. 395 (1878).

19. *United States v. Rosenfield*, 651 F. Supp. 211 (E.D. Pa. 1986); *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985). Criminal forfeiture, whose roots are medieval, is relatively new to American law. *United States v. Nichols*, 841 F.2d 1485, 1487 (10th Cir. 1988). Unlike its civil counterpart, a special verdict of forfeiture must be returned by the jury in a criminal proceeding. As a form of punishment, it has practically been unknown in this country.

20. O. HOLMES, *THE COMMON LAW* 23 (M. Howe ed. 1963).

21. BLACK'S LAW DICTIONARY 436 (6th ed. 1990).

22. *Exodus* 21:28.

23. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

24. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures*,

poses of deodand ceased, the Crown justified the institution as a form of civil punitive damages.²⁵ Though deodand seems to survive in an adulterated form in the modern law of civil forfeiture, most commentators believe that religious or charitable aspects of forfeiture have been lost in American common law.²⁶ The principle of deodand is alive and well; an unreported Virginia circuit court case required forfeiture of a gun for killing a deer.²⁷

Today, public policy replaces deodand in support of civil forfeiture. Forfeiture seeks not only to punish, as the United States Supreme Court noted in *Russello v. United States*,²⁸ but "to remove the profit from organized crime by separating the racketeer from his dishonest gains."²⁹ Consistent with a strong public policy which endorses hitting the drug trade "where it hurts" and stripping organized crime of its instrumentalities,³⁰ civil forfeiture imposes economic penalties on drug dealers,³¹ accounting for its wide use.³² Civil forfeiture statutes date from the colonial period³³ and continue to be enacted into the modern age.³⁴ Today, civil forfeiture figures prominently in governmental efforts to fight drugs.

Wrongful Death and the Western Notion of Sovereignty, 46 TEMP. L.Q. 169 (1973).

25. 1 M. HALE, PLEAS OF THE CROWN, 419 (1st Am. ed. 1847).

26. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, ___, 188 S.W. 54, 55 (1916).

27. See Va. Law Weekly, Nov. 6, 1989, at 409 (Case No. 89-K-129).

28. 464 U.S. 16, 27-28 (1983).

29. *Id.*; see, e.g., 18 U.S.C. § 1963 (1988); 21 U.S.C. § 853 (1988).

30. *United States v. Premises Known as 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 994 (E.D. Pa. 1986); 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374 (profit is the sole motivation for the drug trade, and it is profit that sustains the economic power base of the criminal enterprise).

31. In *Caplan & Drysdale, Chartered v. United States*, 109 S. Ct. 2667 (1989), Justice White stated:

[T]he government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a fund that supports law enforcement efforts. . . The sums of money that can be raised for law enforcement activities this way are substantial and the government's interest in using the profits of crime to fund these activities should not be discounted.

Id. at 2677.

Though criminal forfeiture statutes are designed to raise revenue, the Virginia State Crime Commission estimates that proceeds from all types of forfeitures in the 1987-88 fiscal year constituted only \$150,221 and that "[d]rug law forfeitures were only a portion of that amount." *Richmond Times-Dispatch*, Nov. 4, 1990, at A17.

32. Hughes & O'Connell, *In personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613 (1984).

33. *C.J. Hendry Co. v. Moore*, 318 U.S. at 139.

34. See, e.g. 21 U.S.C. § 881 (1988); VA. CODE ANN. §§ 18.2-249 (Cum. Supp. 1990), 19.2-386.1 (Repl. Vol. 1990).

b. Same Procedure for Criminal or Civil Forfeiture

While generally understood as providing separate remedies,³⁵ civil forfeiture and criminal prosecution are not mutually exclusive.³⁶ Since the United States Supreme Court decision in *United States v. United States Coin & Currency*,³⁷ courts consistently hold that there is no legal difference between the two proceedings.³⁸ *United States Coin & Currency* underscores the merger of the civil and criminal aspects of forfeiture:

From the relevant constitutional standpoint there is no difference between a man who "forfeits" \$8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of \$8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct.³⁹

Although the Supreme Court in *United States Coin & Currency* afforded defendants in civil forfeiture actions the protection of some constitutional procedural safeguards,⁴⁰ most courts recognize that the civil action generally is not "criminal enough"⁴¹ to warrant heightened judicial scrutiny.⁴² Centuries of precedent support a recognition that forfeiture

35. *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987); *United States v. Premises Known as 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 994 (E.D. Pa. 1986). Most state courts hold that civil forfeiture statutes are sufficiently penal in nature to require strict construction.

36. *United States v. Dunn*, 802 F.2d 646 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987). The government does not have to file an indictment or information as a prerequisite to commencing a civil forfeiture action in federal court. To this end, the fifth amendment guarantee against double jeopardy is inapplicable. *United States v. One Assortment of 89 Firearms*, 465 U.S. 1099 (1984). *But see Coffey v. United States*, 116 U.S. 436 (1886).

37. 401 U.S. 715 (1971).

38. *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir. 1980) (Two defendants appealed but were denied certiorari. *See Berg v. United States*, 620 F.2d 1039, *cert. denied*, 449 U.S. 919 (1980); *Hawthorne v. United States*, 620 F.2d 1039, *cert. denied*, 449 U.S. 830 (1980)); *see United States v. Miscellaneous Jewelry*, 667 F. Supp. 232, 242 (D. Md. 1987).

39. 401 U.S. at 718.

40. *See also One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (fourth amendment warrant requirement); *Boyd v. United States*, 116 U.S. 616 (1886) (fifth amendment protection against self-incrimination); *United States v. 25.075 Acres, Located in Swift Creek Township, Wake County, N.C.*, 687 F. Supp. 1005 (E.D.N.C. 1988) (fourth amendment warrant requirement); *United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925 (C.D. Cal. 1987) (fourth amendment procedural requirements); *see also United States v. \$39,000.00 in Canadian Currency*, 801 F.2d 1210 (10th Cir. 1986) (if the government opts for the relatively lax procedural protection of an *in rem* civil proceeding, thereby circumventing the stringent requirements of criminal forfeiture, the government will not be permitted to urge considerations going to the criminal nature of the underlying offense).

41. *United States v. \$2,500.00 in U.S. Currency*, 689 F.2d 10 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1982), *reh'g denied*, 466 U.S. 994 (1982); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976).

42. *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989). The U.S. Supreme Court seems

statutes are so broad that civil liability is "predicated" upon some determinable level of criminal conduct.⁴³

Civil forfeiture is penal in nature. Most civil forfeiture statutes are broad enough to encompass nearly every form of narcoband imaginable, including houses, cars, airplanes, yachts and machine guns as well as negotiable instruments, leaseholds and remainders. Most of the legislation expanding the scope of forfeitable property has been passed since 1984. With the exception of New York,⁴⁴ state civil forfeiture statutes for the most part have been modeled after section 881.

2. Federal Civil Forfeiture Procedure

Although section 881 governs federal civil forfeiture in drug cases, there are no procedural rules within the body of the statute.⁴⁵

a. Influence of Customs Law

Section 881(d) directs the Attorney General to consult customs law to commence a civil forfeiture action. Supplemental Rules for Admiralty and Maritime Claims, Rule C(2) sets forth the procedure for federal civil forfeiture proceedings.⁴⁶ The complicated scheme of administrative or summary civil forfeiture proceedings is set out in 19 U.S.C. sections 1600-1624, illustrating important differences between judicial and administrative or summary civil forfeiture.⁴⁷ Functioning as an additional way to bring civil action, section 1603 empowers the United States government to seize narcoband upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.⁴⁸

Whenever a seizure of narcoband for violation of the customs law is

unwilling to entertain challenges based upon both procedural and substantive rights to counsel under the sixth amendment. *See e.g.*, *Caplan & Drysdale, Chartered v. United States*, 109 S. Ct. 2667 (1989); *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

43. *See United States v. One Ford Coupe*, 272 U.S. 321 (1926); *Goldsmith-Grant v. United States*, 254 U.S. 505 (1921).

44. Forfeiture actions in New York are governed by section 1311 of the New York Civil Practice Law and Rules Law. A civil action may be commenced against a non-criminal defendant to recover narcoband. N.Y. CIV. PRAC. L. & R. 1311 (McKinney 1990).

45. *United States v. \$38,000.00 in U.S. Currency*, 816 F.2d 1538, 1540 (11th Cir. 1987); *United States v. \$152,160.00 in U.S. Currency*, 680 F. Supp. 354, 357 (D. Colo. 1988). Section 881(d) appears to be the only procedural aspect of the statute. This provision states that customs law, to the extent that it is not inconsistent with section 881, shall apply to federal civil drug forfeiture. However, section 881 does not specifically say which customs laws apply.

46. *See* 28 U.S.C.A. Rule C(2) § (West 1970 & Supp. 1990) (Supplemental Rules for Admiralty & Maritime Claims).

47. *Cf. Ninety-One Thousand Dollars*, 715 F. Supp. 423 (D.R.I. 1989).

48. *See* 19 U.S.C. § 1603(a) (1988); 19 C.F.R. §§ 162.21 to .22 (1990); 21 C.F.R. § 1316.72 (1990).

made, the arresting officer must inform the appropriate customs official, who in turn must immediately report the seizure to the U.S. District Attorney.⁴⁹ The U.S. District Attorney then inquires into the facts of the case, and if it appears probable that a forfeiture is likely, the proper proceedings are initiated.⁵⁰ If the value of the narcoband does not exceed \$100,000 or involves the importation, exportation, transportation or storage of a controlled substance, customs must issue a notice of seizure together with a statement of the intention to forfeit and sell, which must be sent to each party who appears to have an interest in the seized article.⁵¹

Although forfeiture notices provide the claimant with information about filing petitions for remission and mitigation,⁵² these notice provisions are inapplicable to controlled substances.⁵³ Any person claiming an interest in narcoband, however, may file a claim with customs and give a bond within twenty days after seizure.⁵⁴ If a claim and bond is filed, the U.S. Attorney must institute judicial forfeiture proceedings pursuant to 21 U.S.C. section 881. If no claim is given or bond filed within twenty days, customs will declare the narcoband forfeited and will sell it at a public auction, deducting all the proper expenses of the seizure and forfeiture.⁵⁵

The DEA Special Agent-in-Charge or the DEA Asset Forfeiture Unit also has the power to declare a forfeiture of narcoband whose value does not exceed \$100,000.⁵⁶ The officer in charge of FBI Property Management has the same authority.⁵⁷ A declaration of forfeiture in an administrative proceeding, moreover, has the same effect as a final decree in a judicial proceeding.⁵⁸ Section 1610 provides that all civil forfeiture for drug felony crimes may be instituted by administrative or summary civil forfeiture, regardless of the value of the narcoband.

If any person claiming an interest in the narcoband pays the full value of the narcoband seized as determined under 19 U.S.C. section 1606 and 21 C.F.R. sections 1316.74-75 (1990), customs may release the narco-

49. See 19 U.S.C. §§ 1602, 1603(b) (1988).

50. See *id.* § 1604.

51. See *id.* § 1607 (1984); 19 C.F.R. § 162.45; see also *Gutt v. United States*, 641 F. Supp. 603 (W.D. Va. 1986); *Winters v. Working*, 510 F. Supp. 14 (W.D. Tex. 1980).

52. 28 C.F.R. § 9.1-.7 (1989).

53. 19 C.F.R. § 162.45(a) (1989).

54. 19 U.S.C. § 1608 (1988); 19 C.F.R. § 162.47 (1989); 21 C.F.R. § 1316.76 (1989); see *In re Application of Williams*, 628 F. Supp. 171, 172 (E.D.N.Y. 1986).

55. 19 U.S.C. §§ 1609(a), 1613 (1988); 19 C.F.R. § 162.46 (1989).

56. 21 C.F.R. § 1316.77(a) (1989).

57. *Id.* § 1316.77(b) (1990).

58. 19 U.S.C. § 1609(b) (1988). If the value of narcoband exceeds \$100,000 or is narcoband whose importation is *not* prohibited, or the narcoband was *not* used to import, export, transport, or store any controlled substance, then forfeiture may only be had by judicial civil action. *Id.* § 1610.

band.⁵⁹ Similarly, any person with an interest in the narcoband may file a petition for remission or mitigation of the forfeiture.⁶⁰ Such mitigation is within the sole discretion of the appropriate customs official.⁶¹

The Secretary of the Treasury may discontinue administrative proceedings in favor of the forfeiture under state law.⁶² Recent steps by the Senate to enact wider forfeitures include instituting administrative forfeiture for sums up to \$500,000 in cash and urging that drug felons be forced to give up a percentage of their yearly incomes.⁶³ The government may begin a civil forfeiture proceeding in one of two ways. It may serve a verified complaint containing allegations of wrongful conduct. Section 881(b) requires the government to properly plead and later establish probable cause for its belief that a substantial connection exists between the property to be forfeited and the illegal activity.⁶⁴

According to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims, the clerk of the court may issue a "warrant for the arrest of the vessel or other property that is the subject of the action."⁶⁵ This warrant begins the forfeiture action. The attorney general may also begin the forfeiture proceeding by seizing the narcoband,⁶⁶ bypassing both the warrant process and the exigent circumstances exceptions,⁶⁷ upon his own determination that there is probable cause to believe the property is subject to forfeiture.⁶⁸ If narcoband seized under section 881(b) is not returned to the lawful owner within ten days, the United States must initiate judicial proceedings "promptly or within such time as

59. 19 U.S.C. § 1614 (1984); 10 C.F.R. § 1623.44 (1989).

60. 19 C.F.R. §§ 171.11-.14; 21 C.F.R. §§ 1316.79-.81 (1989).

61. 19 U.S.C. § 1618 (1988); 19 C.F.R. §§ 171.21-.24, 171.31-33.

62. 19 U.S.C. § 1616(a) (1988).

63. See *Anti-Drug Juggernaut Rolls on in Congress*, Nat'l L.J., Oct. 23, 1989, at 5.

64. See *United States v. \$364,960.00 in U.S. Currency*, 661 F.2d 319, 323 (5th Cir. Unit B 1981).

65. 28 U.S.C.A. Rules C(2), C(3) (West 1970 & Supp. 1990) (Supplemental Rules for Admiralty & Maritime Claims). The Supreme Court of the United States has struck down statutes similar to Rules C(2) and C(3) on the grounds that such statutes violate the procedural due process requirement of the fifth and fourteenth amendments because they fail to provide for meaningful notice and opportunity to be heard in the context of prejudgment seizure. See e.g., *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988); *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

66. 21 U.S.C.A. § 881(b)(4) (West Supp. 1990).

67. *Id.* § 881(b); *United States v. \$128,035.00 in U.S. Currency*, 628 F. Supp. 668 (S.D. Ohio 1986), *appeal dismissed*, 806 F.2d 262 (6th Cir. 1986); *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 612 F. Supp. 1492 (S.D. Fla. 1985), *vacated*, 838 F.2d 1558 (1986). In order to avoid the serious fourth amendment problems created by § 881(b)(4), in the clear absence of any indication of congressional intent, the court must read into that subsection the requirement of exigent circumstances.

