

**PROCEEDINGS AT HEARING
OF
MAY 10, 2021**

COMMISSIONER AUSTIN F. CULLEN

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May 10, 2021

(Via Videoconference)

(PROCEEDINGS COMMENCED AT 9:30 A.M.)

THE REGISTRAR: Good morning. The hearing is now resumed. Mr. Commissioner.

THE COMMISSIONER: Thank you, Madam Registrar.
Yes, Mr. McGowan.

MR. MCGOWAN: Yes. Good morning. Mr. Commissioner, the witness today will be Mr. Stefan Cassella.

Madam Registrar, if you could please attend to affirming the witness.

**STEFAN CASSELLA, called
for the commission,
affirmed.**

THE REGISTRAR: And please state your full name and spell your first name and last name for the record.

THE WITNESS: I am Stefan Cassella. S-t-e-f-a-n,
Cassella, C-a-s-s-e-l-l-a.

EXAMINATION BY MR. MCGOWAN:

Q Good morning, Mr. Cassella.

A Good morning, Patrick.

Q How are you today?

A I'm very well, thank you.

Q Good. I'm going start by just reviewing for the

1 Commissioner some of your background and
2 experience. And you provided to us a copy of
3 your CV?

4 A Yes.

5 MR. MCGOWAN: Madam Registrar, if you could please
6 display that briefly.

7 Q This is a copy of the CV you provided to us?

8 A Yes, it is.

9 MR. MCGOWAN: If that could be the next exhibit,
10 please, Mr. Commissioner.

11 THE COMMISSIONER: Yes, very well. 968.

12 THE REGISTRAR: Exhibit 968.

13 **EXHIBIT 968: Curriculum Vitae of Stefan**
14 **Cassella**

15 MR. MCGOWAN: And that can come down now, Madam
16 Registrar.

17 Q And just without the need to sort of walk you
18 through all of it, I'm just going to touch on a
19 few of the high points of your experience, sir.
20 You're a lawyer by training?

21 A I'm sorry, say again.

22 Q You're a lawyer by training?

23 A Yes, I am.

24 Q Currently you're working as a self-employed
25 consultant, offering your services to state and

1 federal and foreign law enforcement agencies,
2 financial institutions, NGOs and private law
3 firms and the like?

4 A Yes, that's right.

5 Q And the work you're doing now builds on a
6 lengthy career as a prosecutor with a focus on
7 asset forfeiture and money laundering?

8 A Yes, that's right.

9 Q In fact you were with the US State Department
10 from 1985 to 2015?

11 A That would be the United States Department of
12 Justice, but yes.

13 Q Yes. Pardon me. United States Department of
14 Justice, yes. With a real focus throughout your
15 career as a prosecutor prosecuting money
16 laundering and offences which generate
17 significant amounts of proceeds?

18 A Yes, that's right. I mean, I was responsible
19 for trying, that is prosecuting, money
20 laundering and recovering assets through civil
21 and criminal forfeiture. I was for a lengthy
22 period of time the Deputy Chief in the money
23 laundering and asset forfeiture section in
24 Washington which -- with national
25 responsibility, and my responsibility was for

1 drafting legislation and training federal
2 prosecutors and also for setting policy, and
3 later I became the Chief of that section in the
4 US Attorneys office for the District of
5 Maryland.

6 Q You spoke of some of your responsibilities in
7 terms of legislative drafting. You were the
8 principal author of the *Civil Asset Forfeiture*
9 *Reform Act* of 2000?

10 A Yeah, that's right.

11 Q And also the principal author of the money
12 laundering provisions in title 3 of the *US*
13 *Patriot Act*?

14 A Yeah, that's right.

15 Q You've also published extensively on topics
16 related to money laundering and asset
17 forfeiture?

18 A Yes, far more than anyone would want to read,
19 I'm sure.

20 Q You were the author of the text *Asset Forfeiture*
21 *Law* in the United States?

22 A That's right. It's a treatise first published
23 in 2006, second edition in 2013 and a third
24 edition coming out this summer.

25 Q And also the author of *Federal Money Laundering:*

1 *Crimes and Forfeitures?*

2 A That's right. That was published in a second
3 edition in 2020.

4 Q And you're further the author of a monthly
5 digest entitled *Asset Forfeiture and Money*
6 *Laundering?*

7 A That's right. Since 1994, beginning when I was
8 a federal employee and continuing these last
9 six years while I have been in solo practice, I
10 publish a monthly digest of all the federal
11 money laundering and forfeiture cases. It
12 circulates to almost all of the federal law
13 enforcement agencies, to virtually all of the
14 US Attorneys offices and to a number of private
15 law firms by subscription.

16 Q And in addition to advising local law
17 enforcement, you have a role now in advising
18 foreign governments on the formation and
19 structure of their anti-money laundering
20 regimes?

21 A Yeah, it's been an opportunity to travel and to
22 extend the benefit of whatever we've learned
23 here in the United States to foreign
24 governments. Before COVID I travelled
25 extensively in South America, the Middle East,

1 Eastern Europe and Africa and since that time
2 we've been doing some of that training and
3 advising via video conferencing like we are
4 today.

5 Q Okay. Well, I'm hoping we can take advantage of
6 some your wealth of experience to educate the
7 Commissioner a little bit on the American
8 experience as it relates to money laundering and
9 asset forfeiture. In your effort to assist us
10 you've prepared quite a comprehensive report
11 addressing the American federal money laundering
12 and asset forfeiture regime?

13 A That's right.

14 MR. MCGOWAN: Madam Registrar, if we could please
15 have Mr. Cassella's report displayed.

16 That's the first page of the lengthy report
17 you prepared for us?

18 A It looks familiar, yes.

19 MR. MARTLAND: Yes. If that could be the next
20 exhibit, please, Mr. Commissioner.

21 THE COMMISSIONER: Yes, very well. 969.

22 THE REGISTRAR: Exhibit 969.

23 **EXHIBIT 969: Report for the Cullen Commission**
24 **by Stefan Cassella**

25 MR. MCGOWAN: Yes. And that can come down now.

1 Q And in addition you prepared a brief addendum to
2 your report outlining a brief comparison between
3 the US and British Columbia civil forfeiture
4 regimes?

5 A Yes, that's right.

6 MR. MCGOWAN: If that could be displayed briefly,
7 Madam Registrar. If that could be the next
8 exhibit, please.

9 THE COMMISSIONER: 970.

10 THE REGISTRAR: Exhibit 970.

11 **EXHIBIT 970: Addendum - Civil Forfeiture Law in**
12 **the United States**

13 MR. MCGOWAN:

14 Q And, Mr. Cassella, through your private
15 consulting work now you have some affiliation
16 with Dr. German, Dr. Peter German?

17 A Yes, Peter German and I are personal friends.
18 We met 20 years ago at an academic conference
19 that we both attend regularly in Cambridge,
20 England. Cambridge University. And we have
21 over the course of that time worked together on
22 some projects for various NGOs. We are
23 currently working together on a project for the
24 United Nations UNODC. In the past we've done
25 some work with other NGOs in other parts of the

1 world.

2 Q And you're aware that Dr. German prepared a
3 couple of reports for the British Columbia
4 government related to the topic of money
5 laundering?

6 A Yes. He told me that he did.

7 Q Yes. And in the preparation of the reports that
8 you prepared for the commission, were those
9 prepared by you independent of any input from
10 Dr. German other than what you might have read
11 in his reports?

12 A Oh, yeah. This was entirely something I
13 prepared. I don't think he's seen it. I
14 haven't read his reports.

15 Q Okay. I'd like to ask you a few questions about
16 the legislative structure as it relates to money
17 laundering in the United States. I gather
18 there's a good number of legislative provisions
19 which criminalize conduct connected with the
20 money laundering or the non-compliance with AML
21 measures?

22 A Yeah, we have a very robust anti-money
23 laundering regime that deals on the criminal
24 side, some of it in what's called *Bank Secrecy*
25 *Act* and some of it in the *Criminal Code*.

1 Q Okay. And I gather from your report that
2 broadly speaking there's two categories of
3 criminal offence. Currency reporting statutes
4 and, secondly, those that criminalize
5 essentially domestic or international money
6 laundering?

7 A That's correct. I mean, if I could expand on
8 that a little bit. There are various ways in
9 which you could group or subdivide the universe
10 of money laundering statutes. As you mentioned,
11 Patrick, there's those that have to do with
12 currency reporting, or which more generally
13 might be described as statutes that criminalize
14 money laundering regardless of the source of the
15 money because they deal with currency reporting,
16 and the category of crimes that do have to do
17 with criminal proceeds and then financial
18 transactions that follow from that.

19 Another way of characterizing the money
20 laundering statutes might be to group them
21 between those that are domestic money laundering
22 statutes and international money laundering
23 statutes. You can also group them in terms of
24 intent. Those that have to do the intent to
25 conceal, those that have to do with the intent

1 to promote another crime, those that have to do
2 with simply spending the criminal proceeds.

