

## ARTICLES

### ENSURING EFFECTIVE TOOLS FOR A CHALLENGING TASK: AMENDING THE ANIMAL WELFARE ACT'S ANIMAL FIGHTING VENTURE CIVIL ASSET FORFEITURE PROVISION

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## ENSURING EFFECTIVE TOOLS FOR A CHALLENGING TASK: AMENDING THE ANIMAL WELFARE ACT’S ANIMAL FIGHTING VENTURE CIVIL ASSET FORFEITURE PROVISION

Rebecca J. Huss\*

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## I. INTRODUCTION

As with any illegal activity, it is difficult to accurately determine the number of people involved in animal fighting in the United States. However, animal advocacy organizations estimate that tens of thousands of people are involved in dog fighting across the country.<sup>1</sup> Dogfighting is found in every region and appears to be a thriving industry.<sup>2</sup> Other criminal activities often are associated with animal fighting, including crimes relating to illegal gambling, drugs, and weapons.<sup>3</sup> Because the animals used in these crimes often live in inhumane living conditions or are otherwise abused, the cruelty and violence associated with animal fighting does not end with the individual event.<sup>4</sup>

The number of dogs involved in each animal fighting prosecution varies. It might be just a few at a single site or hundreds of dogs at locations in multiple states.<sup>5</sup>

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<sup>1</sup> *Dogfighting FAQ*, ASPCA PROFESSIONAL, <http://www.aspcapro.org/resource/disaster-cruelty-animal-cruelty-animal-fighting/dogfighting-faq#who> [hereinafter ASPCA, *Dogfighting*] (last visited Feb. 25, 2017).

<sup>2</sup> See Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL'Y 1, 19–21 (discussing the increase of dog fighting and stating “the increase in dogfighting at all levels has raised concern among legislators, resulting in more stringent prohibitions against the activity”); Jason Dearen, *Dogfighting Thriving Underground, with Big Money at Stake*, USA TODAY (Nov. 22, 2014, 2:40 PM), <http://www.usatoday.com/story/news/nation/2014/11/22/fighting-dogfighting/19404109/>.

<sup>3</sup> Ortiz, *supra* note 2, at 50–54 (discussing the connection between dogfighting and other criminal offenses, including gang offenses); ASPCA, *Dogfighting*, *supra* note 1; U.S. DEP'T OF AGRIC., ANIMAL CARE BACKGROUNDER: THE ANIMAL WELFARE ACT PROVISIONS ON ANIMAL FIGHTING (2011), [https://www.aphis.usda.gov/publications/animal\\_welfare/2011/dogfighting.pdf](https://www.aphis.usda.gov/publications/animal_welfare/2011/dogfighting.pdf) [hereinafter USDA ANIMAL CARE BACKGROUNDER] (stating “[a]nimal fighting circles can be extremely dangerous, often including other illegal activities such as drugs, firearms, and gambling”).

<sup>4</sup> United States Sentencing Commission, Sentencing Guidelines for United States Courts, 81 Fed. Reg. 27262, 27264–65 (May 5, 2016) [hereinafter Sentencing Guidelines]. The amendments increase the base offense level for offenses involving an animal fighting venture. *Id.* at 27265. One reason is because of the increase in maximum penalties, but another is because such an increased base offense level

better accounts for the cruelty and violence that is characteristic of these crimes, as reflected in the extensive public comment and testimony noting that a defeated animal is often severely injured or killed during or after a fight and that the animals used in these crimes are commonly exposed to inhumane living conditions or other forms of neglect.

*Id.* at 27265; see also Ortiz, *supra* note 2, at 40–41 (discussing the living conditions and treatment of many animals subject to dogfighting).

<sup>5</sup> Neil Katz, *Inside America's Biggest Dog Fighting Bust*, CBS NEWS (July 9, 2009, 7:40 PM), <http://www.cbsnews.com/news/inside-americas-biggest-dog-fighting-bust/> (discussing the seizure of more than 350 dogs in five states in what was described as the “largest simultaneous raid of dog-fighting

The seizure of animals is complicated by the fact that, although animals are considered property under the law, they are sentient beings.

This Article focuses on issues that arise when law enforcement is considering seizing animals that may be part of an animal fighting operation.<sup>6</sup> Obviously, making certain that the laws are adequately structured to deter the wrongful conduct is paramount. In the event of such abuse occurring, the primary purpose of impoundment is to be able to remove an animal from the situation immediately and ensure that a wrongdoer does not regain custody of the animal through prompt transfer of legal title.<sup>7</sup> Another issue that must be addressed is that the housing and

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operations in the U.S.”). The July 2009 dog fighting raid eventually became known as the *Missouri 500* case (with the number of dogs increasing because of puppies being born). Scott Johnson, *367 Dogs Rescued in Raids of Dog-Fighting Operations*, USA TODAY (Aug. 27, 2013, 8:51 AM) (discussing what was thought to be the second largest dog fighting raid in multiple states and referencing the *Missouri 500*).

<sup>6</sup> This Article is not going to address an issue that may be a significant focus of law enforcement personnel: the animals themselves may serve as evidence in any possible criminal proceeding, and law enforcement must take the necessary steps to ensure that wrongdoers are prosecuted consistent with due process rights. Am. B. Ass’n Resolution 108(B) (2011), <http://www.americanbar.org/content/dam/aba/administrative/tips/alc/ABASeizedAnimalsRecommendationandReportAdoptedFeb2011.authcheckdam.pdf> [hereinafter ABA Resolution] The American Bar Association Resolution and report discusses effective evidence collection. *Id.* at 1. Evidence collection at animal fighting or other cruelty scenes parallels evidence collection at other crime scenes and includes photographs, video, and DNA evidence. *Id.* at 2; *see also* MELINDA D. MERCK, VETERINARY FORENSICS: ANIMAL CRUELTY INVESTIGATIONS 17–35, 247–50 (2d ed. 2012) (discussing evidence collection generally and for animal fighting investigations). The animals must be identified at the scene in a way that will carry forward through proceedings that may take months or even years. ABA Resolution, *supra*, at 3 (suggesting that animals be photographed with an identification number or fitted with an identification band). Due to cost and the intrusive—though minimally invasive—nature of the procedure, inserting an identification microchip into each animal at this point in the process is unlikely. Although, if animals are transferred from the initial intake facility, depending on the animals’ legal status at the time, microchipping may be warranted. *Id.* Veterinary attention after impoundment is necessary for “[p]reserving the evidence” as well as to address any conditions causing the animals distress. *Id.* Especially in the case of an animal that may be returned to an original owner, it is necessary to take steps to ensure that the animal’s health does not deteriorate. *Id.* This also includes making certain that there is humane and appropriate confinement of the animals—again considering the fact that the animals may be confined for extended periods of time. *Id.* at 4. Note it is not necessary to hold an animal for evidentiary purposes until trial given the animal’s condition should improve when provided good care. Madeline Bernstein & Barry M. Wolf, *Time to Feed the Evidence: What to Do with Seized Animals*, 35 ENVTL. L. REP. 10679, 10681–82 (2005).

<sup>7</sup> The focus of this Article is on the transfer of title of the animals rather than the initial impoundment of animals. *See infra* notes 38–98 and accompanying text (discussing the role of asset forfeiture in transferring title). The author was appointed by the Eastern District of Virginia as the Guardian/Special Master in the *Bad Newz Kennels* civil asset forfeiture case to make a recommendation regarding the disposition of the dogs that were seized by the federal government in that case. Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008). One of the questions that the author frequently was asked after the *Michael Vick/Bad Newz Kennels* cases

care of these animals during the course of the legal proceedings can be costly.<sup>8</sup>

The purpose of this Article is to consider the delicate balance between supporting the seizure and rehoming of dogs who have been subjected to abuse and due process concerns.<sup>9</sup> The Article begins by tracing the history of the Animal Welfare Act (“AWA”), focusing on the animal fighting provision to put the issue of prosecuting animal fighting ventures at the federal level in context.<sup>10</sup> The Article continues by discussing the general structure of asset forfeiture provisions under

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in 2007 was why the federal government was unable to seize the property where the alleged criminal activity occurred. Although the *dogs* on the property were subject to the civil asset forfeiture provision of the federal Animal Welfare Act (“AWA”), the real property where the dogs were kept and where animal fighting allegedly occurred was not allowed to be seized pursuant to the AWA provision. *See infra* notes 151–64 and accompanying text (discussing AWA asset forfeiture provision).

<sup>8</sup> A goal for animal advocates is that the animals be treated with respect and individually evaluated to determine their disposition. Motion for First Order as to Disposition at 1–2, *United States v. Approx. 53 Pit Bulldogs*, No. 3:07CV397 (E.D. Va. Oct. 1, 2007) [hereinafter *U.S. v. Approx. 53 Pit Bulldogs Motion*] (describing the actions of a team of certified animal behavior experts that evaluated the dogs involved in the *Bad Newz Kennels* case); *see also* Arin Greenwood, *These Dogs Were Rescued Out of Fighting. They Became the Happiest, Most Inspiring Pets Alive*, HUFFINGTON POST (Aug. 25, 2015, 9:38 AM), [http://www.huffingtonpost.com/entry/these-dogs-were-rescued-out-of-fighting-now-theyre-the-happiest-most-inspiring-pets-alive\\_us\\_55d2210be4b055a6dab0f730](http://www.huffingtonpost.com/entry/these-dogs-were-rescued-out-of-fighting-now-theyre-the-happiest-most-inspiring-pets-alive_us_55d2210be4b055a6dab0f730) (providing stories of dogs rescued out of various fighting situations).

<sup>9</sup> This Article has been written with the premise that removing dogs from situations where they allegedly have been involved in animal fighting is in the best interests of the animals. There is a valid concern that some of the dogs will not survive the process either due to a dog being injured or ill when seized or while being held, a determination that an individual dog is aggressive and should be euthanized, or a lack of appropriate rehoming options. *E.g.*, Motion to Dismiss Eight (8) Seized Dogs as Defendants, *United States v. Approx. 64 Dogs*, No. 4:16CV04074 (C.D. Ill. Dec. 15, 2016) (reporting that two seized dogs in the case had died after filing the complaint but before disposition was ordered); First Order as to Disposition, *United States v. Approx. 53 Pit Bulldogs*, No. 3:07CV397 (E.D. Va. Oct. 1, 2007) (ordering a seized dog euthanized because experts assessed the dog was aggressive); Allie Arnell, *27 Fighting Dogs Forfeited to Government*, QCONLINE.COM (Dec. 8, 2016), [http://www.qconline.com/news/crime/fighting-dogs-forfeited-to-government/article\\_7dea0b41-33e1-5756-af60-0b9e93208574.html](http://www.qconline.com/news/crime/fighting-dogs-forfeited-to-government/article_7dea0b41-33e1-5756-af60-0b9e93208574.html) (reporting that two other dogs involved in this same Illinois case will be euthanized because they displayed “extreme aggression”). There are also still several state code provisions that deem dangerous or vicious any dog that has been owned for the purpose of dog fighting or has been trained for fighting. *See, e.g.*, COLO. REV. STAT. § 18-9.204.5(2)(b)(III) (2016) (“engages in or is trained for animal fighting”); S.C. CODE ANN. § 47-3-710(A)(3) (2016) (“owned or harbored primarily or in part for the purpose of fighting or which is trained for fighting”). Animal activists have been successful in reducing the number of states with these types of provisions to provide dogs seized in animal fighting situations the opportunity to be considered for rehoming just like any dog that is in a shelter. For example, the State of California enacted legislation in 2016 removing language from Section 31603 of the Food and Agricultural Code that previously defined dogs seized pursuant to specified animal cruelty laws as vicious dogs. Assemb. B. 1825, Cal. Legis. 2015–2016 Reg. Sess. (Cal. 2016).

