

116TH CONGRESS
2D SESSION

S. 4861

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

IN THE SENATE OF THE UNITED STATES

OCTOBER 26 (legislative day, OCTOBER 19), 2020

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

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 “Deterring Undue En-
5 forcement by Protecting Rights Of Citizens from Exces-
6 sive Searches and Seizures Act of 2020” or the “DUE
7 PROCESS Act of 2020”.

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)—

11 (I) by striking “60 days” and in-
12 sserting “30 days”; and

13 (II) by striking “clauses (ii)
14 through (v)” and inserting “clauses
15 (iii) and (iv)”;

16 (ii) by striking clause (ii);

17 (iii) by redesignating clauses (iii)
18 through (v) as clauses (ii) through (iv), re-
19 spectively;

20 (iv) in clause (ii), as so redesign-
21 nated—

22 (I) in the matter preceding sub-
23 clause (I)—

24 (aa) by striking “60-day”
25 and inserting “30-day”; and

1 (bb) by striking “does not
2 file” and all that follows through
3 “obtain” and inserting “obtains”;
4 and

5 (II) in subclause (I), by striking
6 “60 days” and inserting “30 days”;

7 (v) in clause (iii), as so redesignated,
8 by striking “90 days” and inserting “60
9 days”;

10 (vi) in clause (iv), as so redesignated,
11 by striking “60 days” and inserting “30
12 days”; and

13 (vii) by adding at the end the fol-
14 lowing:

15 “(v) The notice under this subparagraph shall
16 include an address, which shall also be widely pub-
17 lished, at which the seizing agency can receive until
18 5 p.m. on any business day an interested party’s
19 claim contesting a seizure or forfeiture. The inter-
20 ested party may send such a claim to that address
21 by courier or overnight mail. For the purpose of de-
22 termining compliance with any deadlines in filing
23 such a claim, an interested party completes the filing
24 by placing the communication making the claim in
25 the control of an independent third-party delivery

1 service such as a courier company or the United
2 States mail. In determining whether any legal dead-
3 line for the filing of such a claim has been met, a
4 court shall allow for the equitable tolling of the
5 deadline in appropriate cases.

6 “(vi) The seizing agency shall make publicly
7 available for each nonjudicial forfeiture, with respect
8 to which a request for mitigation or remission is
9 made, a statement of the agency’s disposition of that
10 request, redacted if necessary, including the reasons
11 for the decision.”;

12 (B) in subparagraph (C)—

13 (i) by striking “60” and inserting
14 “30”; and

15 (ii) by striking “which period may”
16 and all that follows through “as nec-
17 essary,”;

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

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

21 “(i) the right of the party to request an
22 initial hearing in accordance with paragraph
23 (5);

24 “(ii) the right of the party to be rep-
25 resented by counsel at the initial hearing de-

1 scribed in clause (i) and any civil forfeiture pro-
2 ceeding under a civil forfeiture statute; and

3 “(iii) the right of the party to request that
4 the party be represented by counsel at the ini-
5 tial hearing described in clause (i) and any civil
6 forfeiture proceeding under a civil forfeiture
7 statute if the party meets the requirements de-
8 scribed in subsection (b).”; and

9 (D) by striking “nonjudicial” each place
10 the term appears;

11 (3) in paragraph (2)—

12 (A) in subparagraph (A), by striking “non-
13 judicial”; and

14 (B) in subparagraph (B)—

15 (i) by striking “35 days” and insert-
16 ing “65 days”; and

17 (ii) by striking “30 days” and insert-
18 ing “60 days”;

19 (4) by striking paragraph (3)(A), by striking
20 subparagraph (A) and inserting the following:

21 “(3)(A) Not later than 90 days after a claim has been
22 filed, the Government shall file a complaint for forfeiture
23 in the manner set forth in the Supplemental Rules for Cer-
24 tain Admiralty and Maritime Claims or return the prop-
25 erty pending the filing of a complaint, except that a court

1 in the district in which the complaint has been filed may
2 extend the period for filing a complaint upon agreement
3 of the parties.”; and

4 (5) by adding at the end the following:

5 “(5)(A) A party claiming property seized in a
6 civil forfeiture proceeding under a civil forfeiture
7 statute may request, not later than 30 days after the
8 date on which a notice described in paragraph
9 (1)(A) is received or if notice is not received, not
10 later than 30 days after the date of final publication
11 of notice of seizure, an initial hearing to take place
12 before a magistrate judge in the appropriate United
13 States district court not later than the date on
14 which a civil forfeiture proceeding under a civil for-
15 feiture statute relating to the seized property com-
16 mences.