3 And also perhaps most usefully the one way I
4 like to characterize them or group them are
5 between those that involve self-money
6 laundering, where the criminal who committed the
7 underlying crime is laundering his own money,
8 and those that have to do with third-party money
9 laundering or a standalone money laundering
10 statute where you're prosecuting someone for
11 laundering the proceeds of crime committed by a
12 third party.

13 All of those are different ways you could
14 draw a Venn diagram around the different money
15 laundering statutes.

16 Q Yes. And speaking of the currency reporting
17 statutes, I wonder if you could just address the
18 Commissioner on who is being -- what is the
19 nature of those offences and who are they really
20 aimed at targeting? Is it the money launderer
21 or is it institutions that might deal with the
22 money launderer or the criminals' proceeds?

23 A Well, it's both, but I guess the history is
24 important. These are our oldest money
25 laundering statutes. They date back to 1970 and

1 they're part of the *Bank Secrecy Act*, what we
2 call the *Bank Secrecy Act*. The idea was to
3 create a paper trail when people are conducting
4 their transactions exclusively in cash
5 specifically for the purpose of avoiding the
6 creation of a paper trail and the original
7 impetus for them was to detect tax evasion.
8 People conduct transactions in cash so that they
9 don't create paper and without paper it's more
10 difficult to determine that they are not
11 reporting all their income for tax purposes.

12 So the idea was to create that paper trail
13 by requiring the financial institutions to
14 report any transaction involving more than
15 \$10,000 in currency to the Treasury Department.
16 And over time they were expanded, so now we have
17 several categories of currency transaction
18 reports. Those that must be filed by financial
19 institutions, banks and similar financial
20 institutions. Those that must be filed by
21 trades or businesses. You know, anyone -- a car
22 dealer, an attorney, anyone that conducts a
23 trade or a business and receives more than
24 \$10,000 in currency. And finally, travellers.
25 Anyone travelling in or out of the United States

1 with more than \$10,000 in currency.

2 So you have those three different categories
3 of reports, and there are penalties that apply
4 to the financial institution or the trader
5 business or the traveller that fails to file
6 them, but there are also penalties that apply to
7 people who seek to evade the reporting
8 requirement in various ways. In the original
9 enactment of the statutes in 1970 it was just --
10 the punishment was simply failing to file the
11 report, but since that time we now have the
12 crime of structuring where you manipulate your
13 financial transactions in such a way to prevent
14 the bank or the financial institution or the
15 merchant from detecting the fact that you're
16 conducting a transaction involving more than
17 \$10,000.

18 And if you wanted, we could discuss in
19 detail the various ways in which that offence
20 can be committed. But since 1986 we've had the
21 crime of failing to file a report, filing a
22 false report, filing an incomplete report, and
23 structuring your transactions to evade the
24 reporting requirement. And this can apply to
25 the reports that have to be filed by banks, to

1 the reports that have to be filed by trades and
2 businesses and to the travellers' reports that
3 are filed with the customs service.

4 Q I wonder if you could just comment on the extent
5 to which prosecutions are actually pursued in
6 the United States for offences such as failing
7 to file a report or filing an incomplete or
8 false report?

9 A Well, we do prosecute those. And generally
10 early on there were was some prosecutions
11 against banks for failing to file a report.
12 They just didn't consider it to be -- in my
13 opinion they didn't consider it to be something
14 important to do. And to make the point, there
15 were some fairly high profile prosecutions
16 against the bank of New England and the Bank of
17 Boston. And I'm talking about back in the late
18 1970s, early 1980s. There hasn't been much need
19 to prosecute financial institutions for this
20 offence, at least not the major ones. Since
21 that time they have understood the importance of
22 it.

23 There have been some prosecutions against
24 cheque cashers and more informal money service
25 businesses for failing to file the reports or

1 for filing false or misleading reports since
2 that time. Most prosecutions, however, deal
3 with the customer who has been trying to evade
4 the reporting requirement by the way he has or
5 she has manipulated the financial transaction.

6 Q Thank you. One of the offences that I saw
7 commented on in your report which is perhaps of
8 interest is the offence of using more than
9 \$10,000 in criminally derived funds. I wonder
10 if you can just briefly comment on that offence
11 for the Commissioner.

12 A Sure. Moving on from the currency transaction
13 reporting offences, which do not require proof
14 of the illegal source of the money. We have
15 several categories of offences that do involve
16 illegally tainted criminal proceeds. And these
17 of course are not restricted to cash in this
18 context. We're talking about whatever form the
19 proceeds might take.

20 But in addition to the, I guess, somewhat
21 more traditional money laundering statutes that
22 we see around the world which might be
23 characterized as concealment money laundering
24 where there's an intent to conceal the money or
25 promotion money laundering where there's an

1 intent to use the criminal proceeds to commit a
2 new crime in the future, we have a transaction
3 money laundering statute. It's title 18,
4 section 1957 of the *US Code*. And effectively it
5 makes it an offence to spend or deposit or
6 transfer any criminal proceeds in an amount over
7 \$10,000 for any purpose.

8 And the typical transaction is someone who
9 commits a crime and then uses more than \$10,000
10 in the proceeds of that crime to buy an
11 expensive car or boat or airplane or jewellery
12 or to take an expensive vacation or simply to
13 transfer the money to other persons, whether
14 they be involved in or not involved in his
15 criminal offence. The notion was -- and this
16 was enacted in 1988 and has been used
17 extensively. The notion was to make the
18 criminal proceeds valueless. If you can't spend
19 the proceeds of your crime, the argument went,
20 then there is a deterrent to committing the
21 crime in the future. So you can't commit a
22 crime and make more than \$10,000 in proceeds and
23 benefit from it because you can't spend the
24 money without committing another crime.

25 And a second objective was to criminalize

1 the receipt of that money by someone not
2 involved in the underlying offence but who was
3 benefitting from the offence by becoming a
4 vendor of goods and services. If I sell
5 automobiles to a known drug dealer, he's
6 committing a violation of section 1957, that is
7 the drug dealer is, by spending more than
8 \$10,000 to buy my car and I'm committing the
9 offence by receiving it.

10 And so you're making the criminals money
11 valueless in two respects. He can't spend it
12 without committing another crime and a merchant
13 cannot receive it knowingly without committing a
14 crime as well. And so the idea is to sort of
15 freeze criminal proceeds out of the stream of
16 commerce.

17 There was a 10,000 minimum threshold placed
18 on the statute so as not to criminalize *de*
19 *minimis* transactions, but -- and there is also a
20 requirement that the transaction involve a
21 financial institution. Simply spending cash on
22 the street doesn't trigger the statute. But
23 otherwise it's a statute that is used quite
24 frequently to prosecute the simple spending or
25 investment of criminal proceeds.

1 Q And you mentioned that the recipient would have
2 to knowingly receive the criminal proceeds,
3 which I take it means they would have to know
4 that the proceeds were criminal?

5 A Yes, that's right.

6 Q And in -- with respect to that statute, does
7 willful blindness suffice to establish
8 knowledge?

9 A Yes. In all of our money laundering statutes,
10 that one included, knowledge and willful
11 blindness are equated with each other. So a
12 judge would typically instruct the jury that the
13 defendant has -- they must find beyond a
14 reasonable doubt that the defendant knew the
15 money was criminal proceeds and that they can
16 make that inference from his willful blindness.
17 And then "willful blindness" is defined in
18 several ways, but it is the equivalent of
19 knowledge.

20 Q I wonder if you could just comment on nature of
21 the statutes that exist in the United States
22 which target sort of international professional
23 money launderers.

24 A Well, the international money laundering statute
25 is similar to but not identical to the domestic

1 money laundering statute. One way in which it
2 differs is that you don't need a financial
3 transaction, you just need to be transporting or
4 transferring money across the border. So it
5 applies to anyone who is moving money in any
6 form, currency or non-currency, including in
7 this day and age cryptocurrencies, into or out
8 of the United States.

9 The other way in which it differs from our
10 domestic money laundering statute, and I often
11 call it a reverse money laundering statute for
12 this reason, is that it does not depend on the
13 money being criminally derived. It depends only
14 on the purpose of the transaction being to
15 promote a criminal offence. So whereas
16 something like a concealment money laundering
17 statute would look backward to what is the
18 source of the money, an international promotion
19 money laundering statute looks forward to what
20 is the purpose of the transaction. And so any
21 money, whether criminally derived or not, sent
22 into the United States or sent from the United
23 States to a foreign country, can be an
24 international promotion money laundering offence
25 if the purpose of the transaction was to promote

1 one of our specified unlawful activities. We
2 could talk about what that term means in a
3 minute.

4 But -- and so it's often used when someone
5 is employed to -- someone who first does this on
6 his own behalf or is employed on behalf of a
7 criminal to send money into or out of the United
8 States to finance terrorism, to promote drug
9 trafficking, to promote, you know, a public
10 corruption offence or any other offence on our
11 list of specified unlawful activities.

12 Q Okay. And you've used the term "specified
13 unlawful activity." I wonder if you could just
14 address what that speaks to.

15 A Yeah, unfortunately, in my view, the United
16 States is one of the few countries in the world
17 that adopts a list-based approach to money
18 laundering predicates. The vast majority of
19 countries around the world make it an offence to
20 launder the proceeds of any crime, foreign or
21 domestic -- perhaps limiting it to felonies, but
22 to any crime, foreign or domestic, without
23 making a list of the crimes to which the statute
24 applies.

