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(Original Signature of Member)

114TH CONGRESS
2D SESSION

H. R. _____

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

IN THE HOUSE OF REPRESENTATIVES

Mr. SENSENBRENNER introduced the following bill; which was referred to the Committee on _____

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

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

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

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

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

8 (2) in paragraph (1)—

9 (A) in subparagraph (A)—

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

12 (ii) by striking clause (ii);

13 (iii) in clause (iii)—

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

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

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

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

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

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

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

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

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

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

3 (B) in subparagraph (C)—

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

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

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

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

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

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

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

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

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

5 (4) in paragraph (2)(B)—

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

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

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

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

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

22 “(5)(A) A party claiming property seized in a civil
23 forfeiture proceeding under a civil forfeiture statute may
24 request, not later than 30 days after the date on which
25 a notice described in paragraph (1)(A) is received or if

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

8 “(B) If a party makes a request under subparagraph
9 (A), a magistrate judge shall conduct an initial hearing
10 not later than 10 days after the date on which the request
11 is made.

12 “(C) At the initial hearing—

13 “(i) the magistrate judge shall—

14 “(I) inform the party in easily understood
15 terms of—

16 “(aa) the right of the party to be rep-
17 resented by counsel at the initial hearing
18 and any civil forfeiture proceeding under a
19 civil forfeiture statute;

20 “(bb) the right of the party to request
21 that the party be represented by counsel at
22 the initial hearing and any civil forfeiture
23 proceeding under a civil forfeiture statute
24 if the magistrate judge finds that the party

1 meets the requirements described in sub-
2 section (b);

3 “(cc) sufficiently detailed facts re-
4 garding the seizure of the property if the
5 property was seized pursuant to a warrant
6 described in the matter preceding subpara-
7 graph (A) of section 981(b)(2); and

8 “(dd) the right of the party to chal-
9 lenge the lawfulness of the seizure of the
10 property, including on the grounds that at
11 the time the property was seized—

12 “(AA) if the property was seized
13 pursuant to a warrant described in
14 the matter preceding subparagraph
15 (A) of section 981(b)(2), the warrant
16 was not supported by probable cause;
17 or

18 “(BB) if the property was seized
19 without a warrant described in
20 subitem (AA), none of the exceptions
21 described in subparagraphs (A) and
22 (B) of section 981(b)(2) apply to the
23 seizure of the property; and

24 “(II) if the party meets the requirements
25 described in subsection (b), authorize counsel to

1 represent the party or insure that the party is
2 represented by an attorney for the Legal Serv-
3 ices Corporation, as applicable, in accordance
4 with that subsection; and

5 “(ii) the burden of proof is on the Government
6 to establish that at the time the property was
7 seized—

8 “(I) if the property was seized pursuant to
9 a warrant described in the matter preceding
10 subparagraph (A) of section 981(b)(2), the war-
11 rant was supported by probable cause; or

12 “(II) if the property was seized without a
13 warrant described in subclause (I)—

14 “(aa) sufficiently detailed facts re-
15 garding the seizure of the property; and

16 “(bb) an exception described in sub-
17 paragraphs (A) and (B) of section
18 981(b)(2) applies to the seizure of the
19 property.

20 “(D) The magistrate judge shall enter an order for
21 the immediate release of the seized property with prejudice
22 to the right of the Government to commence a forfeiture
23 proceeding at a later time if the magistrate judge finds
24 that—

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

4 “(ii) the Government did not meet the burden
5 of proof described in subparagraph (C)(ii).”.

6 **SEC. 3. REPRESENTATION.**

7 Section 983(b) of title 18, United States Code, is
8 amended—

9 (1) in paragraph (1)(A), by striking “judicial”;
10 and

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

19 **SEC. 4. BURDEN OF PROOF.**

20 Section 983(e) of title 18, United States Code, is
21 amended—

22 (1) in paragraph (1), by striking “a preponder-
23 ance of the evidence” and inserting “clear and con-
24 vincing evidence”; and

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

4 **SEC. 5. RIGHT TO REQUEST HEARING ON PRE-TRIAL RE-**
5 **STRAINT OF PROPERTY TO RETAIN COUNSEL**
6 **OF CHOICE.**

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

9 (1) by striking paragraph (1) and inserting the
10 following:

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

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

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

1 “(I) there is a substantial probability that
2 the United States will prevail on the issue of
3 forfeiture and that failure to enter the order
4 will result in the property being destroyed, re-
5 moved from the jurisdiction of the court, or
6 otherwise made unavailable for forfeiture; and

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

11 “(B)(i) Upon motion of a defendant charged with a
12 violation of section 1962 for which criminal forfeiture is
13 ordered under this section and against whom the order
14 is entered, supported by an affidavit, the court shall hold
15 a hearing to determine whether to modify or rescind, in
16 whole or in part, an order entered under subparagraph
17 (A) to allow the defendant to use the property subject to
18 the order to retain counsel of choice.

