

114TH CONGRESS  
2D SESSION

# S. 3045

To amend title 18, United States Code, to reform certain forfeiture procedures, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JUNE 9, 2016

Mr. GRASSLEY (for himself and Mr. LEAHY) introduced the following bill;  
which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend title 18, United States Code, to reform certain forfeiture procedures, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “DUE PROCESS Act  
5       of 2016” or the “Deterring Undue Enforcement by Pro-  
6       tecting Rights of Citizens from Excessive Searches and  
7       Seizures Act of 2016”.

1 **SEC. 2. GENERAL RULES FOR CIVIL FORFEITURE PRO-**  
 2 **CEEDINGS.**

3 Section 983(a) of title 18, United States Code, is  
 4 amended—

5 (1) in the subsection heading, by striking  
 6 “COMPLAINT” and inserting “COMPLAINT; INITIAL  
 7 HEARING”;

8 (2) in paragraph (1)—

9 (A) in subparagraph (A)—

10 (i) in clause (i), by striking “60 days”  
 11 and inserting “30 days”;

12 (ii) by striking clause (ii);

13 (iii) in clause (iii)—

14 (I) in the matter preceding sub-  
 15 clause (I)—

16 (aa) by striking “60-day”  
 17 and inserting “30-day”; and

18 (bb) by striking “does not  
 19 file” and all that follows through  
 20 “obtain” and inserting “obtains”;  
 21 and

22 (II) in subclause (I), by striking  
 23 “60 days” and inserting “30 days”;

24 (iv) in clause (iv), by striking “90  
 25 days” and inserting “60 days”;

1 (v) in clause (v), by striking “60  
2 days” and inserting “30 days”; and

3 (vi) by adding at the end the fol-  
4 lowing:

5 “(vi) The notice under this subparagraph shall  
6 include an address, which shall also be widely pub-  
7 lished, at which the seizing agency can receive until  
8 5 p.m. on any business day an interested party’s  
9 claim contesting a seizure or forfeiture. The inter-  
10 ested party may send such a claim to that address  
11 by courier or overnight mail. For the purpose of de-  
12 termining compliance with any deadlines in filing  
13 such a claim, an interested party completes the filing  
14 by placing the communication making the claim in  
15 the control of an independent third-party delivery  
16 service such as a courier company or the United  
17 States mail. In determining whether any legal dead-  
18 line for the filing of such a claim has been met, a  
19 court shall allow for the equitable tolling of the  
20 deadline in appropriate cases.

21 “(vii) The seizing agency shall make publicly  
22 available for each nonjudicial forfeiture, with respect  
23 to which a request for mitigation or remission is  
24 made, a statement of the agency’s disposition of that

1 request, redacted if necessary, including the reasons  
2 for the decision.”;

3 (B) in subparagraph (C)—

4 (i) by striking “60” and inserting  
5 “30”; and

6 (ii) by striking “which period may”  
7 and all that follows through “as nec-  
8 essary,”;

9 (C) by adding at the end the following:

10 “(G) Any notice described in subparagraph (A)  
11 that is provided to a party shall include notice of—

12 “(i) the right of the party to request an  
13 initial hearing in accordance with paragraph  
14 (5);

15 “(ii) the right of the party to be rep-  
16 resented by counsel at the initial hearing de-  
17 scribed in clause (i) and any civil forfeiture pro-  
18 ceeding under a civil forfeiture statute; and

19 “(iii) the right of the party to request that  
20 the party be represented by counsel at the ini-  
21 tial hearing described in clause (i) and any civil  
22 forfeiture proceeding under a civil forfeiture  
23 statute if the party meets the requirements de-  
24 scribed in subsection (b).”; and

1 (D) by striking “nonjudicial” each place it  
2 appears;

3 (3) in paragraph (2)(A), by striking “non-  
4 judicial”;

5 (4) in paragraph (2)(B)—

6 (A) by striking “35 days” and inserting  
7 “65 days”; and

8 (B) by striking “30 days” and inserting  
9 “60 days”;

10 (5) so that subparagraph (A) of paragraph (3)  
11 reads as follows:

12 “(A) Not later than 90 days after a claim has  
13 been filed, the Government shall file a complaint for  
14 forfeiture in the manner set forth in the Supple-  
15 mental Rules for Certain Admiralty and Maritime  
16 Claims or return the property pending the filing of  
17 a complaint, except that a court in the district in  
18 which the complaint has been filed may extend the  
19 period for filing a complaint upon agreement of the  
20 parties.”; and

21 (6) by adding at the end the following:

22 “(5)(A) A party claiming property seized in a  
23 civil forfeiture proceeding under a civil forfeiture  
24 statute may request, not later than 30 days after the  
25 date on which a notice described in paragraph

1 (1)(A) is received or if notice is not received, not  
2 later than 30 days after the date of final publication  
3 of notice of seizure, an initial hearing to take place  
4 before a magistrate judge in the appropriate United  
5 States district court not later than the date on  
6 which a civil forfeiture proceeding under a civil for-  
7 feiture statute relating to the seized property com-  
8 mences.

9 “(B) If a party makes a request under subpara-  
10 graph (A), a magistrate judge shall conduct an ini-  
11 tial hearing not later than 10 days after the date on  
12 which the request is made.

13 “(C) At the initial hearing—

14 “(i) the magistrate judge shall—

15 “(I) inform the party in easily under-  
16 stood terms of—

17 “(aa) the right of the party to be  
18 represented by counsel at the initial  
19 hearing and any civil forfeiture pro-  
20 ceeding under a civil forfeiture stat-  
21 ute;

22 “(bb) the right of the party to re-  
23 quest that the party be represented by  
24 counsel at the initial hearing and any  
25 civil forfeiture proceeding under a civil

1 forfeiture statute if the magistrate  
2 judge finds that the party meets the  
3 requirements described in subsection  
4 (b);

5 “(cc) sufficiently detailed facts  
6 regarding the seizure of the property  
7 if the property was seized pursuant to  
8 a warrant described in the matter pre-  
9 ceding subparagraph (A) of section  
10 981(b)(2); and

11 “(dd) the right of the party to  
12 challenge the lawfulness of the seizure  
13 of the property, including on the  
14 grounds that at the time the property  
15 was seized—

16 “(AA) if the property was  
17 seized pursuant to a warrant de-  
18 scribed in the matter preceding  
19 subparagraph (A) of section  
20 981(b)(2), the warrant was not  
21 supported by probable cause; or

22 “(BB) if the property was  
23 seized without a warrant de-  
24 scribed in subitem (AA), none of  
25 the exceptions described in sub-

1 paragraphs (A) and (B) of sec-  
2 tion 981(b)(2) apply to the sei-  
3 zure of the property; and

4 “(II) if the party meets the require-  
5 ments described in subsection (b), author-  
6 ize counsel to represent the party or insure  
7 that the party is represented by an attor-  
8 ney for the Legal Services Corporation, as  
9 applicable, in accordance with that sub-  
10 section; and

11 “(ii) the burden of proof is on the Govern-  
12 ment to establish that at the time the property  
13 was seized—

14 “(I) if the property was seized pursu-  
15 ant to a warrant described in the matter  
16 preceding subparagraph (A) of section  
17 981(b)(2), the warrant was supported by  
18 probable cause; or

19 “(II) if the property was seized with-  
20 out a warrant described in subclause (I)—

21 “(aa) sufficiently detailed facts  
22 regarding the seizure of the property;  
23 and

24 “(bb) an exception described in  
25 subparagraphs (A) and (B) of section



1                   981(b)(2) applies to the seizure of the  
2                   property.

3                   “(D) The magistrate judge shall enter an order  
4                   for the immediate release of the seized property with  
5                   prejudice to the right of the Government to com-  
6                   mence a civil forfeiture proceeding at a later time if  
7                   the magistrate judge finds that—

8                   “(i) the requirements described in subpara-  
9                   graphs (A) through (E) of subsection (f)(1) are  
10                  met; and

11                  “(ii) the Government did not meet the bur-  
12                  den of proof described in subparagraph  
13                  (C)(ii).”.