<sup>10</sup> *Infra* notes 15–35 and accompanying text.

federal law.<sup>11</sup> Asset forfeiture provisions are controversial, and the Article will consider arguments made by both proponents and opponents of these laws, as well as recent legislation addressing some of those concerns.<sup>12</sup> The Article then focuses on the federal civil asset forfeiture provision of the AWA and recent legislation that specifically targets this provision.<sup>13</sup> The Article concludes with recommendations for passing proposed legislation relating to civil asset forfeiture and cost reimbursement provisions that would serve to support the prosecution of animal fighting ventures.<sup>14</sup>

## II. BRIEF HISTORY OF THE ANIMAL WELFARE ACT

The law that is now known as the Animal Welfare Act was enacted in 1966 to “protect the owners of dogs and cats from theft of such pets, to prevent the sale or use of dogs and cats which have been stolen, and to ensure that certain animals intended for use in research facilities are provided humane care.”<sup>15</sup> In 1970, the statute was amended to expand the list of animals used in experimentation that are covered by the AWA and to cover persons and entities exhibiting animals to the public.<sup>16</sup>

Legislation in 1976 added Section 2156 making it “unlawful for any person to knowingly sponsor or exhibit any animal in any animal fighting venture to which any animal was moved in interstate or foreign commerce.”<sup>17</sup> (Note: 7 U.S.C. § 2156 is also referred to as Section 26 of the Animal Welfare Act.) The 1976 amendment also made it unlawful to buy, sell, transport, or deliver such an animal or to use instruments of interstate commerce for promoting or furthering an animal fighting

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<sup>11</sup> *Infra* notes 38–98 and accompanying text.

<sup>12</sup> *Infra* notes 99–150 and accompanying text.

<sup>13</sup> *Infra* notes 151–212 and accompanying text.

<sup>14</sup> *Infra* notes 213–21 and accompanying text.

<sup>15</sup> Act of Aug. 24, 1966, Pub. L. No. 89-544, 80 Stat. 350. For a more expansive discussion of the history of the Animal Welfare Act, see Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13 (2006). The U.S. Department of Agriculture’s National Agricultural Library has legislative history regarding the AWA on its website. ANIMAL WELFARE INFO. CTR., *Legislative History of the Animal Welfare Act: Table of Contents*, U.S. DEP’T AGRIC.: NAT’L AGRIC. LIBRARY, <https://awic.nal.usda.gov/legislative-history-animal-welfare-act-table-contents> (last updated June 2014).

<sup>16</sup> Animal Welfare Act of 1970, Pub. L. 91-579, sec. 3, § 2(g)-(h), 84 Stat. 1560, 1561 (current version at 7 U.S.C. § 2132(g)-(h) (2012)).

<sup>17</sup> Animal Welfare Amendments of 1976, Pub. L. 94-279, sec. 17, § 26(a), 90 Stat. 417, 421 (current version at 7 U.S.C. § 2156(a)).

venture.<sup>18</sup> The 1976 language included an exception for animal fighting with birds if such activity was legal under state law.<sup>19</sup> Violation of these provisions resulted in a fine of not more than \$5,000 and/or imprisonment of not more than one year for each violation.<sup>20</sup> The section of the AWA that is the focus of this Article (costs and forfeiture under subsection (f)) was included in the 1976 amendments.<sup>21</sup>

The provision in the AWA relating to animal fighting remained static for twenty-five years. Amendments in 1985 focused on improving standards of care for laboratory animals.<sup>22</sup> The AWA was amended in 1990 to provide a holding period at shelters before dogs and cats could be sold to dealers.<sup>23</sup> In 2002, the AWA was amended to effectively exclude birds, rats, and mice from the definition of animal regulated for the purposes of research.<sup>24</sup>

Amendments in 2002 changed the language that did not make it unlawful to sponsor or exhibit a bird in an animal fighting venture that is legal under state law.<sup>25</sup> These amendments restricted that exception to circumstances where the person did not have knowledge that any bird in the animal fighting venture was bought, sold, or transported in interstate or foreign commerce.<sup>26</sup> The sentence listing the actions that are unlawful (buy, sell, transport, deliver, or receive) was slightly changed.<sup>27</sup> The amount of a fine allowed for violation of the provision was also increased to \$15,000.<sup>28</sup>

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<sup>18</sup> § 26(b), 90 Stat. at 421 (current version at 7 U.S.C. § 2156(b)).

<sup>19</sup> § 26(d), 90 Stat. at 422 (current version at 7 U.S.C. § 2156(d)).

<sup>20</sup> § 26(e), 90 Stat. at 422 (amended 2007).

<sup>21</sup> § 26(f), 90 Stat. at 422 (current version at 7 U.S.C. § 2156(f)).

<sup>22</sup> Food Security Act of 1985, Pub. L. 99-198, §§ 1751–1759, 99 Stat. 1354, 1645–1650.

<sup>23</sup> Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. 101-624, § 28(a)(1), 104 Stat. 3359, 4066 (codified at 7 U.S.C. § 2158(a)(1) (2012)).

<sup>24</sup> Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, sec. 10301, § 2(g), 116 Stat. 134, 491 (codified at 7 U.S.C. § 2132(g)). The sections relating to animals and the Animal Welfare Act are found at §§ 10301–10305.

<sup>25</sup> Sec. 10302(a)(1), § 26(a)(2), 116 Stat. at 492 (codified at 7 U.S.C. § 2156(a)(3)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Sec. 10303(a)(1).



The Animal Fighting Prohibition Enforcement Act of 2007 added a prohibition against the interstate commerce of knives, gaffs, or other sharp instruments used on the legs of birds in animal fighting.<sup>29</sup> It also moved the penalties for violations of the animal fighting provision to a criminal code section of the United States Code, increasing the penalties for such violations to fines of up to \$250,000 and/or three years imprisonment.<sup>30</sup>

In 2008, the penalty for violation of the animal fighting prohibition was increased to up to five years imprisonment and/or a fine of up to \$250,000.<sup>31</sup> The definition of “animal fighting venture” was changed,<sup>32</sup> and the prohibition now includes language regarding possession and training.<sup>33</sup>

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<sup>29</sup> Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110-22, sec. 3, § 26(e), 121 Stat. 88, 88 (codified at 7 U.S.C. § 2156(e)).

<sup>30</sup> § 26(i), 121 Stat. at 89 (codified at 7 U.S.C. § 2156(j)). By moving the penalty provision of 7 U.S.C. § 2156 to 18 U.S.C. § 49, the fine provision in Title 18 is now applied to these cases. 18 U.S.C. § 49 (2012). That section states that those violating the provisions of 7 U.S.C. § 2156 “shall be fined under this title.” *Id.* The fines for individuals for Title 18 are set out in § 3571 (Sentence of Fine). § 3571(b). For a felony the amount of the fine is not more than \$250,000; for a Class A misdemeanor that does not result in death the fine is no more than \$100,000. *Id.* The classification of the offense (if not specified by letter grade in the offense) is classified by the maximum term of imprisonment. § 3559(a). One year or less but more than six months is classified as a Class A misdemeanor. § 3559(a)(6). Less than five years but more than one year is a Class E felony. § 3559(a)(5). Note that a subsection of 18 U.S.C. § 3571 also provides an alternative fine based on pecuniary gain or loss that could allow a defendant to be fined no more than twice the gross gain (or loss). § 3571(d). At the time of the *Bad Newz Kennels* case, the penalty under the AWA was limited to imprisonment of one year or less; in 2007 Mr. Vick was charged under 18 U.S.C. § 371 (conspiracy), which provided for up to three years of imprisonment. Indictment, *United States v. Michael Vick a/k/a “Ookie,”* No. 3:07CR 274 (E.D. Va. July 17, 2007).

<sup>31</sup> Food Conservation and Energy Act of 2008, Pub. L. 110-234, sec. 14207(b), § 49(a), 122 Stat. 923, 1462. The 2008 amendments also added language regulating the importation of live dogs into the United States for resale purposes. Sec. 14210, § 18, 122 Stat. at 1464 (codified at 7 U.S.C. § 2148).

<sup>32</sup> Currently, animal fighting venture is defined as:

[A]ny event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment, except that the term “animal fighting venture” shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal.

7 U.S.C.A. § 2156(g)(1) (West 2016).

<sup>33</sup> The language now states it “shall be unlawful for any person to knowingly sell, buy, possess, train, transport, deliver, or receive any animal for purposes of having the animal participate in an animal fighting venture.” 7 U.S.C.A. § 2156(b) (West 2016).

In 2014, the AWA was amended to add a prohibition on attendance at an animal fight or causing an individual younger than sixteen years of age to attend an animal fight.<sup>34</sup> Attending an animal fight can result in a fine of up to \$100,000 and/or imprisonment of not more than one year, and causing an individual under sixteen years of age to attend an animal fight can result in a fine of \$250,000 and/or imprisonment of not more than three years.<sup>35</sup>

Note that 18 U.S.C. § 3663 allows for a court to order restitution “in any criminal case to the extent agreed to by the parties in a plea agreement.”<sup>36</sup> In the *Bad Newz Kennels* case, the plea agreement in the associated criminal case provided that Mr. Vick would “make restitution for the full amount of the costs associated with the disposition of all dogs” which were subject to the civil action known as *United States v. Approximately 53 Pit Bull Dogs*.<sup>37</sup>

The next Section discusses the structure of asset forfeiture under federal law. Asset forfeiture results in legal title to property being transferred.<sup>38</sup> In other words, the initial impoundment of animals is not the focus of these provisions; asset forfeiture results in the transfer of title to the government.<sup>39</sup> After title has been

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<sup>34</sup> Agricultural Act of 2014, Pub. L. 113-79, sec. 12308(b)(1), § 26(a)(2), 128 Stat. 649, 991 (codified at 7 U.S.C. § 2156 (a)(2)).

<sup>35</sup> Sec. 12308(b)(2), § 49(c), 128 Stat. at 991 (codified at 18 U.S.C. § 49(c)). Amendments to the U.S. Sentencing Commission sentencing guidelines reflect the increased maximum penalties available for violations of the AWA provision. Sentencing Guidelines, *supra* note 4, at 27264–65 (increasing the base offense level for offenses involving an animal fighting venture).

<sup>36</sup> 18 U.S.C. § 3663(a)(3) (2012).

<sup>37</sup> Government’s Motion for Restraining Order at 5, *United States v. Michael Vick a/k/a “Ookie,”* No. 3:07CR 274 (E.D. Va. Nov. 20, 2007). Mr. Vick was assessed a fine of \$5,000 and sentenced to twenty-three months of imprisonment and three years of supervised release in the criminal case. Sentencing Minutes at 2, *United States v. Michael Vick a/k/a “Ookie,”* No. 3:07CR 274 (E.D. Va. Dec. 10, 2007). Because Mr. Vick pled guilty to “Conspiracy to Travel in Interstate Commerce in Aid of Unlawful Activities” the possible fine was up to \$250,000 and a maximum term of imprisonment of five years. Plea Agreement at 1, *United States v. Michael Vick a/k/a “Ookie,”* No. 3:07CR 274 (E.D. Va. Aug. 24, 2007). The amount of restitution was set at \$928,073.04 in this case. Government’s Motion for Restraining Order, *supra*, at 7.

<sup>38</sup> STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES* 17 (2d ed. 2013).

<sup>39</sup> For example, in the *Bad Newz Kennels* case, the dogs were seized by the Surry County Sheriff’s Department in April 2007, and the court documentation filed to begin the asset forfeiture process was filed in early July 2007. Verified Complaint in Rem, *United States v. Approx. 53 Pit Bulldogs*, No. 3:07CV397 (E.D. Va. July 2, 2007).

transferred, disposition of the animals can be determined.<sup>40</sup> It is important to understand these general asset forfeiture provisions as they interact with the specific provision in the AWA.

### III. ASSET FORFEITURE UNDER FEDERAL LAW

Asset forfeiture is a complex topic.<sup>41</sup> One federal statute authorizes the forfeiture of the proceeds of more than 200 crimes, and the federal government has forfeiture authority over more than 250 federal, state, and foreign crimes.<sup>42</sup> However, because forfeiture provisions have been added over time for various reasons, there is not consistent treatment of the issue.<sup>43</sup> The property that can be subject to forfeiture differs based on the crime (and the statutory provision the prosecutor applies).<sup>44</sup> The extent forfeiture is allowed ranges from nothing (no forfeiture of anything related to the crime) to “all assets” of a person.<sup>45</sup> Forfeiture can be authorized to seize the proceeds or gross proceeds of a crime.<sup>46</sup> Forfeiture can also be authorized to seize property “involved in” the offense or the instrumentalities used in committing the offense.<sup>47</sup>

#### A. *Types of Forfeiture Provisions*

Forfeiture can be divided into three types: criminal, administrative, and judicial. This Section discusses each of them in turn, focusing on judicial forfeitures

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<sup>40</sup> 7 U.S.C.A. § 2156(f) (West 2016) (providing that any “animal . . . forfeited to the United States . . . upon a judgment of forfeiture shall be disposed of by sale for lawful purposes or by other humane means, as the court may direct”).