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

21 “(C) At the initial hearing—

22 “(i) the magistrate judge shall—

23 “(I) inform the party in easily under-
24 stood terms of—

1 “(aa) the right of the party to be
2 represented by counsel at the initial
3 hearing and any civil forfeiture pro-
4 ceeding under a civil forfeiture stat-
5 ute;

6 “(bb) the right of the party to re-
7 quest that the party be represented by
8 counsel at the initial hearing and any
9 civil forfeiture proceeding under a civil
10 forfeiture statute if the magistrate
11 judge finds that the party meets the
12 requirements described in subsection
13 (b);

14 “(cc) sufficiently detailed facts
15 regarding the seizure of the property
16 if the property was seized pursuant to
17 a warrant described in the matter pre-
18 ceeding subparagraph (A) of section
19 981(b)(2); and

20 “(dd) the right of the party to
21 challenge the lawfulness of the seizure
22 of the property, including on the
23 grounds that at the time the property
24 was seized—

1 “(AA) if the property was
2 seized pursuant to a warrant de-
3 scribed in the matter preceding
4 subparagraph (A) of section
5 981(b)(2), the warrant was not
6 supported by probable cause; or

7 “(BB) if the property was
8 seized without a warrant de-
9 scribed in subitem (AA), none of
10 the exceptions described in sub-
11 paragraphs (A) and (B) of sec-
12 tion 981(b)(2) apply to the sei-
13 zure of the property; and

14 “(II) if the party meets the require-
15 ments described in subsection (b), author-
16 ize counsel to represent the party or insure
17 that the party is represented by an attor-
18 ney for the Legal Services Corporation, as
19 applicable, in accordance with that sub-
20 section; and

21 “(ii) the burden of proof is on the Govern-
22 ment to establish that at the time the property
23 was seized—

24 “(I) if the property was seized pursu-
25 ant to a warrant described in the matter

1 preceding subparagraph (A) of section
2 981(b)(2), the warrant was supported by
3 probable cause; or

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

6 “(aa) sufficiently detailed facts
7 regarding the seizure of the property;
8 and

9 “(bb) an exception described in
10 subparagraph (A) or (B) of section
11 981(b)(2) applies to the seizure of the
12 property.

13 “(D) The magistrate judge shall enter an order
14 for the immediate release of the seized property with
15 prejudice to the right of the Government to com-
16 mence a civil forfeiture proceeding at a later time if
17 the magistrate judge finds that—

18 “(i) the requirements described in subpara-
19 graphs (A) through (E) of subsection (f)(1) are
20 met; and

21 “(ii) the Government did not meet the bur-
22 den of proof described in subparagraph
23 (C)(ii).”.

1 **SEC. 3. REPRESENTATION.**

2 Section 983(b) of title 18, United States Code, is
3 amended—

4 (1) in paragraph (1)(A), by striking “judicial”;
5 and

6 (2) in paragraph (2)(A), by striking “judicial
7 civil forfeiture proceeding under a civil forfeiture
8 statute is financially unable to obtain representation
9 by counsel, and the property subject to forfeiture is
10 real property that is being used by the person as a
11 primary residence” and inserting “civil forfeiture
12 proceeding under a civil forfeiture statute is finan-
13 cially unable to obtain representation by counsel”.

14 **SEC. 4. BURDEN OF PROOF.**

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

17 (1) in paragraph (1), by striking “a preponder-
18 ance of the evidence” and inserting “clear and con-
19 vincing evidence”; and

20 (2) in paragraph (2), by striking “a preponder-
21 ance of the evidence” and inserting “clear and con-
22 vincing evidence”.

1 **SEC. 5. RIGHT TO REQUEST HEARING ON PRETRIAL RE-**
2 **STRAINT OF PROPERTY TO RETAIN COUNSEL**
3 **OF CHOICE.**

4 (a) TITLE 18.—Section 1963 of title 18, United
5 States Code, is amended—

6 (1) by striking subsection (d)(1) and inserting
7 the following:

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

14 “(i) upon the filing of an indictment or infor-
15 mation charging a violation of section 1962 and al-
16 leging that the property with respect to which the
17 order is sought would, in the event of conviction, be
18 subject to forfeiture under 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
26 will result in the property being destroyed, re-

1 moved from the jurisdiction of the court, or
2 otherwise made unavailable for forfeiture; and

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

7 “(B)(i) Upon motion of a defendant charged with a
8 violation of section 1962 for which criminal forfeiture may
9 be ordered under this section, supported by an affidavit,
10 the court shall hold a hearing to determine whether to
11 modify or rescind, in whole or in part, an order entered
12 under subparagraph (A) to allow the defendant to use the
13 property subject to the order to retain counsel of choice.

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

15 “(I) the weight of the evidence against the de-
16 fendant with respect to the violation of section 1962
17 for which criminal forfeiture may be ordered under
18 this section;

19 “(II) the weight of the evidence with respect to
20 whether the property will be subject to forfeiture
21 under this section;

22 “(III) the history and characteristics of the de-
23 fendant; and

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

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

4 “(i) extended by the court for good cause
5 shown; or

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

8 (2) in subsection (d)(2), by inserting “that the
9 defendant committed a violation of section 1962 for
10 which criminal forfeiture may be ordered under this
11 section and probable cause to believe” after “be-
12 lieve”.