14 **SEC. 3. REPRESENTATION.**

15                  Section 983(b) of title 18, United States Code, is  
16                  amended—

17                  (1) in paragraph (1)(A), by striking “judicial”;  
18                  and

19                  (2) in paragraph (2)(A), by striking “judicial  
20                  civil forfeiture proceeding under a civil forfeiture  
21                  statute is financially unable to obtain representation  
22                  by counsel, and the property subject to forfeiture is  
23                  real property that is being used by the person as a  
24                  primary residence” and inserting “civil forfeiture

1 proceeding under a civil forfeiture statute is finan-  
 2 cially unable to obtain representation by counsel”.

3 **SEC. 4. BURDEN OF PROOF.**

4 Section 983(c) of title 18, United States Code, is  
 5 amended—

6 (1) in paragraph (1), by striking “a preponder-  
 7 ance of the evidence” and inserting “clear and con-  
 8 vincing evidence”; and

9 (2) in paragraph (2), by striking “a preponder-  
 10 ance of the evidence” and inserting “clear and con-  
 11 vincing evidence”.

12 **SEC. 5. RIGHT TO REQUEST HEARING ON PRETRIAL RE-**  
 13 **STRAINT OF PROPERTY TO RETAIN COUNSEL**  
 14 **OF CHOICE.**

15 (a) TITLE 18.—Section 1963(d) of title 18, United  
 16 States Code, is amended—

17 (1) by striking paragraph (1) and inserting the  
 18 following:

19 “(1)(A) Upon application of the United States, the  
 20 court may enter a restraining order or injunction, require  
 21 the execution of a satisfactory performance bond, or take  
 22 any other action to preserve the availability of property  
 23 described in subsection (a) for forfeiture under this sec-  
 24 tion—

1           “(i) upon the filing of an indictment or infor-  
2           mation charging a violation of section 1962 and al-  
3           leging that the property with respect to which the  
4           order is sought would, in the event of conviction, be  
5           subject to forfeiture under this section; or

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

10           “(I) there is a substantial probability that  
11           the United States will prevail on the issue of  
12           forfeiture and that failure to enter the order  
13           will result in the property being destroyed, re-  
14           moved from the jurisdiction of the court, or  
15           otherwise made unavailable for forfeiture; and

16           “(II) the need to preserve the availability  
17           of the property through the entry of the re-  
18           quested order outweighs the hardship on any  
19           party against whom the order is to be entered.

20           “(B)(i) Upon motion of a defendant charged with a  
21           violation of section 1962 for which criminal forfeiture may  
22           be ordered under this section, supported by an affidavit,  
23           the court shall hold a hearing to determine whether to  
24           modify or rescind, in whole or in part, an order entered

1 under subparagraph (A) to allow the defendant to use the  
2 property subject to the order to retain counsel of choice.

3 “(ii) At the hearing, the court shall consider—

4 “(I) the weight of the evidence against the de-  
5 fendant with respect to the violation of section 1962  
6 for which criminal forfeiture may be ordered under  
7 this section;

8 “(II) the weight of the evidence with respect to  
9 whether the property will be subject to forfeiture  
10 under this section;

11 “(III) the history and characteristics of the de-  
12 fendant; and

13 “(IV) the nature and circumstances of the case.

14 “(C) An order entered pursuant to subparagraph  
15 (A)(ii) shall be effective for not more than 90 days, un-  
16 less—

17 “(i) extended by the court for good cause  
18 shown; or

19 “(ii) an indictment or information described in  
20 subparagraph (A)(i) has been filed.”; and

21 (2) in paragraph (2), by inserting “that the de-  
22 fendant committed a violation of section 1962 for  
23 which criminal forfeiture may be ordered under this  
24 section and probable cause to believe” after “be-  
25 lieve”.