25 Our statute unfortunately is list-based, and

1 the list is called "the list of specified
2 unlawful activities."

3 So it is not a crime to launder the proceeds
4 of any criminal offence in the United States.
5 It's only a crime to launder the proceeds of one
6 of the 250 crimes that appears on the list, and
7 that list is comprehensive but it's not all
8 inclusive. There are some crimes -- some
9 federal crimes which are omitted. There are
10 state crimes that are included and many that are
11 omitted and there are only a few categories of
12 foreign crimes that are included on that list.
13 And that's one of the weaknesses we believe, or
14 I believe, in our statute.

15 Q Okay. I'd like to turn now to the legislative
16 regime in the United States addressing asset
17 forfeiture. I gather from your report asset
18 forfeiture can be pursued both through the
19 criminal prosecution as part of the sentencing
20 or through a civil forfeiture proceeding?

21 A Yes, that's right.

22 Q And do you have sort of -- within the criminal
23 and civil realm sort of one comprehensive
24 statute addressing this? I gather from your
25 report perhaps there's a collection of disparate

1 statutes which address some various aspects of
2 asset forfeiture.

3 A We have the exact opposite of one comprehensive
4 statute. We have the result of different
5 committees of Congress over a period of more
6 than 200 years deciding when and how to enact
7 asset forfeiture statutes, and you get exactly
8 what you would expect from that process.

9 So we have statutes literally scattered
10 throughout the *US Criminal Code* -- and here I'm
11 only speaking of course of the federal system.
12 Each of the states has their own systems. But
13 within the federal system we have forfeiture
14 statutes, criminal statutes and non-criminal
15 statutes authorizing asset forfeiture scattered
16 throughout the code. You might find some
17 enacted decades or even centuries ago in obscure
18 places in the code having to do with, say,
19 wildlife protection or, you know, alcohol
20 taxation and so forth. You might find them in
21 the immigration and customs statutes. You might
22 find them anywhere.

23 One of the tasks I had as a supervisor in my
24 office in the Justice Department was to try to
25 construct a compilation of all of those various

1 forfeiture statutes, which we did. And there's
2 a publication which you may have or you may want
3 to get that's -- what is it called? Asset
4 Forfeiture and Money Laundering Statutes (2019),
5 a publication of the Department of Justice which
6 collects them all or does its -- makes an effort
7 to collect them all.

8 The problem with the way they evolved is
9 that they are totally inconsistent with each
10 other. Some of the statutes are civil
11 forfeiture only. Some of the statutes are
12 criminal forfeiture only. Some of the statutes
13 authorize the forfeiture of the proceeds of the
14 crime. Some authorize the forfeiture of both
15 the proceeds of the crime and property used to
16 facilitate it. Some only authorize the
17 forfeiture of the facilitating property. And
18 then there are some that are different
19 altogether. And then there are some crimes for
20 which there is no forfeiture authority at all.
21 The most glaring example being tax evasion.

22 And all of this is not by design. It's just
23 by historical happenstance. It's historical
24 contingency as to how these things got enacted
25 at different times over a long period.

1 Q Okay. And do you have a view as to whether sort
2 of one centralized comprehensive regime is more
3 optimal than the experience in the United
4 States?

5 A No one should do it the way we did it. It's
6 crazy. And most countries have not. I mean,
7 I'm familiar with many forfeiture statutes
8 around the world and they typically say the
9 proceeds of crime and the instrumentalities of
10 crime are subject to forfeiture or confiscation.
11 That's another interchangeable term that many
12 countries use. There are -- they differ in
13 terms of the procedures. Some countries are
14 criminal only and some countries have adopted
15 non-conviction based or what we call civil
16 forfeiture. But they typically say all the
17 proceeds of all crimes, foreign or domestic, and
18 the property used to commit all crimes, foreign
19 or domestic, found in our country are subject to
20 forfeiture.

21 Q And I gather from your report that prosecutors
22 pursue forfeiture both through the criminal
23 sentencing and through civil forfeiture. And I
24 wonder if you could just start by outlining
25 those two different methods or approaches.

1 A Sure. Well, it's important to understand, I
2 think, that in our system a prosecutor has a
3 choice of which vehicle to choose. We don't
4 have a separate civil forfeiture agency or a
5 separate criminal forfeiture agency. The United
6 States Attorneys, the federal prosecutors are
7 the prosecutors who can bring either a civil or
8 a criminal asset forfeiture action as appears
9 appropriate in a given case.

10 A criminal forfeiture is an aspect of the
11 defendant's sentence. So the United States
12 brings an action, criminal prosecution against
13 Jones and the *United States v. Jones* is the name
14 of the case. And somewhere in the indictment it
15 says that if Jones is convicted of crimes
16 alleged in counts 1, 2, 3, 4 and 5 of this
17 indictment, then he shall forfeit the proceeds
18 of those crimes or the property used to
19 facilitate those crimes as the applicable
20 forfeiture statute in that particular case might
21 indicate.

22 If he is convicted, the court then has to
23 make a determination as to whether or not the
24 government has met its burden with respect to
25 the nexus between the property it wants to

1 forfeit and the crime for which the defendant's
2 been convicted. And then the court makes the
3 forfeiture judgment part of the sentencing
4 process. And we could go into far more detail
5 as how that works, but that's in a nutshell what
6 happens. Indictment, conviction and then
7 forfeiture as part of the sentencing process and
8 a resulting order of forfeiture.

9 If there is no criminal prosecution or if
10 for whatever reason the government chooses to
11 pursue civil forfeiture instead, and in my
12 report I've got about ten pages in there about
13 what the various reasons are why the prosecutor
14 might choose to do a forfeiture without a
15 prosecution. In that case we have an entirely
16 separate procedural regime that applies.

17 It's important to understand that although
18 we call it "civil forfeiture," it's still a law
19 enforcement tool. It goes to the same court,
20 handled by the same prosecutors, but it's called
21 "civil" because civil procedures apply. It's
22 still a law enforcement action but civil
23 procedures apply. The government in a nutshell
24 has to establish two things. That the
25 property -- that a crime was committed by

1 someone and that the property in question is
2 derived from that crime or was used to commit
3 that crime.

4 So a typical case is styled, and this is
5 often thought unusual, the United States of
6 America versus the property. It doesn't mean
7 that the property has committed a crime or that
8 the property did something wrong. It simply is
9 our way of telling the world that this is the
10 asset that we're seeking to forfeit. Maybe it's
11 a firearm; maybe it's a pile of cash; maybe it's
12 a building; maybe it's bank account. Whatever
13 it is, basically we're declaring that the United
14 States believes this is property derived from or
15 used to commit a crime. And inviting the world
16 to come in and make a claim contesting the
17 forfeiture.

18 The government has to prove the crime and it
19 has to prove the connection between the property
20 and the crime. And then -- by the civil
21 standard. And then persons who object to the
22 forfeiture have a right to -- you know, all the
23 rights that apply in civil forfeiture cases,
24 which we can talk about. And ultimately at the
25 end of the day if the government prevails, a

1 court will issue a judgment transferring title
2 of the property to the government.

3 Q Thank you. With respect to the criminal route,
4 if the offender is convicted and there is --
5 nexus between the property and the crime is
6 established, is forfeiture mandatory?

7 A Yes. The court is required to make a forfeiture
8 order if the government is requesting
9 forfeiture. The -- it was an amusing case just
10 recently where the government chose not to seek
11 forfeiture and a third party came in and
12 objected and said, I wish you would seek
13 forfeiture because the property in question
14 belongs to my partner in a tavern and I don't
15 want to be in business with a convicted
16 arsonist, so please forfeit his property, and it
17 says in the statutory that forfeit is mandatory.

18 Well, it's only mandatory if the government
19 asks for it. And if the government chooses not
20 to be in partnership in a failing tavern in the
21 city of Baltimore, it doesn't have to pursue
22 that if it doesn't think that's in the interests
23 of the government. So -- but it's mandatory if
24 the government seeks it, yes.

25 Q And I gather there's an exception of grossly

1 disproportionate which can sort of exempt
2 forfeiture of an asset from the mandatory
3 nature?

4 A That's right. In both -- and this applies
5 equally in civil and in criminal forfeiture
6 cases. But the proportionality rule which is,
7 you know, seen throughout the world in various
8 context, it finds voice in the United States
9 through the 8th Amendment to the *Bill of Rights*,
10 which bars -- I think the phrase would be
11 "excessive fines." And this comes within the
12 rubric of excessive fines.

13 And the way the supreme court has defined an
14 excessive fine is a forfeiture that would be
15 grossly disproportional to the gravity of the
16 offence. So in both the criminal context and
17 the civil context when all is said and done, the
18 government has met all of its burdens. The
19 property owner or the defendant in the criminal
20 case has the right to come forward and say, but
21 you're violating the 8th Amendment, and have a
22 hearing on that question.

23 Q You've got a criminal sentencing. An asset that
24 would otherwise be subject to forfeiture has
25 disappeared. What options are available to the

1 court?