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

20 “(I) the weight of the evidence against the de-
21 fendant with respect to the violation of section 1962
22 for which criminal forfeiture is ordered under this
23 section;

1 “(II) the weight of the evidence with respect to
2 whether the property will be subject to forfeiture
3 under this section;

4 “(III) the history and characteristics of the de-
5 fendant; and

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

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

10 “(i) extended by the court for good cause
11 shown; or

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

14 (2) in paragraph (2), by inserting “that the de-
15 fendant committed a violation of section 1962 for
16 which criminal forfeiture may be ordered under this
17 section and probable cause to believe” after “be-
18 lieve”.

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

22 (1) by striking paragraph (1) and inserting the
23 following:

24 “(1)(A) Upon application of the United States, the
25 court may enter a restraining order or injunction, require

1 the execution of a satisfactory performance bond, or take
2 any other action to preserve the availability of property
3 described in subsection (a) for forfeiture under this sec-
4 tion—

5 “(i) upon the filing of an indictment or infor-
6 mation charging a violation of this title or title III
7 for which criminal forfeiture may be ordered under
8 this section and alleging that the property with re-
9 spect to which the order is sought would, in the
10 event of conviction, be subject to forfeiture under
11 this section; or

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

16 “(I) there is a substantial probability that
17 the United States will prevail on the issue of
18 forfeiture and that failure to enter the order
19 will result in the property being destroyed, re-
20 moved from the jurisdiction of the court, or
21 otherwise made unavailable for forfeiture; and

22 “(II) the need to preserve the availability
23 of the property through the entry of the re-
24 quested order outweighs the hardship on any
25 party against whom the order is to be entered.

1 “(B)(i) Upon motion of a defendant charged with a
2 violation of section 1962 for which criminal forfeiture is
3 ordered under this section and against whom the order
4 is entered, supported by an affidavit sufficient to dem-
5 onstrate a genuine need for the defendant to use the prop-
6 erty subject to an order entered under subparagraph (A)
7 to retain counsel of choice, the court shall hold a hearing
8 to determine whether to modify or rescind, in whole or
9 in part, the order to allow the defendant to use the prop-
10 erty to retain counsel of choice.

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

12 “(I) the weight of the evidence against the de-
13 fendant with respect to the violation of this title or
14 title III for which criminal forfeiture is be ordered
15 under this section;

16 “(II) the weight of the evidence with respect to
17 whether the property will be subject to forfeiture
18 under this section;

19 “(III) the history and characteristics of the de-
20 fendant; and

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

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

1 “(i) extended by the court for good cause
2 shown; or

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

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

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

11 Section 2465(b) of title 28, United States Code. is
12 amended—

13 (1) in paragraph (1), by striking “substan-
14 tially”; and

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

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

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

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

5 The Inspector General shall annually conduct an
6 audit of a representative sample of Federal civil forfeitures
7 under statutes described in section 983(i) of title 18,
8 United States Code to ensure those forfeitures are con-
9 stitutionally sound and consistent with the letter and spirit
10 of the law. The Inspector General shall report the results
11 of the audit to the Attorney General and to Congress.
12 Such report shall also include the fiscal status of the Asset
13 Forfeiture Fund, including any projected growth or
14 shrinking of the Fund in future years, and the viability
15 of the fund.

16 **SEC. 8. PUBLICLY AVAILABLE DATA BASES.**

17 (a) QUARTERLY UPDATED DATA BASE ON DETAILS
18 OF FORFEITURES.—The Attorney General shall establish
19 and maintain, with updates on a quarterly basis, a publicly
20 available data base that describes with respect to seizures
21 for all Federal civil forfeiture containing the following:

22 (1) For each such seizure:

23 (A) Unit of an agency responsible for the
24 seizure, and the location, including at a min-

1 imum the State, city, and judicial district where
2 and date when the seizure took place.

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

6 (C) The nature and value of the seized
7 property.

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

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

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

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

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

1 (I) The status of any concurrent or related
2 criminal proceeding against the owner of the
3 property, any pending case under title 11 in
4 which the owner of record of the property is the
5 debtor, and any pending civil case in which a
6 receiver has been ordered to take control of the
7 property.

8 (J) Whether the forfeiture was contested.