1 (b) CONTROLLED SUBSTANCES ACT.—Section 413(e)  
2 of the Controlled Substances Act (21 U.S.C. 853(e)) is  
3 amended—

4 (1) by striking paragraph (1) and inserting the  
5 following:

6 “(1)(A) Upon application of the United States, the  
7 court may enter a restraining order or injunction, require  
8 the execution of a satisfactory performance bond, or take  
9 any other action to preserve the availability of property  
10 described in subsection (a) for forfeiture under this sec-  
11 tion—

12 “(i) upon the filing of an indictment or infor-  
13 mation charging a violation of this title or title III  
14 for which criminal forfeiture may be ordered under  
15 this section and alleging that the property with re-  
16 spect to which the order is sought would, in the  
17 event of conviction, be subject to forfeiture under  
18 this section; or

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

23 “(I) there is a substantial probability that  
24 the United States will prevail on the issue of  
25 forfeiture and that failure to enter the order

1 will result in the property being destroyed, re-  
2 moved from the jurisdiction of the court, or  
3 otherwise made unavailable for forfeiture; and

4 “(II) the need to preserve the availability  
5 of the property through the entry of the re-  
6 quested order outweighs the hardship on any  
7 party against whom the order is to be entered.

8 “(B)(i) Upon motion of a defendant charged with a  
9 violation of section 401 of the Controlled Substances Act  
10 (21 U.S.C. 841 et seq.) for which criminal forfeiture is  
11 ordered under this section, supported by an affidavit suffi-  
12 cient to demonstrate a genuine need for the defendant to  
13 use the property subject to an order entered under sub-  
14 paragraph (A) to retain counsel of choice, the court shall  
15 hold a hearing to determine whether to modify or rescind,  
16 in whole or in part, the order to allow the defendant to  
17 use the property to retain counsel of choice.

18 “(ii) At the hearing, the court shall consider—

19 “(I) the weight of the evidence against the de-  
20 fendant with respect to the violation of this title or  
21 title III for which criminal forfeiture may be ordered  
22 under this section;

23 “(II) the weight of the evidence with respect to  
24 whether the property is subject to forfeiture under  
25 this section;

1 “(III) the history and characteristics of the de-  
 2 fendant; and

3 “(IV) the nature and circumstances of the case.

4 “(C) An order entered pursuant to subparagraph  
 5 (A)(ii) shall be effective for not more than 90 days, un-  
 6 less—

7 “(i) extended by the court for good cause  
 8 shown; or

9 “(ii) an indictment or information described in  
 10 subparagraph (A)(i) has been filed.”; and

11 (2) in paragraph (2), by inserting “that the de-  
 12 fendant committed a violation of this title or title III  
 13 for which criminal forfeiture may be ordered under  
 14 this section and probable cause to believe” after “be-  
 15 lieve”.

16 **SEC. 6. RECOVERY OF ATTORNEYS FEES.**

17 Section 2465(b) of title 28, United States Code, is  
 18 amended—

19 (1) in paragraph (1), by striking “substan-  
 20 tially”; and

21 (2) by adding at the end the following:

22 “(3) If the claim is resolved by a settlement in which  
 23 the claimant prevails, the claimant is entitled to attorneys  
 24 fees under this subsection to the same extent that the  
 25 claimant would be if a judgment were issued in the pro-

ceeding for the property recovered under the settlement.  
 The payment of attorneys fees under this subsection may  
 not be waived as a part of any settlement with the claim-  
 ant. That payment is not subject to any offset or deduc-  
 tion by the United States in connection with any claim  
 the United States may have against the claimant.

“(4) For the purposes of this subsection, a claimant  
 prevails if the claimant recovers more than 50 percent,  
 by value, of the money or other property that is claimed.”.

#### **SEC. 7. ANNUAL AUDIT OF CIVIL FORFEITURES.**

The Inspector General shall annually conduct an  
 audit of a representative sample of Federal civil forfeitures  
 under statutes described in section 983(i) of title 18,  
 United States Code, to ensure those forfeitures are con-  
 stitutionally sound and consistent with the letter and spirit  
 of the law. The Department of Justice Inspector General  
 shall report the results of the audit to the Attorney Gen-  
 eral and to Congress. Such report shall also include the  
 fiscal status of the Asset Forfeiture Fund and Treasury  
 Forfeiture Fund, including any projected growth or  
 shrinking of the Funds in future years, and the viability  
 of the Funds.

#### **SEC. 8. PUBLICLY AVAILABLE DATABASES.**

(a) QUARTERLY UPDATED DATABASE ON DETAILS  
 OF FORFEITURES.—The Attorney General shall establish



1 and maintain, with updates on a quarterly basis, a publicly  
2 available database that describes with respect to seizures  
3 for all Federal civil forfeiture containing the following:

4 (1) For each such seizure:

5 (A) Unit of an agency responsible for the  
6 seizure, and the location, including at a min-  
7 imum the State, city, and judicial district where  
8 and date when the seizure took place.