68. *Certain Real Estate Property*, 612 F. Supp. at 1495.

allowed by the court."⁶⁹

b. Constitutional Considerations

Constitutional problems emerge in any taking of property, and no less so under federal civil forfeiture. Issues of meaningful notice and opportunity to be heard presented in the *Sniadach* line of cases have led the federal courts to deem forfeiture criminal by nature, for the purposes of protecting the defendant's fourth and fifth amendment rights.⁷⁰

In an important constitutional challenge to section 881 originating process, the court, in *United States v. Real Property Located at 25231 Mammoth Circle*,⁷¹ held that section 881 must comply with the procedural requirements imposed by the fourth amendment.⁷² Compared with the due process requirement for replevin or attachment actions, Rule C(3) has not been interpreted to require that the allegations in the verified government complaint be reviewed by a detached and neutral judicial officer *before the complaint is issued*.⁷³

The procedural law followed by the Second, Sixth, Tenth, and Eleventh Circuits, although not mandated by Rule C(3), requires a judicial finding of "probable cause" before a seizure warrant is issued, except where the clerk of the court makes a finding of "exigent circumstances."⁷⁴ In fact, Rule C(3) specifically exempts civil forfeiture actions under section 881 from such rigorous judicial scrutiny. Thus, a clerk may issue warrants for arrest of narcoband based solely upon the verified complaint of the government. There is no independent statutory requirement of review by a detached and neutral judicial officer. Such a procedure may violate the fourth amendment because it does not satisfy the requirement of judicially determined probable cause and particularity.⁷⁵

69. 28 U.S.C.A. Rule C(4) (West 1970 & Supp. 1990) (Supplemental Rules for Admiralty & Maritime Claims).

70. *Boyd v. United States*, 116 U.S. 616 (1886); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976). See generally SHERRIS, *Drug Related Forfeitures: Land Titles Issues*, Prob. & Prop., (Jan.-Feb. 1990).

71. 659 F. Supp. 925 (C.D. Cal. 1987)

72. *Id.* at 927; see also *Shadwick v. City of Tampa*, 407 U.S. 345 (1972); *In re Application of Kingsley*, 614 F. Supp. 219 (D. Mass. 1985), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986).

73. *But see Richmond Tenants Org., Inc. v. Kemp*, No. 3:90CV00346 (E.D. Va. Dec. 19, 1990) (requirement of meaningful notice and opportunity to be heard *prior to seizure of government housing*).

74. *United States v. 25.075 Acres, Located in Swift Creek Township, Wake County, N.C.*, 687 F. Supp. 1005 (E.D.N.C. 1988). See *United States v. 124 E. North Ave., Lake Forest, Ill.*, 651 F. Supp. 1350 (N.D. Ill. 1987).

75. See *Illinois v. Gates*, 462 U.S. 213 (1983). *But see Amstar v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants Nat'l Bank of Mobile v. The Dredge General G.L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981).

The Advisory Committee on the 1985 Amendments to the Rules took a different view. They contemplated a simple warrant/order with conclusory findings. Citing *United States v. \$8,850. 00*,⁷⁶ and *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁷⁷ the committee argued that a prompt hearing or review by a judicial officer is not constitutionally mandated and could prejudice the government in its prosecution. The committee did not discuss the problems inherent in any statutory grant of power that allows a clerk of the court to determine what does and what does not constitute "exigent circumstances."⁷⁸

3. State Civil Forfeiture Procedure

The Virginia scheme is a typical example of state civil forfeiture procedure. The filing of an information commences a forfeiture action.⁷⁹ The information must name as defendants all owners and lienholders and must specifically describe the property and the grounds for forfeiture. Similar to federal legislation, section 19.2-386.1 of the Virginia Code permits seizure before the filing of an information which must be made within ninety days after seizure or the property must be released to the owner.⁸⁰

The Virginia Code bars civil forfeiture actions if brought three years after "discovery" by the Commonwealth of the last act giving rise to forfeiture.⁸¹ Both the federal and state forfeiture procedures provide exemptions for innocent owners and bona fide purchasers.⁸²

C. *Nine Different Standards in Federal Circuits*

Circuits and states define the "facilitation" element in nine different ways, illustrating the historical development of the concept. Differences of opinion regarding facilitation point out the need for a more workable

76. 461 U.S. 555 (1983).

77. 416 U.S. 663 (1974).

78. *Swift Creek Township*, 687 F. Supp. at 1005.

79. VA. CODE ANN. § 19.2-386.1 (Repl. Vol. 1990).

80. *Id.* The information must be filed within 90 days, compared with "promptly or within such time as allowed by court" under Rule C(4).

81. *Id.*

82. *Id.* § 19.2-386.8. For recent discussions of the "innocent owner defense," as it relates to section 881, see *United States v. Parcel of Real Property Known as 6109 Grubb Rd., Millcreek Township, Erie, Pa.*, 886 F.2d 618 (3rd Cir.), *reh'g denied*, 890 F.2d 659 (3rd Cir. 1989); *United States v. One Parcel of Real Estate at 11885 S.W. 46 St., Miami, Fla.*, 715 F. Supp. 355 (S.D. Fla. 1989); *United States v. Marks*, 703 F. Supp. 623 (E.D. Mich. 1988); *United States v. One Single Residence & Outbuildings Located at 15621 S.W. 209th Ave., Miami, Fla.*, 699 F. Supp. 1531 (S.D. Fla. 1988), *aff'd*, 894 F.2d 1511 (11th Cir. 1990). *Bona fide* purchaser provisions are also prevalent in both state and federal legislation. See, e.g., VA. CODE ANN. § 19.2-386.8. *Bona fide* purchaser exemptions are especially important to title insurance companies.

legal definition. An examination of the major split among the circuits over the "facilitation" element for civil forfeiture of narcoband in drug felony cases lays the foundation for formulations of such a definition.

Cases from those jurisdictions which have addressed the meaning of "facilitate" illustrate widely varying interpretations of what the government must show in order to satisfy the facilitation element of its cause of action. A defendant can travel from state to state, committing the same illegal act in each different state, with the result that his narcoband in one state will forfeit and in another state it will not. The burden of proof upon the government may range from proving that the property was used as "cover" for the illegal activity at one extreme, to proving that the narcoband was used in "substantial connection" with the drug transaction at the other extreme.

This current nine-way split concerning the proper legal meaning of "facilitation" suggests judicial confusion over the role of congressional intent, canons of statutory construction and precedent in resolving this complex criminal litigation.

The District of Columbia and Federal Circuits have no standard for interpretation of the facilitation concept. The Eleventh Circuit applies the "cover" test; while the Eighth Circuit applies the *de minimis* test. The Fifth, Sixth and Seventh Circuits apply the "in any manner" test. The Tenth Circuit looks for "purpose" and "subsequent distribution" and for "links" between the property and drugs. The Ninth Circuit applies the "aggregate of facts" test, requiring some connective link provable by a "combination" of evidence. The First Circuit applies the "antecedent relationship" plus "integral part" test; while the Second Circuit applies the "sufficient nexus" standard test. The Third and Fourth Circuits apply the "substantial connection" test. The author creates these labels to reach a sensible paradigm of facilitation. In the following discussion of each test, the differences of opinion from circuit to circuit become apparent.

1. Jurisdictions with no Judicial Standard

The precise reach of the facilitation element remains an unexplored question in two circuits. In the Court of Appeals for the District of Columbia⁸³ and the Court of Appeals for the Federal Circuit,⁸⁴ the meaning of property "used in any manner to facilitate" has yet to be addressed. While these courts consistently phrase the issue in terms of whether the narcoband "has been used to facilitate the sale of a controlled substance," they do not directly answer the question of what exactly facilitation

83. *United States v. Fafowara*, 865 F.2d 360, 362 (D.C. Cir. 1989).

84. *United States v. One 1979 Cadillac Coupe De Ville*, 833 F.2d 994 (Fed. Cir. 1987).

means. Rather, these courts leave the determination of the legal meaning of substantive elements, such as facilitation, to juries. The practice contributes substantially to the uncertainty surrounding civil forfeiture in general.⁸⁵

Jury determination goes beyond merely deciding whether the narcoband was used to "facilitate" the drug deal. When the jury decides what "facilitation" means, the issue of what constitutes the appropriate legal meaning of facilitation becomes a question of fact and not a question of law.⁸⁶ Asking the jury to determine the legal meaning of the "facilitation" element violates the common law principle that juries are supposed to decide only questions of fact.⁸⁷ The Ninth Circuit, for example, suggests that "the district court's determination of probable cause for forfeiture is reviewable *de novo* as a question of law."⁸⁸ Courts which leave facilitation to juries as an issue of fact provide no guidance to practicing attorneys because the result may be a different legal standard in every case.

2. "Cover" Test

The "cover" test of facilitation only requires the narcoband to function as a disguise or camouflage for illegal activity. In *United States v. Rivera*,⁸⁹ the Eleventh Circuit provided an excellent illustration of "cover" as a standard for the facilitation element. Willie Burgess bred quarter horses on his farm near Covington, Georgia. He also sold and distributed high-purity heroin from the farm to local dealers. The federal government sought forfeiture of the ranch, including twenty-seven quarter horses, but it offered no proof at trial that the horses played any role in Burgess' drug trafficking activities. Following the United States Supreme Court's

85. Although thirty-three states have reported decisions on this aspect of the civil forfeiture cause of action, the non-delineated, factual jury interpretation of "used to facilitate" is present only in the state law of Arkansas, Washington, Oregon, Georgia, Mississippi, Wisconsin and Kansas. See, e.g., *Fafowara*, 865 F.2d at 362; *Beebe v. State*, 298 Ark. 119, 765 S.W.2d 943 (1989) (guns seized not forfeitable absent evidence that they were "equipment" used in delivering a controlled substance); *State v. Anderson*, 194 Ga. App. 139, 390 S.E.2d 68 (1989); *State v. One 1978 Chevrolet Corvette*, 8 Kan. App. 2d 747, 667 P.2d 893 (1983); *Saik v. State ex rel. Miss. Bureau of Narcotics*, 473 So. 2d 188, 190-91 (Miss. 1985); *Linn County v. 22.16 Acres of Real Property & Fixtures Attached Thereto*, 95 Or. App. 59, 767 P.2d 473 (1989) *aff'd*, 309 Or. 272, 786 P.2d 723 (1990); *Forfeiture of One 1980 Porsche*, 54 Wash. App. 498, 774 P.2d 528 (1989); *State v. S & S Meats, Inc.*, 92 Wis. 2d 64, 284 N.W.2d 712 (Ct. App. 1979).

86. Since the standard of care in a particular case "is a legal rule, from which the jury [is] not free to deviate, it is a matter of law, and is to be applied by the court." W. PROSSER & R. KEETON, PROSSER AND KEETON ON TORTS 236 (5th ed. 1984).

87. A jury may not be called upon to determine a question of law, nor to speculate on the meaning of the law. W.H. BRYSON, HANDBOOK ON VIRGINIA PROCEDURE 446 (1989).

88. *United States v. Padilla*, 888 F.2d 642, 643 (9th Cir. 1989).

89. 884 F.2d 544, 545-46 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1322 (1990).

broad language in *Russello v. United States*,⁹⁰ the Eleventh Circuit held the term "facilitate," as used in section 853 of the continuing criminal enterprise statute,⁹¹ encompasses the situation in which a horse-breeding business and the horses on hand are used as "cover" for the drug enterprise.⁹²

Following this theory, to be subject to forfeiture, narcoband need not have any physical contact with the sale, manufacture, or distribution of a controlled substance, intended or unintended, so long as at some time it was used as a "front" or "cover" for the drug dealing.⁹³ Choosing a broad construction of forfeiture statutes,⁹⁴ the Eleventh Circuit found clear congressional intent that "cover" is facilitation. The so-called cover test for the meaning of "used in any manner to facilitate" is the broadest standard used.

Federal civil forfeiture statutes not only authorize forfeiture of narcoband "used to facilitate" illegal drug activity but narcoband "intended to be used to facilitate" as well.⁹⁵ In *United States v. One 1980 Bertram 58 Foot Motor Yacht*,⁹⁶ the Eleventh Circuit determined whether a ship known as the *Mologa* was subject to forfeiture. At trial, the government presented evidence that defendant Rodriguez had told one of the ship's captains that the *Mologa* would be used in the trafficking business and that alterations would be necessary to "optimize its drug-carrying capability."⁹⁷ Before any plans could be executed and before the vessel could be used to actually transport any marijuana, the owners were arrested.

In reaching the conclusion that the yacht was "intended for use" in the interstate transportation of narcotics, the court was "mindful that the minimal amount of action taken in this case to effect the smuggler's criminal intentions is near the outer parameter of the scope of the 'intended for use' language. . . ."⁹⁸ The Eleventh Circuit's positions taken in *Bertram 58 Foot Motor Yacht* and *Rivera* are the broadest in the country, though language in the former case suggests that the court recognizes an

90. 464 U.S. 16, 27-29 (1983).

91. 21 U.S.C. § 853 (1988).

92. *Rivera*, 884 F.2d at 546. The court in *Rivera* interpreted the words of a criminal forfeiture statute.

93. See *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir.), cert. denied, 454 U.S. 818 (1981) (presence of automobile with its hood up provided a convenient cover, whereas two men alone in an alley might have appeared suspicious). Recent Third Circuit cases suggest that this case is an anomaly in the circuit.

94. *Russello*, 464 U.S. at 27-29.

95. See, e.g., 21 U.S.C. § 881 (1988). See *Jennings v. State*, 553 N.E.2d 191 (Ind. App. 1990) (\$1,474 in cash on defendant and over fifty grams of marijuana in car were intended for use in dealing marijuana).

96. 876 F.2d 884, 887 (11th Cir. 1989).

97. *Id.* at 886.

98. *Id.* at 887.

outer limit to the standard.

Forfeiture of an automobile used for transportation to a hotel where a drug deal was arranged, but not consummated, was the subject of *United States v. One 1979 Porsche Coupe*.⁹⁹ The Eleventh Circuit, held that: “[t]o support a forfeiture under § 881, the government must demonstrate probable cause for the belief that a *substantial connection* exists between the vehicle to be forfeited and the relevant criminal activity. . . .”¹⁰⁰ Although the defendant’s car transported neither drugs nor money, it transported the “pivotal” figure in the attempted drug deal “several hundred miles to the precise location” of the proposed deal. This pattern of activity was enough to establish a “substantial connection.”¹⁰¹

One 1979 Porsche Coupe would suggest that the Eleventh Circuit follows the stricter “substantial connection” test. This is a logical conclusion especially since the Eleventh Circuit in *Bonner v. City of Prichard*¹⁰² bound itself to follow the precedent set before September 30, 1981 by its predecessor court, the Fifth Circuit.¹⁰³ *Bonner* followed the prior Fifth Circuit standard set in *United States v. \$364,960.00 in United States Currency*.¹⁰⁴ Yet based on the more recent cases of *Bertram* and *Rivera* the Eleventh Circuit apparently discarded the standards of *Bonner* and *\$364,960.00 in United States Currency* in favor of the “cover” test for facilitation which presently remains firmly in place.