9 (K) Whether the innocent owner made a
10 claim on the property.

11 (L) The total expenses associated with the
12 forfeiture.

13 (M) The total net proceeds of the for-
14 feiture.

15 (2) A statistical break down for each agency of
16 the cases of remission and mitigation, including—

17 (A) the numbers of requests for remission
18 and mitigation that were—

19 (i) fully granted;

20 (ii) partially granted; or

21 (iii) returned; and

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

1 (i) the average percentage of the value
2 of seized property that was returned to the
3 owner; and

4 (ii) what percentage of requests re-
5 sulted in returned property in each of the
6 following categories:

7 (I) More than zero but less than
8 25 percent of the property was re-
9 turned.

10 (II) 25 percent or more of the
11 property was returned, but less than
12 50 percent.

13 (III) 50 percent or more of the
14 property was returned, but less than
15 75 percent.

16 (IV) 75 percent or more of the
17 property was returned, but less than
18 100 percent.

19 (3) Any money given from the Asset Forfeiture
20 Fund or Treasury Forfeiture Fund to State or local
21 law enforcement for Joint Law Enforcement Oper-
22 ations (commonly referred to as “JLEO”) funding,
23 or for any other purpose, and the name of the State
24 or local entity receiving that funding.

1 (b) REAL-TIME DATA BASE TO ASSIST PERSONS
2 WHOSE PROPERTY IS SEIZED.—

3 (1) ESTABLISHMENT.—The Attorney General
4 shall establish and maintain, with updates on a real-
5 time basis, a data base, organized by State and
6 county, with respect to each Federal seizure of real
7 and personal property for Federal civil forfeiture
8 under statutes described in section 983(i) of title 18,
9 United States Code.

10 (2) DESIGN.—The Attorney General shall de-
11 sign the data base to allow any interested party, in-
12 cluding any owner, creditor, or lienholder, to deter-
13 mine whether that party has an interest in any such
14 property and to inform that party, and the general
15 public, on the specifics of how to contest each sei-
16 zure before the forfeiture.

17 (c) HEADS OF AGENCIES TO SUBMIT INFORMATION
18 FOR DATA BASES.—Not less frequently than quarterly, on
19 a schedule determined by the Attorney General, the head
20 of each Federal agency shall submit to the Attorney Gen-
21 eral a report that provides, in such form as the Attorney
22 General may prescribe, the information the Attorney Gen-
23 eral is required to include in the data bases established
24 under this section.

1 **SEC. 9. STANDARD OF PROOF RELATING TO POSSIBLY IN-**
2 **NOCENT OWNERS.**

3 (a) BURDEN OF PROOF.—Paragraph (3) of section
4 983(c) of title 18, United States Code, is amended to read
5 as follows:

6 “(3) if the Government’s theory of forfeiture is
7 that the property was used to commit or facilitate
8 the commission of a criminal offense, or was in-
9 volved in the commission of a criminal offense, the
10 Government shall establish by clear and convincing
11 evidence that—

12 “(A) there was a substantial connection
13 between the property and the offense; and

14 “(B) the owner of any interest in the
15 seized property—

16 “(i) intentionally used the property in
17 connection with the offense;

18 “(ii) knowingly consented to the use
19 of the property by another in connection
20 with the offense; or

21 “(iii) should have reasonably known
22 that the property was being used in con-
23 nection with the offense.”.

24 (b) INNOCENT OWNER DEFENSE.— Paragraph (1)
25 of section 983(d) of title 18, United States Code, is
26 amended to read as follows:

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

6 **SEC. 10. PROPORTIONALITY.**

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

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

12 (2) by amending paragraph (2) to read as fol-
13 lows:

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

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

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

6 “(2) CIVIL FORFEITURE.—

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

16 “(B) STRUCTURING.—Any property in-
17 volved in a violation of section 5324, or any
18 conspiracy to commit any such violation, and
19 any property traceable to any such violation or
20 conspiracy, may be seized and forfeited to the
21 United States in accordance with the proce-
22 dures governing civil forfeitures in money laun-
23 dering cases pursuant to section 981(a)(1)(A)
24 of title 18 only if the property to be seized and
25 forfeited is derived from an illegal source or if

1 the structuring offense was used to conceal vio-
2 lations of other criminal laws.”.

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

4 This Act and the amendments made by this Act shall
5 take effect on the date of the enactment of this Act and
6 apply only with respect to seizures made on or after that
7 date. Seizures made before that date shall continue to be
8 governed by the law as it existed without regard to this
9 Act or the amendments made by this Act.