9 (B) The type of initial seizure (such as  
10 during a stop based on probable cause, or pur-  
11 suant to a Federal warrant).

12 (C) The nature and value of the seized  
13 property.

14 (D) In what manner forfeiture of seized  
15 property was conducted (whether by a civil or  
16 administrative proceeding, through settlement,  
17 or otherwise).

18 (E) Whether a forfeiture of the seized  
19 property was of the entire property, or only a  
20 part, and if partial, the proportion of the whole  
21 that was forfeited.

22 (F) The disposition of the seized property,  
23 the date of forfeiture, if any, and the date the  
24 disposition took place.

1 (G) What type of criminal activity any for-  
2 feited property relates to.

3 (H) Whether any forfeited money was re-  
4 turned to the victim of a crime in connection  
5 with which the forfeiture occurred, and the  
6 amount returned.

7 (I) The status of any concurrent or related  
8 criminal proceeding against the owner of the  
9 property, any pending case under title 11 in  
10 which the owner of record of the property is the  
11 debtor, and any pending civil case in which a  
12 receiver has been ordered to take control of the  
13 property.

14 (J) Whether the forfeiture was contested.

15 (K) Whether the innocent owner made a  
16 claim on the property.

17 (L) The total expenses associated with the  
18 forfeiture.

19 (M) The total net proceeds of the for-  
20 feiture.

21 (N) Demographic information on the per-  
22 son or persons subject to the seizure.

23 (2) A statistical breakdown for each agency of  
24 the cases of remission and mitigation, including—

1 (A) the numbers of requests for remission  
2 and mitigation that were—

- 3 (i) fully granted;  
4 (ii) partially granted; or  
5 (iii) returned; and

6 (B) with respect to requests that were par-  
7 tially granted—

8 (i) the average percentage of the value  
9 of seized property that was returned to the  
10 owner; and

11 (ii) what percentage of requests re-  
12 sulted in returned property in each of the  
13 following categories:

14 (I) More than zero but less than  
15 25 percent of the property was re-  
16 turned.

17 (II) 25 percent or more of the  
18 property was returned, but less than  
19 50 percent.

20 (III) 50 percent or more of the  
21 property was returned, but less than  
22 75 percent.

23 (IV) 75 percent or more of the  
24 property was returned, but less than  
25 100 percent.

1           (3) Any money given from the Asset Forfeiture  
 2       Fund or Treasury Forfeiture Fund to State or local  
 3       law enforcement for Joint Law Enforcement Oper-  
 4       ations (commonly referred to as “JLEO”) funding,  
 5       or for any other purpose, and the name of the State  
 6       or local entity receiving that funding.

7       (b) REAL-TIME DATABASE TO ASSIST PERSONS  
 8       WHOSE PROPERTY IS SEIZED.—

9           (1) ESTABLISHMENT.—The Attorney General  
 10      shall establish and maintain, with updates on a real-  
 11      time basis, a database, organized by State and coun-  
 12      ty, with respect to each Federal seizure of real and  
 13      personal property for Federal civil forfeiture under  
 14      statutes described in section 983(i) of title 18,  
 15      United States Code.

16          (2) DESIGN.—The Attorney General shall de-  
 17      sign the database to allow any interested party, in-  
 18      cluding any owner, creditor, or lienholder, to deter-  
 19      mine whether that party has an interest in any such  
 20      property and to inform that party, and the general  
 21      public, on the specifics of how to contest each sei-  
 22      zure before the forfeiture.

23          (c) HEADS OF AGENCIES TO SUBMIT INFORMATION  
 24      FOR DATABASES.—Not less frequently than quarterly, on  
 25      a schedule determined by the Attorney General, the head

1 of each Federal agency shall submit to the Attorney Gen-  
 2 eral a report that provides, in such form as the Attorney  
 3 General may prescribe, the information the Attorney Gen-  
 4 eral is required to include in the databases established  
 5 under this section.