The substantial connection test may not be dead, however, in the Eleventh Circuit. A recent case suggests a return to the reasoning expressed in *\$364,960.00 in United States Currency*. In *United States v. Four Parcels of Real Property in Greene & Tuscaloosa Counties in the State of Alabama*,¹⁰⁵ the court signaled a departure from the “cover” test. The case involved forfeiture of a bulldozer that was allegedly purchased with drug money. The court placed the burden of proof upon the government to show that “a substantial connection exists between the property to be forfeited and an illegal exchange of a controlled substance.”¹⁰⁶

In an earlier case *United States v. \$41,305.00 in Currency & Travellers*

99. 709 F.2d 1424 (11th Cir. 1983).

100. *Id.* at 1426.

101. *Id.*

102. 661 F.2d 1206 (11th Cir. 1981).

103. In *Bonner v. City of Prichard*, the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on Sept. 30, 1981. *Id.* at 1207. Former Fifth Circuit cases upheld forfeiture of narcoband whose sole connection to the criminal activity was its use in transporting the narcotics supplier to the scene of the drug transaction. See *United States v. One 1977 Cadillac Coupe De Ville*, 644 F.2d 500, 503 (5th Cir. 1981).

104. 661 F.2d 319, 323 (5th Cir. 1981).

105. 893 F.2d 1245 (11th Cir. 1990).

106. *Id.* at 1249.

Checks,¹⁰⁷ the court outlined eight factors it relied upon in making the crucial assessment of whether a "substantial connection" existed:

(1) The defendant had a reputation among law enforcement authorities as a drug dealer;

(2) The defendant had delivered a kilo of cocaine to an individual in Arkansas and had arranged for a subsequent delivery;

(3) The defendant stated to this individual that the cocaine which he delivered was a part of a larger shipment;

(4) The initial delivery of cocaine by the defendant to the individual in Arkansas was on consignment;

(5) On the occasion of the defendant's arrest, he was scheduled to contact the individual in Arkansas and receive payment for the cocaine previously delivered;

(6) Instead, the defendant had in his possession a second kilo of cocaine at the time of his arrest;

(7) The defendant was subsequently prosecuted in Arkansas and received a life sentence; and

(8) The defendant was subsequently indicted in federal court in Arkansas and in Miami for offenses regarding controlled substances.¹⁰⁸

3. *De Minimis* Test

The *de minimis* test subjects property to forfeiture if there is any physical contact between such property and any aspect of criminal wrongdoing surrounding drug transactions, short of mere happenstance. The Eighth Circuit approved the *de minimis*, or "mere transportation" test, in a case that involved forfeiture of an automobile.¹⁰⁹ In *United States v. One 1980 Red Ferrari*, the evidence showed that the defendant had cocaine in his pocket while driving the sports car.¹¹⁰ The court concluded that "a vehicle is subject to forfeiture no matter how small the quantity of contraband found."¹¹¹

Four years earlier, though, in *United States v. One 1976 Ford F-150 Pickup*,¹¹² the Eighth Circuit had declined to find a truck seen on one occasion in an area of marijuana cultivation to be narcoband "substan-

107. 802 F.2d 1339 (11th Cir. 1986).

108. *Id.* at 1344 n.8.

109. *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989).

110. *Id.* at 188.

111. *Id.* (citing *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979)); see also *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 425 (2d Cir. 1977) (transportation of drugs, however minute, is sufficient to merit forfeiture).

112. 769 F.2d 525 (8th Cir. 1985).

tially associated" with the defendant's marijuana farm.¹¹³ The court declined to adopt the rule that "mere transportation" of persons to the location of illicit activity supports forfeiture.¹¹⁴ While the Eighth Circuit has not explicitly rejected the well-delineated showing required of the government in *One 1976 Ford F-150 Pickup*, the older rule now appears inoperative.

Currently the Eighth Circuit maintains that if persons "make real property available as a situs for an illegal drug transaction, it is forfeitable."¹¹⁵ The property in *United States v. Premises Known as 3639-2nd Street, N.E.* was admittedly used to sell drugs. Embracing the "substantial connection" standard set forth in *Ford F-150 Pickup*, the court held that the "use of the house to sell cocaine sufficed to establish a sufficient connection."¹¹⁶

While "cover" establishes a sufficient connection in the Eleventh Circuit, a sufficient connection is established in the Eighth Circuit by the *de minimis* action of making the real property available for a drug deal. Although the statute requires something more than "incidental or fortuitous contact between the property and the underlying illegal activity," the property need not be indispensable to the commission of the offense.¹¹⁷ The *de minimis* test for the "facilitation" concept is a strict lexical view of facilitation, differing radically from the approach taken by the First, Second, Third, and Fourth Circuits. For the Eighth Circuit, the term "facilitate" encompasses any activity making the prohibited conduct less difficult or free from hindrance or obstruction.¹¹⁸ State courts of Connecticut,¹¹⁹ Illinois,¹²⁰ Utah,¹²¹ and Arizona¹²² follow the *de minimis* standard.

113. *Id.* at 527.

114. *Id.* at 526-27.

115. *United States v. Premises Known as 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (citing *United States v. 26.075 Acres*, 687 F. Supp. 1005, 1014 (E.D.N.C. 1988)).

116. *Id.* at 1097. *See also* *United States v. Walker*, 900 F.2d 1201 (8th Cir. 1990). In *Walker*, the court noted that at the time of seizure of the Mercedes, its only connection to illegal drug transactions was telephone conversations about prior drug deals made from the car phone. The Eighth Circuit ruled that there was no probable cause at the time of seizure to believe that the car had been used to facilitate an illegal drug transaction. After seizure, the government discovered one kilo of drugs in the trunk, along with three 9mm pistols, an electronic scale, and \$57,000.00 cash in a spare tire compartment. All of the evidence discovered after the seizure of the Mercedes, however, was suppressed at the civil forfeiture proceeding.

117. *3639-2nd St., N.E.*, 869 F.2d at 1096.

118. *Id.*; *see also* *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3rd Cir. 1981); *United States v. One 1950 Buick Sedan*, 231 F.2d 219, 222 (3rd Cir. 1956).

119. In *State v. Gaudio*, 19 Conn. App. 588, 562 A.2d 1156 (1989), a vehicle was subject to forfeiture where police discovered five and one-half grams of cocaine in the glove compartment. In Connecticut, narcoband is subject to forfeiture if it is "used as a means of committing any criminal offense." CONN. GEN. STAT. ANN. § 54-33g (West 1988). *See also* *State v. Daniels*, 789 S.W.2d 243 (Mo. App. 1990) (defendant who had previously been convicted of possession of marijuana was collaterally estopped from denying knowledge of presence of

4. "In Any Manner" Test

Unlike the very broad *de minimis* test, the "in any manner" test requires a showing that property was actually used, or was intended to be used, in some way related to the drug dealing. Though limited by the requirement of *use* rather than merely a tangential relationship, the standard is broadened by the wide scope of uses included—*any* use.

After September 30, 1981,¹²³ the Fifth Circuit considers forfeiture proper if the narcoband was used "in any manner" to facilitate the sale, transportation or similar act of a controlled substance.¹²⁴ Some Fifth Circuit decisions, however, adopt the "substantial connection" analysis of the facilitation element.¹²⁵ In *United States v. 1964 Beechcraft Baron Aircraft*,¹²⁶ defendant Preston flew a drug dealer to Abilene, Texas, in his Beechcraft Baron. Undercover agents gave the drug dealer a five-gallon container full of P2P, which had an electronic device in it that emitted signals. Preston and the drug dealer then flew from Abilene to Amarillo. Using the electronic device, the agents traced the container to Preston's business in Amarillo.¹²⁷ The court specifically rejected the "substantial connection" standard as "inapplicable" to section 881(a)(4), holding instead, that "use in any manner" was the proper test for the facilitation concept.¹²⁸

marijuana in the glove compartment of his car in subsequent forfeiture proceeding).

120. Illinois defines "facilitate" in a way similar to Connecticut but applies an "in any manner" test to determine whether the drug transaction was "made easier." *People ex rel. Daley v. 1986 Honda*, 537 N.E.2d 1077 (Ill. App. Ct. 1989).

121. *State v. One 1982 Silver Honda Motorcycle*, Utah Registration 5P218, VINIHFSC0229CA35870, 735 P.2d 392 (Utah App. 1987) (small amount of contraband involved did not preclude forfeiture of motorcycle); *State v. One 1983 Pontiac*, 717 P.2d 1338 (Utah 1986) (no requirement of profit motive; use of car to transport drug-using son on two occasions). In Utah, even a small amount of contraband present in the house or car will support forfeiture of the entire property.

122. 1977 Cessna 206, License No. N756HQ, Serial No. U20604107, 141 Ariz. 196, 688 P.2d 1088 (1984). Evidence before an Arizona court that an aircraft which had marijuana in it was of a type "normally used" by drug dealers supported forfeiture of the plane.

123. According to *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) after this date, the Eleventh Circuit is not bound by Fifth Circuit precedent. Therefore, the Eleventh Circuit should be bound by neither *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), *cert. denied, sub nom. Preston v. United States* 461 U.S. 914 (1983), nor *United States v. One 1979 Mercury Cougar*, 666 F.2d 228 (5th Cir. 1982).

124. *1964 Beechcraft Baron*, 691 F.2d at 727 (citing *One 1979 Mercury Cougar*, 666 F.2d at 230 n.3). This interpretation is similar to the approach taken by the Sixth and Seventh Circuits, and is joined by the state courts of Oklahoma, Nevada, D.C., Illinois, and New Mexico. See *infra* notes 139-59 and accompanying text.

125. See, e.g., *United States v. \$364,960.00 in U.S. Currency*, 661 F.2d 319 (5th Cir. 1981); *United States v. \$4,000.00 in U.S. Currency*, 1990 WL 752 (E.D. La. Jan. 2, 1990).

126. 691 F.2d at 727. Other courts believe *1964 Beechcraft Baron* and its "in any manner" test represent the facilitation concept for the Fifth Circuit. See *United States v. One Parcel of Real Property*, 712 F. Supp. 810, 811 (D. Or. 1989).

127. *1964 Beechcraft Baron*, 691 F.2d at 726-27.

128. *Id.* at 728.

In *United States v. One Gates Learjet*,¹²⁹ the Fifth Circuit explicitly rejected any common standard for all civil forfeiture proceedings. Instead, it applied different evidentiary requirements to different types of narcoband, depending on the type of property and, to a certain extent, the nature of the criminal activity allegedly engaged in. The phrase, "used to facilitate," is found in section 881 (a)(4) and (a)(7) and the phrase, "furnished or intended to be furnished," appears in section 881(a)(6).¹³⁰ The court in *One Gates Learjet* gave the words in each of those sections different meanings. Therefore, the amount of evidence sufficient to establish that the narcoband "facilitated" the drug deal varies with each type of property and the particular statutory language.

In *One Gates Learjet* the aircraft had been confiscated pursuant to three separate sections of the Federal Criminal Code: 21 U.S.C. section 881(a)(4), 21 U.S.C. section 881 (a)(6), and 19 U.S.C. section 1595a(a). For each of these laws, Judge Politz wrote, the question of forfeiture must be based upon a "totality of the circumstances, not just the quantity of the contraband."¹³¹ In addition to the quantity of drugs on board, the court looked to the dangerousness of the possession.¹³² The facts indicated that after a fruitless sniff-search, a DEA chemist found a 10-to-14/100,000 of an ounce particle of cocaine in vacuum dust. Based upon this "trace" and hearsay evidence the government sought forfeiture.¹³³

To sustain the forfeiture under section 881(a)(4), the "transportation" allegation in the verified complaint, the court required a showing that the Learjet had been used *in any manner* to transport or "facilitate" the transportation of the cocaine.¹³⁴ The presence of a quantity of cocaine so minute as to be invisible to the naked eye even if "aided by a large magnifying glass" will not support a showing of probable cause.¹³⁵ The government failed to satisfy the evidentiary burden. On the other hand, the "proceeds of crime" allegation under section 881(a)(6) requires the government to show that a "*substantial connection* exists between the property to be forfeited and the criminal activity."¹³⁶ Here, there was no evi-

129. 861 F.2d 868 (5th Cir. 1988).

130. *Id.* at 869.

131. *Id.* at 871.

132. *Id.* (citing *Edelin v. United States*, 227 A.2d 395, 398-99 (D.C. App. 1967) ("If this substance cannot be sold, if it cannot be administered or dispensed, common sense dictates that it is *not* such a narcotic as contemplated by Congress to be a danger to society, the possession of which is proscribed.")).

133. *Id.* at 869-70.

134. *Id.* at 870-71.

135. *Id.* at 871-72.

136. *Id.* at 872. The legislative history of section 881 is devoid of any mention of the "substantial connection" test. H. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.

dence that tainted assets had been used to purchase the plane. Significantly, the court chose to impose a substantial connection requirement with respect to the "proceeds of crime" allegation, while both RICO and the Comprehensive Drug Abuse and Prevention Act were primarily designed to attack such a requirement.

Finally, with regard to the Title 19 count, the "illegal introduction" allegation, the amount of cocaine found was so negligible that it did not even constitute an "article which is introduced into the United States."¹³⁷ One possible reason for the inconsistent standards is that "proceeds of crime," such as money, are easier to trace directly to illegal drug trafficking, at least easier than real estate or automobiles. At this date, however, the courts have given no rationale for the differing treatment of property.

Although it demonstrates some rather strained statutory construction, *One Gates Learjet* shows that facilitation is a legal concept whose meaning should be decided by the court. Despite the seemingly discriminating approach to facilitation jurisprudence in *One Gates Learjet* and despite the doubt cast upon the validity of the "in any manner" test by cases like *United States v. \$364,960.00 in United States Currency*,¹³⁸ the opinion in *1964 Beechcraft Baron Aircraft* seems to exemplify the current Fifth Circuit position on facilitation.

The Sixth Circuit, which supports the "in any manner" test,¹³⁹ reiterates the disagreement among the circuits as to whether the "substantial connection" standard should apply.¹⁴⁰ This circuit considers itself bound by the decision in *United States v. One 1975 Mercedes 280S*.¹⁴¹ The court's position in *1975 Mercedes 280S* is similar to Fifth Circuit analysis. As stated in *One Gates Learjet* and *1964 Beechcraft Baron*, all the government needs to prove is that the narcoband was used or was intended to be used "in any manner" in connection with the illegal drug operation.¹⁴²

The defendant in *1975 Mercedes 280S*, Patricia Glenn, telephoned a man at a local pawn shop to ask if she could come by the shop because she needed "one, ah, you know . . . a small one." Police observed Glenn's

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137. *One Gates Learjet*, 861 F.2d at 873.

138. 661 F.2d 319 (5th Cir. 1981). Recent Fifth Circuit cases indicate a swing away from the "in any manner" test. In *United States v. \$24,000.00 in U.S. Currency*, the court held that government must show that there is probable cause for a belief that a "substantial connection exists between the property to be forfeited and the criminal activity defined by the statute." 722 F. Supp. 1386, 1389 (N.D. Miss. 1989) (quoting *United States v. \$38,600.00 in U.S. Currency*, 784 F.2d 694, 697 (5th Cir. 1986)).