<sup>41</sup> To illustrate the complexity of the process, the Department of Justice’s 2016 Asset Forfeiture Policy Manual is 192 pages. ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP’T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL (2016), <https://www.justice.gov/criminal-afmls/file/839521/download> [hereinafter DOJ POLICY MANUAL]. The DOJ Policy Manual is a compilation of policies governing its asset forfeiture program. *Id.* at 1.

<sup>42</sup> CASSELLA, *supra* note 38, at 5, 28.

<sup>43</sup> *Id.* at 5 (citing 18 U.S.C. § 981(a)(1)(c) (2012)).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 4 (citing 18 U.S.C. § 981(a)(G) (2012) (authorizing all assets of a person engaged in terrorism are subject to forfeiture)).

<sup>46</sup> *Id.* at 4–5 (discussing how proceeds is defined). Proceeds can be defined using a “but-for” test—anything that the offender would not have gained if they had not engaged in the crime. *Id.* at 5.

<sup>47</sup> *Id.* at 4.

(sometimes referred to as civil forfeiture), as this is the approach that is often used in connection with the seizure of animals.

### 1. Criminal Forfeiture

Criminal forfeiture is not an action against the property but is part of a sentence imposed on a person who has been convicted of a criminal offense.<sup>48</sup> The law establishing the criminal offense must authorize the possibility of forfeiture as part of the punishment.<sup>49</sup> The number of offenses that authorized criminal forfeiture increased in 2000 when, as part of The Civil Asset Forfeiture Act of 2000 (“CAFRA”), the law was changed to allow criminal forfeiture even if there is no specific criminal forfeiture provision, so long as civil forfeiture would be authorized for that offense.<sup>50</sup>

The government must provide the defendant notice in the indictment if it wishes to initiate a criminal forfeiture action.<sup>51</sup> The trial proceeds like any other criminal case.<sup>52</sup> If a defendant is convicted, the court will then hear additional evidence to decide whether there is enough of a connection between the property and the crime to support forfeiture.<sup>53</sup> For example, the property was “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation,” or the property is, or is derived from “any proceeds the person obtained, directly or indirectly, as the result of such violation.”<sup>54</sup>

There are limitations on criminal forfeiture, such as the property subject to criminal forfeiture is restricted to only the property relating to that specific offense, transaction, or period of time during which the criminal conduct is occurring.<sup>55</sup> The

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<sup>48</sup> *Id.* at 562.

<sup>49</sup> *Id.* at 562–63.

<sup>50</sup> *Id.* at 576 (citing to CAFRA’s amendment of 28 U.S.C. § 2461).

<sup>51</sup> FED. R. CRIM. P. 32.2(a).

<sup>52</sup> CASSELLA, *supra* note 38, at 13. The government can request a restraining order to preserve property subject to criminal forfeiture. 21 U.S.C. § 853 (2012). Section 28 U.S.C. § 2461(e) (2012) applies most of the procedures of § 853 to all criminal forfeitures (the exceptions relate to the Controlled Substances Act).

<sup>53</sup> FED. R. CRIM. P. 32.2.

<sup>54</sup> 21 U.S.C. § 853(a).

<sup>55</sup> CASSELLA, *supra* note 38, at 566–67.

government's burden of proof for criminal forfeiture is establishing the connection between the offense and property by a preponderance of evidence.<sup>56</sup>

As criminal forfeiture is connected to an individual defendant's conviction, property belonging to third parties may not be forfeited.<sup>57</sup> If the government is able to meet its burden of proof, the order of forfeiture is included in the court's judgment at sentencing.<sup>58</sup> It is common to have parallel or successive forfeiture proceedings using more than one forfeiture approach.<sup>59</sup>

## 2. Administrative Forfeiture<sup>60</sup>

Administrative forfeiture occurs if the forfeiture proceeding is uncontested.<sup>61</sup> Essentially, a federal law enforcement agency granted authority for administrative forfeiture under a statute seizes property<sup>62</sup> and provides notice to anyone with a potential interest in the property.<sup>63</sup> If no one files a claim contesting the forfeiture, a

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<sup>56</sup> *Id.* at 663–65.

<sup>57</sup> *Id.* at 572–73. A post-trial process is available for any third parties asserting ownership rights in the property after the entry of forfeiture. FED. R. CRIM. P. 32.2(n). A discussion of the proceedings by which criminal asset forfeiture occurs and third parties can assert their ownership rights is beyond the scope of this Article; however, the author highly recommends Mr. Cassella's book to readers who wish to gain a greater understanding of the issues.

<sup>58</sup> CASSELLA, *supra* note 38, at 14.

<sup>59</sup> *Id.* at 549.

<sup>60</sup> The procedural rules for administrative forfeitures were consolidated in 18 U.S.C. § 983 with the passage of the Civil Asset Forfeiture Act of 2000 (CAFRA). RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43890, ASSET FORFEITURE: SELECTED LEGAL ISSUES AND REFORMS 4 (2015), <https://www.hsdl.org/?view&did=762441>. If the rules are silent, customs laws will apply. *Id.*

<sup>61</sup> CASSELLA, *supra* note 38, at 10. *See infra* note 73 discussing the civil nature of administrative forfeiture.

<sup>62</sup> *Id.* Probable cause (that the property is subject to seizure) and a warrant may be required to seize the property but there are "numerous exceptions" to the warrant requirement.

<sup>63</sup> *Id.* Notice by publication is also required. *Id.* Rule G. Forfeiture Actions in Rem of the Federal Rules of Civil Procedure sets forth the publication requirement in more detail. FED. R. CIV. P. tit. XIII Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule G Forfeiture Actions in Rem [hereinafter FED. R. CIV. P. Supplemental Rule G]. There are exceptions to the notice requirement. *Id.* Publication is not required if the "defendant property is worth less than \$1,000 and direct notice under Rule G(4)(b) to every person the government can reasonably identify as a potential claimant; or (B) the court finds the cost of publication exceeds the property's value and that other means of notice would satisfy due process." *Id.* Publication can be made through posting a notice on an "official internet government forfeiture site for at least 30 consecutive days" or by publication in a newspaper once a week for three consecutive weeks. *Id.* If person entitled to receive written notice does not receive such notice, that person can file a motion to set aside a declaration of forfeiture. 18 U.S.C. § 983(e) (2012).

declaration of forfeiture is entered with the same effect as a judicial order.<sup>64</sup> There are limits to the types of property subject to administrative forfeiture.<sup>65</sup> It is difficult to determine with accuracy the percentage of all forfeiture actions that are uncontested, but one leading commentator on the topic states approximately 80% of forfeitures in drug cases are uncontested (based on information from the Drug Enforcement Agency), and other seizing agencies report similar percentages.<sup>66</sup>

The CAFRA legislation referenced above has been described as a significant, but not comprehensive, reform of the general rules relating to forfeiture.<sup>67</sup> CAFRA established time limits for federal agencies to begin a claim<sup>68</sup> and provides a process for claims to be made.<sup>69</sup> Under the general provisions relating to non-judicial forfeitures, a person making a claim for the property is not required to post a bond relating to the property.<sup>70</sup> If a claim is filed, the federal government must either file a complaint for forfeiture (beginning a civil asset forfeiture proceeding) or return the property within ninety days.<sup>71</sup>

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<sup>64</sup> See, e.g., 19 U.S.C. § 1609 (2012) (providing example of a declaration of forfeiture in an administrative provision that has the same force and effect as a final decree in a judicial forfeiture); see also CASSELLA, *supra* note 38, at 10.

<sup>65</sup> See CASSELLA, *supra* note 38, at 11 (stating “most types of property may be seized administratively” but citing to 19 U.S.C. § 1607 setting the maximum dollar value on administrative forfeiture, and 18 U.S.C. § 985(a), providing that real property cannot be forfeited through an administrative process); see also THOMPSON, *supra* note 60, at 4 (discussing limits to administrative forfeiture proceedings).

<sup>66</sup> CASSELLA, *supra* note 38, at 10. If the Due Process Act discussed *infra* notes 139–44 and accompanying text is enacted, there will be considerable data available to determine this type of information in the future.

<sup>67</sup> David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 15 (2012) (“[T]he whole bill smacks of patchwork, adjusting standards and overturning the doctrines responsible for the worst injustices, but neither reexamining the foundations of forfeiture law nor establishing a sound policy rationale for forfeiture procedure overall.”); see also *infra* notes 123–46 and accompanying text (discussing proposed legislation amending some of the statutory provisions governing forfeiture).

<sup>68</sup> 18 U.S.C. § 983(a)(1)(A)(i) (2012) (generally providing no more than sixty days after the seizure of property to send notice in a nonjudicial civil forfeiture proceeding). For property that is seized by state or local law enforcement agencies, the period of time is extended to not more than ninety days. *Id.* § 983(a)(1)(A)(iv). The period of time for sending notice may be extended under certain circumstances. *Id.* § 983(a)(1)(B) & (D).

<sup>69</sup> *Id.* § 983(a)(2)(B) (establishing the timing for such claims—thirty-five days after the letter is mailed or thirty days after final publication of the seizure). The claim does not need to be in a particular form but must identify the property, state the claimant’s interest, and be made under oath. *Id.* § 983(a)(2)(C).

<sup>70</sup> *Id.* § 983(a)(2)(E).

<sup>71</sup> *Id.* § 983(a)(3).

In the alternative, within the same time frame of ninety days, the government may obtain a criminal indictment with an allegation that the property is subject to forfeiture or take the necessary steps to preserve its right to the property under an applicable criminal forfeiture statute.<sup>72</sup> If it is not possible to use an administrative forfeiture process, judicial (sometimes referred to as civil) forfeiture can be used.

### 3. Judicial Forfeiture

In a judicial forfeiture (sometimes referred to as a civil forfeiture) action,<sup>73</sup> the government files an *in rem* action against the property itself.<sup>74</sup> This is the type of forfeiture action generally used in animal fighting cases. By using this construct, the government is not required to file separate civil actions against every person who has a potential legal interest in the property.<sup>75</sup> A civil asset forfeiture proceeding is not dependent on a criminal case—it can stand on its own regardless of the status of any criminal indictment.<sup>76</sup> The theory, supported by public policy, is if the property was derived from or used to commit a criminal offense, it should be subject to forfeiture.<sup>77</sup>

A civil forfeiture action will follow the same general format as other civil actions.<sup>78</sup> The government (as the plaintiff) files a verified complaint, and claimants (any persons asserting a right to the property) must file a claim and answer the

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<sup>72</sup> *Id.* § 983(a)(3)(B). The government may include a forfeiture allegation in a criminal complaint in addition to filing a civil forfeiture complaint. *Id.* § 983(a)(3)(C).

<sup>73</sup> The procedures for civil forfeiture actions are governed by Supplement Rule G of the Federal Rules of Civil Procedure and 18 U.S.C. § 983. FED. R. CIV. P. Supplemental Rule G; 18 U.S.C. § 983; *see also* CASSELLA, *supra* note 38, at 16. Both administrative forfeiture and judicial forfeiture are civil forfeitures because they are both *in rem* (compared to *in personam*) causes of action. Frequently “judicial” forfeiture is referred to as “civil” forfeiture.

<sup>74</sup> CASSELLA, *supra* note 38, at 14. As an example, see Verified Complaint in Rem at 1, *United States v. Approximately 53 Pit Bulldogs*, Civil Action No.: 3:07CV397 (E.D. Va., July 2, 2007), describing the defendant property as “[A]pproximately 53 pit bulldogs seized by the Surry County Sheriff’s Department on or about April 25, 2007 from 1915 Moonlight Road, Smithfield, Virginia.”

<sup>75</sup> CASSELLA, *supra* note 38, at 15.

<sup>76</sup> *Id.* at 14 (citing to cases that state that the property owner’s culpability is irrelevant in determining whether forfeiture is appropriate).