2 A Well, have value-based forfeiture. That is if
3 the criminal has been convicted and the -- and
4 all the other procedural steps have been
5 followed, there was notice in the indictment and
6 he's been convicted of an offence for which
7 forfeiture is authorized and all that good
8 stuff. The forfeiture order can take one of
9 three forms. It can be the actual property
10 derived from or used to commit the crime. We
11 call that a directly forfeitable property.

12 Or if that property is missing -- it has
13 been dissipated, can't be found; it's beyond the
14 jurisdiction of the court; it's in the
15 possession of someone who can't be reached --
16 the government is entitled to a value-based
17 judgment for the value of the property that's
18 missing. The term of art the courts seem to
19 like is when the money has been spent on wine,
20 women and song. I never knew that was a
21 technical legal phrase, but it appears to be.
22 And if the money that's been spent on wine,
23 women and song, we get a value-based judgment.

24 And then the third option or a third form
25 which the forfeiture order can take is the

1 forfeiture of a substitute asset to satisfy
2 the money judgment. To satisfy the value-based
3 judgment. So if the defendant committed a fraud
4 involving \$13 million and he's already spent all
5 of the money or most of it and there's an
6 outstanding balance owed to the government, but
7 it turns out that he owns property, he owns an
8 island in the Caribbean, then that can be
9 forfeited to substitute -- as a substitute asset
10 to satisfy the money judgment.

11 Q Okay. And moving to the civil forfeiture
12 regime. That's an *in rem* regime in the United
13 States as it is in British Columbia?

14 A Right. That's the reason for the funny names on
15 the statutes because it is *in rem*, and so it's
16 been our custom since the 18th century to name
17 the *in rem* defendant in the caption of the case.
18 But it's an *in rem* action where we have to find
19 the actual property derived from or used to
20 commit the crime and proceed against it.

21 Q I wonder if you could just briefly outline for
22 the Commissioner your understanding of the
23 origins of this *in rem* regime from the 1800s.

24 A Yeah, it's an interesting story. As a very
25 practical matter, in the very first Congress

1 in -- which convened in 1789, they appreciated
2 that there were times when you could seize a
3 ship that was involved in piracy or smuggling or
4 in the slave trade, but you could not lay hands
5 on the ship owner or the actual perpetrators of
6 the offence. And so the question became how do
7 you go about realizing the revenue potential of,
8 you know, the duties that are owed on the
9 smuggled goods or how do you go about achieving
10 the deterrence or the punishment intended when
11 someone is involved in piracy or the slave trade
12 but you can't lay hands on the particular
13 individual because he is somewhere in the
14 Caribbean and not within the reach of federal
15 law enforcement.

16 So they went into -- they used admiralty law
17 and they just -- they said that we would begin
18 going after these vessels and their cargo under
19 an *in rem* proceeding to force the property owner
20 to come forward and contest the forfeiture if he
21 wished to do so. Of course he might then expose
22 himself to criminal prosecution if he were to
23 show up. I mean, I don't know if we ever
24 brought one against the ship owned by Black
25 Beard the pirate, but probably if we had and

1 he'd shown up, they would have arrested him, and
2 so he doesn't.

3 But the -- so all of our early forfeiture
4 cases from the late 18 century, early
5 19th century are admiralty-type cases involving
6 slave ships and pirate ships. And you might say
7 what relevance did that have to do with what we
8 do today aside from it being the origin of what
9 has become a greatly expanded and more robust
10 forfeiture regime. We still have forfeitures in
11 piracy and slave trafficking cases; we just call
12 them "terrorism cases" and "human trafficking
13 cases" now.

14 Q Okay. I'd like to turn to some practices
15 associated with the prosecution of money
16 laundering in the United States. And you've
17 already alluded to the fact that civil
18 forfeiture and criminal forfeiture is pursued by
19 the same prosecutor. In British Columbia we
20 have a criminal system that operates independent
21 or sort of in tandem with but not connected to
22 our civil forfeiture regime. And I wonder if
23 you can just comment on the sort of
24 intermingling of those two approaches in the
25 United States.

1 A It's always seemed to me based on my experience
2 that it was much more sensible to treat these as
3 two different tools to be used to achieve the
4 same objective. Forfeiture is a law enforcement
5 tool and it has purposes. Punishment,
6 deterrence, incapacitation, recovery of money
7 for victims, all of the purposes for which asset
8 forfeiture is pursued. And there are times when
9 it makes sense to do it as part of a criminal
10 prosecution and times when not possible or
11 advisable to do so.

12 And so it seemed to us and it has always
13 seemed to me to be sensible to have the
14 investigation done by the same people. The
15 objectives are the same, the facts you have to
16 collect and the things you have to prove are
17 very much the same. And then you make a
18 judgment at the appropriate time as to whether
19 to pursue the case criminally because you have a
20 criminal prosecution or not because you don't or
21 you think it's not appropriate to do is.

22 And so it's just, you know, if I'm in my
23 garden and there are times when I want the
24 square shovel and times when I want spade, you
25 know. It depends which one works at a given

1 time. It wouldn't make any sense in our system
2 to have to sort of say well, in this case I
3 think maybe criminal prosecution won't work and
4 now I have to go find some other agency and get
5 some other guy interested in pursuing a civil
6 action.

7 I know that in countries where that was done
8 that way it wasn't terribly successful. Whether
9 because the civil side was under resourced or
10 under financed or whether it was because the
11 restrictions or what -- you know, what they had
12 to show before they could -- their jurisdiction
13 would be triggered or for whatever reason, that
14 didn't seem to be an effective way to proceed.

15 That's not to say that in our larger
16 prosecutors' offices for bureaucratic reasons
17 there aren't criminal specialists and civil
18 specialists. There certainly are. If you have
19 an office the size of, say, Los Angeles where
20 they have several hundred federal prosecutors,
21 the people who specialize in civil forfeiture
22 are in a different building across the street
23 from the people who specialize in criminal
24 forfeiture. But that just has to do with
25 bureaucratic organization of the office. That's

1 still the same people doing the same task, and
2 in smaller offices there is no distinction of
3 that nature. And it seems to work fairly well.

4 When I was the chief of the money laundering
5 and asset forfeiture section in Maryland in the
6 City of Baltimore, I had it entirely within my
7 discretion, subject of course to my supervisor,
8 to decide if a case should be done criminally or
9 civilly. I would make that decision based on
10 the various things that I've listed in my report
11 as to the criteria we use to choose to do a case
12 civilly or criminally.

13 Other US Attorneys Offices -- and of course
14 we have 93 US Attorneys Offices -- might
15 structure their offices differently, but it
16 still makes sense to have this treated as a
17 tool -- a choice of tools within one toolbox
18 that you can use as the case might seem most
19 appropriate.

20 Q Thank you. The Commissioner has heard evidence
21 suggesting that prosecutions for money
22 laundering in this province are really quite
23 rare. I wonder if you can comment in a general
24 way how common it is in the United States for
25 the offence of money laundering to be prosecuted

1 either as a standalone offence or in conjunction
2 with a predicate offence where significant
3 proceeds are generated.

4 A I would say that money laundering prosecutions
5 are common. They occur every day. Part of my
6 work as the author of the digest that you
7 alluded to earlier, Patrick, is to read the
8 cases every morning that come out, and there are
9 always three or four money laundering
10 prosecutions every day. And the question I
11 guess you really want to know the answer to is
12 how often are those cases where the money
13 laundering charge is an add-on to an existing
14 prosecution of the same individual and how often
15 is it a standalone money laundering prosecution
16 of someone else.

17 The vast majority are add-ons. Where
18 someone who has been prosecuted for fraud or
19 drug trafficking or a corruption offence is also
20 charged with laundering the money in violation
21 either of the concealment statute or the
22 promotion statute or transaction statute. There
23 are of course cases in which the prosecution is
24 of a third-party money launderer who was not the
25 one who committed the underlying crime.

1 Historically if one went back to the origins
2 of the statute in 1986, you might say that
3 Congress might have anticipated that more of the
4 cases would be standalone cases and fewer would
5 be self money laundering cases, but as it turns
6 out prosecutors tend to like to add the money
7 laundering charge onto the prosecution. They
8 don't always do it. They do it frequently. And
9 we can talk about, if you like, the reasons why
10 it's considered to be a useful thing to do to
11 add it onto a prosecution of a person who's
12 already being prosecuted for the underlying
13 offence.

14 But to answer your question, it's so common
15 that we do typical money laundering training for
16 every -- every baby prosecutor goes to, you
17 know, a class that includes a money laundering
18 course and it's expected that it will be
19 considered as part of every investigation that
20 involves money. Not every crime involves money,
21 but in federal court the vast majority do.

22 Q I'm going ask you some questions about
23 investigations in a few minutes, but maybe I'll
24 just circle back to something that you commented
25 on, that is the rationale for adding a money

1 laundrying offence, say, to somebody charged
2 with a serious drug offence or a serious fraud
3 offence where conviction will already carry a
4 significant consequence. What do you see as the
5 benefit to adding on and also pursuing a money
6 laundrying charge?