139. See *United States v. One 1984 Cadillac*, 888 F.2d 1133 (6th Cir. 1989).

140. *Id.* at 1136.

141. 590 F.2d 196, 199 (6th Cir. 1979).

142. *1964 Beechcraft Baron*, 691 F.2d 725, 727 (5th Cir. 1982).

car in the parking lot of the pawn shop. Later Glenn left the shop, got in her car and drove away. No evidence of drugs was found in the car but an undercover informant at the pawn shop indicated that he had sold drugs to Glenn on more than one occasion.¹⁴³ Even if it applied the "substantial connection" standard, the court stated that this evidence was sufficient to establish probable cause to believe a "substantial connection" existed.¹⁴⁴ The car had been used "in any manner" to facilitate a drug deal at the pawn shop.¹⁴⁵

Meanwhile, the Seventh Circuit had suggested that circumstances in which property was "used repeatedly" in the course of a conspiracy, requiring proof of the existence of a *connection* between assets and the illegal enterprise, might be sufficient to satisfy the facilitation requirement.¹⁴⁶ However, the court expressly rejected a substantial connection standard and adopted an "in any manner" standard in *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Illinois*.¹⁴⁷ Undercover agent John Mueller spoke with defendant Born about the purchase and sale of kilogram quantities of cocaine. Mueller called Born at home and explained that he was out of cocaine. Born agreed to sell Mueller the drugs for \$3,200. To arrange a rendezvous for the deal, the next morning Mueller again called Born, but another man, Mazzanti, answered. Later that day, Mazzanti called Mueller himself and arranged to deliver the drugs that night. According to Mazzanti, this delivery was Born's way of "feeling out Mueller to make sure he was legitimate."¹⁴⁸ Mazzanti explained to Mueller that if he ever needed more cocaine, he should give Born a call at home. In opposition to the district court's order of forfeiture, Born claimed that because no *substantial connection* existed between the cocaine and his property the order of forfeiture was improper.¹⁴⁹

"The language of the statute is clear, straightforward and unambiguous," wrote Chief Judge Bauer.¹⁵⁰ In *916 Douglas Avenue*, the Seventh Circuit explicitly rejected the "substantial connection" test:

Grafting an implied "substantial connection" test on to the plain language of [section 881] would not avoid ambiguity or the frustration of the Congressional scheme, but promote them. We see no reason to read the penal-

143. *One 1975 Mercedes 280S*, 590 F.2d at 199.

144. *Id.* at 199-200. See *United States v. One 1985 Chevrolet Corvette*, 1990 WL 134711 (6th Cir. 1990) (government satisfied burden of showing facilitation where at the time of arrest defendant was in the automobile, had \$4,700.00 cash and .167 grams residue of cocaine on his person, despite evidence that drugs could have come from another source).

145. *One 1975 Mercedes 280S*, 590 F.2d at 200.

146. See *United States v. Nelson*, 851 F.2d 976, 981 (7th Cir. 1988).

147. 903 F.2d 490 (7th Cir. 1990).

148. *Id.* at 493.

149. *Id.* at 491.

150. *Id.* at 492.

ties of this statute more narrowly than the plain language demands [A]lthough the Fourth Circuit has adopted a "substantial connection" test, the differences between this approach and our own appear largely to be semantic rather than practical [T]he distinction between a "substantial connection" test and the "in any manner, or part" language offered directly in the statute is blurry at best. We believe the more principled and direct approach, and the one demanded by the plain wording of the statute itself, is to affirm forfeiture of any real estate that is used *in any manner or part* to commit or facilitate the commission of a drug related offense.¹⁵¹

Applying this "in any manner" standard, the court limited its inquiry to whether the connection between the underlying drug transaction and the defendant's property was "more than incidental or fortuitous."¹⁵² Predictably, the court held that the connection was sufficient.

Although some recent district court opinions follow this "more than incidental or fortuitous" language,¹⁵³ an Illinois federal district court has rejected this approach to facilitation jurisprudence. In *United States v. 8848 South Commercial Street, Chicago, Illinois*,¹⁵⁴ the court stated that the government must prove at the outset "that there was reasonable grounds to believe that a *substantial connection* exists between the property to be forfeited and the criminal activity."¹⁵⁵ Oklahoma,¹⁵⁶ New Mexico,¹⁵⁷ and Nevada,¹⁵⁸ seem to follow the "in any manner" approach of the Fifth, Sixth, and Seventh Circuits.¹⁵⁹

151. *Id.* at 493-94 (emphasis added).

152. *Id.*

153. *See, e.g.,* *United States v. Certain Real Property*, 747 F. Supp. 505, 515 (E.D. Wis. 1990) ("more than incidental or fortuitous" connection exists where search of residence reveals *highly sophisticated marijuana growing operations*, and the presence of marijuana).

154. 1990 WL 139137 (N.D. Ill. Sept. 14, 1990).

155. *Id.* (emphasis added). In *8848 S. Commercial St.*, the police seized 47.91 grams of marijuana and 5.9 grams of cocaine from an upstairs bedroom apartment and 2.91 grams of marijuana and 5.16 grams of cocaine from a downstairs tavern. There were also four drug-related arrests made on the property.

156. *In re* Forfeiture of a 1977 Chevrolet Pickup, 734 P.2d 693 (Okla. Ct. App. 1987) (used to violate "in any manner").

157. *In re* Forfeiture of a 1982 Ford Bronco, 100 N.M. 577, 673 P.2d 1310 (1983) ("in any manner" to transport—need not be for purpose of sale).

158. Nevada courts will order forfeiture of any property that is used "in any manner" to facilitate a drug deal; but use of the property must be related to the "sale" of a controlled substance. One 1978 Chevrolet Van v. Churchill County *ex rel.* Banovich, 97 Nev. 510, 634 P.2d 1208 (1981). Other cases from Nevada suggest that the state accords with the D.C. and Federal Circuits. One 1977 Porsche 911S v. Washoe County, State of Nevada *ex rel.* Washoe County Sheriff's Dept. Consol. Narcotics, 100 Nev. 210, 678 P.2d 1150 (1984).

159. *But see In re* Forfeiture of \$5,264, 432 Mich. 242, —, 439 N.W.2d 246, 255 (1989) (expressly rejecting the "in any manner" test and applying the "substantial connection" test).

5. "Delivery and Subsequent Distribution" Analysis

Carving out a more limited definition of uses, the Tenth Circuit emphasizes "substantial connection" and the role of the property in the delivery and subsequent distribution of drugs. Although the Tenth Circuit has not squarely addressed the issue, cases decided in its district courts suggest that its rule would be more narrow than the "in any manner" test.

In *United States v. One 1987 Ford F-350 4x4 Pickup*,¹⁶⁰ the Federal District Court of Kansas, found that the truck "in some manner" facilitated the sale or possession of a controlled substance. The truck was "*substantially connected* to the intended purchase and possession of marijuana."¹⁶¹

In this case, a meeting set up by undercover DEA agents to purchase 500 pounds of marijuana took place at the Holidome in Manhattan, Kansas. The deal was later closed at a hotel. The defendants drove a pickup truck to the Holidome and then to the hotel. "[T]he government contends the pickup was used to facilitate the sale or possession of a controlled substance and forfeiture is warranted."¹⁶² No money or marijuana was ever transported in the truck.¹⁶³ After reviewing the split among the circuits, the court ruled in favor of the government because there were "reasonable grounds" to believe use of the truck made "the possession and purchase of marijuana less difficult."¹⁶⁴ Because it *facilitated* the drug deal in this manner, the truck was subject to forfeiture.¹⁶⁵ The court concluded: "[i]f the law requires a 'substantial connection' to drug activity, that test is met on the facts."¹⁶⁶ Thus, this court's interpretation of "substantial connection" required a showing that the property facilitated the delivery and subsequent distribution of the drugs.

In *United States v. Harris*,¹⁶⁷ the Tenth Circuit found that the government satisfied the sufficient nexus test of the criminal forfeiture provision¹⁶⁸ upon seizure from defendant's truck of a silver metal box containing nineteen marijuana cigarettes, rolling papers, roach clips, newspapers from Virginia, and motel receipts from Tennessee and Virginia. The court found that \$413,493 in currency found in the truck was intended to be used to facilitate drug dealing and was forfeited.¹⁶⁹

160. 739 F. Supp. 554 (D. Kan. 1990).

161. *Id.* at 559 (emphasis added).

162. *Id.* at 557.

163. *Id.*

164. *Id.* at 559.

165. *Id.*

166. *Id.*

167. 903 F.2d 770 (10th Cir. 1990).

168. 21 U.S.C. § 853(a)(2).

169. *Id.* at 773, 777.

The Tenth Circuit standard with its apparent "delivery and subsequent distribution" component is narrower than the "in any manner" test, and pushes the Tenth Circuit's forfeiture jurisprudence further into the "substantial connection" realm.

6. "Aggregate of Facts" Test

The Ninth Circuit requires an even greater "connection" between the narcoband and illegal drug activity. The "totality of the circumstances" approach to determine a standard for facilitation, demonstrated in Fifth Circuit opinions,¹⁷⁰ basically mirrors the path taken by the Ninth Circuit.¹⁷¹ The "aggregate of facts" test imposes an even narrower scope of use than the Tenth Circuit's "delivery-subsequent distribution" standard because no single fact can stand alone to show facilitation. Rather, the court looks for a combination of facts. The facilitation element, as a result, has received markedly different treatment in those courts following the Ninth Circuit approach.

In *United States v. Padilla*,¹⁷² the Ninth Circuit applied an "aggregate of facts" test to find probable cause for forfeiture.¹⁷³ The presence or absence of a single fact is not dispositive of the case, as it might be in the Fifth, Sixth, Seventh, Eighth or Eleventh Circuits. Unless the "aggregate of facts" demonstrates that property was exchanged or was intended to be exchanged for drugs, it must be released from forfeiture.¹⁷⁴ The facts *must* indicate "more than the mere existence of a large amount of cash to establish a connection between that cash and illegal drug transactions. . . ." ¹⁷⁵ To this end, the narcoband must be in "combination" with other persuasive evidence of drug activity.¹⁷⁶ The property must be connected or "linked" to the drugs.¹⁷⁷ In *United States v. One Parcel of Real Property*,¹⁷⁸ the Ninth Circuit intimated that it would hold the govern-

170. See *One Gates Learjet*, 861 F.2d 868 (5th Cir. 1988).

171. See *United States v. \$93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir.), *cert. denied sub nom.*, *Willis v. United States*, 469 U.S. 831 (1984).

172. 888 F.2d 642 (9th Cir. 1989).

173. *Id.* at 643 (citing *United States v. \$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1363 (9th Cir. 1986)).

174. *Id.*

175. *Id.* at 644.

176. See *\$93,685.61 in U.S. Currency*, 730 F.2d at 572; see also *United States v. One Parcel of Real Property*, 904 F.2d 487 (9th Cir. 1990); *United States v. \$22,287.00 in U.S. Currency*, 709 F.2d 442 (6th Cir. 1983) (money, heroin, powder scales, guns, found in search after drug sale arrests); *United States v. \$83,500.00 in U.S. Currency and \$40.00 in Canadian Currency*, 671 F.2d 293 (8th Cir. 1982) (money found at scene of drug sale).

177. *Padilla*, 888 F.2d at 645.

178. 904 F.2d 487 (9th Cir. 1990) *rev'g on other grounds*, 712 F. Supp. 810 (D. Or. 1989). Although the Ninth Circuit in reversing the district court did not address the "substantial connection" issue, it noted that the district court's rejection of the "substantial connection" test probably was appropriate. *Id.* at 940 n.1.

ment to the "aggregate of facts" standard.¹⁷⁹ The Texas Supreme Court¹⁸⁰ and Texas Court of Appeals,¹⁸¹ likewise, support the "aggregate of facts" standard.

7. "Antecedent Relationship" Test

Although the First Circuit has seemingly demanded a higher level of scrutiny in civil forfeiture cases requiring not only must the use of the property be an "integral part" of the drug transaction, but also that "antecedent relationship" between the property and the drug deal exist—the recent decision in *United States v. A Parcel of Land with a Building Located Thereon*¹⁸² suggests some movement toward the Eighth Circuit's *de minimis* test. Following the rule set out in *United States v. Premises Known as 3629-2nd Street N.E.*,¹⁸³ the court stated that "[f]orfeiture has been enforced for truly *de minimis* infractions."¹⁸⁴ The defendant's illegal activity plainly was more than *de minimis*, which made application of the *de minimis* test in *A Parcel of Land* easy.¹⁸⁵ The majority of cases, nevertheless, follow the narrower "integral party" and "antecedent relationship" standard.

179. The district court held that delivery of cocaine to Caywood in the defendant's property (a home) was sufficient to support forfeiture. 712 F. Supp. at 813. The court's decision turned not only on the "delivery" of drugs but also on Caywood's repeated visits to the residence for the purpose of obtaining cocaine, together with the fact that after the visits to the property Caywood always distributed cocaine to the informant. *Id.* The decision of the district court was reversed on grounds other than facilitation analysis. The Ninth Circuit held that a triable issue of fact existed on whether the delivery of cocaine took place at an auto parts store or at the defendant's residence and reversed the district court's summary judgment. *Id.* at 491, 492.

180. In a case where currency was located in the same bathroom cabinet as drugs, the Texas Supreme Court specifically rejected the contention that the money was derived from an illegal source, since mere circumstantial evidence prohibited a finding that there was a connection between the money and an illegal drug transaction. \$56,700 in U.S. Currency v. State, 730 S.W.2d 659, 662 (Tex. 1987).

181. The Texas Court of Appeals found that, where money was found locked in a safe next to methamphetamine inside a house containing a methamphetamine laboratory in full operation, there was sufficient circumstantial evidence to find that the money came from illegal sales. However, without more evidence of the "link" between the drug business and some nine millimeter automatic weapons and electronic equipment, the state failed to meet its burden of proof to support forfeiture of the personal property. *Barron v. State*, 746 S.W.2d 528, 531 (Tex. App. 1988).

182. 884 F.2d 41 (1st Cir. 1989).

183. 869 F.2d 1093, 1096 (8th Cir. 1989).

184. *A Parcel of Land*, 884 F.2d at 45.