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.* at 16.

complaint within a set time.<sup>79</sup> The process continues with discovery, the filing of relevant motions, and a trial.<sup>80</sup> Any party may demand a trial by jury.<sup>81</sup>

The government must prove by a “preponderance of the evidence” that the property is subject to forfeiture.<sup>82</sup> The government must also establish a “substantial connection” between the property and any criminal offense if the theory supporting the forfeiture is that the property “was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense.”<sup>83</sup> A claimant is entitled to immediate release of seized property if certain conditions indicate that there is substantial hardship to the claimant.<sup>84</sup>

An “innocent owner” defense is available to claimants.<sup>85</sup> Innocent owner is defined as an owner with a property interest at the time of the alleged illegal conduct who “(i) did not know of the conduct giving rise to the forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”<sup>86</sup> The innocent owner defense cannot be used to support ownership of property that is illegal to possess.<sup>87</sup>

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<sup>79</sup> *E.g.*, Motion for Entry of Default Judgment and Brief in Support, United States v. Approx. 53 Pit Bulldogs, Civil Action No.: 3:07CV397 (E.D. Va. Aug. 30, 2007) (describing the process for providing notice in this case detailing that known parties in interest were mailed notice and the government published notice). In this case, one person submitted a document that did not purport to be a claim or interest as required by § 983 but instead was an opinion, and in addition the filing was received by the court outside the time prescribed by the statutory provision. *Id.* at 2 n.1.

<sup>80</sup> CASSELLA, *supra* note 38, at 16.

<sup>81</sup> FED. R. CIV. P. Supplemental Rule G, *supra* note 63.

<sup>82</sup> 18 U.S.C. § 983(c)(1) (2012).

<sup>83</sup> *Id.* § 983(c)(3).

<sup>84</sup> *Id.* § 983(f). However, the “substantial hardship” provision does not apply if the property, among other things “is to be used as evidence of a violation of law; . . . or is likely to be used to commit additional criminal acts if returned to the claimant.” *Id.* § 983(f)(8).

<sup>85</sup> *Id.* § 983(d). The burden of proving that a person is an innocent owner is also by the preponderance-of-the-evidence standard. *Id.* § 983(d)(1).

<sup>86</sup> *Id.* § 983(d)(2)(A). The innocent owner defense can also be raised by a person who acquires a property interest after the conduct supporting the forfeiture took place if the person “(i) was a bona fide purchaser or seller for value . . . and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.” *Id.* § 983(d)(3).

<sup>87</sup> *Id.* § 983(d)(4).



To put it simply, the government will prevail if it establishes the property is subject to forfeiture and no claim is made or no claimant is able to establish an innocent owner defense.<sup>88</sup> After the asset forfeiture proceeding has transferred title to the property to the government, disposition of the property occurs.

#### 4. Disposition of Forfeited Property

Statutory provisions provide for the disposition of forfeited property.<sup>89</sup> Statutory provisions may stipulate that property that cannot be lawfully possessed should be destroyed.<sup>90</sup> Proceeds may be deposited into a general fund or allocated for a specific purpose.<sup>91</sup> Proceeds may also be used to provide restitution to victims.<sup>92</sup> Some federal statutes also allow intergovernmental transfers of funds generated through the forfeiture process.<sup>93</sup>

The majority of the cash and proceeds from the sale of forfeited property are deposited in the Department of the Treasury Forfeiture Fund or Department of Justice Asset Forfeiture Fund (the “Fund”).<sup>94</sup> The Attorney General has authorization to control the distribution of money in the Fund.<sup>95</sup> Money from the Fund may be used to pay expenses relating to the forfeiture, including rewards to informants.<sup>96</sup> Expenses associated with law enforcement may also be paid for by the Fund, including the support of joint cooperative operations among local, state, and federal

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<sup>88</sup> CASSELLA, *supra* note 38, at 17.

<sup>89</sup> CHARLES DOYLE, CONG. RESEARCH SERV., 97–139, CRIME AND FORFEITURE 20 (2015), <https://www.hsdl.org/?view&did=762005>.

<sup>90</sup> *Id.* See also THOMPSON, *supra* note 60, at 27–28 (discussing how proceeds can be used).

<sup>91</sup> DOYLE, *supra* note 89, at 20.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 22. Prior to legislation passed in 1984 “virtually all of the money realized from fines and forfeitures . . . was deposited in the general fund of the United States Treasury.” *Id.*; see also THOMPSON, *supra* note 60, at 27–28 (discussing establishment of funds where forfeited assets are deposited). This is an important issue to commentators who argue that the current structure providing that assets are deposited into the funds described herein creates a profit motive that was not in existence when the proceeds were deposited into the general fund of the U.S. Treasury. DOYLE, *supra* note 89, at 27; see also Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 798–99 (2009) (arguing the proceeds should be redirected to the General Treasury Fund).

<sup>95</sup> DOYLE, *supra* note 89, at 23.

<sup>96</sup> *Id.*

law enforcement, as well as travel and training.<sup>97</sup> Note that the USDA's Office of the Inspector General (who works with state and local authorities to enforce the AWA's provision regarding animal fighting) is one of the agencies that participates in the Department of Justice ("DOJ") Fund program.<sup>98</sup>

### B. Rationale and Criticisms of Asset Forfeiture

#### 1. Rationales for Asset Forfeiture

There are several policy justifications put forth to support asset forfeiture. The first is to remove the "tools of the crime" from circulation.<sup>99</sup> A second rationale is that assets seized through forfeiture can be used to compensate victims.<sup>100</sup> Third, asset forfeiture can serve to deter criminal activity by taking away the ability to profit from the crime.<sup>101</sup> Fourth, asset forfeiture also serves as punishment or retribution.<sup>102</sup>

Although critics of asset forfeiture may disagree, one rationale that is not utilized by many proponents supporting asset forfeiture is revenue generation.<sup>103</sup> Ethical guidelines (at both the state and federal level) caution "that potential revenue must never be allowed to jeopardize the effective investigation of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens."<sup>104</sup> Some ethical guidelines address the perception of forfeiture being used to generate revenue by stating that salaries and benefits of personnel in the agencies

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<sup>97</sup> *Id.* at 24. Similar activities can be supported by the Department of the Treasury Forfeiture Fund as directed by the Secretary of the Treasury. *Id.* at 25–27.

<sup>98</sup> U.S. DEP'T OF JUSTICE, ASSET FORFEITURE PROGRAM, PARTICIPANTS AND ROLES, <https://www.justice.gov/afp/participants-and-roles> (listing the USDA-OIG as one of the agencies that participates in judicial forfeitures through the DOJ Asset Forfeiture Fund program); USDA ANIMAL CARE BACKGROUNDER, *supra* note 3 (discussing the roles of the USDA's Animal Plant Health Inspection Service and Office of Inspector General).

<sup>99</sup> CASSELLA, *supra* note 38, at 2.

<sup>100</sup> *Id.* (citing 18 U.S.C. § 981(e)(6) (2012) as an example of how victims can be compensated for some crimes, especially white collar crimes).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 3.

<sup>103</sup> DEE R. EDGEWORTH, ASSET FORFEITURE PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 316 (3d ed. 2014).

<sup>104</sup> *Id.* Ms. Edgeworth continues by cautioning personnel involved in the decision to pursue forfeiture that "law enforcement not, revenue production, is the primary objective of forfeiture." *Id.*

involved with forfeiture should not be dependent or contingent upon the level of seizures.<sup>105</sup>

## 2. Criticisms of Asset Forfeiture

There has been considerable controversy over the use of asset forfeiture through the years.<sup>106</sup> Because there has been an extensive amount of analysis about the issue, this Section only highlights some of the concerns.<sup>107</sup> Objections to asset forfeiture

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<sup>105</sup> *Id.* A few states also have provisions that do not allow forfeited funds to be used for salaries of personnel. *Id.*

<sup>106</sup> *See, e.g.*, Pimentel, *supra* note 67, at 23–32 (arguing that the public policy rationales set forth to support asset forfeiture are not compelling enough to support the procedure and setting forth several specific issues that are problematic); Darpana M. Shelth, *Policing for Profit: The Abuse of Forfeiture Laws*, 14 FEDERALIST SOC'Y REV. 24 (2013) (discussing the growth of asset forfeitures and arguing that because of financial incentives that allow agencies to benefit from civil forfeitures additional safeguards are warranted).

<sup>107</sup> There has been extensive analysis of discrete aspects of the asset forfeiture process and recommendations for its reform by numerous commentators, including many law students. *E.g.*, Brynn Applebaum, Note, *Criminal Asset Forfeiture and the Sixth Amendment After Southern Union and Alleyne: State Level Ramifications*, 68 VAND. L. REV. 549 (2015); Dennis De Almeida, Comment, *Government Seizures of Cash Property: Does the Federal Government Have to Pay Interest When It Is Required to Return Money?*, 45 SETON HALL L. REV. 1087 (2015); Rebecca Hausner, Note, *Adequacy of Notice Under CAFRA: Resolving Constitutional Due Process Challenges to Administrative Forfeitures*, 36 CARDOZO L. REV. 1917 (2015); Kasey L. Higgins, Note, "Shiver Me Timbers!" *Civil Asset Forfeiture: Crime Deterrent or Incentive for the Government to Pillage and Plunder Property*, 4 PHOENIX L. REV. 771 (2011); Jennifer Levesque, Note, *Property Rights—When Reform is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59 (2014–15); Robert McFadden, Comment, *Criminal Forfeitures: The Supreme Court Gives Unbridled Discretion to Curtail the Sixth Amendment* [Kaley v. United States, 134 S. Ct. 1090 (2014)], 54 WASHBURN L.J. 253 (2014); Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. CIV. RTS. L.J. 427 (2012); Michael van den Berg, Note, *Proposing a Transactional Approach to Civil Forfeiture Review*, 163 U. PA. L. REV. 867 (2015) (providing examples of some recent law student articles addressing the issue). Examples of other commentators that have considered issues relating to forfeiture include the following: Annemarie Bridy, *Carpe-Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683 (2014) (providing an overview of civil forfeiture and arguing that that the reforms made in 2000 are insufficient to address the harms that arise when Internet domain names are seized); Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 CARDOZO L. REV. 1 (2013) (analyzing the development of criminal forfeiture proceedings); Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181 (2011) (arguing that criminal defendants should be able to argue for a downward departure of their sentence if they have forfeited assets); Pimentel, *supra* note 67 (considering procedural aspects of asset forfeiture and considering policy arguments raised to support asset forfeiture).

can be divided into two primary categories: procedural and structural.<sup>108</sup>

Many of the major issues relating to the constitutionality of the procedural aspects of asset forfeiture provisions have been settled.<sup>109</sup> Issues relating to due process have been a source of significant litigation.<sup>110</sup> Due process concerns include (a) issues if the property was forfeited regardless of the innocence of the owner; (b) the right to notice and opportunity to be heard before property is seized; and (c) issues relating to post-seizures notices and delay.<sup>111</sup> Other constitutional concerns that have been raised include arguments regarding proportionality and excessiveness, double jeopardy, searches and seizures, and the right to counsel.<sup>112</sup> Regardless of the establishment of the constitutionality of procedural aspects of asset forfeiture, as discussed below, legislation has been introduced to address some of these procedural issues given the continuing concerns raised by commentators.<sup>113</sup>

Structural concerns reflect the inherent nature of asset forfeiture and distribution of proceeds of the seizures. As a DOJ spokesperson stated, the “Asset Forfeiture Fund acts in many ways like a revolving fund . . . . Forfeited proceeds are

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<sup>108</sup> THOMPSON, *supra* note 60, at Summary.

<sup>109</sup> CASSELLA, *supra* note 38, at 28. The issue of standing for claimants is another issue that has been frequently litigated. THOMPSON, *supra* note 60, at 9–11. There has been considerable litigation relating to the constitutionality and other aspects of asset forfeiture. The purpose of the extremely limited discussion in this Article is to inform the reader that there has been considerable controversy over asset forfeiture generally, rather than to highlight all aspects of the issue. Readers are encouraged to read Mr. Cassella’s book and the other references provided herein, if they would like to learn more about the topic.

<sup>110</sup> CASSELLA, *supra* note 38, at 39–57; *see also* Andrew W. Laing, Note, *Asset Forfeiture & Instrumentalities: The Constitutional Outer Limits*, 8 N.Y.U.L. & LIBERTY 1201, 1208 (2014) (discussing due process cases relating to asset forfeiture and stating that “Supreme Court cases addressing asset forfeiture have generally held, applying multi-factor tests, that seizure of a property interest without an opportunity for a prior hearing is constitutionally permissible under certain circumstances”).

<sup>111</sup> CASSELLA, *supra* note 38, at 39–57.