6 **SEC. 9. STANDARD OF PROOF RELATING TO POSSIBLY IN-**  
 7 **NOCENT OWNERS.**

8 (a) BURDEN OF PROOF.—Paragraph (3) of section  
 9 983(c) of title 18, United States Code, is amended to read  
 10 as follows:

11 “(3) if the Government’s theory of forfeiture is  
 12 that the property was used to commit or facilitate  
 13 the commission of a criminal offense, or was in-  
 14 volved in the commission of a criminal offense, the  
 15 Government shall establish by clear and convincing  
 16 evidence that—

17 “(A) there was a substantial connection  
 18 between the property and the offense; and

19 “(B) the owner of any interest in the  
 20 seized property—

21 “(i) intentionally used the property in  
 22 connection with the offense;

23 “(ii) knowingly consented to the use  
 24 of the property by another in connection  
 25 with the offense; or

1                   “(iii) knew that the property was  
2                   being used in connection with the of-  
3                   fense.”.

4           (b) INNOCENT OWNER DEFENSE.—

5                   (1) SECTION 983(d)(1).—Paragraph (1) of sec-  
6                   tion 983(d) of title 18, United States Code, is  
7                   amended to read as follows:

8                   “(1) An innocent owner’s interest in property  
9                   shall not be forfeited under any civil forfeiture stat-  
10                  ute. The Government shall have the burden of prov-  
11                  ing that the claimant is not an innocent owner by  
12                  clear and convincing evidence.”.

13                  (2) SECTION 983(d)(2)(A)(i).—Paragraph  
14                  (2)(A)(i) of section 983(d) of title 18, United States  
15                  Code, is amended by inserting “or consent to” after  
16                  “did not know of”.

17 **SEC. 10. PROPORTIONALITY.**

18           Section 983(g) of title 18, United States Code, is  
19           amended—

20                   (1) in paragraph (1), by inserting “or otherwise  
21                   disproportional to the gravity of the offense” before  
22                   the period at the end; and

23                   (2) by amending paragraph (2) to read as fol-  
24                   lows:

1           “(2) In making this determination, the court  
 2           shall consider, in addition to the analysis as to  
 3           whether the forfeiture is constitutionally excessive,  
 4           the value of the property, the seriousness of the of-  
 5           fense, the level of the claimant’s culpability in the  
 6           offense giving rise to forfeiture, the claimant’s prior  
 7           record, the claimant’s financial condition, and  
 8           whether the forfeiture statute is intended to address  
 9           the type of conduct alleged as the basis for for-  
 10          feiture.”.

11 **SEC. 11. SEARCH AND FORFEITURE OF MONETARY INSTRU-**  
 12 **MENTS.**

13          Section 5317(c) of title 31, United States Code, is  
 14          amended by striking paragraph (2) and inserting the fol-  
 15          lowing:

16               “(2) CIVIL FORFEITURE.—

17               “(A) IN GENERAL.—Any property involved  
 18               in a violation of section 5313 or 5316, or any  
 19               conspiracy to commit any such violation, and  
 20               any property traceable to any such violation or  
 21               conspiracy, may be seized and forfeited to the  
 22               United States in accordance with the proce-  
 23               dures governing civil forfeitures in money laun-  
 24               dering cases pursuant to section 981(a)(1)(A)  
 25               of title 18.

1           “(B) STRUCTURING.—Any property in-  
2           volved in a violation of section 5324, or any  
3           conspiracy to commit any such violation, and  
4           any property traceable to any such violation or  
5           conspiracy, may be seized and forfeited to the  
6           United States in accordance with the proce-  
7           dures governing civil forfeitures in money laun-  
8           dering cases pursuant to section 981(a)(1)(A)  
9           of title 18 only if the property to be seized and  
10          forfeited is derived from an illegal source or if  
11          the structuring offense was used to conceal vio-  
12          lations of other criminal laws.”.

13 **SEC. 12. EFFECTIVE DATE AND APPLICABILITY.**

14          This Act and the amendments made by this Act shall  
15          take effect on the date of the enactment of this Act and  
16          apply only with respect to seizures made on or after that  
17          date. Seizures made before that date shall continue to be  
18          governed by the law as it existed without regard to this  
19          Act or the amendments made by this Act.

○