185. *Id.* at 44. The police seized from the property about eighty live marijuana plants, and approximately fifty drying plants, as well as some marijuana seeds. According to the evidence, defendants grew the marijuana in three separate fields located on the property. They dried it on a "homemade" rack in the home, and stored the drugs both in the home and in a shed located on the property. The court found that this was evidence of a "large-scale, high-volume marijuana production operation, carried out on several segments of appellant's property." *Id.*

Under this standard, not every involvement of narcoband with an illegal drug transaction triggers forfeiture. In *United States v. One 1972 Chevrolet Corvette*,¹⁸⁶ the defendant was found guilty of conspiracy and possession with intent to distribute a controlled substance. His role in the scheme was that of a banker. The only relationship the vehicle had to the distribution scheme or plan was to transport the defendant to a certain prearranged location, where he was supposed to receive payment of his "front money."¹⁸⁷ The court fashioned the standard for the facilitation concept by imposing two requirements: first, there must be an "antecedent relationship between the vehicle and the sale of narcotics" and second, the transaction or meeting which the narcoband is alleged to "facilitate" must be an "integral part" of the illegal activity.¹⁸⁸

The First Circuit recently reaffirmed this "antecedent relationship" approach to the facilitation element. In *United States v. Parcel of Land & Residence at 28 Emery Street, Merrimac, Massachusetts*,¹⁸⁹ the government presented evidence of less than five grams of "white powder substance resembling cocaine," a plastic bag with "green vegetable matter," some marijuana cigarettes and butts, various drug paraphernalia, and numerous weapons. The Court of Appeals held that there was a "lack of solid evidentiary basis for linking the house to the sale of drugs."¹⁹⁰ The government failed to prove a sufficient connection between the narcoband and the illegal drug activity.¹⁹¹

8. "Sufficient Nexus" Test

The "sufficient nexus" test, expanded by the Second Circuit, draws a fine distinction on the concept of what is an "integral part" of a drug deal, suggesting other relationships may be sufficient to trigger forfeiture. In comparison with the "integral part" component of the "antecedent relationship" test, however, the standard in the Second Circuit appears to be more generic and possibly less demanding.¹⁹²

186. 625 F.2d 1026 (1st Cir. 1980).

187. *Id.* at 1029. "Front money" is money put up before the drug deal is consummated.

188. *Id.* at 1029-30 (car not forfeited because it bore no antecedent relationship to the sale of drugs).

189. 914 F.2d 1 (1st Cir. 1990).

190. *Id.* at 4.

191. *Id.* See also *United States v. 141 Bell Rock St.*, 900 F.2d 470, 472 (1st Cir. 1990).

192. According to the Second Circuit and the states of Colorado, California, New York, New Jersey, New Hampshire, and Massachusetts, if the facts indicate that a vehicle was an "integral part" of a drug selling conspiracy, and was involved in the transportation of a drug dealer to the situs of a prearranged meeting or illegal transaction, where a sale of narcotics is proposed or consummated, there is sufficient evidence to justify forfeiture. *United States v. One 1974 Eldorado Sedan*, 548 F.2d 421, 423-25 (2d Cir. 1977).

In *United States v. One 1974 Cadillac Eldorado Sedan*, the court rejected the "substantial connection" test.¹⁹³ The court disagreed with such a narrow construction of the forfeiture statute, but it also declined to follow the *de minimis* or "in any manner" tests, criticizing them as "severe."¹⁹⁴ The court settled on the notion that in order to be an "integral part" of the drug conspiracy there must be some nexus between the narcoband and the drugs, which forms a "sufficient basis" for forfeiture.¹⁹⁵

While the Second Circuit has never endorsed the "substantial connection" standard for the facilitation concept, it has come close. In 1989, the court in *United States v. Property at 4492 South Livonia Road, Livonia, New York*¹⁹⁶ reinforced the requirement of a nexus between drugs and narcoband forming a "sufficient basis" for forfeiture, as that phrase was expressed in *One 1974 Cadillac Eldorado Sedan*.

In *Property at 4492 South Livonia Road*, the criminal defendant, Meyer, retrieved drugs from the residence on two occasions and sold them to an undercover informant. DEA agents seized from the residence the following items:

[S]everal containers holding cocaine cutting agents and small quantities of cocaine and marijuana; a triple beam balance scale; seven hand guns; a hand grenade; an Uzi 9mm. carbine; and \$19,000 in cash, of which nine \$100 bills were confirmed by serial match-up to have been given in the cocaine purchases.¹⁹⁷

On appeal from a judgment of forfeiture, the Second Circuit did not require the government to "link" the property to a particular drug transaction. However, the court did require a showing that the property was "sufficiently connected" with illegal narcotics activity.¹⁹⁸ Unclear is whether simply being "integral" to the drug transaction satisfies the "sufficient nexus" test, or whether in addition to being "integral" there must be other contacts between the narcoband and the drugs, thereby raising the connection to a "sufficient nexus." In any case, this "sufficient nexus" test is the legal formulation of the facilitation concept in the Second Circuit.¹⁹⁹ Recent cases from the district courts in this circuit underscore the

193. *Id.* (discussing *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974)).

194. *Id.* at 426.

195. *Id.* (a sufficient nexus was found and forfeiture was ordered where car was used to transport the trafficker to the site of the drug deal).

196. 889 F.2d 1258 (2d Cir. 1989).

197. *Id.* at 1261.

198. *Id.* at 1269.

199. The Second Circuit recently upheld forfeiture of an entire apartment complex, even though only some of the apartments in the building were used in connection with actual drug dealing. *United States v. 141st Str. Corp.*, 911 F.2d 870 (2d Cir. 1990).

requirement of repeated illegal drug transactions.²⁰⁰ New York,²⁰¹ New Jersey,²⁰² New Hampshire,²⁰³ and Massachusetts²⁰⁴ have adopted the Sec-

200. See *United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, Babylon, N.Y.*, 747 F. Supp. 173 (E.D.N.Y. 1990); *United States v. \$76,745,100.00 in U.S. Currency*, 1990 WL 129188 (S.D.N.Y. Aug. 31, 1990); *United States v. All Right, Title & Interest in Real Property & Appurtenances Known as 288-290 North St., Middleton, N.Y.*, 743 F. Supp. 1068 (S.D.N.Y. 1990); *United States v. All Right, Title & Interest in Property & Premises Known as 710 Main St., Peekskill, N.Y.*, 744 F. Supp. 510 (S.D.N.Y. 1990); *United States v. \$175,260.00 in U.S. Currency*, 741 F. Supp. 45 (E.D.N.Y. 1990).

201. In *Vergari v. Lockhart*, 144 Misc. 2d 86, 545 N.Y.S.2d 223 (1989), the court held that defendant's possession of narcotics alone, would not support forfeiture of money. From the defendant, police seized a bag of cocaine, \$110.00 in cash, and a piece of paper with names and numbers totalling \$7,296.00. Scales were found on the premises, together with grinders, spoons, and numerous clear plastic bags, as well as \$24,350.00 in cash, a weapon, and more sheets of paper with names and numbers on them. Under these circumstances, the government established a common scheme or plan of criminal activity involving the use of the property to traffick in narcotics. In addition, the court held that it was necessary to find that the property "contributes directly and materially" to the crime. *Id.* at ___, 545 N.Y.S.2d at 228. This language seems to echo the "integral part" component of the Second Circuit.

In *Property Clerk, New York City Police Dept. v. Aponte*, 141 Misc. 2d 129, 532 N.Y.S.2d 1000 (1988), *rev'd*, 158 A.D.2d 431, 552 N.Y.S.2d 118 (1990), an automobile used to drive to and from the situs of purchase, and in which heroin was purchased, was not subject to forfeiture according to the supreme court. The facts were too attenuated to support the requisite nexus for forfeiture. However, the appellate division reversed, holding that the evidence adequately proved a "sufficient nexus" between the vehicle and the illegal drug transaction. The appellate division upheld forfeiture "where [Aponte] was seen driving away in his vehicle from the scene of the transaction, and a post-arrest search uncovered the presence of contraband." 158 A.D.2d 431, ___, 552 N.Y.S.2d 118, 119 (1990).

202. New Jersey courts have also found that lack of a "sufficient nexus" between money and illegal activity will release the narcoband from forfeiture. *State v. One 1978 Ford Van*, 218 N.J. Super. 374, 527 A.2d 935 (1987). The "integral part" language, prominent in Second Circuit decisions, has led state courts within the circuit to refer to ties of causality or dependency, representing varying degrees of proximity in the relationship between the property and the illegal drug transaction. See *State v. One 1979 Chevrolet Camaro Z28*, 202 N.J. Super. 222, 494 A.2d 816 (1985).

203. The Supreme Court of New Hampshire has held that its state forfeiture statute is devoid of any requirement to prove a "connection" with a *specific* illegal transaction. \$270,523.46 in U.S. Currency, 130 N.H. 202, 536 A.2d 1270 (1987). The court was faced with a statute which simply required proof that money was "used or intended for use" in violation of the controlled drug act. Where a large quantity of money was found in proximity to drugs, along with records of drug transactions, implements used to prepare cocaine for sale, and books on money laundering, the evidence was sufficient to justify forfeiture of the money.

204. In Massachusetts, money found at six locations in a residence from which 103 pounds of marijuana was also seized was not subject to forfeiture because there was no evidence that the homeowners had been involved in selling marijuana or were conducting an ongoing drug business. There were no ledger books, packaging materials or safety deposit box keys. No sales of marijuana by the homeowners had been observed by investigating officers, nor had any undercover purchases been arranged so that there would be identifiable funds among monies seized. The defendants, not surprisingly, contended that the entire amount of the marijuana was for personal use. The Supreme Court of Massachusetts ruled that the evidence was insufficient to establish the requisite nexus for forfeiture. *Commonwealth v. Seven Thousand Two Hundred Forty-Six Dollars*, 404 Mass. 763, 537 N.E.2d 144

ond Circuit definition of facilitation.

9. "Substantial Connection" Test

The last of the nine standards is the narrowest. "Substantial connection" draws an unbroken line from the property to the core of the drug deal. The standard is articulated in *United States v. Premises Known as 2639 Meetinghouse Road*,²⁰⁵ which stated that when property is said to be used to "further" the illegal trafficking in narcotics, the government has the initial burden of proof of showing that a "substantial connection" exists between the property to be forfeited and the criminal activity. In this case, DEA officials interviewed five cooperating witnesses who indicated that the defendants, Leiby and Sebzda, had invested proceeds from their methamphetamine drug trade in various bars, including the bar located at 2639 Meetinghouse Road. These informants stated that Sebzda's sole source of income was the drug trade, which the defendant admitted in a taped confession.²⁰⁶ After reviewing the corporate records, DEA agents concluded that Leiby also had insufficient income from legitimate sources to have made cash payments for the purchase of the bar. The property was placed in forfeiture under section 881(a)(6) of the federal statute.²⁰⁷

However, the landmark "substantial connection" standard decision is *United States v. Certain Lots in Virginia Beach*.²⁰⁸ In this case, the only "connection" between certain lots of real property located in Virginia Beach, Virginia and illegal drug activity was a single transaction. An undercover DEA agent met with defendant, Cole, at Cole's house. Cole showed the agent twelve ounces of cocaine and packaged it at the agent's request. He told the agent that he had just picked up the drugs and the scale on his way home from work. The agent left the residence, returning in an hour to pick up the cocaine. Both Cole and the agent then left the residence. A subsequent search of Cole's house revealed "no cocaine."²⁰⁹

Unlike other courts addressing the facilitation concept, the court in *Certain Lots In Virginia Beach* maintained "conformity to *stare decisis*

(1989).

205. 633 F. Supp. 979, 986 (E.D. Pa. 1986) (citing *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3rd Cir. 1984); *United States v. \$64,000.00 in U.S. Currency*, 722 F.2d 239, 244 (5th Cir. 1984)).

206. *2639 Meetinghouse Road*, 633 F. Supp. at 985, 987 n.6.

207. *Id.* at 985; *see also* *In re Forfeiture of \$10,780.00 in U.S. Currency*, 181 Mich. App. 761, 450 N.W.2d 93 (1989) (owner of money was trafficking in cocaine; his cash expenditures were grossly disproportionate to his gross income, and he was unable to explain the source of the excess funds).

208. 657 F. Supp. 1062 (E.D. Va. 1987) (cited by the Second, Third, Fifth, Eighth Circuits).

209. *Id.* at 1063-64.

and the legislative history.”²¹⁰ Persuaded by the authority in *United States v. 1966 Beechcraft Aircraft Model King Air*,²¹¹ the court held that “real property may be subject to forfeiture only where there is a substantial connection between the property and the underlying illegal transaction.”²¹²

Although the district court agreed wholeheartedly with the rule of law in *1966 Beechcraft*, the court was puzzled by the *1966 Beechcraft* analysis, which declared that a plane that only transported conspirators to the situs of the drug exchange had been used in “substantial connection.” The court said that *1966 Beechcraft* was the “outer limits” of what could be called “substantial.”²¹³ The court went on to say, if “substantial” means anything, it cannot be said that the connection between Cole’s house and the drug sale was “substantial.” There was no evidence that Cole “routinely” used the home to store, hide, or to distribute drugs.²¹⁴

Applying similar analysis, the North Carolina Court of Appeals recently held that forfeiture was justified where the state had shown that the property was the location of a “pattern of racketeering activity.”²¹⁵ This “pattern” requirement has also been utilized by an Alabama federal district court.²¹⁶ To these courts, this requirement of patterned and/or routine activity indicates a “substantial connection,” which they believe is necessary to justify forfeiture.

The Fourth Circuit, in two recent cases, reiterated the requirement that property subject to forfeiture must be substantially connected with drugs. In the case of *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane, Summerfield, North Carolina*,²¹⁷ the government discovered the following items: marijuana in a vase in the living room of the defendant’s house; a gram of cocaine in the defendant’s car; one bottle of Inositol (a common cutting agent for cocaine) in a bedroom and another battle beneath the kitchen sink; and one set of triple beam scales in the living room and another in the bedroom. The scales had

210. *Id.* at 1065.

211. 777 F.2d 947 (4th Cir. 1985). The *1966 Beechcraft* court explained that Congress intended that the civil forfeiture provisions of section 881 to permit forfeiture of property only if a substantial connection exists between the property and the underlying criminal activity. The airplane in *1966 Beechcraft* transported the conspirators to the exchange site. This established a “substantial connection” between the airplane and the drug transaction. *Id.* at 953.

212. *Certain Lots in Virginia Beach*, 657 F. Supp. at 1065.

213. *Id.*

214. *Id.*

215. *State v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., Kannapolis, N.C.*, 96 N.C. App. 84, 384 S.E.2d 585 (1989).

216. *United States v. 60 Acres, More or Less, with Improvements Thereon, Located in Etowack County, Ala.*, 727 F. Supp. 1414 (N.D. Ala. 1990).

217. 906 F.2d 110 (4th Cir. 1990).

cocaine residue on them. Cocaine was present on trash, on the vanity, on a briefcase and in a plastic bag inside the briefcase and at other locations in the house. There was also testimony that the defendant had prepared, packaged, consumed and distributed cocaine from the house.²¹⁸ Applying the "substantial connection" standard, the court held that the government had proved that the defendant used the house to "facilitate" the possession of cocaine with the intent to distribute.²¹⁹

The court reached a similar result in *United States v. Schifferli*.²²⁰ The court held that, under the "substantial connection" test, *at a minimum* the narcoband must have more than an incidental or fortuitous connection to criminal activity.²²¹ Dr. Schifferli used his dentist office to write illegal prescriptions over forty times during a four month period. The court found that the office was subject to forfeiture.²²² Although the court did hold the government to the "substantial connection" standard, it said that just one use of the property *may be enough* to trigger forfeiture. In *Schifferli*, and other like cases, where the property occupies a significant role in the overall scheme of illegal drug activity, one use of the property may indeed be enough to establish a "substantial connection." 7715 *Betsy Bruce Lane* and *Schifferli* establish, however, that the strength of such connection must be "substantial," which is a far greater evidentiary requirement than is contemplated by the "in any manner" test.²²³

D. Virginia's Unique Legislative Standard

The Fourth Circuit and particularly the Commonwealth of Virginia seem to be the fulcrum of the heightened "substantial connection" analysis. Virginia is the only state where the words "substantial connection" actually appear in its forfeiture statute. Section 18.2-249 of the Virginia Code provides:

Seizure of property used in connection with or derived from illegal drug transactions.—A. The following shall be subject to lawful seizure . . . (i) all money, medical equipment, office equipment, laboratory equipment, motor vehicles, and all other personal and real property of any kind or character, *used in substantial connection with the illegal manufacture, sale or distri-*

218. *Id.* at 112-13.