<sup>112</sup> *Id.* at 57–91. Issues relating to access to counsel include both the pretrial freezing of assets in a criminal case (denying the defendant the use of those assets to pay for counsel) and the right to counsel in civil asset forfeiture cases for indigent claimants. THOMPSON, *supra* note 60, at 20–26 (discussing right to counsel issues including a 2014 Supreme Court case relating to the pretrial freezing of assets). *See also* Luis v. United States, 136 S. Ct. 1083, 1085 (2016) (concluding the “pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment”).

<sup>113</sup> *See infra* notes 123–50 and accompanying text (discussing the Due Process Act of 2016).

being deposited throughout the year to replenish the funds that are simultaneously flowing out of the Asset Forfeiture Fund to pay for approved agency expenses.”<sup>114</sup>

One of the structural concerns raised by critics is the possibility that the system provides incentives that encourage personnel making decisions regarding forfeiture to take such action.<sup>115</sup> Essentially, the argument is that there is a profit incentive inherent in the asset forfeiture process.<sup>116</sup> This institutional bias could result in law enforcement agencies shifting resources and focus towards cases (such as drug cases) where there could be considerable assets and away from other types of cases.<sup>117</sup>

Another structural issue arises out of the DOJ practice of “adoptive forfeiture,” a process that allows the DOJ to “adopt” property seized by state and local governments as part of its “equitable sharing” program.<sup>118</sup> Critics viewed this program as a way to circumvent state laws that include additional protections for property owners.<sup>119</sup>

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<sup>114</sup> Christopher Ingraham, *The Feds Have Resumed a Controversial Program that Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/> (quoting Peter J. Carr identified as a DOJ spokesman about the resumption of the Equitable Sharing Program).

<sup>115</sup> Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 863 (2014). Professors Lemos and Minzner’s article focuses on financial incentives such as settlements and court judgments (including fines); however, they also discuss the role of asset forfeiture. *Id.* at 868–71. See also Pimentel, *supra* note 67, at 31 (arguing that the financial incentives may distort policy judgments regarding allocation of resources).

<sup>116</sup> THOMPSON, *supra* note 60, at 26.

<sup>117</sup> Lemos & Minzner, *supra* note 115, at 869–70. As discussed *infra* notes 155–64 and accompanying text, this would be of special concern to animal advocates given that currently the only assets subject to forfeiture in the AWA’s animal fighting provision are the animals themselves—who are often considered to have very low, if any, economic value.

<sup>118</sup> THOMPSON, *supra* note 60, at Summary. The DOJ had briefly suspended this practice at the end of 2015 but resumed in late March 2016. Ingraham, *supra* note 114.

<sup>119</sup> THOMPSON, *supra* note 60, at 29; Ingraham, *supra* note 114. Note, one of the reasons that the American Civil Liberties Union only provided “qualified support” of the Due Process Act of 2016 is because that act does not address the issue of equitable sharing—which the organization argues incentivizes forfeitures by creating a profit motive for law enforcement agencies. See *infra* note 149 and accompanying text (discussing position of American Civil Liberties Union). Other commentators have argued to eliminate the equitable sharing arrangements as well. *E.g.*, Moores, *supra* note 94, at 801–02. The U.S. Attorney General has addressed some of these concerns by issuing an order in January 2015 adopting a policy that limits the federal adoption of assets seized by state or local law enforcement (so the property is then forfeited under federal law) to assets that directly implicate public safety concerns such as firearms and property associated with child pornography unless the Assistant Attorney General for the Criminal Division approves. U.S. ATT’Y GEN., PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY

Even if the profit incentive is eliminated, a recent article by Professors Margaret Lemos and Max Minzner argues that “for-profit public enforcement” provides reputational rewards for agencies.<sup>120</sup> That article considers the various external audiences that scrutinize agencies’ activities and sets forth evidence that some agencies publicly emphasize large settlements or awards, even if such agencies may fail to collect the money.<sup>121</sup> The same article also questions whether there are incentives, even if “low powered,” that help guide decision-making by individuals pursuing cases with possibly large financial recoveries.<sup>122</sup>

### C. Legislation Impacting Federal Asset Forfeiture Generally

As discussed above, critics of asset forfeiture often cite to due process concerns.<sup>123</sup> Both the Republican and Democratic National Committees’ 2016 party platforms raised concerns with perceived abuses of the civil asset forfeiture system.<sup>124</sup>

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STATE AND LOCAL LAW ENFORCEMENT AGENCIES (Jan. 16, 2015), <https://www.justice.gov/file/318146/download>; *see also* U.S. DEP’T OF JUSTICE, EQUITABLE SHARING WIRE, POLICY LIMITING THE FEDERAL ADOPTION OF SEIZURES BY STATE AND LOCAL GOVERNMENT AGENCIES (Jan. 16, 2015), <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/01/16/01-16-15-wire.pdf> (describing the order).

<sup>120</sup> Lemos & Minzner, *supra* note 115, at 875–86.

<sup>121</sup> *Id.* at 882–84, 891 (discussing reasons why agencies might want to publicize either their total recoveries or individual cases with significant recoveries).

<sup>122</sup> *Id.* at 887–90, 893–94 (arguing that individual lawyers may emphasize monetary awards to bolster their own reputations).

<sup>123</sup> *See supra* Part III(B)(2) (discussing criticisms of asset forfeiture).

<sup>124</sup> The 2016 Democratic Party Platform states, “[w]e will reform the civil asset forfeiture system to protect people and remove perverse incentives for law enforcement to ‘police for a profit.’” DEMOCRATIC PLATFORM COMM., *2016 Democratic Party Platform*, AM. PRESIDENCY PROJECT (July 21, 2016), [http://www.presidency.ucsb.edu/papers\\_pdf/117717.pdf](http://www.presidency.ucsb.edu/papers_pdf/117717.pdf). The 2016 Republican Party Platform states:

Civil asset forfeiture was originally intended as a way to cripple organized crime through the seizure of property used in a criminal enterprise. Regrettably, it has become a tool for unscrupulous law enforcement officials, acting without due process, to profit by destroying the livelihood of innocent individuals, many of whom never recover the lawful assets taken from them. When the rights of the innocent can be so easily violated, no one’s rights are safe. We call on Congress and state legislatures to enact reforms to protect law-abiding citizens against abusive asset forfeiture tactics.

REPUBLICAN NAT’L PLATFORM COMM., *Republican Platform 2016*, AM. PRESIDENCY PROJECT 15 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf).

Legislation has been proposed addressing some of these issues.<sup>125</sup> The Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2016 (“Due Process Act”) would have amended several sections of 18 U.S.C. § 983 that set out the general rules for civil forfeiture proceedings.<sup>126</sup>

The Due Process Act would have substantially reduced the amount of time the government has to provide notice to interested parties after the seizure of property.<sup>127</sup> The notice itself would have been required to have more information to make it easier for a person who wishes to assert a right to the property to initiate his or her claim.<sup>128</sup> The notice would have also required information that the interested party has the right to request an initial hearing and be represented by counsel.<sup>129</sup>

The Due Process Act would have provided for interested parties to have more time to file a claim.<sup>130</sup> It also would have eliminated the ability to obtain an extension of time for the government to file a complaint after such claim (currently ninety days).<sup>131</sup> An initial hearing process in front of a magistrate judge would have been added under the Due Process Act.<sup>132</sup> In any such initial hearing, the magistrate judge

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<sup>125</sup> Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2016, H.R. 5283, 114th Cong. [hereinafter Due Process Act]. Note that the Due Process Act is only the most recent of the reform proposals. THOMPSON, *supra* note 60, at 15–26 (discussing other recent reform proposals). Note to readers—the discussion of legislation in this Article refers to information available as of February 1, 2017. The purpose of providing this legislative information is to illustrate the type of provisions that may be included in future legislation. As similar legislation has been proposed in the past, readers are encouraged to go to [Congress.gov](http://Congress.gov) and search for “forfeiture” to determine whether there has been new legislation proposed on this topic. For example, readers should note that legislation was introduced on March 29, 2017 that mirrors the language of the Due Process Act as discussed herein, with the exception that some of the language of the HEART Act of 2017, discussed *infra* notes 205–09 has been included at the end as a new Section 12. Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2017, H.R. 1795, 115th Cong.

<sup>126</sup> Due Process Act, *supra* note 125.

<sup>127</sup> *Id.* § 2 (reducing the amount of notice from sixty to thirty days or from ninety to sixty days respectively, depending on the current period of time allocated under the statute).

<sup>128</sup> *Id.* (providing the notice must include an address which also must be widely published for the seizing agency to receive a claim).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (providing for an increase in time from thirty-five to sixty-five days and thirty to sixty days respectively).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 2. The legislation also amends the provisions relating to pretrial restriction of property. *Id.* § 5.

would have been required to inform the party “in easily understood terms” of his or her right to counsel, facts relating to the seizure, and the right of the party to challenge the lawfulness of the seizure.<sup>133</sup>

The right to counsel would have been expanded to eliminate the requirement that such right is dependent on the seized property status—currently limited to real property being used by the person as a primary residence.<sup>134</sup> The ability to recover attorneys’ fees pursuant to 28 U.S.C. § 2465(b) also would have been expanded under the Due Process Act.<sup>135</sup> Section 2465 currently allows for successful claimants to recover reasonable attorneys’ fees if the claimant “substantially prevails.”<sup>136</sup> It would have been changed to define “prevails” as “if the claimant recovers more than 50 percent, by value, of the money or other property that is claimed.”<sup>137</sup> Attorneys’ fees would have been allowed if the claim were resolved by settlement.<sup>138</sup>

The Due Process Act also would have required the Inspector General to make an annual audit of civil forfeitures to “ensure those forfeitures are constitutionally sound and consistent with the letter and spirit of the law.”<sup>139</sup> A quarterly updated database describing all federal civil forfeiture seizures would have been established.<sup>140</sup> The database would have contained significant information about each seizure, including describing the property itself, the type of criminal activity, and the status of any related criminal proceedings.<sup>141</sup> Information relating to the process itself, such as whether it was contested and if any innocent owner claim was made, would have also been included in the database.<sup>142</sup> The database would have

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<sup>133</sup> *Id.* § 2.

<sup>134</sup> *Id.* § 3. The right to counsel is still dependent on the person’s status as someone who is financially unable to obtain representation by counsel. *Id.*

<sup>135</sup> *Id.* § 6.

<sup>136</sup> 28 U.S.C. § 2465(b)(1) (2012).

<sup>137</sup> Due Process Act, *supra* note 125, at § 6.

<sup>138</sup> *Id.* The payment of attorney fees under that subsection cannot be waived as part of any settlement and is not subject to offset or deduction by the government in connection with any claim it has against the person who has settled. *Id.*

<sup>139</sup> *Id.* § 7.

<sup>140</sup> *Id.* § 8.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*



included total expenses and net proceeds from each forfeiture action.<sup>143</sup> Additionally, the Due Process Act would have mandated the Attorney General establish a second database to allow interested parties to determine if they have an interest in property and to educate the public on how to contest seizures.<sup>144</sup>

Perhaps the most significant change in the current structure of civil forfeiture that would have been made by the Due Process Act would be to change the burden of proof for the government from “a preponderance of the evidence” to a “clear and convincing evidence” standard.<sup>145</sup> The standard of proof relating to possibly innocent owners also would have been changed to provide that the government has to establish, by clear and convincing evidence, not only the substantial connection between the property and criminal offense, but also that the owner “(i) intentionally used the property in connection with the offense; (ii) knowingly consented to the use of the property by another in connection with the offense; or (iii) should have reasonably known that the property was being used in connection with the offense.”<sup>146</sup>

The American Bar Association (“ABA”) urged members of the House Judiciary Committee to approve the legislation.<sup>147</sup> The ABA focused on the higher standard of proof required and easier recovery of legal fees.<sup>148</sup> The American Civil Liberties Union offered “qualified support” for the Due Process Act as “an important first step” to provide procedural protections but remains concerned about the profit incentives that it believes drive forfeiture.<sup>149</sup> Other civil rights organizations also indicated their support or qualified support for the legislation.<sup>150</sup> The AWA’s asset

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<sup>143</sup> *Id.* The database would also disclose the names of any state or local entity receiving funding from the Fund and Treasury Forfeiture Fund. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* § 4.

<sup>146</sup> *Id.* § 9.

<sup>147</sup> Letter from the Am. Bar Ass’n to Members of Cong. (May 24, 2016), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016may24\\_dueprocessact\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016may24_dueprocessact_1.authcheckdam.pdf).