7 A Well, stepping back, I mean, I think money
8 laundrying -- the laundrying of the proceeds of
9 a crime does an additional harm to the social --
10 to the social fabric. I mean, there's something
11 additionally harmful about hiding your criminal
12 proceeds or about using those criminal proceeds
13 to commit some other offence in the future or
14 just using them for conspicuous consumption. So
15 there's a reason why you would want to, from a
16 policy point of view, make money laundrying an
17 additional offence that carried with it some
18 significant punishment.

19 Now, from the prosecutor's point of view --
20 the prosecutor, I must admit, doesn't think in
21 terms of broad policy concerns. The prosecutor
22 has particular objectives and reasons why this
23 is useful in his or her case at a particular
24 time. Money laundrying tends to expand the
25 scope of the criminal investigation in several

1 ways. It expands the category or the universe
2 of potential defendants. Some defendants
3 committed the underlying crime. Some defendants
4 committed the underlying crime and laundered the
5 money. Some defendants only laundered the
6 money. If you didn't charge money laundering,
7 you would not reach that last group of
8 defendants.

9 The person whose job it is simply to store
10 the money in a drug offence and have it -- you
11 know, launder it through a series of bank
12 accounts and then go to Mexico, or the
13 professional money launderer, a lawyer or an
14 accountant, who was charged with creating, you
15 know, trusts or putting money in the names of
16 shell companies or doing whatever it was that
17 was done to conceal or disguise the money. So
18 it expands the universe of possible defendants.

19 Second, it expands the scope of the offence
20 in terms of time. A money laundering offence
21 has to be brought in the United States within
22 five years of the money laundering transaction.
23 It does not have to be brought within five years
24 of when the underlying crime occurred. So you
25 could have a crime, a drug offence, a fraud

1 offence, a child pornography offence that
2 occurred six, seven, ten years ago, but the
3 money wasn't laundered until yesterday because
4 it was in a hole in the ground, because it was
5 invested in a piece of real property, because it
6 was -- wherever it was. We're outside the
7 statute of limitations, which is again
8 five years for the underlying crime, for
9 prosecuting the fraud or drug or child
10 pornography offence, but we're not outside the
11 five-year statute of limitation for the money
12 laundering offence because that five years runs
13 from the transaction.

14 The proceeds of crime remain the proceeds of
15 crime forever. So if I, you know, sold a load
16 of drugs in 1985 and that money has been hidden
17 in some bank account or it's been invested in
18 some building all this time and now I sell the
19 building or open the bank account, I'm
20 committing a new money laundering offence. So
21 money laundering is a way of expanding the reach
22 of the prosecutor in terms of time as well as in
23 terms of the number of defendants.

24 And third, the money laundering prosecution
25 can expand the categories of evidence that are

1 admissible in a case. If I -- and this is a
2 real case. I prosecuted a case involving an
3 environmental fraud. Someone had deceived the
4 major oil companies into believing that he was
5 producing biofuels, that is renewable energy,
6 and he was getting paid by the major oil
7 companies for this production of biofuel,
8 biodiesel that he didn't actually produce.
9 Well, that's a crime and he could be prosecuted
10 for that.

11 And what it lacks is a lot of jury appeal.
12 The jurors are typically not terribly excited
13 about somebody ripping off ExxonMobil or the Sun
14 Oil Company and don't really care a lot about
15 the details of environmental regulations and
16 biofuel regulations. But when it turned out
17 this individual who stole the \$9 million had
18 used it to buy a fleet of 24 Lamborghinis,
19 Maseratis, Bentleys and Rolls Royces that all of
20 a sudden gets everyone's attention.

21 Now, how he spent the money might not be
22 relevant and therefore the evidence of how he
23 spent the money might not be admissible if I'm
24 only prosecuting him for the environmental
25 crime. If I want the jury to hear what really

1 happened and I want that to be a factor in their
2 deliberations because it obviously goes to his
3 intent in committing the underlying crime -- he
4 can't claim that he was -- he thought he was
5 doing the right thing if he suddenly ran on off
6 and bought himself a fleet of cars -- I might
7 want to charge money laundering as well.
8 Because then all the evidence about each
9 transaction, each time he purchased a
10 Lamborghini or a Maseratis, he's committing a
11 new money laundering offence and that all
12 becomes admissible.

13 So the money laundering offence expanded the
14 category of defendants, it expanded the time, it
15 expands the categories of evidence that are
16 admissible. It adds to the punishment -- this
17 is the fourth thing -- because there is a bump
18 in the sentence. Even for a self-money
19 launderer there's a bump in the sentence if he
20 not only commits the crime but then launders
21 the money. And that can be of some significance
22 to the prosecutor.

23 And finally, forfeiture. Forfeiture for a
24 money laundering offence, at least in our
25 system, is broader than forfeiture for the

1 underlying crime. If you have a white collar
2 crime for which only the forfeiture of proceeds
3 has been authorized, but you have a money
4 laundering offence for which the forfeiture of
5 the proceeds as well as any other property
6 involved in the offence is authorized, you would
7 get a lot more forfeiture. You would have a
8 greater ability to recover property for the
9 benefit of victims and so forth if you charged
10 the money laundering offence.

11 And we could talk more about that under the
12 scope of what's forfeitable in a money
13 laundering case, but that's another reason to
14 charge money laundering is because forfeiture is
15 broader in money laundering cases.

16 Q So I wonder if you can just address the ability
17 to seek forfeiture of commingled funds in the
18 face of a conviction for money laundering.

19 A Well, whether it's a criminal money laundering
20 offence or whether were doing this forfeiture
21 civilly, the scope of the forfeiture statute for
22 money laundering is the same and it's broad.

23 It says any property involved in the money
24 laundering offence is subject to forfeiture, and
25 that's been defined judicially in the cases as

1 meaning three things. It's the actual proceeds
2 of the crime being laundered. And you might say
3 that doesn't add very much; you could already
4 get that. Yes, that's true. But it's the
5 proceeds of the crime being laundered. It's any
6 property that is the subject matter of the
7 transaction.

8 So he launders his money by taking \$500,000
9 in fraud proceeds, co-mingling it with \$500,000
10 from some other source and buying a million
11 dollar house. The property involved in that
12 money laundering offence is the million dollar
13 house, not just the half of it that's traceable
14 to the underlying criminal predicate. So we
15 would be able to forfeit the entire -- the property
16 in its entirety under a money laundering theory,
17 but only half of it under a proceeds theory. So
18 the forfeiture for the money laundering is much
19 broader.

20 And then the third category of what you can
21 forfeit in a money laundering case is property
22 used to facilitate the money laundering. For
23 example, he laundered the money through his
24 business. He wanted the world to think that he
25 was selling more pizzas, so he laundered the

1 money through his pizzeria. Then you would be
2 able to forfeit the entire pizzeria as property
3 used to commit the money laundering offence. Or
4 he laundered his money by commingling it with
5 other money from other offences -- from other
6 non-offences in his bank account using the clean
7 money to conceal or disguise the dirty money.

8 Then we can forfeit all of the clean money
9 as property involved in the money laundering
10 offence. So in those respects, whether it be a
11 criminal money laundering forfeiture or a civil
12 money laundering forfeiture, the scope of the
13 statute is far broader than just the proceeds of
14 the crime that was the subject of the money
15 laundering offence.

16 Q It's been suggested that there may be a
17 reluctance or hesitation on the part of some
18 prosecutors to prosecute the offence of money
19 laundering out of a concern that this offence is
20 unduly complex and difficult to prosecute. Is
21 this a concern that you've heard, and do you
22 have any response to that suggestion?

23 A Yes. That is an issue. It's not unique to the
24 United States, I am sure, but we have, you know,
25 hundreds and hundreds of prosecutors and there

1 are times when people will say, I don't need my
2 life complicated by getting involved in the
3 financial side of the crime; I can get a guilty
4 plea or I can easily prosecute this person for
5 embezzlement or drug trafficking or whatever it
6 is and I don't need to spend more time on the
7 financial side of the crime.

8 I've always taken the contrary view, but you
9 are not shocked to learn that because I was the
10 guy who was in charge of money laundering and
11 forfeiture in the Department of Justice. So it
12 was part of my job to convince people that they
13 should make it part of their job to pursue the
14 financial side of the crime for all kinds of
15 good reasons. Because it has a deterrent value,
16 because it has an additional punishment, because
17 it allows us to get the money back to the
18 victim, because it prevents people from using
19 the money in future criminal activity and thus
20 has an incapacitation factor to it and so forth.
21 And there are other factors as well.

22 But there are some prosecutors, like in
23 anything else -- we have a *RICO* statute and
24 there are some people who don't like to use the
25 *RICO* statute because is very complicated. I

1 have one friend who once said to me, in my
2 district we don't charge *RICO* offences and we
3 don't associate with those who do; it's just too
4 much extra work to explain to the jury.

5 So there's no -- I can't say that every
6 prosecutor does everything exactly the same, but
7 there's -- it is a common thing to include the
8 financial side of the investigation in a case
9 with the consequence that you'll bring a money
10 laundering charge and/or bringing a forfeiture
11 request as part of it.