13 (b) CONTROLLED SUBSTANCES ACT.—Section 413 of
14 the Controlled Substances Act (21 U.S.C. 853) is amend-
15 ed—

16 (1) by striking subsection (e)(1) and inserting
17 the following:

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

24 “(i) upon the filing of an indictment or infor-
25 mation charging a violation of this title or title III

1 for which criminal forfeiture may be ordered under
2 this section and alleging that the property with re-
3 spect to which the order is sought would, in the
4 event of conviction, be subject to forfeiture under
5 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 401 for which criminal forfeiture is or-
22 dered under this section, supported by an affidavit suffi-
23 cient to demonstrate a genuine need for the defendant to
24 use the property subject to an order entered under sub-
25 paragraph (A) to retain counsel of choice, the court shall

1 hold a hearing to determine whether to modify or rescind,
2 in whole or in part, the order to allow the defendant to
3 use the property to retain counsel of choice.

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

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

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

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

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

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

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

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

22 (2) in subsection (e)(2), by inserting “that the
23 defendant committed a violation of this title or title
24 III for which criminal forfeiture may be ordered

1 under this section and probable cause to believe”
2 after “believe”.

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

4 Section 2465(b) of title 28, United States Code, is
5 amended—

6 (1) in paragraph (1), in the matter preceding
7 subparagraph (A), by striking “substantially”; and

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

9 “(3) If the claim is resolved by a settlement in which
10 the claimant prevails, the claimant is entitled to attorneys
11 fees under this subsection to the same extent that the
12 claimant would be if a judgment were issued in the pro-
13 ceeding for the property recovered under the settlement.
14 The payment of attorneys fees under this subsection may
15 not be waived as a part of any settlement with the claim-
16 ant. That payment is not subject to any offset or deduc-
17 tion by the United States in connection with any claim
18 the United States may have against the claimant.

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

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

23 (a) IN GENERAL.—The Inspector General of the De-
24 partment of Justice shall annually conduct an audit of a
25 representative sample of Federal civil forfeitures under

1 statutes described in section 983(i) of title 18, United
2 States Code, to ensure those forfeitures comply with the
3 Constitution of the United States and all other applicable
4 Federal laws.

5 (b) REPORT.—The Inspector General of the Depart-
6 ment of Justice shall submit to the Attorney General and
7 to Congress a report on the results of the audit required
8 under subsection (a), which shall include the fiscal status
9 of the Department of Justice Assets Forfeiture Fund and
10 Treasury Forfeiture Fund, including any projected growth
11 or reduction of amounts in the funds in future years, and
12 the viability of the funds.

13 **SEC. 8. PUBLICLY AVAILABLE DATABASES.**

14 (a) QUARTERLY UPDATED DATABASE ON DETAILS
15 OF FORFEITURES.—The Attorney General shall establish
16 and maintain, with updates on a quarterly basis, a publicly
17 available database that describes with respect to seizures
18 for all Federal civil forfeiture containing the following:

19 (1) For each such seizure:

20 (A) Unit of an agency responsible for the
21 seizure, and the location, including at a min-
22 imum the State, city, and judicial district where
23 and date when the seizure took place.

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

4 (C) The nature and value of the seized
5 property.

6 (D) In what manner forfeiture of seized
7 property was conducted (whether by a civil or
8 administrative proceeding, through settlement,
9 or otherwise).

10 (E) Whether a forfeiture of the seized
11 property was of the entire property, or only a
12 part, and if partial, the proportion of the whole
13 that was forfeited.

14 (F) The disposition of the seized property,
15 the date of forfeiture, if any, and the date the
16 disposition took place.

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

19 (H) Whether any forfeited money was re-
20 turned to the victim of a crime in connection
21 with which the forfeiture occurred, and the
22 amount returned.

23 (I) The status of any concurrent or related
24 criminal proceeding against the owner of the
25 property, any pending case under title 11,

1 United States Code, in which the owner of
2 record of the property is the debtor, and any
3 pending civil case in which a receiver has been
4 ordered to take control of the property.

5 (J) Whether the forfeiture was contested.

6 (K) Whether the innocent owner made a
7 claim on the property.

8 (L) The total expenses associated with the
9 forfeiture.

10 (M) The total net proceeds of the for-
11 feiture.