<sup>148</sup> *Id.*

<sup>149</sup> Letter from the Am. Civil Liberties Union to Members of Congress (May 24, 2016), [https://www.aclu.org/sites/default/files/field\\_document/due\\_process\\_endorsement\\_letter\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/due_process_endorsement_letter_final.pdf).

<sup>150</sup> *E.g.*, Letter from the Leadership Conference for Civil and Human Rights to Members of Cong. (May 24, 2016), <http://civilrightsdocs.info/pdf/policy/letters/2016/Support-DUE-PROCESS-Act-of-2016.pdf> (providing qualified support).

forfeiture provision uses the general asset forfeiture process, so the Due Process Act would have impacted animals seized under the AWA's provision.

#### IV. AWA'S CIVIL ASSET FORFEITURE AND COST REIMBURSEMENT PROVISIONS RELATING TO ANIMAL FIGHTING VENTURES

##### A. *The AWA's Civil Asset Forfeiture Provision*

The focus of this Article is on the ability of the federal government to seize animals and obtain reimbursement for the costs of their care in the context of animal fighting.<sup>151</sup> Seizing animals is more complicated than seizing some other forms of property.<sup>152</sup> As an example, when discussing pre-seizure planning, the DOJ's Asset Forfeiture Policy Manual ("DOJ Policy Manual") mandates pre-seizure planning discussions with the U.S. Marshals Service for "assets that create difficult or unusual problems," including animals.<sup>153</sup> The DOJ Policy Manual also directs each U.S. Attorney's Office "to establish specific procedures . . . before seizing/restraining . . .

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<sup>151</sup> There are other provisions in the regulations for the AWA that allow for the confiscation of animals and cost reimbursement. If a U.S. Department of Agriculture Animal and Plant Health Inspection Service official finds that an animal held by a dealer, exhibitor, or carrier is suffering because of lack of compliance with the standards set forth in the regulations, and, after notification, if the suffering is not alleviated, the animal(s) can be confiscated. 9 C.F.R. § 2.129(a) (2016). Confiscated animals may be placed by sale or donation to persons or facilities that can offer a level of care meeting or exceeding the standards (whether licensees or not) or can be euthanized, and the dealer, exhibitor, or carrier "must bear all costs incurred in performing the placement or euthanasia." § 2.129(c)-(d). Another regulation applies similar language regarding confiscation and cost reimbursement to research facilities for animals not being used to carry out research or experimentation. § 2.38(e). Dogs that were refused entry into the United States because of noncompliance with the importation of live dogs' regulations may also be seized and costs assessed against the person who intended to import the dog. § 2.153; *see also* Amy L. Breyer, *Asset Forfeiture and Animal Cruelty: Making One of the Most Powerful Tools in the Law Work for the Most Powerless Members of Society*, 6 ANIMAL L. 203 (2000) (arguing for the use of asset forfeiture laws to combat animal cruelty).

<sup>152</sup> *See supra* note 6 (discussing the issues relating to seizure, evidence collection, and maintaining animals). When the author of this Article was appointed as the Guardian/Special Master of the *Bad Newz Kennels* case, she spoke to a colleague at the time (Clare Nuechterlein) who had previously served as an Assistant United States Attorney from 1989–2000 working on civil asset forfeiture matters in addition to other issues. Ms. Nuechterlein told the author that when she was working on civil asset forfeiture matters, she was told that the seizure of live animals was complicated and the general rule was to try to avoid seizing "anything that eats or excretes" because of the difficulty in housing and caring for the animals. E-mail from Clare Nuechterlein to author (July 2, 2016, 12:09 PM) (on file with author) (confirming conversation).

<sup>153</sup> DOJ POLICY MANUAL, *supra* note 41, at ch. 1, Sec. I.B.

other types of property that may pose problems of maintenance and/or disposition (e.g. animals and aircraft).”<sup>154</sup>

The current language of 7 U.S.C. § 2156(f) is substantively the same as when it was adopted in 1976.<sup>155</sup>

A warrant to search for and seize any animal which there is probable cause to believe was involved in any violation of this section may be issued by any judge of the United States or of a State court of record or by a United States magistrate judge within the district wherein the animal sought is located. Any United States marshal or any person authorized under this section to conduct investigations may apply for and execute any such warrant, and any animal seized under such a warrant shall be held by the United States marshal or other authorized person pending disposition thereof by the court in accordance with this subsection. Necessary care including veterinary treatment shall be provided while the animals are so held in custody. Any animal involved in any violation of this section shall be liable to be proceeded against and forfeited to the United States at any time on complaint filed in any United States district court or other court of the United States for any jurisdiction in which the animal is found and upon a judgment of forfeiture shall be disposed of by sale for lawful purposes or by other humane means, as the court may direct. Costs incurred for care of animals seized and forfeited under this section shall be recoverable from the owner of the animals (1) if he appears in such forfeiture proceeding, or (2) in a separate civil action brought in the jurisdiction in which the owner is found, resides, or transacts business.<sup>156</sup>

A close reading of the provision elicits the following issues. First, it is clear that the only “property” currently subject to forfeiture under the section is the animals purportedly used in the animal fighting venture.<sup>157</sup> If law enforcement wants to seize

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<sup>154</sup> DOJ POLICY MANUAL, *supra* note 41, at ch. 1, Sec. I.A. If it involves an administrative forfeiture, the agents in charge of each field office would be tasked with this issue. *Id.* The DOJ Policy Manual also requires pre-seizure planning discussions to consider any “expected logistical issues involving the maintenance, management, or disposition of the asset.” *Id.* at ch. 1, Sec. C.2.

<sup>155</sup> There were minor changes to the “costs” sentence to separate the two circumstances in which costs can be recoverable in 2008. Animal Welfare Act, Pub. L. 110-234, 122 Stat. 1462 (2008).

<sup>156</sup> 7 U.S.C.A. § 2156(f) (West 2016).

<sup>157</sup> In other words, under the current language, if law enforcement wishes to seize the other personal property at the location (cash, vehicles, equipment), it would need to have another basis for the seizure, such as drugs or gambling.

other property, including any proceeds of the venture, such seizure must be accomplished using laws addressing other criminal activities. Second, unlike the general disposition of property under the civil forfeiture laws authorizing the Attorney General to dispose of the forfeited property, this section directs the court to determine the disposition of the animals and includes the disposition by sale or by “other humane means.”<sup>158</sup> Essentially, there is more flexibility on the disposition of the animals because of the inclusion of the “other humane means” language.<sup>159</sup> However, this also means it is necessary to procure a judicial order to govern the disposition of any animals.<sup>160</sup>

Third, the costs for the care of the animals are only recoverable if the owner “appears in such forfeiture proceeding” or in a separate civil action.<sup>161</sup> Because of this language, there is an incentive for an owner to not appear in the forfeiture proceeding—essentially, if an owner is concerned about being assessed for costs, he or she should not assert his or her rights in the property. Presumably, in any negotiation process the government could also allow an owner to relinquish any interest in dogs that are seized in order to avoid these costs.<sup>162</sup>

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<sup>158</sup> 7 U.S.C.A. § 2156(f) (West 2016).

<sup>159</sup> Other humane means may include euthanization. In the *Bad Newz Kennels* case, one dog was euthanized prior to the appointment of the Guardian/Special Master. First Order as to Disposition at 1, *United States v. Approx. 53 Pit Bulldogs*, No. 3:07CV397 (E.D. Va., Oct. 1, 2007) (ordering the dog identified as number 2621 be euthanized because experts had found that the dog “exhibited intense aggression towards humans such that it cannot be safely managed”).

<sup>160</sup> During the *Bad Newz Kennels* case, one of the dogs was required to be euthanized for medical reasons. Prior to the decision to euthanize the dog, the Guardian/Special Master had discussed the procedure for dealing with medical issues for the dogs with the U.S. Attorney’s Office. The procedure in that case required the concurrence of the Assistant Special Agent-in-Charge of the case. Report of the Special Master at 3, *United States v. Approx. 53 Pit Bulldogs*, No. 3:07CV397 (E.D. Va. Dec. 6, 2007); Huss, *supra* note 7, at 83.

<sup>161</sup> 7 U.S.C.A. § 2156(f) (West 2016).

<sup>162</sup> See, e.g., *United States v. 37 Pit Bull Terrier Dogs*, No. 1:14-cv-00205-WHA (M.D. Ala. Mar. 21, 2014). In this case, a claim was made in June 2014 asserting that an individual had rights to the dogs and they were taken in error, but in July 2014 the claimant filed a motion to withdraw the claim with a relinquishment of ownership form. The claimant reportedly requested admission into a pre-trial diversion program that would likely include forfeiting the dogs. *Ala. Dog Fighting Defendant Seeks Diversion*, WTVY.COM (July 1, 2014), <http://www.wtv.com/home/headlines/Alabama-dog-fighting-defendant-seeks-diversion-265387191.html> (last visited Apr. 17, 2017). The same man reportedly pled guilty to dog fighting related charges; Matt Eloffson, *Dothan Man to Plead Guilty to Dog Fighting-Related Charges*, DOTHAN EAGLE (Feb. 25, 2015), [http://www.dothaneagle.com/news/crime\\_court/dothan-man-to-plead-guilty-to-dog-fighting-related-charges/article\\_b1840d04-bd2e-11e4-934b-f3856d9f2043.html](http://www.dothaneagle.com/news/crime_court/dothan-man-to-plead-guilty-to-dog-fighting-related-charges/article_b1840d04-bd2e-11e4-934b-f3856d9f2043.html) (last visited Apr. 17, 2017).

It is important to note that until the asset forfeiture process is completed, the government has a duty to “maintain the evidence,”<sup>163</sup> and the government can be liable for any damage to the property if the forfeiture is not upheld.<sup>164</sup> The “maintenance of evidence” is the reason that the cost of care associated with the seizure of animals can be so significant as discussed below.

### B. Issue of Reimbursement of Costs of Care

The costs associated with animal fighting cases can be significant.<sup>165</sup> It is difficult to quantify the costs.<sup>166</sup> The jurisdiction or jurisdictions where the animals are seized often bear the cost of care.<sup>167</sup> The costs relating to animal care include, but are not limited to, animal handling/transport, boarding fees, veterinary care, euthanasia, post-mortem exam, and remains disposal.<sup>168</sup> The salary and overhead expenses can include the costs associated with animal control officers, police officers, veterinary services or care, shelter workers, prosecutors, and court staff.<sup>169</sup>

Although it is clear that the federal government will seize animals, the cost involved in the seizure and maintenance of the animals is an issue. The DOJ Policy Manual requires consideration of whether assets should be seized at all.<sup>170</sup> As part of

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<sup>163</sup> DOJ POLICY MANUAL, *supra* note 41, at 43–44.

<sup>164</sup> 28 U.S.C. § 2680 (2012) (providing exceptions to the Federal Torts Claim Act); *see also* Pimentel, *supra* note 67, at 18–19 (discussing the legislative history of CAFRA, including the amendment allowing for damages claims).

<sup>165</sup> *See infra* notes 165–69 and accompanying text (discussing the costs associated with these cases). The Humane Society of the United States created a fund specifically to provide grants to law enforcement and animal control agencies for the seizure and care of animals in connection with animal fighting cases. *Animal Fighting Rescue Fund*, HUMAN SOC’Y OF U.S., [http://www.humanesociety.org/forms/animal\\_fighting\\_rescue\\_form.html](http://www.humanesociety.org/forms/animal_fighting_rescue_form.html) (last visited June 16, 2016) (providing for grants of up to \$10,000). The costs of care in the *Missouri 500* case, discussed *supra* note 5 was assessed at around \$350,000. Matthew Heger, *Bringing RICO to the Ring: Can the Anti-Mafia Weapon Target Dogfighters?*, 89 WASH. U. L. REV. 241, 254 (2011) (discussing the *Missouri 500* dog fighting case).

<sup>166</sup> GOVERNOR’S COMM’N ON THE HUMANE TREATMENT OF ANIMALS, COST ANALYSIS OF ANIMAL CRUELTY IN NEW HAMPSHIRE: 2008 REPORT 9 (2008), <https://www.nh.gov/humane/documents/cruelty-cost.pdf> [hereinafter NEW HAMPSHIRE REPORT].