219. *Id.*; see also *United States v. One Lot Jewelry*, 749 F. Supp. 118 (W.D.N.C. 1990) (substantial connection required). Under the federal scheme of drug enforcement, possession with the intent to distribute is a predicate to forfeiture, which, arguably, demonstrates the grave concerns over the interstate trade in controlled substances. For a discussion of Virginia's state forfeiture standard, see *infra* note 224 and accompanying text.

220. 895 F.2d 987 (4th Cir. 1990).

221. *Id.* at 990.

222. *Id.* at 991. The court also noted that the office "provided an air of legitimacy and protection from outside scrutiny," which is reminiscent of the cover test for forfeiture. *Id.*

223. See also *United States v. \$95,945.18 in U.S. Currency*, 913 F.2d 1106, 1110 (4th Cir. 1990) (forfeiture of money that was "clearly" involved with major drug transactions).

*bution of controlled substances . . . except real property shall not be subject to lawful seizure unless the minimum prescribed punishment for the violation is a term of not less than five years; (ii) everything of value furnished, or intended to be furnished, in exchange for a controlled substance. . . .*²²⁴

Because there have been no cases defining "substantial connection" as used in the Virginia statute and because there is no recorded legislative history, the Fourth Circuit's judicially created "substantial connection" standard might be applied by Virginia state courts. By legislatively calling for the heightened burden of proof, Virginia is progressive in its approach to the facilitation element.

Definitions of facilitation range from broad to narrow, from simple to complex, with esoteric gradations along the continuum. The wide range of these definitions across the circuits illustrates an urgent need for a common, clearly expressed standard.

II. TOWARD A THEORY OF "SUBSTANTIAL CONNECTION"

In order to determine the appropriate legal meaning of facilitation in civil forfeiture cases, courts should resort to the clear statements from Congress contained in the specific language of section 881 and in the legislative history, to traditional principles of statutory construction and to precedent. Insufficient attention to these principles has led to the current disagreement among the circuits over the facilitation clause of the civil statute. The approach taken by the "substantial connection" jurisdictions, a standard reflected in the Code of Virginia, is the most appropriate in these civil forfeiture cases.

A. Congressional Intent

Congressional policy is often obvious on the face of the statute and judges need not search far for the meaning of words or expressions. Under these conditions, courts follow what is commonly called the "plain meaning rule."²²⁵ In *Hutton v. Phillips*,²²⁶ the Delaware Supreme Court provided a classic statement of this doctrine:

224. VA. CODE ANN. § 18.2-249 (Cum. Supp. 1990). Prior to this code amendment, seizures were conducted pursuant to § 4-56 of the Virginia Code, which required only that the narcoband be "connected" with the illegal manufacture, sale or distribution of a controlled substance; no substantial connection was required. The code limits seizure to the crimes of manufacture, sale and distribution of controlled substances, proscribed by § 18.2-248. No seizure, and thus no forfeiture may be instituted by the Commonwealth for possession of a controlled substance with the *intent* to distribute, no matter the quantity.

225. See, e.g., *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

226. 45 Del. 156, 70 A.2d 15 (1949).

[Judicial interpretation] involves far more than picking out dictionary definitions of words or expressions used. Consideration of the context and the setting is indispensable properly to ascertain a meaning. In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely.

. . . Implicit in the finding of a plain, clear meaning of an expression *in its context*, is a finding that such meaning is rational and "makes sense" in that context.²²⁷

The United States Supreme Court presumes that unambiguous statutory language expresses legislative purpose, making resort to legislative history unnecessary.²²⁸ For example, in *United States v. Rivera*,²²⁹ the Eleventh Circuit addressed the scope of "facilitation" under 21 U.S.C. section 853—a *criminal* forfeiture statute—and found congressional intent clearly expressed in the law's direction that provisions be "*liberally construed* to effectuate its remedial purposes."²³⁰ However, *civil* forfeiture statutes such as section 881 do not have such clear directives for liberal construction. Broad construction of facilitation under section 881 is further limited only to "property interests" subject to RICO forfeiture.²³¹ The United States Supreme Court has not indicated that a broad standard should apply to facilitation under section 881. Judicial construction of civil forfeiture statutes, therefore, cannot rely on the guidance of plain meaning, as can construction of criminal statutes.

1. Plain Meaning in *916 Douglas Avenue*

In *916 Douglas Avenue*, the Seventh Circuit decision wrote that "[f]orfeiture is appropriate if the property is 'used, or intended to be used, in any manner or part, to commit or to *facilitate* the commission' of a drug offense."²³² Because the court found plain meaning in the language of the statute, it saw no need to inquire into congressional intent. There was no reason, the court asserted, to read the penalties of section 881 more narrowly than the plain language demanded. Moreover, the court in *916 Douglas Avenue* noted that the distinctions between the narrow

227. *Id.* at 159, 70 A.2d at 17 (emphasis added).

228. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

229. 884 F.2d 544 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1322 (1990).

230. *Id.* at 546 (quoting 21 U.S.C. § 853(o) (Supp. IV 1987)) (emphasis added).

231. *See Russello v. United States*, 464 U.S. 16, 27 (1983).

232. 903 F.2d 490, 492-93 (7th Cir. 1990) (quoting 28 U.S.C. § 881(a)(7) (1984)) (emphasis added).

“substantial connection” approach and the broad “in any manner” approach to the legal meaning of facilitation were “semantic,” “blurry at best.”²³³ The court presumed that if narcoband has more than an incidental or fortuitous connection with drugs it has been used in “substantial connection” and, therefore, it has facilitated a drug deal.²³⁴

The court’s analysis fails. It denies the possibility that in applying this broad and rigid definition of “facilitate,” an even lower threshold of activity might also render the consummation of the drug deal “less difficult,” a lower standard demonstrated, for instance, in the Fifth or Eleventh Circuits’ cases.²³⁵ Would this rigid definition lead courts to conclude simple proof that narcoband made the drug deal “less difficult” is sufficient? Second, instead of focusing narrowly on the “in any manner” qualifier, courts’ attention should be directed to the meaning of “*facilitate*” which is the direct activity Congress sought to attack by enacting section 881. Rigid adherence to the “in any manner” language may also be at odds with the rule of construction requiring *any* ambiguities in a penal statute to be resolved in favor of defendants.

In *Universal Camera Corp. v. NLRB*,²³⁶ the United States Supreme Court considered the “substantial evidence” formula in the context of the Wagner Act.²³⁷ The sponsors of the legislation thought the words, “substantial evidence,” were clear, but Justice Frankfurter noticed that “the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism.”²³⁸ In light of the competing interests of the litigants, subtle differences in the opinions of judges about legal meaning should be tempered by reference to the steady calculus of the congressional record. Frankfurter’s comments are illustrative. “However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything ‘logically probative of some matter requiring to be proved.’”²³⁹

If the words of a statute are “clear” and “of plain meaning,” the expectation of a conflicting interpretation ought to be non-existent. Yet, the Seventh Circuit explicitly mentioned an apparent “conflict” with the Fourth Circuit on the facilitation issue.²⁴⁰ The court, nevertheless, re-

233. *Id.* at 494.

234. *Id.*

235. See *supra* notes 89-104 and accompanying text and notes 123-28 and accompanying text.

236. 340 U.S. 474 (1950).

237. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 160(e)).

238. *Id.* at 497.

239. *Id.* (quoting *Funk v. United States*, 290 U.S. 371 (1933); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 530 (1896)).

240. 916 *Douglas Ave.*, 903 F.2d at 493-94.

solved the conflict by avoiding statements of congressional intent in its sweeping application of "plain meaning."²⁴¹ By side-stepping analysis of legislative history, the court necessarily misses those arguments supporting the "substantial connection" test.

2. Psychotropic Substances Act²⁴²

These arguments supporting the "substantial connection" standard, however, are not found in original congressional statements concerning the intended scope of the facilitation clauses of section 881.²⁴³ Courts must look to the language of related later statutes to find clear statements of the intended meaning of facilitation.²⁴⁴ The joint explanatory statement of the Psychotropic Substances Act of 1978 notes: "Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a *substantial connection* between the property and the underlying criminal activity which the statute seeks to prevent."²⁴⁵ Nothing contained in the Psychotropic Substances Act suggests that Congress contemplated an unlimited forfeiture power for the federal government. The phrase, "*these provisions*," appears to refer to the statutory forfeiture provisions of section 881 as a whole and should be taken as a deliberate guide to its language. In resolving the dispute between the circuits over whether the "used in any manner to facilitate" language may reach narcoband used only to transport conspirators to the situs of a drug transaction, the court in *United States v. 1966 Beechcraft Aircraft Model King Air*,²⁴⁶ was persuaded by the "substantial connection" instruction contained in the legislative history. The First,²⁴⁷ Second,²⁴⁸ Third,²⁴⁹ Fourth,²⁵⁰ Fifth,²⁵¹ Sixth,²⁵² Eighth,²⁵³ and Elev-

241. *See id.* at 494.

242. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (codified at 21 U.S.C. §§ 352, 801 note, 801(a) 802, 811, 812, 823, 827, 830, 841-43, 852, 872, 881, 952-53, 965); Pub. L. No. 96-359, 94 Stat. 1194 (codified as amended at 21 U.S.C. §§ 830, 841-43 (1980)).

243. *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026, 1029 (1st Cir. 1980).

244. *See id.*

245. 1978 U.S. CODE CONG. & ADMIN. NEWS 9518, 9522 (emphasis added).

246. 777 F.2d 947, 953 (4th Cir. 1985).

247. *See One 1972 Chevrolet Corvette*, 625 F.2d 1026.

248. *See United States v. Property at 4492 S. Livonia Rd.*, Livonia, N.Y., 889 F.2d 1258, 1269 (2d Cir. 1989) (citing, *United States v. 1974 Cadillac Eldorado*, 575 F.2d 344, 345 (2d Cir. 1978)); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 423 (2d Cir. 1977).

249. *See United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192 (3rd Cir. 1983).

250. *See 1966 Beechcraft Aircraft*, 777 F.2d at 953; *United States v. Certain Lots in Va. Beach*, 657 F. Supp. 1062 (E.D. Va. 1987).

251. *See United States v. \$321,470.00 in U.S. Currency*, 874 F.2d 298, 306 (5th Cir. 1989).

252. *See United States v. 526 Liscum Drive*, Dayton, Montgomery County, Ohio, 866 F.2d 213, 216 (6th Cir. 1989); *United States v. One 1984 Cadillac*, 888 F.2d 1133, 1138 (6th Cir. 1989); *United States v. Premises Known as 8584 Old Brownsville Rd.*, Shelby County, Tenn., 736 F.2d 1129, 1131 (6th Cir. 1984).

253. *See United States v. Premises Known as 3639-2nd St., N.E.*, Minneapolis, Minn., 869

enth²⁵⁴ Circuits explicitly acknowledged this historical language as an expression of congressional intent in the forfeiture context.²⁵⁵ The Eighth Circuit, for instance, in *United States v. One 1976 Ford F-150 Pickup*,²⁵⁶ quoted congressional statements from the Psychotropic Substances Act, which supported its holding that narcoband must be "substantially associated" with the manufacture of marijuana. The court stated: "[W]e do not believe that the forfeiture statute was meant to support divestiture of private property based on an *insubstantial connection* between the vehicle and the illegal activity. . . ."²⁵⁷

As shown, courts give the proper high regard for congressional intent. However, the courts need to focus on all applicable congressional intent, which is found not only in section 881, but also in related forfeiture provisions such as the Psychotropic Substances Act. Even though section 881 was "designed to enhance the use of forfeiture," Congress explicitly indicated its desire to keep this powerful weapon on a leash.²⁵⁸

3. "Indispensability" Requirement

The court in *United States v. Certain Lots in Virginia Beach*²⁵⁹ quoted at length from the Senate Report accompanying the proposed 1984 amendments to 21 U.S.C. section 881:

Under current law, if a person uses a boat or a car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, *even though its use was indispensable to the commission of a major drug offense* and the prospect of the forfeiture of the property would have been a powerful deterrent.²⁶⁰

The inference of this statement is clear. While, on the one hand, the legislative history did not indicate that the narcoband must be "indispensable

F.2d 1093, 1096-97 (8th Cir. 1989); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985).

254. See *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983).

255. While acknowledging "substantial connection" as the touchstone of forfeiture, the courts differ in their interpretation of the language. See *supra* notes 83-223 and accompanying text.

256. 769 F.2d at 527.

257. *Id.* at 527 (emphasis added).

258. S. REP. NO. 225, 98th Cong., 2d Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3374.

259. 657 F. Supp. 1062 (E.D. Va. 1987).

260. *Id.* at 1065 (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 195, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3378) (emphasis added).

to the commission of a major drug offense," on the other hand, Congress did not intend civil forfeiture to apply to property which has only a fortuitous or incidental connection with criminal activity involving drugs.²⁶¹ The district court in *Certain Lots in Virginia Beach* interpreted "indispensable" to mean "substantial connection."²⁶²

The Second Circuit interpreted "indispensable" in a similar way. In *United States v. One 1974 Cadillac Eldorado Sedan*,²⁶³ the court stated:

The nabobs of the drug business normally eschew physical custody of dope, relegating to their minions possession of the brown paper bag. . . . If the purpose of the [forfeiture] statute is, as Congress indicated, to reduce the profits of those who practice this nefarious profession, we are loathe [sic] to make the forfeiture depend upon the *accident* of whether dope is physically present in the vehicle.²⁶⁴

Whether Congress intended its statement about "indispensability" to be considered as a forfeiture standard is unclear. The First and Second Circuits' requirement that the narcoband be an "integral part" of the drug deal is similar to the "indispensable" language. The integral part test outlined in *United States v. One 1972 Chevrolet Corvette*,²⁶⁵ is consistent with a congressional mandate for a "substantial connection." On the continuum of facilitation, courts may place "substantial connection" between "indispensability" and "integral part." Moreover, Congress' references to "indispensability" should not necessarily be read to limit the substantive element of facilitation. Rather, references to "indispensability" not only appear directed toward the nature of property subject to forfeiture, as seen in *Russello v. United States*,²⁶⁶ but also the *use* of the narcoband.

"Indispensable" in the Senate Report may apply specifically to the type of *conduct* which subjects the narcoband to forfeiture. The "use" of the boat or car may be "indispensable" to the transportation or manufacture of dangerous drugs, not specifically "indispensable" to the drug deal itself. If the illegal drug activity could have been accomplished by any means, or at any location, the narcoband may be released from forfeiture

261. *Certain Lots in Virginia Beach*, 657 F. Supp. at 1065; 916 *Douglas Ave.*, 903 F.2d at 493.