12 But not everyone does it and it's always a
13 learning process. That's why we have a training
14 academy where we spend a lot of time trying to
15 convince people that this is something they want
16 to learn how to do.

17 Q Yes. I'm going ask you a little bit about that
18 training, but I'd be interested in your thoughts
19 on whether the prosecution of a money laundering
20 offence is so unduly difficult or complex that
21 it's beyond the competence of an average
22 prosecutor.

23 A It is certainly not unduly complicated or
24 difficult, you know, especially if you have just
25 that offence we talked about a while ago, the

1 1957 offence where all you have to show is
2 someone spent or transferred more than \$10,000
3 in criminal proceeds. I mean, that often comes
4 across as a no-brainer.

5 We've actually had to enact a policy that
6 says, don't bring that charge when it's too
7 simple. In other words, if someone simply
8 receives more than \$10,000 in criminal proceeds
9 and all he did was go down to the bank and
10 deposit it, that's 1957 offence but we don't
11 charge that because it doesn't seem like it
12 really adds anything. It's called a "receipt
13 and deposit" case. So contrary to the notion
14 that it's too difficult and sometimes too easy.

15 Now, there are other money laundering cases
16 that are much more complicated. I mean, the
17 money -- if the money launderer did his or her
18 job, which was to make it really difficult to
19 trace the money through a complex or convoluted
20 series of transactions often involving shell
21 companies and offshore bank accounts and money
22 held in the names of fictitious third parties --
23 if the money launderer did his or her job well
24 the case is going to be harder to prove. You
25 don't want to only prosecute the low-hanging

1 fruit. You want to go after the more
2 complicated cases; otherwise you're awarding the
3 defendant for laundering -- for doing his job
4 well, for laundering the money well, and you
5 don't want that to be the case.

6 So you do want to encourage people to spend
7 time investigating the more complicated cases
8 and bringing them to fruition.

9 Ironically one of my favourite defences to
10 money laundering is, I could not be guilty of
11 laundering money because federal authorities
12 figured it out; if some cop was able to figure
13 out what I was doing, then obviously I wasn't
14 concealing or disguising anything. The response
15 to that is just because you didn't do your job
16 as well as you could have doesn't mean you're
17 innocent.

18 But there's a lot to be said for spending
19 the time it takes to go after the more
20 complicated cases. They tend to be the more
21 serious cases involving a lot of money which
22 should be going back to victims or which is
23 being used for some nefarious purposes. You
24 know, money is being invested in our
25 institutions, being used to corrupt our

1 financial institutions, being used to dominate
2 markets in real estate or in securities in ways
3 that we don't want to see happen, and we should
4 be going after that.

5 Q Are the nature of the elements that have to be
6 proved in a money laundering case more difficult
7 for a prosecutor than other serious offences
8 that are prosecuted?

9 A No. You have to prove basically that the money
10 is the proceeds, that the defendant knew it,
11 that he conducted a financial transaction and in
12 some cases that he had certain specific intent.
13 That's no more difficult than proving a fraud
14 case or anything else.

15 In a standalone money laundering case of
16 course you have to prove that the person's
17 knowledge of the illegal source of the money
18 even though he's not the one who committed the
19 underlying crime. If I'm prosecuting Jones for
20 laundering Jones's own drug proceeds, proving
21 the knowledge is not hard. If I'm prosecuting
22 Smith for laundering Jones' drug proceeds, I
23 have to prove that Smith knew what Jones was
24 doing. And that adds a little bit of a proof
25 problem but you do that with circumstantial

1 evidence. You prove that he was conducting
2 transactions in an unusual, convoluted way that
3 made no sense that, that he had a personal or
4 familiar relationship with the underlying
5 criminal or whatever else you need to do to
6 prove circumstantially the *mens rea* element of
7 the crime. But that's not so different from
8 what you have to prove in any other case.

9 So no, the answer no. It's just as easy to
10 prove a money laundering case as anyone else if
11 you apply yourself and understand the elements.

12 Q Thank you. Now, I know in the United States
13 there are units that -- prosecution units that
14 specialize in the prosecuting of money
15 laundering and financial crime and targeting
16 assets, but I gather from your evidence that the
17 training of prosecutors on the topic of money
18 laundering is broader than just those
19 prosecutors that are assigned to specialized
20 units.

21 A That's right. We have a training academy. It's
22 called the National Advocacy Center. It's
23 located in Columbia, South Carolina, and all
24 federal prosecutors have training there, both
25 when they are first hired and then routinely

1 thereafter. Money laundering and forfeiture are
2 part of the routine introduction that all
3 federal prosecutors have to the federal system
4 just as they learn the fraud statutes and the
5 drug statutes and so forth.

6 And then -- of course this is in the
7 pre-COVID days -- there were always a
8 specialized money laundering course and a
9 specialized forfeiture course for those who
10 wanted to come back and learn more about that,
11 but it was always part of the basic training for
12 everyone that came to the National Advocacy
13 Center.

14 Q And I gather from your report that some US
15 Attorneys offices have units that -- or offices
16 that specialize in money laundering and asset
17 forfeiture, including a significant one in
18 Washington, DC. And I wonder if you could just
19 address the Commissioner on those units and
20 their composition and makeup and the nature of
21 the investigations or accuseds that they target.

22 A Well, in the larger US Attorneys offices and --
23 including mid-size ones. I was in Maryland.
24 That's a mid-size one. We had 80 prosecutors.
25 Within the -- among the 80 prosecutors, there

1 The other function of the specialized unit
2 is to undertake cases that are particularly
3 complex and long term in nature and that are
4 really more money laundering case than they are
5 add on to some other case. And that can be an
6 international case. It can be a case involving
7 a large number of defendants. It can be a case
8 that involves a lot of undercover work or some
9 kind of surveillance over a long period of time.
10 And you might want to dedicate some people
11 within the specialized unit to handle that.

12 Now, that's -- I've been speaking until now
13 about how you might structure an individual
14 prosecutors' office in one of our 93 federal
15 prosecutors' offices. In Washington in the main
16 office they have a money laundering and asset
17 recovery section specialty unit within the
18 criminal division that similarly serves this
19 legal advice and resource function for the
20 benefit of anyone around the country. When I
21 was working there when I was the deputy chief in
22 charge of that unit, I would get calls -- five,
23 six, seven calls a day from somebody in Nebraska
24 or Texas or Louisiana and saying, you know, can
25 you help me with this; do you have a go by; can

1 you give me some advice.

2 And they also specialize in the kinds of
3 international -- complex international cases
4 that somebody in Washington probably ought to
5 handle rather than somebody in the US Attorneys
6 office where they have other competing parochial
7 interests. And so there is a kleptocracy unit
8 in the -- in Washington where they specialize in
9 and almost exclusively handle the laundering of
10 criminal proceeds by politically connected
11 persons around the world who are laundering the
12 money through US banks or investing it in US
13 property.

14 They have people who specialize in money
15 laundering violations committed by financial
16 institutions. The cases that you might read
17 about that result in a large settlement against
18 Deutsche Bank or, you know, HSBC would be
19 probably handled by that unit because they are
20 complex and specialized. Or cases that require
21 a lot of international requests for mutual legal
22 assistance might be handled by that unit because
23 it would be beyond the resource capability of
24 some of the smaller US Attorneys offices.

25 Q Thank you. Speaking of the British Columbia

1 experience, there's some suggestion in the
2 evidence -- for your note, Mr. Commissioner,
3 it's exhibit 794 at page 14 -- that since 2015
4 in the province of British Columbia there's been
5 only one major money laundering case in which
6 charges have been approved. I wonder if you
7 can -- and that's sort of in the context of a
8 public discourse which has focused some
9 attention on the topic of money laundering and I
10 wonder you could just offer your comment on that
11 and how it might compare to the American
12 experience.

13 A Well, it's an extremely small number. I mean,
14 it seems to me, without obviously being able to
15 comment on what prosecutorial decisions were
16 made by someone else on facts that I don't know,
17 an opportunity is missed. I mean, you want to
18 prosecute money laundering cases for all the
19 reasons we've discussed. The additional harm
20 that laundering money does to society, and the
21 ability to punish additional classes of
22 individuals and to take advantage of the
23 financial investigation of a crime.

24 If you don't do the financial investigation,
25 then you miss the money laundering. And one

1 possible reason for a very small number of money
2 laundering prosecutions was because the
3 financial investigation was not done or there
4 could be other reasons. But I think it's a
5 missed opportunity to go after individuals who
6 are only involved in the money laundering to --
7 and to follow the money and to recover it.

8 It seems to me that if you're recovering the
9 money through forfeiture, you almost certainly
10 have come across a money laundering offence on
11 the way there because when you're recovering the
12 money in a fraud case or a drug case or any
13 other case, a corruption case, you're not only
14 approving the underlying crime and you're not
15 only finding the money but you're finding out
16 how the money got from the underlying crime to
17 the place where you found it, and that was
18 probably a money laundering offence. And so you
19 just -- if you have a money laundering statute
20 but you didn't use it in that context, then you
21 probably missed an opportunity to do so.