<sup>167</sup> *Cost of Care Legislation*, AMERICAN SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/animal-protection/public-policy/cost-care-legislation> (last visited June 16, 2016); ABA Resolution, *supra* note 6, at 6.

<sup>168</sup> NEW HAMPSHIRE REPORT, *supra* note 166, at 5–6.

<sup>169</sup> *Id.*

<sup>170</sup> DOJ POLICY MANUAL, *supra* note 41, at 24.

that consideration, the issue of the net equity of assets that may be seized should be weighed.<sup>171</sup> In the context of animals, the individual animals may be in need of veterinary care that could become costly in addition to the expenses incurred in maintaining the animals.<sup>172</sup> Although the DOJ Policy Manual sets minimum net equity requirements, it recognizes that “in some circumstances an overriding law enforcement interest may require the seizure/forfeiture of an asset that does not meet the [net equity] criteria.”<sup>173</sup> One basis for a waiver is the “owner or person in possession of the property has been arrested or will be criminally prosecuted.”<sup>174</sup>

There are three primary ways that money can be transferred to the government in connection with animal fighting prosecutions. The first is through the imposition of a fine.<sup>175</sup> As discussed above, the cap on the amount of the fine that can be assessed in a federal animal fighting prosecution is now significant; however, there are limits on when fines can be assessed, and the money paid for a fine for violation of the AWA provision would not be available to reimburse providers for the costs of care of the animals.<sup>176</sup>

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<sup>171</sup> *Id.* The DOJ Policy Manual states as part of the pre-seizure questions that should be answered the following: “(2) *Should the asset be seized or even targeted for forfeiture?* If the asset has a negative or marginal net equity at the time of seizure, should it be seized and forfeited? Over time, what is the likelihood that the asset will depreciate to a negative or marginal value? What law enforcement benefits are to be realized from seizure and forfeiture? Is a restraining or protective order an adequate alternative to seizure given the circumstances? Can any anticipated losses be avoided or mitigated through careful planning on the part of the participants? Will custody, forfeiture, and/or disposal of the asset impose unduly significant demands on USMS or USAO resources and/or require a considerable infusion of funds from the AFF [Asset Forfeiture Fund]?” *Id.*

<sup>172</sup> Huss, *supra* note 7, at n.91 (describing veterinary care, including extensive emergency care provided to the dogs seized in the *Bad Newz Kennels* civil asset forfeiture case).

<sup>173</sup> DOJ POLICY MANUAL, *supra* note 41, at 26.

<sup>174</sup> *Id.*

<sup>175</sup> See *supra* notes 28–35 and accompanying text (discussing increasing caps on the fines that may be imposed if an individual violates the AWA prohibition on animal fighting provision).

<sup>176</sup> 28 U.S.C. § 2041 (2012) (providing that moneys paid into any court of the United States shall be deposited with the Treasurer of the United States); 42 U.S.C. § 10601(a)-(b) (2012) (providing that an account to be known as the Crime Victims Fund be established and that fines collected from persons convicted of all offenses against the United States with the exception of a specified list, be deposited in the Crime Victims Fund). Types of expenses that are allowed to be funded through the Crime Victims Fund are limited and would not include costs of care for animals. §§ 10601–10602; see also *OVC Fact Sheet*, CRIME VICTIMS FUND, OFF. FOR VICTIMS OF CRIME, <http://www.ovc.gov/pubs/crimevictims/fundfs/intro.html> (last visited Apr. 3, 2017). Caps for the fines are set out in 18 U.S.C. § 3571, and 18 U.S.C. § 3572 sets out the factors to be considered when imposing a fine. Factors considered include the defendant’s income, financial resources, and the burden the fine will impose on the defendant and persons

The second way money can be transferred to the government in connection with animal fighting prosecutions is through restitution paid by a defendant as part of the resolution of criminal charges or a civil action.<sup>177</sup> Restitution can be an effective way to provide for reimbursement of costs of care, but it is dependent on the successful criminal prosecution or application of a civil provision against an individual with resources, and the possible collection of funds only occurs at the end of the process.<sup>178</sup> The final way money often enters the system, and is available to reimburse for costs of care, is through the adoption of bond or security requirements.

Many states have adopted bond or security requirements for animals seized in cruelty cases.<sup>179</sup> An additional rationale for these bond provisions is to decrease the amount of time between when the animals are seized and when they could be moved out of the local shelters (rehomed or otherwise).<sup>180</sup> If the purported owner fails to post a bond or security, the person surrenders his or her rights in the animal. In

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financially dependent on the defendant. 18 U.S.C. §§ 3571–3572 (2012). Whether restitution is ordered is another factor considered in determining if a fine should be imposed. § 3572(b).

<sup>177</sup> See *supra* note 37 and accompanying text discussing the restitution assessed in the *Michael Vick* case. Restitution provisions are also available in some states to address this issue. ABA Resolution, *supra* note 6, at 6. If a bond has been posted, the bond would be applied to the restitution; however, often the bond does not cover the full costs of care. *Id.* at 6–7.

<sup>178</sup> *Supra* note 37 (providing example of reimbursement associated with a criminal prosecution); *supra* notes 156–62 (discussing current reimbursement provision in the AWA).

<sup>179</sup> *E.g.*, IND. CODE § 35-46-3-6 (2008) (providing that a bond must be posted not later than ten days after an animal has been impounded); see also ABA Resolution, *supra* note 6, at 4. The Animal Legal Defense Fund (“ALDF”) ranks state animal protection laws each year. Press Release, Animal Legal Defense Fund, *Best & Worst States for Animal Protection Laws* (Jan. 9, 2017), <http://aldf.org/press-room/press-releases/best-worst-states-for-animal-protection-laws-2016-report-released/> [hereinafter ALDF Press Release]. The ALDF rankings analysis considers animal protection laws of all types but also provides some insight into how states deal with animal fighting and cost of care reimbursement. Animal Legal Defense Fund, *2016 U.S. Animal Protection Laws Rankings: Comparing Overall Strength & Comprehensiveness*, <http://aldf.org/wp-content/uploads/2017/01/Rankings-Report-2016-ALDF.pdf> [hereinafter ALDF Report]. For the states listed as the “best” it is common to find pre-conviction forfeiture provisions and cost recovery measures. *Id.* ALDF referenced the passage of a comprehensive cost of care law as part of the reason for the State of Wisconsin’s improvement in the rankings in 2016. *Id.*; see also Animal Legal Defense Fund, *Animal Protection Laws of the United States and Canada*, <http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada/> (last visited Feb. 9, 2017) (providing the eleventh edition of the compendium of animal protection laws for each state). In contrast, states that are listed as the “worst” may have laws that do not include forfeiture provisions or are viewed as having inadequate cost recovery language. ALDF Report, *supra*.

<sup>180</sup> ABA Resolution, *supra* note 6, at 4.

addition, an animal can be relinquished voluntarily in order to avoid posting a bond.<sup>181</sup>

The ABA adopted a resolution and report in February 2011 that urged governmental bodies to enact laws that ensure the humane treatment and timely disposition of seized animals.<sup>182</sup> The ABA resolution called for laws that provide that persons with ownership of seized animals, “consistent with due process requirements, post a reasonable bond or security or, in the alternative, promptly surrender the animals to the custody of the lawful authorities.”<sup>183</sup> In addition, the ABA Resolution called for laws that allow “localities and/or organizations caring for the animals be granted restitution for the costs incurred for the care of the animals not covered by a reasonable bond or security by any person who does not promptly surrender such animals.”<sup>184</sup>

Note that the 2000 CAFRA legislation discussed above<sup>185</sup> eliminated the bond requirement under the general rules relating to asset forfeitures because it could be considered unconstitutional and was an unnecessary deterrent to contesting forfeitures.<sup>186</sup> Recent proposed legislation addresses, in part, the concern over the costs of care and current lack of a bond requirement.

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<sup>181</sup> *E.g.*, 510 ILL. COMP. STAT. ANN. 70/3.05 (LexisNexis 2012).

<sup>182</sup> ABA Resolution, *supra* note 6, at 1.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* The ABA resolution also calls for governmental entities to adopt laws that

[e]stablish effective evidence collection and identification of each animal at the scene of the seizure; 2. Provide prompt and continuing veterinary attention for each animal as warranted by each animal’s medical condition; 3. Establish a protocol for humane and appropriate confinement for the animals; . . . [and] 5. Utilize a timely process to determine the disposition of the animals and provide for prompt transfer to an appropriate rescue organization or adoptive home with humane euthanization occurring only if an animal’s medical or behavioral condition warrants such action or it is determined, after reasonable time and effort have been expended, that no appropriate placement for an animal exists; . . .

*Id.*

<sup>185</sup> *See supra* notes 50, 67–69 and accompanying text.

<sup>186</sup> Pimentel, *supra* note 67, at 19 (analyzing the legislative history of CAFRA and discussing the elimination of the cost bond). The general rules relating to forfeitures contain a provision providing for a civil fine between \$250 and \$5,000 if a court finds a claimant’s assertion of an interest in property was frivolous, if the government prevails in a civil forfeiture proceeding. 18 U.S.C. § 983(h) (2012).



### C. Proposed Legislation Targeting the AWA's Asset Forfeiture Provision

In February 2016 legislation was introduced that would address the issue of civil asset forfeiture of animals pursuant to Section 2156 (referred to in the legislation as Section 26 of the AWA). Similar legislation was introduced on January 10, 2017 and will be discussed below.<sup>187</sup> The title to the original legislation was Help Extract Animals from Red Tape Act of 2016 or the HEART Act of 2016 (the “HEART Act of 2016”).<sup>188</sup> The HEART Act of 2016 would have reduced the amount of time an animal could be in legal limbo and provided for a bond hearing process.<sup>189</sup> The HEART Act of 2016 would have amended the general rules for civil forfeiture proceedings set out in Title 18 in the following ways.<sup>190</sup> First, it would have reduced the time period in which notice of seizure of the property needs to be sent to interested parties from sixty days to thirty days with respect to animals seized pursuant to Section 26 of the AWA or under the prohibition of illegal gambling businesses (18 U.S.C. § 1955).<sup>191</sup>

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<sup>187</sup> Help Extract Animals from Red Tape Act of 2017, H.R. 398, 115th Cong. (2017) [hereinafter HEART Act of 2017]. Note to readers—the information in this Article regarding this legislation is up to date as of February 1, 2017. Readers interested in the legislation are encouraged to go to [Congress.gov](http://Congress.gov) to determine the current status of the legislation. See *supra* note 125 for an example of legislation that could impact the HEART Act of 2017.

<sup>188</sup> Help Extract Animals from Red Tape Act of 2016, H.R. 4613, 114th Cong. § 1 (2016) [hereinafter HEART Act of 2016].

<sup>189</sup> It is important to reduce the amount of time an animal is in a shelter, not only because that will reduce the cost of care, but also because being confined to a shelter, especially for a prolonged period of time can cause an animal's condition to decline. Bernstein & Wolf, *supra* note 6, at 10682–83 (discussing issues that can arise when animals are confined to shelters). In the *Bad Newz Kennels* case, once the title to the dogs passed to the federal government, but before the final order of disposition, some of the dogs were transferred for interim foster care to rescue organizations. Huss, *supra* note 7, at 78–79. The dogs remaining in the shelters received additional attention from a volunteer from one of those organizations. *Id.*; see also Declaration in Support of Government's Emergency Application for Entry of Default, United States v. Approx. 64 Dogs, Civil Action No. 16-4074 (C.D. Ill. Oct. 5, 2016) (providing declaration in support of the government's application for entry of default for seized dogs by Mr. Tim D. Rickey, Vice President, Field Investigations and Response for the American Society for the Prevention of Cruelty to Animals, discussing the possible deleterious effects on the health and well-being of animals who are cared for in the long-term in a shelter environment).

<sup>190</sup> HEART Act of 2016, *supra* note 188, §§ 2–3 (amending 18 U.S.C. § 983).

<sup>191</sup> *Id.* § 2 (amending 18 U.S.C. § 983(a)(1)(A) to reduce the notice period for Section 26 of the AWA and 18 U.S.C. § 1955 which prohibits illegal gambling businesses).