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

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

16 (A) the number of requests for remission
17 and mitigation that were—

18 (i) fully granted;

19 (ii) partially granted; or

20 (iii) returned; and

21 (B) with respect to requests that were par-
22 tially granted—

23 (i) the average percentage of the value
24 of seized property that was returned to the
25 owner; and

1 (ii) what percentage of requests re-
2 sulted in—

3 (I) less than 25 percent of the
4 property returned;

5 (II) not less than 25 percent and
6 less than 50 percent of the property
7 returned;

8 (III) not less than 50 percent
9 and less than 75 percent of the prop-
10 erty returned; and

11 (IV) not less than 75 percent of
12 the property returned.

13 (3) Any money given from the Department of
14 Justice Asset Forfeiture Fund or Treasury For-
15 feiture Fund to State or local law enforcement for
16 joint law enforcement operations funding, or for any
17 other purpose, and the name of the State or local
18 entity receiving that funding.

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

21 (1) ESTABLISHMENT.—The Attorney General
22 shall establish and maintain, with updates on a real-
23 time basis, a database, organized by State and coun-
24 ty, with respect to each Federal seizure of real and
25 personal property for Federal civil forfeiture under

1 statutes described in section 983(i) of title 18,
2 United States Code.

3 (2) DESIGN.—The Attorney General shall de-
4 sign the database to allow any interested party, in-
5 cluding any owner, creditor, or lienholder, to deter-
6 mine whether that party has an interest in any such
7 property and to inform that party, and the general
8 public, on the specifics of how to contest each sei-
9 zure before the forfeiture.

10 (c) HEADS OF AGENCIES TO SUBMIT INFORMATION
11 FOR DATABASES.—Not less frequently than quarterly, on
12 a schedule determined by the Attorney General, the head
13 of each Federal agency shall submit to the Attorney Gen-
14 eral a report that provides, in such form as the Attorney
15 General may prescribe, the information the Attorney Gen-
16 eral is required to include in the databases established
17 under this section.

18 **SEC. 9. STANDARD OF PROOF RELATING TO POSSIBLY IN-**
19 **NOCENT OWNERS.**

20 (a) BURDEN OF PROOF.—Section 983(c) of title 18,
21 United States Code, is amended by striking paragraph (3)
22 and inserting the following:

23 “(3) if the Government’s theory of forfeiture is
24 that the property was used to commit or facilitate
25 the commission of a criminal offense, or was in-

1 volved in the commission of a criminal offense, the
2 Government shall establish by clear and convincing
3 evidence that—

4 “(A) there was a substantial connection
5 between the property and the offense; and

6 “(B) the owner of any interest in the
7 seized property—

8 “(i) intentionally used the property in
9 connection with the offense;

10 “(ii) knowingly consented to the use
11 of the property by another in connection
12 with the offense; or

13 “(iii) knew that the property was
14 being used in connection with the of-
15 fense.”.

16 (b) INNOCENT OWNER DEFENSE.—Section 983(d) of
17 title 18, United States Code, is amended—

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

20 “(1) An innocent owner’s interest in property
21 shall not be forfeited under any civil forfeiture stat-
22 ute. The Government shall have the burden of prov-
23 ing that the claimant is not an innocent owner by
24 clear and convincing evidence.”; and

1 (2) in paragraph (2)(A)(i), by inserting “or
2 consent to” after “know of”.

3 **SEC. 10. PROPORTIONALITY.**

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

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

9 (2) by striking paragraph (2) and inserting the
10 following:

11 “(2) In making this determination, the court
12 shall consider, in addition to the analysis as to
13 whether the forfeiture is constitutionally excessive,
14 the value of the property, the seriousness of the of-
15 fense, the level of the claimant’s culpability in the
16 offense giving rise to forfeiture, the claimant’s prior
17 record, the claimant’s financial condition, and
18 whether the forfeiture statute is intended to address
19 the type of conduct alleged as the basis for for-
20 feiture.”.

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

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

1 “(2) CIVIL FORFEITURE.—

2 “(A) IN GENERAL.—Any property involved
3 in a violation of section 5313 or 5316, or any
4 conspiracy to commit any such violation, and
5 any property traceable to any such violation or
6 conspiracy, may be seized and forfeited to the
7 United States in accordance with the proce-
8 dures governing civil forfeitures in money laun-
9 dering cases pursuant to section 981(a)(1)(A)
10 of title 18.

11 “(B) STRUCTURING.—Any property in-
12 volved in a violation of section 5324, or any
13 conspiracy to commit any such violation, and
14 any property traceable to any such violation or
15 conspiracy, may be seized and forfeited to the
16 United States in accordance with the proce-
17 dures governing civil forfeitures in money laun-
18 dering cases pursuant to section 981(a)(1)(A)
19 of title 18 only if the property to be seized and
20 forfeited is derived from an illegal source or if
21 the structuring offense was used to conceal vio-
22 lations of other criminal laws.”.

1 **SEC. 12. APPLICABILITY.**

2 This Act and the amendments made by this Act shall
3 apply only with respect to seizures made on or after the
4 date of enactment of this Act.

○