22 Q I'd like to turn now to the topic of asset
23 forfeiture. And you've discussed for the
24 Commissioner the tools available to a prosecutor
25 in the United States to pursue the recovery of

1 assets. I wonder if you can comment on what
2 percentage of money laundering cases -- or cases
3 that develop or attract or create significant
4 proceeds, in what percentage those cases,
5 speaking generally, is forfeiture of assets
6 pursued?

7 A It's the rare money laundering case that results
8 it a conviction but doesn't result in a
9 forfeiture judgment. You know, if you get -- if
10 you convict someone of money laundering, then
11 you've already proven everything you need to
12 prove to get the forfeiture judgment. The only
13 issue in that situation is whether or not you
14 can find the assets. And if you cannot, then
15 you have to settle for a value-based money
16 judgment. If you can find the assets, then you
17 should be getting a forfeiture order for those
18 specific assets.

19 Now, there's -- reasonable people can differ
20 about this. There are people who think that
21 whenever I prove a money laundering case and I
22 prove that the defendant laundered, say,
23 \$1 million US, I should get a judgment for
24 \$1 million US and I should collect whatever I
25 can collect and leave the rest outstanding in

1 case I find that the defendant later comes into
2 some money -- maybe he had money all along and I
3 didn't find it; maybe he's going come into some
4 money later -- and I'll have the judgment to use
5 to execute at the appropriate time when I
6 discovery that additional money.

7 And that indeed has happened. I did a money
8 laundering case 30 years ago where we got a \$135
9 million forfeiture judgment against a money
10 launderer. He was laundering money for the drug
11 cartels in Colombia. And years later we
12 discovered that he'd buried a whole cache of
13 gold bars underneath the rose bushes in his
14 mother's backyard. And we had the money
15 judgment and so we were able to go get the gold
16 bars and satisfy to some extent the outstanding
17 judgment.

18 The other school of thought is okay, if I
19 can actually find the money I'll get a
20 forfeiture judgment, but I don't need
21 uncollected value-based judgments sitting around
22 on my shelf for the rest of my career. Some
23 bean counter is only going to come and say,
24 you're not doing your job; you're not collecting
25 your judgments, so wouldn't it be better if I

1 didn't get those judgments since they're
2 uncollectable anyway; the guy is a knucklehead
3 who has no money and now he's going to be
4 serving 30 years in prison; this is a waste of
5 everybody's time. That's not my view, but I
6 understand that view and that there are people
7 who don't get money judgments because they feel
8 that way.

9 But there's -- so what I'm saying is that
10 there's a difference between whether or not
11 there's a basis for a forfeiture order in every
12 money laundering case -- there is -- and whether
13 or not people bother pursuing them when they
14 think they're uncollectible. And there's a
15 division of on that.

16 Q Okay. And what about dealing with offences --
17 not money laundering perhaps but offences which
18 generate significant proceeds, in
19 what percentages those cases? I'm thinking of,
20 you know, significant drug offences or frauds.
21 In what percentage of those cases do prosecutors
22 pursue the recovery of assets either through the
23 sentencing or through civil forfeiture?

24 A My answer is the same. I mean, prosecutors do
25 pursue the forfeiture in drug cases and fraud

1 cases as frequently as they do in money
2 laundering cases. And it's -- you know, I wish
3 everybody was on the same page on this, but
4 there are people who just don't bother. You
5 know, I understand. If I'm a young prosecutor
6 and I have a docket of, you know, 20 pending
7 cases and the defendant in case number 1 who is
8 charged with drug trafficking is willing to
9 plead guilty tomorrow and get the case off my
10 docket as long as I don't pursue forfeiture, I
11 might be tempted to take that deal.

12 Now, I have spent most of my career yelling
13 at people, telling them not to do that. But the
14 reason I've had to spend my career telling them
15 not to do that is that they are inclined to do
16 that. It's human nature to move a case along.
17 It's human nature. But there's no doubt that
18 adding the financial side to a case tends to
19 slow the process down.

20 The question is whether that's a good thing
21 or a bad thing. I think that -- and this is my
22 personal view -- we should not leave criminals
23 in the possession of criminal proceeds. There
24 are all kinds of reasons why they should be
25 required to disgorge those criminal proceeds or

1 to have to satisfy a judgment if they've already
2 spent them. I think it's -- you know, in order
3 to enact another form of punishment, in order to
4 recover the money for victims, in order to
5 discourage the people from committing the same
6 crime, in order to make sure they don't have the
7 money in their possession to use to commit
8 future crimes and to signal to the public that
9 we're playing on a level playing field.

10 I mean, tell you one anecdote that sort of
11 illustrates my view and then how it contrasts
12 with some other views. I had a defendant in
13 Baltimore who was convicted of -- was ready to
14 plead guilty to being a drug trafficker. He had
15 used his drug proceeds -- there was no doubt
16 about the facts. He'd used his drug proceeds to
17 open a very nice restaurant that was well
18 reviewed in the newspapers and it had a nice
19 clientele, it had a dress code, it had -- you
20 know, had a nice chef. It was a benefit to his
21 neighbourhood. He wasn't using the restaurant
22 to launder money. He wasn't using the
23 restaurant to sell drugs. He had simply opened
24 the restaurant and financed the restaurant with
25 his criminal proceeds.

1 Now, should he be allowed to just plead
2 guilty and keep the restaurant or should he be
3 forced to forfeit the restaurant as part of his
4 sentence in the drug case? I insisted that he
5 forfeit the restaurant. Why? Well, there's
6 somebody else down the street who wants to open
7 a restaurant who doesn't have tax free criminal
8 proceeds to use as his capital, who has to go a
9 bank and borrow money, who has to get money from
10 relatives, who has to use his life savings or
11 put his house up for mortgage in order to open a
12 restaurant. And I think that these people
13 should be on the same level playing field and
14 you shouldn't be at an advantage in the
15 marketplace for opening restaurants or starting
16 any other kind of business or running for public
17 office or doing anything because you've got tax
18 free criminal proceeds and the other guy doesn't.
19 So that's my view.

20 Now, someone else would say, you're nuts;
21 you spent months investigating this guy for drug
22 trafficking; you've got him dead to rights;
23 he's ready to plead guilty; take the guilty
24 plea already and let him keep the restaurant
25 and go on to the next case. And I understand

1 that reasonable people differ about that and I
2 can't tell you what percentage of prosecutors in
3 the United States think that I'm right and
4 which -- what percent think I'm nuts, but that's
5 where we are.

6 Q Thank you. You've talked about the ability to
7 pursue forfeiture through the criminal
8 sentencing or through civil forfeiture. And I
9 wonder if you can just comment on some of the
10 most significant factors that might lead you
11 down one path or the other.

12 A Well, as a matter of default, you would default
13 to doing it criminally. And the reason is --
14 the reasons are two. If you're going to
15 prosecute the defendant anyway, it's a whole lot
16 easier to get the forfeiture judgment as part of
17 his sentence than it is to commence an entirely
18 new case, an entirely new *in rem* case against
19 him and prove everything again. It's one-stop
20 shopping. It's easier to just get the
21 forfeiture as part of the criminal case. The
22 other reason why it's a default to do the case
23 criminally is that there are times when you have
24 to accept that fact that all you can get is a
25 money judgment because we can't trace the money.

1 And in *in rem* cases there no such thing as a
2 money judgment or a substitute asset. It's an
3 *in rem* case. The United States of America
4 versus \$1 million fraud proceeds. We have to
5 prove that the \$1 million that we found in a
6 bank account or that we found in a duffle bag in
7 the back of a guy's car is the fraud proceeds.
8 If it's not, if it's some other money that he
9 has, then there's no *in rem* action against it
10 because there's no ability to trace it back to
11 the crime.

12 So criminal forfeiture's claim to fame is
13 the ability to get a value-based judgment and a
14 substitute asset where the property can't be
15 traced. If I'm doing a fraud case and I want to
16 get the money back to the victims, I want to
17 make sure that I get a million dollars back to
18 Mrs. Smith, the victim, and not lose because I
19 couldn't trace the money -- the million dollars
20 that the defendant had in his bank account back
21 to his fraud because he was able to say that
22 that million dollars actually came from his
23 medical practice or, you know, whatever else he
24 does for a living that generates legitimate
25 income. So by default you want to do the cases

1 criminally.

2 In my report, I think it's starting around
3 page 40 or so, there's a list of 11 instances
4 where you can't. And we can go through them all
5 or I can just tell you, you know, some of the
6 high points. But basically if the forfeiture's
7 not contested, we can get this over with very
8 quickly by doing a non-conviction based
9 forfeiture. If the defendant is dead or
10 incompetent to stand trial, we have to do the
11 forfeiture civilly because we don't have
12 convictions in absentia in the United States.
13 So if you want to recover the money from a
14 defendant who has committed suicide on the eve
15 of trial or can't be prosecuted for some reason,
16 you have to do the forfeiture civilly.

17 Similarly, if he's a fugitive, if he is a
18 foreign national who committed the crime in a
19 foreign country and then put his money here, if
20 he's unknown, we just don't know who he is, we
21 have to do the forfeiture civilly. I can give
22 you lots of examples of that.