The HEART Act of 2016 also would have added language that provides if a person files a claim for an animal seized in a non-judicial forfeiture (under Section 26 of the AWA or 18 U.S.C. 1955), the federal government may file a petition in U.S. district court for a bond hearing relating to the claim.<sup>192</sup> The federal government would have been required to provide notice to the person claiming an interest in the animal and the court should commence the hearing not later than fifteen days after the date the person receives such notice.<sup>193</sup> The federal government would have been required to provide an accounting of the “costs already incurred, and the estimated reasonable and anticipated costs of future care for the animal per day” to the district court and person claiming an interest in the animal not later than five days prior to the hearing date.<sup>194</sup> “[R]easonable and anticipated costs’ include food, boarding, veterinary care (including humane euthanasia where appropriate), transport, and any other costs the court deems necessary to provide care to the seized animal.”<sup>195</sup>

The district court must order the person to post a bond unless he or she shows good cause not to post the bond.<sup>196</sup> The amount of the bond would have been set by the court and should “reimburse all reasonable and anticipated costs of caring for the animal from the date of seizure to a date the court deems appropriate” unless the court determined the person is financially unable to post a bond in that amount.<sup>197</sup> If the person failed to post the bond after fifteen days after issuance of the order, the court would have had the authority to order the immediate forfeiture of the seized animal to the government.<sup>198</sup> If bond had been posted, the U.S. Marshals Service would have been allowed to draw from the bond the “actual reasonable costs incurred

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<sup>192</sup> *Id.* § 3.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> HEART Act of 2016, *supra* note 188, § 3.

<sup>197</sup> *Id.* The court shall consider the following factors in determining whether the person is unable to pay a bond:

- (I) the income, earning capacity, and financial resources of the person claiming an interest in the animal;
- (II) the actual cost of care for the animal prior to seizure of the animal by the person claiming an interest in the animal, including but not limited to food, vaccinations, veterinary expenses, and licenses; and
- (III) such other factors as the court deems appropriate.

*Id.*

<sup>198</sup> *Id.*

in caring for the seized animal.”<sup>199</sup> If the person claiming an interest in the animal posted a bond and prevailed in the forfeiture proceeding, he or she would have been entitled to receive the full amount of the bond back.<sup>200</sup> The HEART Act of 2016 also made it clear that the owner of the animal may, instead of posting a bond or proceeding to a forfeiture hearing, voluntarily relinquish an animal to the government or animal control, animal shelter, or animal protection organization.<sup>201</sup> Essentially, this bond provision would have meant that an individual asserting an interest in an animal must obtain a bond to ensure that the estimated costs will be paid, rather than requiring the government to try to collect the costs after the process ends.

Representative Katko, one of the legislators who introduced the bill, cited to the financial burden placed on the government and local shelters and non-profit organizations in cases where animals are seized to support the legislation.<sup>202</sup> Representative Katko stated that the legislation “maintains important due process protections and shifts the cost of care for animals seized under federal animal fighting and gambling statutes from the taxpayer to the individual responsible.”<sup>203</sup> The American Society for Prevention of Cruelty to Animals and other animal advocacy organizations supported this legislation.<sup>204</sup>

As discussed above, in January 2017, similar legislation was introduced titled the “Help Extract Animals from Red Tape Act of 2017” or the “HEART Act of

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* The HEART Act of 2016 also provides that the “testimony of a person at a hearing held under this subsection is not admissible against that person in any criminal proceeding, except in a prosecution for perjury, and does not waive that person’s right against self-incrimination.” *Id.*

<sup>202</sup> U.S. Congressman John Katko, Press Release, *Katko Introduces Bipartisan Legislation to Support CNY Animal Advocacy Organizations and Save Taxpayer Dollars* (Feb. 25, 2016), <https://katko.house.gov/media-center/press-releases/katko-introduces-bipartisan-legislation-support-cny-animal-advocacy> [hereinafter *Katko Bipartisan Legislation*] (last visited Apr. 17, 2017). Representative Judy Chu of California co-introduced the bill. U.S. Congresswoman Judy Chu, Press Release, *Reps. Chu and Katko Introduce HEART Act to Help Animals Rescued by Federal Government* (Feb. 25, 2016), <https://chu.house.gov/press-release/reps-chu-and-katko-introduce-heart-act-help-animals-rescued-federal-government> (last visited Apr. 17, 2017).

<sup>203</sup> *Katko Bipartisan Legislation*, *supra* note 202.

<sup>204</sup> *Id.*; ASPCA, *Take Action: Help Extract Animal Fighting Victims from Red Tape* (Feb. 25, 2016), <http://www.asPCA.org/news/take-action-help-extract-animal-fighting-victims-red-tape> (last visited Apr. 17, 2017) (discussing the legislation and stating that lengthy holding periods for animals is a burden for animal-protection groups and shelters and can prevent future animal-fighting investigations).

2017.”<sup>205</sup> The HEART Act of 2017 also would provide for a shorter notice provision<sup>206</sup> but dropped the language of the HEART Act of 2016 that would have allowed the government to petition the district court for a bond hearing.<sup>207</sup> Instead of the bond hearing language, the Heart Act of 2017 would add language requiring the claimant in any civil forfeiture proceeding in which the government prevails to reimburse the United States for “any actual and reasonable costs to the government for the transportation, shelter, care, veterinary services or where appropriate, humane euthanasia of an animal that was the subject of the proceeding.”<sup>208</sup>

Under the HEART Act of 2017, a court may reduce the size of reimbursement based on several factors including “the claimant’s financial condition and need to support a family.”<sup>209</sup> Although the HEART Act of 2017 restitution provision is a positive step, in that it more clearly articulates the type of expenses that would be subject to restitution and credits any restitution to the agency or fund used to pay the costs, it still requires that the individual that is subject to such provision be a “claimant” in the proceeding.<sup>210</sup> This reimbursement language does not have the same impact as the bond hearing provision of the HEART Act of 2016 because, under the 2017 legislation, the government is required to try to collect any reimbursement of costs after the forfeiture proceeding has ended rather than having the bond amount to be able to be drawn upon during the proceedings.<sup>211</sup> In addition, bond requirements can result in a reduction of the amount of time an animal is in the legal process.<sup>212</sup>

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<sup>205</sup> HEART Act of 2017, H.R. 398, 115th Cong.

<sup>206</sup> *Id.* § 2. The language regarding notice in the HEART Act of 2017 also added provisions allowing for an extension of the notice provision under certain circumstances but only after consideration of following factors: “(i) The cost to the government of caring and providing shelter for the animal. (ii) The psychological and physical health of the animal and the effect the delay will have on its rehabilitation. (iii) Any increased risk that the delay could necessitate the euthanasia of the animal.” *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* § 3(b). The agency or fund used to pay for the costs would be the one to be reimbursed.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See supra* notes 192–201 and accompanying text (discussing bond provision of the HEART Act of 2016).

<sup>212</sup> *See supra* notes 179–84 and accompanying text (discussing state bond provisions).

## V. CONCLUSION: SUGGESTED REVISIONS TO STRENGTHEN THE AWA'S ANIMAL FIGHTING VENTURES PROVISION

There has been a significant strengthening of the AWA's animal fighting provision in the past decade. The reality is that the possibility of significant prison sentences and fines can now be used by prosecutors to more effectively address the issue of animal fighting at the federal level.

As this Article discusses, significant pieces of legislation have been introduced that would impact the application of § 2156 of the AWA. On one hand, opponents of asset forfeiture generally want to increase the time for owners to assert their rights and make it more difficult for the federal government to meet its burden of proof. On the other hand, legislators recognizing the costs associated with animal fighting (both financial and to the animals' well-being) are proposing to reduce the time the animals involved in asset forfeiture would be in legal limbo and to address the costs associated with the seizure of animals. Either version of the HEART Acts' provisions relating to costs and impoundment would override any new protections provided by the Due Process Act regarding timing; however, the stricter standard of proof would remain.

Adopting aspects of the Due Process Act and a version of the HEART Act (or similar legislation) may be the best way to address the general concerns over asset forfeiture, while recognizing that seizing animals involves unique issues.

The AWA should be strengthened to provide additional tools for prosecutors to address animal fighting.<sup>213</sup> The AWA should be amended to allow for the civil asset forfeiture of property other than the animals.<sup>214</sup> If our society believes that forfeiture provisions can be appropriately utilized for other offenses (such as drugs or gambling), why should animal-fighting offenses be treated any differently?<sup>215</sup> The theories supporting civil asset forfeiture apply equally to these crimes.<sup>216</sup> Don't we want to remove the tools of the crime and deter this type of criminal activity? Why shouldn't the vehicles used to transport the dogs over state lines or the real estate

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<sup>213</sup> Remember, in theory, asset forfeiture is *not* supposed to be used as a direct revenue generation tool. See *supra* notes 103–05 and accompanying text (discussing ethical issues in asset forfeiture).

<sup>214</sup> See also *supra* note 50 and accompanying text (discussing that criminal forfeiture is another option if civil forfeiture is supported by the statutory provision).

<sup>215</sup> USDA ANIMAL CARE BACKGROUNDER, *supra* note 3 (discussing other illegal activities that often are included in animal fighting circles).

<sup>216</sup> See *supra* notes 99–102 and accompanying text.

where fights were held be subject to asset forfeiture?<sup>217</sup> The additional language could provide a non-exhaustive list of the types of property that could be seized, or it could more generally state that the property allowed to be seized includes any proceeds and property used or intended to be used to commit or facilitate the commission of the offense (in this case the animal fighting venture).

The Author proposes that the amendment could be accomplished in a few ways. The current provision of the AWA could be amended to expand the property that is subject to civil asset forfeiture to any property associated with the animal fighting ventures.<sup>218</sup> In the alternative, a separate section could be added providing for civil asset forfeiture for property other than the animals involved in animal fighting ventures.<sup>219</sup>

Second, the Author suggests the U.S. Code provision relating to restitution should be revised to provide that if a defendant is convicted of the AWA's animal fighting venture provision, the court may order the defendant make restitution to any victim of such offense.<sup>220</sup> Additional language would need to be added to clarify that "victim" in this circumstances is any person or entity that had or will have incurred economic costs associated with the offense, included, but not limited to, the costs incurred for the care of the animals.<sup>221</sup> As with assessment of fines, the court would be required to consider the financial resources available to the defendant and the

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<sup>217</sup> See *supra* notes 151–64 and accompanying text (discussing the limited asset forfeiture provision under the AWA). Note that the seizure of real estate is subject to greater protection under the law, including a requirement of prior notice and that the property must be seized pursuant to a judicial (civil) forfeiture rather than an administrative process. 18 U.S.C. § 985 (2012); see also CASSELLA, *supra* note 38, at 225–35 (discussing the seizure of real property).

<sup>218</sup> Disposition of the property other than the animals should be subject to the standard asset forfeiture process.

<sup>219</sup> Having a separate section would require prosecutors to file separate cases but would mean that any differences in how the property is treated (for notice provisions etc.) would be easier to track. If legislation such as the Due Process Act is passed, the seizure of property other than animals should be made subject to the due process protections and timing that apply to the seizure of property in other crimes.

<sup>220</sup> 18 U.S.C. § 3663(a)(1)(A) (setting forth the offenses that can support court ordered restitution). Note that 18 U.S.C.A. § 3663A (West 2016) sets out certain offenses (and victims) where restitution is mandated rather than at the discretion of the court. The HEART Act of 2017 would clarify the possibility of restitution to the United States; however, this proposal widens the pool of potential victims to other entities (such as humane societies and shelters) that have or will have incurred economic costs.

<sup>221</sup> 18 U.S.C. § 3663 (a)(2) (defining victim). It is not unusual for a non-profit or other entity to be entitled to restitution for the care of animals. *E.g.*, *Bickford v. State*, 25 N.E.3d 1275 (Ind. App. 2015) (holding that a non-profit rescue organization was a "victim" of the defendant's neglect of horses under the general restitution statute). It is unrealistic to provide for all future costs of care; however, at a minimum, the costs associated with the animals' care for a reasonable time for an entity to find a suitable placement for the animal should be included.

impact on the defendant's dependents; thus, significant restitution awards are unlikely except in situations with defendants who have substantial assets.

Third, the Author argues that the language of the HEART Act of 2016, which provides for the government to have the option to request a bond hearing, should be re-introduced. Bond hearings are common at the state level in animal cruelty cases, and they make it more likely that the government may recoup some of its expenses if a purported owner wishes to contest a seizure of animals.

This Article sets forth just a few ways that the AWA's animal fighting venture provision can be strengthened. The dogs seized in these cases may not have significant economic value, but they are vulnerable sentient beings who deserve our protection.