262. *Id.* at 1065. The United States District Court for Minnesota reached the same conclusion holding that one drug sale at a house did not constitute "substantial connection." However, the Eighth Circuit reversed finding that there was a "substantial connection." *United States v. \$12,585.00*, 669 F. Supp. 939, 943 (D. Minn. 1987), *rev'd*, No. 87-5449 (8th Cir. Mar. 10, 1989), *reh'g denied*, 869 F.2d 1093 (1989).

263. 548 F.2d 421 (2d Cir. 1977).

264. *Id.* at 426. (emphasis added). *See also United States v. One 1979 Lincoln Continental*, 574 F. Supp. 156, 159-60 (N.D. Ohio 1983), *aff'd*, 754 F.2d 376 (6th Cir. 1984).

265. 625 F.2d 1026, 1029-30 (1st Cir. 1980).

266. 464 U.S. 16, 20 (1983).

because use of that specific means or situs was not "indispensable."²⁶⁷

The legislative history of the Contraband Seizure and Forfeiture Act²⁶⁸ illustrates congressional concern with the rising international drug trade and drug trafficking in this country. The House Report accompanying 49 U.S.C. section 781 reflects this concern:

Enforcement officers of the government have found that one of the best ways to strike at commercialized crime is through the pocketbook of the criminals who engage in it. Vessels, vehicles, and aircraft may be termed the *operating tools* of dope peddlers, and often represent *major capital investments* . . . Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.²⁶⁹

Adherence to the requirement of indispensability comports with congressional statements about combatting the trade in illegal narcotics yet does not produce harsh forfeitures at every turn. In some exceptional cases, the notion of "indispensability" may require that the government prove the property was not only "substantially connected" to an illegal drug transaction, but also was "indispensable" to a drug deal itself. Where a single use of the property may be sufficient to trigger section 881, the connection between the narcoband and the illegal drug transaction must be greater.²⁷⁰ Courts in these cases look for significant and critical contacts. Just one use of the property may indeed be sufficient to subject it to forfeiture, but the significance of such a connection is that it must be "indispensable."

While no court has yet suggested that "substantial" does not mean "indispensable," "substantial connection" is a slightly less rigorous burden. While Congress addressed the issue of "indispensability" in the legislative history of the Psychotropic Substances Act, some courts have interpreted the facilitation standard as requiring a "substantial connection." Because the common law does not favor forfeitures, they should only be enforced within the letter of the law.²⁷¹ However, "substantial connection" a more viable and effective standard than the "indispensable" standard announced by Congress. Under an "indispensable" standard, few forfeitures would result because of the incredibly strong connection required between the property and the drug activity. While defendants' property

267. See *Platt v. United States*, 163 F.2d 165, 167 (10th Cir. 1947) (automobile used to make a drug deal released from forfeiture; "ease or difficulty of the purchase would have been the same no matter how [the defendant] got there").

268. 49 U.S.C. § 781 (1982).

269. H. REP. NO. 2751, 81ST CONG., 2D SESS. (1950), reprinted in 1950 U.S. CODE CONG. SERV. 2952, 2953-54 (emphasis added).

270. See *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990) (substantial connection between office building and its use by dentist in connection with writing of illegal prescriptions justifies forfeiture of property); see also *supra* notes 220-23 and accompanying text.

271. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939).

would be shielded, this result would not further the purpose of forfeiture to reduce drug trafficking. The "substantial connection" standard, on the other hand, is a sufficiently demanding standard that ensures forfeitures will not be rampant, yet also ensures forfeitures will occur when there is a sufficiently strong and justifiable connection between the property and the illegal drug activity. Even under vigorous attack by its critics, the "substantial connection" standard survives as the best answer to the legal question presented by section 881 forfeitures.

4. Criticism of Psychotropic Substances Act Language

Few courts have specifically rejected the "substantial connection" standard.²⁷² The Second, Fifth and Seventh Circuits do not agree to such a "narrow" construction of the forfeiture statute, although the Second Circuit does embrace a more exacting "sufficient nexus-integral part" test.²⁷³ In *United States v. 1964 Beechcraft Baron Aircraft*,²⁷⁴ the court relied heavily upon the absence of "substantial connection" language in the legislative history²⁷⁵ in determining that "the 'substantial connection' standard does not apply to § 881(a)(4)."²⁷⁶ Although congressional statements in the history of the Psychotropic Substances Act made no explicit mention of using the "substantial connection" test for other provisions of the forfeiture statute,²⁷⁷ surely this language was not intended to be so severely limited to section 881(a)(6) cases. The mere absence of specific statutory language ought not be interpreted as conclusive evidence of legislative intent.²⁷⁸ Because Congress intended to expand the scope of property forfeitable beyond conveyances through the Psychotropic Substances Act, its standard of "substantial connection" should apply to all "forfeitable." The "text of the law, the starting point of analysis, must not be taken in a vacuum."²⁷⁹ When courts insist that specific references to "substantial connection" in the legislative history are fixed and unalterable, they ignore the tradition of judicial construction of statutes. Given that the Psychotropic Substances Act is a vital part of the historical *context* of the federal civil forfeiture scheme, the rejection of "substantial connection" and adoption of the "in any manner" test takes the

272. See, e.g., *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982) (interpreting § 881[a][4]), *cert. denied sub nom. Preston v. United States*, 461 U.S. 914 (1983)); see also *supra* notes 126-28 and accompanying text.

273. See *supra* notes 192-204 and accompanying text.

274. 691 F.2d 725 (5th Cir. 1982).

275. See generally *Comprehensive Drug Abuse Prevention & Control Act*, H. REP. NO. 1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566.

276. *1964 Beechcraft Baron*, 691 F.2d at 727.

277. 691 F.2d 725, 727 (5th Cir. 1982), *cert. denied sub nom.*, *Preston v. United States*, 461 U.S. 914 (1983).

278. Cf. I. SUTHERLAND, STATUTORY CONSTRUCTION § 27 (4th ed. 1985).

279. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 748 (D.D.C. 1971).

meaning of facilitation out of the larger context.

Judicial consideration of the "substantial connection" standard predates the Psychotropic Substances Act. Before 1978, courts discussed the appropriateness of the heightened "substantial connection" requirement. In 1977, the Second Circuit debated the notion of "facilitation" in *United States v. One 1974 Cadillac Eldorado Sedan*.²⁸⁰ After analyzing the "substantial connection" cases, the court settled upon the "sufficient nexus" test. The court indicated emphatically that this "sufficient nexus" interpretation of the statutory language "used in any manner to facilitate" comported with the "language and *intent* of section 881(a)(4)."²⁸¹ These pre-1978 statements of congressional intent suggest that courts perceived a clear message from the statute and that the proper legal standard for facilitation is greater than "in any manner."

5. The *Aponte* Case

The New York case of *Property Clerk, New York City Police Department v. Aponte*²⁸² suggests another reason why courts mistakenly reject the "substantial connection" standard. The court stated: "The use of the words 'in any manner' in [the federal] statute, and the absence of the 'substantial connection' language . . . demonstrates a congressional intent to have the [federal] statute apply to a more extensive range of activity [than state forfeiture statutes.]"²⁸³ *Aponte* suggests that the clear absence of specific "substantial connection" language in the federal statute justifies a "liberal" view of the facilitation element. However, the *Aponte* decision has limited application. *Aponte* addresses the construction of state forfeiture statutes, not federal statutes. *Aponte* could be interpreted to mean that, in the absence of the "in any manner" language in state forfeiture statutes, state courts are bound to construe the meaning of facilitation in state civil forfeiture proceedings more narrowly than the federal courts. *Aponte* further suggests that application of the federal standard to determine when narcoband will forfeit for violations of state law is inappropriate.

The absence of "substantial connection" language, moreover, should not automatically lead courts to conclude that the legislature did not intend for that standard to apply. The Michigan Court of Appeals in *People v. 2850 Ewing Road*,²⁸⁴ interpreted the legislative intent of a statute which "closely" parallels the federal civil forfeiture statute and stated:

Nothing in this statute indicates a legislative intent that the situs of a drug

280. 548 F.2d 421 (2d Cir. 1977).

281. *Id.* at 423 (emphasis added).

282. 158 A.D.2d 431, 552 N.Y.S.2d 118 (1990).

283. *Id.* at 432, 552 N.Y.S.2d at 119.

284. 161 Mich. App. 266, 409 N.W.2d 800, *appeal denied*, 429 Mich. 884 (1987).

transaction is subject to forfeiture merely because it is the situs. Had the Legislature intended a house to be subject to forfeiture if an illegal drug transaction occurs within the house, it could have clearly stated so.²⁸⁵

Similarly, nothing in the federal forfeiture statutes indicates a congressional intent that narcoband should forfeit merely because it bears "some relationship" to an illegal drug transaction, including situs, transportation, or proceeds. Congress sought to address the quality of this "relationship" in enacting the civil forfeiture statute. Congress could have clearly defined facilitation in the body of the statute by subjecting to forfeiture any property where a drug transaction occurs, any property that transports a person to the arrangement or consummation of a drug deal, or any property that provides camouflage for a drug deal. Congress did not do this, however,

Section 932.703(1) of The Florida Contraband Forfeiture Act is an example of a clear statutory indication of legislative intent. "In any incident in which possession of any contraband article . . . constitutes a felony, the vessel, motor vehicle, aircraft, or personal property in or on which such contraband article is located at the time of seizure shall be contraband subject to forfeiture."²⁸⁶ The Florida statute clearly defines the required connection between the drugs and the narcoband: a felony amount of contraband found in or on the property at the time of seizure triggers forfeiture.

The South Dakota legislature, in the face of repeated judicial decisions releasing narcoband from civil forfeiture,²⁸⁷ amended its statute to include the following provision: "This subdivision includes those instances in which a conveyance transports, possesses or conceals marijuana or a controlled substance . . . without the necessity of showing that the conveyance is specifically being used to . . . facilitate the transportation. . . ."²⁸⁸ Prior to the amendment, the Supreme Court of South Dakota held that facilitation required "more than mere transportation of an amount of drugs for personal use."²⁸⁹

Congress chose not to enact such a clearly delineated statute as some states of have done. The absence of "substantial connection" language in the statute, therefore, may also support the proposition that Congress intended to define the facilitation concept as a "substantial connection" between the narcoband and the illicit drug activity. In this light, the "in any manner" language is a mere qualifier. The federal statute may plausibly

285. *Id.* at 272, 409 N.W.2d at 802.

286. *State v. Crenshaw*, 548 So.2d 223, 224-25 (Fla. 1989) (quoting FLA. STAT. ANN. § 932.703(1) (West 1985 Cum. Supp. 1991) (emphasis added)).

287. *See, e.g., State v. One 1972 Lincoln Continental*, 295 N.W.2d 343 (S.D. 1980).

288. S.D. CODIFIED LAWS ANN. § 34-20B-70(4) (1989).

289. *One 1972 Lincoln Continental*, 295 N.W.2d at 347.

be read to state that narcoband is subject to forfeiture only if it has been used "in any manner" in substantial connection with an illegal drug transaction. Against the backdrop of the legislative history, this interpretation is an acceptable way of reading the statute. Furthermore, application of the doctrines of *noscitur a sociis* and *in pari materia* seems to negate any inference that the mere absence of the words "substantial connection" from the body of the statute automatically requires the court to fashion a liberal definition of the "facilitation" element.

6. Connotation

Noscitur a sociis means a definition can be found by connotation from surrounding or accompanying phrases.²⁹⁰ The meaning of the phrase "used in any manner to facilitate" can be determined from this method of statutory construction. The requirements of "probable cause,"²⁹¹ the so-called "innocent owner" exceptions,²⁹² the "stay" provisions²⁹³ in section 881, all point to the conclusion that Congress intended private property owners to be constitutionally protected from imprudent prosecution. These same sorts of guarantees are found in criminal forfeiture statutes, which also have *bona fide* purchaser exceptions.²⁹⁴

The Ninth Circuit expressed heightened concern about potential fifth amendment "takings" problems in the "innocent owner" context.²⁹⁵ Similarly, the Michigan legislature specifically declared that unsuspecting parties have a security interest in real property subject to forfeiture.²⁹⁶ In particular, the existence of the "innocent owner" and "stay" provisions of section 881, strongly suggests that Congress had the same constitutional concerns in mind when it drafted the facilitation language. A constitutional analysis would support a greater threshold of connection than would be required by the "in any manner" test. "The 'substantial connection' test . . . strikes the proper balance between the rights of the individual property owners and the state's need to use the weapon of forfeiture in its war on wholesale drug dealing."²⁹⁷ This balancing of interests inherent in the mechanics of civil forfeiture statutes supports the "substantial connection" standard.

290. For a discussion of the rule, see R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233 (1975); see also *Gleason v. Thaw*, 236 U.S. 558 (1915).

291. 21 U.S.C. § 881(b) (Cum. Supp. 1989).

292. 21 U.S.C. §§ 881(a)(4)(B), (a)(7) (Cum. Supp. 1989).

293. 21 U.S.C. § 881(i) (Cum. Supp. 1989).

294. See, e.g., 18 U.S.C. § 1963 (1988).

295. See *Gaudry v. United States*, 893 F.2d 1096 (9th Cir. 1990).

296. MICH. STAT. ANN. § 14.15-7521(1)(f), 7523(3) (Callaghan 1989).

297. Forfeiture of \$5,264, 432 Mich. 242, ___, 439 N.W.2d 246, 255 (1989).

7. Common Construction

Just as judicial faithfulness to the canon of *noscitur a sociis* invites courts to adopt the "substantial connection" standard, the maxim of *in pari materia* suggests an equally persuasive reason for a strict definition of the facilitation element.²⁹⁸ Statutes upon the same subject matter or relating to a common purpose should be construed together.²⁹⁹ References to other civil forfeiture statutes support this general rule. The United States Supreme Court in *United States v. Lane Motor Co.*³⁰⁰ interpreted language similar to section 881's "used to facilitate" in section 3116 of the 1939 Internal Revenue Code, although section 3116's language was broader than that of section 881.³⁰¹ The Court held that "a vehicle used solely for commuting to an illegal distillery is not used *in* violating the revenue laws."³⁰²

The Ninth Circuit, in *Simpson v. United States*,³⁰³ interpreted the meaning of 26 U.S.C. section 7302, which provides for the seizure of "any property intended for use in violating the provisions of the internal revenue laws."³⁰⁴ Justice Merrill wrote that "an automobile used only for the personal convenience of the owner as transportation to the site of the illicit operation is not subject to seizure."³⁰⁵ The *Lane Motor Co.* and *Simpson* cases support the proposition that only property which is "indispensable" to the drug deal should be subject to forfeiture. The New Hampshire federal district court, in *United States v. One 1972 Datsun*,³⁰⁶ drew upon the language in these tax statutes to support the rule that "to be forfeited [under section 881], a vehicle must have some substantial connection to . . . the underlying activity which the statute seeks to prevent."³⁰⁷ The language in the internal revenue statutes appears to require that the government show a "substantial connection" in section 881 cases, because the courts interpreted words practically identical to section 881.

Indisputably, all civil forfeiture statutes share two public policy goals underlying criminal statutes.³⁰⁸ The first goal is the separation of the drug dealer from his ill-gotten gains, and the second is the erosion of the eco-

298. For a discussion of the rule, see R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES*, 233 (1975).

299. *Undercofler v. L.C. Robinson & Sons, Inc.*, 111 Ga. App. 411, ___, 141 S.E.2d 847, 849 (1965).

300. 344 U.S. 630 (1953).

301. The section allowed forfeiture of property "intended for use in violating" the alcohol tax laws, as well as property "which has been so used." *Id.* at 630.

302. *Id.* at 630-31 (emphasis in original).

303. 272 F.2d 229 (9th Cir. 1959).

304. *Id.* at 231.

305. *Id.*

306. 378 F.2d 1200 (D.N.H. 1974).

307. *Id.* at 1206.

308. *United States v. \$152,160.00 in U.S. Currency*, 680 F. Supp. 354, 356 (D. Colo. 1988).

conomic base of the drug trade.³⁰⁹ Because forfeiture statutes share a commonality of subject matter and purpose, the individual provisions of section 881 and other federal and state statutes should be interpreted *in pari materia*. Proper construction of the statute requires a uniform interpretation of these common features. Therefore, if Congress clearly enunciates that the "substantial connection" test should be applied to "proceeds of crime," the same phrase used in other parts of section 881 should receive the same construction.

8. Considerations of Equity

Most courts recognize that not every involvement of narcoband with an illegal drug transaction should trigger forfeiture.³¹⁰ When the penalty is disproportionate to any loss which could possibly accrue to the state as a result of the owner's illegal drug activity, notions of inequity arise.³¹¹ Because forfeiture of narcoband is a harsh remedy under any circumstance, equity dictates that a greater amount of harmful contact is needed in order for the forfeiture to be justified. An equitable test for facilitation analysis would forestall some of the unjust consequences resulting from zero tolerance programs. For example, in one case, a court ordered the defendant's vehicle to be forfeited after police seized .226 grams of marijuana from a plastic bag found in the trunk.³¹² The court speculated that "it was likely the matter constituted the remains of a larger quantity of marijuana, especially in light of its location in the vehicle."³¹³ In another case, a twenty-eight foot yacht was forfeited to the United States after two leaves and a twig of marijuana were found stuck in a crevice of a board in a compartment underneath the gasoline tank, and the bilge water tested positive for marijuana.³¹⁴ Based upon the assumption that only a few drug dealers are ever caught, however, the equitable principle of proportionality competes with the notion that only disproportionate action on the part of the government can deter.

One answer to this argument is that disproportionate risks ought to be prohibited by the eighth amendment.³¹⁵ On remand from the Second Cir-

309. See *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977).

310. See *Humphery v. Humphery*, 254 Ala. 395, 48 So. 2d 424 (1950); *Kay v. Kay*, 188 Cal. App. 2d 214, 10 Cal. Rptr. 196 (1961); *Roshek Realty Co. v. Roshek Bros. Co.*, 249 Iowa 349, 87 N.W.2d 8 (1957); *Roth Dev. Co. v. A.R. John Gen. Contractor, Inc.*, 263 Or. 561, 503 P.2d 493 (1972).

311. Cf. *Fifty States Management Corp. v. Pioneer Auto Parks*, 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979).

312. *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979).

313. *Id.*

314. *United States v. One 1982 28 Foot Int'l Vessel*, 741 F.2d 1319, 1320 (11th Cir. 1984).

315. Some courts have been reluctant to apply the eighth amendment to civil forfeiture proceedings. See, e.g., *United States v. Santaro*, 866 F.2d 1538 (4th Cir. 1989); see also *Commonwealth v. One 1986 Ford Mustang*, ___ Pa. ___, 579 A.2d 958, 960 (1990) (relationship

cuit, the district court in *United States v. Regan*³¹⁶ declared the \$17.8 million asset forfeiture sought from four officers of the Princeton/Newport Partners violative of the excessive fines and cruel and unusual punishment clauses of the eighth amendment.³¹⁷ Judge Carter became the first jurist in history to vacate forfeitures on constitutional grounds.

B. *Statutory Construction*

The Texas case of *Barron v. State*³¹⁸ succinctly states the common law rule for construction of civil forfeiture statutes. "A [civil] forfeiture statute should be read in such a way as to effectuate the intent of the Legislature while at the same time, if reasonably possible, to prevent rather than cause a forfeiture."³¹⁹

Remedial acts of Congress, which "supply defects" and "abridge superfluities" in the law, generally are given liberal construction.³²⁰ Certain well-established barriers to this general application, however, do exist. Courts deem remedial statutes which operate retrospectively to abrogate pre-existing property rights to be destructive in nature.³²¹ Relation-back provisions, prevalent in forfeiture statutes since feudal times, impair vested, pre-existing property rights acquired by statute and the common law. This impairment mandates strict construction.

A number of recent decisions from the Iowa Supreme Court indicate a willingness to judicially apply strict construction and limit the police powers of the state to seize narcoband. In one case, the court ruled that police cannot seize "legitimately acquired" homes which are used in the commission of a crime.³²² In *Kaster v. State*, the court considered whether misdemeanor violations of Iowa's game and fish laws, gave rise to forfeiture of the boat.³²³ The court decided that the term "facilitate" in Iowa Code section 809.1 required a "substantial connection between the property and the crime."³²⁴

Civil forfeiture statutes, in addition, are both remedial and penal. Since the penal purpose of a civil forfeiture statute cannot be separated from

between amount of drugs and value of narcoband is immaterial).

316. 699 F. Supp. 36 (S.D.N.Y. 1988).

317. Sontag, *Princeton/Newport Case: RICO Stretched Too Far?*, Nat'l L.J., Nov. 20, 1989, at 3.

318. 746 S.W.2d 528 (Tex. Ct. App. 1988).

319. *Id.* at 530 (citing *Sheppard v. Avery*, 89 Tex. 301, ___, 34 S.W. 440, 442 (1896)).

320. *Kuriansky v. Bed-Stay Health Care Corp.*, 135 A.D.2d 160, 525 N.Y.S.2d 225 (1988).

See generally E. CRAWFORD, CONSTRUCTION OF STATUTES 492-93 (1940).

321. *Ex parte Buckley*, 53 Ala. 42 (1875).

322. See *Forfeitures Rejected*, Nat'l L.J., June 11, 1990, at 6 (no cite given in article).

323. 454 N.W.2d 876, 877. *Kaster* used a gill net to catch three fish which police found in his boat. *Id.*

324. *Id.* at 879.

its remedial counterpart,³²⁵ and since a penalty against the rights of property owners will be involved in every case, the distinction between penal and remedial has become blurred. The Tenth Circuit in *United States v. \$39,000.00 in Canadian Currency* expressed "grave concern" about separating a person from his property in "anticipation" of formal criminal proceedings.³²⁶

Remedial statutes in derogation of the common law, moreover, should be strictly construed.³²⁷ Although there is a strong common law tradition of civil forfeiture in this country, civil forfeiture statutes, like section 881, nevertheless, abrogate common law rights of free transfer and devise, or other alienation, by interfering with and encumbering a private property owner's power to freely dispose of his property. For these reasons, the United States Supreme Court has declared that forfeiture statutes must be strictly construed.³²⁸

C. *Doctrine of Lenity*

Strict rules of construction are given their pragmatic life in the form of the doctrine of lenity. Congress never recorded its views on the legal meaning of facilitation in drug felony civil forfeiture cases. The current debate between the "in any manner" jurisdictions and the "substantial connection" jurisdictions illustrates the ambiguity caused by Congress' failure to speak. Multiple interpretations of the facilitation standard are undesirable in jurisprudence.

The Eleventh Circuit's opinion in *United States v. Rivera*³²⁹ points to a solution for the problem of ambiguity in civil forfeiture statutes, a solution closely aligned with traditional canons of strict construction and lenity. To save his quarter horses, the defendant, Burgess, attempted to draw on the doctrine of lenity as it was announced in *United States v. Enmons*.³³⁰ In *Enmons*, the United States Supreme Court, reviewed a government appeal in a case involving alleged Hobbs Act violations.³³¹ Justice Stewart explained that as the Hobbs Act was "a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity."³³² Three reasons why the *Enmons* principle of strict con-

325. See *United States v. \$39,000.00 in Canadian Currency*, 801 F.2d 1210, 1218 (10th Cir. 1986).

326. *Id.* at 1219 n.7.

327. CRAWFORD, *supra* note 320, at 495.

328. *United States v. One 1936 Model Ford*, 307 U.S. 219 (1939).

329. 884 F.2d 544 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1322 (1990).

330. 410 U.S. 396 (1972).

331. 18 U.S.C. § 1951 (Cum. Supp. 1989).

332. *Enmons*, 410 U.S. at 396 (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820); *United States v. Halseth*, 342 U.S. 277, 280 (1951); *Bell v. United States*, 349 U.S. 81, 83 (1955); *Arroyo v. United States*, 359 U.S. 419, 424 (1959); *Rewis v. United States*, 401

struction is applicable to lenity include:

[1] The court will not extend the law beyond its meaning to take care of a broader legislative purpose;

[2] The court will resolve an evenly balanced uncertainty of meaning in favor of a criminal defendant, the common law, the "common right," a taxpayer, or sovereignty;

[3] Where the manifest purpose of the statute, as collaterally revealed, is narrower than its express meaning, the court will restrict application of the statute to its narrower purpose.³³³

The rule of lenity is applicable only when no clear legislative directive exists.³³⁴ Thus, in the absence of a "clearly expressed legislative intent" statutory language must not be regarded as conclusive.³³⁵ The rule of lenity is applicable to all statutes that are criminal in nature. In *Kennedy v. Mendoza-Martinez*,³³⁶ the United States Supreme Court enumerated the tests traditionally applied to determine whether a statute is penal:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned³³⁷

Interpreting the "penalties" section of the Federal Firearms Act,³³⁸ the United States Supreme Court in *United States v. One Assortment of 89 Firearms*,³³⁹ acknowledged that actions giving rise to forfeiture proceedings are criminal in nature. The Fourth Circuit explicitly stated that the punitive aspects of civil forfeiture are "self-evident."³⁴⁰ In *People v. Chicago*,³⁴¹ the Illinois Supreme Court treated the subject in a quasi-constitutional sense. The court held that a statute which creates the right to exercise a police power deserves strict construction with reasonable doubt resolved against the state. Civil forfeiture statutes are sufficiently punitive that they should be construed in favor of the property owner. The real disagreement among the circuits concerns the proper amount of con-

U.S. 808, 812 (1970)).

333. R. DICKERSON, *THE INTERPRETATION & APPLICATION OF STATUTES* 206 (1975).

334. *Rivera*, 884 F.2d at 546.

335. *See* *Russello v. United States*, 464 U.S. 16, 20 (1983).

336. 372 U.S. 144, 168-69 (1963).

337. *Id.* at 168-69.

338. 18 U.S.C. § 924(d) (Cum. Supp. 1989).

339. 465 U.S. 354, 365-66 (1983).

340. *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989).

341. 261 Ill. 16, 103 N.E. 609 (1913).

tacts between the narcoband and the drugs.

The current debate should be resolved in accordance with the doctrine of lenity. The Eleventh Circuit in *United States v. Rivera*³⁴² did not subscribe to a narrow reading of section 853 because of the obvious congressional intent expressed by section 853(o). The Second Circuit in *United States v. One 1974 Cadillac Eldorado Sedan*,³⁴³ however, characterized the "substantial connection" standard as a narrow or strict construction of the civil forfeiture statute. Similarly, the New Hampshire Supreme Court in *re* \$270,523.46 in *United States Currency*,³⁴⁴ held the government to a stricter "sufficient nexus" test. Especially when meaning is in doubt, civil forfeiture statutes should be construed most heavily against the government and in favor of the private property owner. Lenity requires a definition that would resolve the action in favor of the defendant. Such a strict construction calls for application of the "substantial connection" test.

The need to impose upon the government a heightened "substantial connection" standard for the facilitation concept is motivated as much by elementary concerns about proper judicial action and the principle of lenity, as it is by statements of clear congressional intent in the legislative history. Recognition of the "substantial connection" requirement is supported by reference to established principles of statutory construction, such as *noscitur a sociis* and *in pari materia*. "Substantial connection" is the optimal answer to the question of the appropriate meaning of facilitate in civil forfeiture actions. No other standard is as well supported by the law. Powerful reasons for applying the "substantial connection" test to civil forfeiture cases also come from the common law. In tandem with congressional intent and statutory construction, precedent must be part of judicial interpretation of the facilitation element. A pattern is discernible within the decisions of a great majority of circuits and states, including jurisdictions that purportedly adopt the "in any manner" test. Certain patterns of behavior justify forfeiture of narcoband. Courts have focused their discussion on words such as "routine," "repeated," "regular," and "delivery," and they have used phrases such as "ongoing drug business," "common scheme or plan," "length of association," "antecedent relationship," "multiple items of evidence," "combination of other persuasive evidence," "subsequent distribution," "integral significant or critical part" in the "overall" scheme of things. This level of analysis suggests an elective affinity with the "substantial connection" standard. The notion of property has always been sacred in this country. The strength of that value is supported by the "substantial connection" standard for facilitation.

342. 884 F.2d 544, 546 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1322 (1990).

343. 548 F.2d 421, 423 (2d. Cir. 1977).

344. 130 N.H. 202, 536 A.2d 1270 (1987).

A recent case from the Eleventh Circuit illustrates how courts would analyze "substantial connection" under the proposed definition. In *United States v. Approximately 50 Acres of Real Property*,³⁴⁵ the defendants never used the property as a delivery or storage site for a *specific* drug deal.³⁴⁶ The evidence indicated, however, that the property was used to negotiate and plan an essential component of a specific drug transaction that actually took place. The conspirators met regularly on the property and discussed the details of their schemes. They traveled from a house on the land to inspect a proposed aircraft landing site for importation of cocaine.³⁴⁷ The government proved a substantial connection.

III. CONCLUSION

In the war against drugs, a balance must be struck between the guilty and the innocent. That balance can be achieved through a requirement that the government show a "substantial connection" between property to be forfeited and illegal drug business. A proposed draft for model jury instructions for the Commonwealth of Virginia gives a definition of "substantial connection" as the routine, repeated, and intentional use of the narcoband to conduct the illegal manufacture, sale, distribution of a controlled substance. This definition accords with Fourth Circuit case law and with precedent from other jurisdictions.

This definition synthesizes the approaches taken by a majority of the circuits into one fair, uniform and concise standard, which ensures that the federal government will not be able to take advantage of venue laws to increase its chances of succeeding in a forfeiture action. It recognizes that narcoband which is merely "suspected" of being in "substantial connection" with illegal drug activity should be released from forfeiture. Actual "substantial connection" between the property and illegal activity must be shown. A careful examination of the legislative history, principles of statutory construction, and precedent strongly supports "substantial connection" as the correct standard for defining the facilitation element in civil forfeiture cases.

Steven S. Biss

345. 920 F.2d 900 (11th Cir. 1991).

346. *Id.* at 903.

347. *Id.*