23 I had a case where the defendant in Oklahoma
24 charged a large sum of money for an absolutely
25 worthless medical treatment for terminally ill

1 cancer patients, was indicted and then fled for
2 Mexico, leaving behind property in Oklahoma. I
3 want to recover that money for the benefit of
4 the survivors of those families that were
5 charged this money for this worthless medical
6 treatment. I'm not going to wait to get her
7 back from Mexico where she's fighting
8 extradition or maybe she was missing -- I can't
9 remember now -- so we did a civil forfeiture to
10 recover the money.

11 Or you might have a person like in the
12 Magnitsky case, the Russian case where the
13 lawyer Magnitsky was beaten to death in his jail
14 cell in Russia when he discovered a fraud
15 against his clients. That \$230 million that was
16 stolen in Russia by Russian organized crime was
17 in part invested in real estate in New York. We
18 don't even know who the Russian criminals were,
19 never mind being able to get jurisdiction over
20 them or extradite them to the United States, but
21 we can prove that this crime occurred and we can
22 prove that the money is traceable to property in
23 New York. So we bring a civil forfeiture
24 action.

25 Other instances maybe the statute of

1 limitations has already run on the criminal
2 case. Maybe the property is clearly identified
3 as criminal proceeds but the -- but it was in
4 the hands of a courier. You stop somebody for a
5 traffic violation. He's got \$120,000 in cash in
6 rubber bands -- wrapped in rubber bands in the
7 car and he says, Bob gave me the money told me
8 to drive it to Las Vegas. Who's Bob? I never
9 got his last name. Okay. Well, we know that
10 the money is drug proceeds. We can -- you know,
11 there's be a dog alert; there'll be notes on the
12 money; there will be drug residue, whatever.
13 But we don't know whose money it is. You bring
14 a civil forfeiture action and force the
15 wrongdoer to come forward if he wishes to do so.

16 There are times when you just think that in
17 the interests of justice there's no need to
18 bring a criminal prosecution. Maybe the
19 defendant has already been convicted in state
20 court. Maybe he's facing prosecution in state
21 court but the state doesn't have a good
22 forfeiture statute and you want to forfeit the
23 property and recover it, and you use the federal
24 process to do that. There's no reason to
25 prosecute him a second time. Just bring a civil

1 forfeiture action.

2 Maybe he's already been convicted in Canada
3 and there's no reason to recover the property
4 through a separate US-based criminal prosecution
5 when we can just bring a civil forfeiture action
6 and return the money to Canada. We do that all
7 the time.

8 Or maybe in the interests of justice nobody
9 should be prosecuted at all. You know, my
10 favourite example of that -- this is a real case
11 out of Seattle, Washington, right across the
12 border from you guys. A woman is 70 years old
13 and she has a son that who is a convicted felon.
14 He would like to have a firearm collection.
15 Federal law says a convicted felon cannot own a
16 firearm. She knows that, so she goes to the gun
17 dealer and buys five or six firearms, falsifying
18 on the application that they're for herself and
19 not -- when they're in fact going to be given to
20 her son. She buys the firearms and gives them
21 to her son. She has committed a federal
22 firearms offence in that she had lied on the
23 application when buying the firearms.

24 What to do? You can do nothing. And say, I
25 guess you're a great mom. You could indict her

1 for a federal felony and seek a prison sentence.
2 Or maybe the right thing to do is just recover
3 the firearms, and that would be a civil
4 forfeiture action.

5 So in those and in other instances I name in
6 the report, civil forfeiture just is the
7 alternative to pursue when you don't have a
8 criminal prosecution.

9 And the one I haven't mentioned yet is
10 perhaps unique to this -- our system or not, but
11 in our system in a criminal case we cannot
12 forfeit a third party's property. If I convict
13 Jones of the crime, I can only forfeit Jones's
14 property. If Jones used his brother-in-law's
15 gun or his wife's truck or his corporation's
16 business to commit the crime, that person did
17 not have an opportunity to intervene in the
18 criminal trial. It would be a violation of the
19 brother-in-law's or the wife's or the
20 corporation's due process rights to take their
21 property in a proceeding from which they had no
22 right to participate.

23 So the only way to take the property that
24 was used to commit a crime, if it was a third
25 party's property, is to bring a civil forfeiture

1 action and in that civil forfeiture action give
2 the brother-in-law or the wife or the
3 corporation the opportunity to intervene and
4 object. And so civil forfeiture is used when we
5 are going after third-party property that was
6 used to commit a criminal case.

7 So anyway, lots of instances where we have
8 to do it. By default you'd rather do it
9 criminally but you sometimes can't or shouldn't.

10 Q Are there instances where the evidence available
11 to a prosecutor proves insufficient to satisfy
12 the criminal standard and the prosecutor in turn
13 takes advantage of the lower burden of proof
14 required for a civil forfeiture action?

15 A Yes. That comes off particularly in those cases
16 that I mentioned like with the courier cases,
17 you not only have to prove in a criminal case
18 beyond a reasonable doubt that the crime
19 occurred but you have to prove that this guy is
20 the guy who committed the crime.

21 If somebody is driving cross-country on his
22 way to Los Angeles with \$120,000 cash in wrapped
23 in rubber bands in the concealed in, you know,
24 vacuum sealed bags in the back of his car, he is
25 carrying drug money but maybe he is not the drug

1 dealer. And so you might have enough evidence
2 to prove beyond a reasonable doubt that it's
3 drug money but you don't have evidence to prove
4 beyond a reasonable doubt that this driver is
5 the drug trafficker. And so in that case you
6 would just resort to the civil standard of being
7 able to prove that this is drug money in a civil
8 forfeiture case rather than trying to prosecute
9 the individual.

10 Q Thank you. I'd like to turn to the topic of
11 investigating money laundering and
12 proceeds-based offences. There's been -- it's
13 been suggested by some that the investigation of
14 money laundering is a highly complex matter.
15 I'd like you to perhaps comment on whether the
16 investigation of money laundering offences is in
17 all instances beyond the competence of an
18 average police officer and needs to be left to a
19 highly trained and specialized unit.

20 A It is not beyond the competence of the average
21 police officer in most cases. In most cases it's
22 straightforward. You know, it's not hard to
23 prove that somebody, who you already have proven
24 is a drug trafficker -- that he used drug money
25 to purchase the expensive cars in his driveway.

1 You show that he has on his tax return shown no
2 legitimate source of income. He claims to earn
3 \$10,000 a year mowing lawns, that he paid cash
4 for these automobiles, that he titled them in
5 the names of his sister and that he did so
6 during the time that he was earning money as a
7 drug trafficker. So in the average -- you know,
8 in the typical case this is fairly
9 straightforward and not really complicated.

10 Now, there's going to be very complicated
11 cases. As we discussed before, you know, a
12 sophisticated money launderer is going to use
13 offshore shell corporations. He is going to
14 launder the money through foreign banks. He is
15 going to create all kind of complicated trust
16 instruments. He's going to do things that are
17 beyond the ken of the average criminal therefore
18 probably beyond the expertise of the average
19 policeman. And in those cases you do want to
20 have some kind of specialized training and
21 specialized expertise.

22 Some of our agents are extremely good at
23 what they do in prosecuting or investigating,
24 you know, drug crimes or street crimes or crimes
25 of that nature but don't really have the

1 experience with analyzing bank records and
2 knowing what bank records to ask for and to know
3 how to go on to, you know, credit report
4 databases and find out what assets the person
5 has and so forth.

6 In large cases -- in large complicated cases
7 we would form task forces that included some
8 people who had financial training, whether they
9 be just analysts or whether they be agents with
10 financial training or whether they be agent
11 lawyers. The FBI has a lot of agent lawyers,
12 and so there are cases where you need to do
13 that, but it's not necessary in every single
14 case.

15 Q You comment on these task forces that target the
16 sort of higher level and more complex money
17 laundering. And I wonder if you can just take a
18 moment and comment on -- you know, if you were
19 putting one of these units together, what would
20 you be looking for in terms of skills and the
21 makeup of the unit?

22 A Well, if I were putting together a task force in
23 a complicated, you know, sophisticated money
24 laundering case, I would want there to be a
25 prosecutor in charge of the overall

1 investigation who had some idea of what he or
2 she was looking for. You know, what makes --
3 what are the elements of money laundering and
4 how am I going to ultimately prove this. So to
5 give direction.

6 And then I would want to have agents who had
7 training in, you know, that kind of
8 investigative work. They've been to training
9 courses in analyzing bank records and making
10 international requests for documents and so
11 forth. And then I'd probably want to supplement
12 or augment that team with a financial analyst.
13 Somebody who was not a gun-carrying federal
14 agent necessarily, but somebody who maybe was a
15 CPA or had training in the kind of work that
16 needs to be done to create spreadsheets and to
17 be able to convince a jury at the end of the day
18 that the money that started out over here and
19 the money that's now found over here went
20 through this incredibly complicated Byzantine
21 web of financial transactions and is the same
22 money and that it was done by these people who
23 one may infer had the knowledge and intent to
24 commit the money laundering offence.

25 So a task force would often be multiagency.

1 We'd sometimes have -- in a drug case we'd have
2 drug agents who are really good at doing drug
3 cases but might not know what an IRS agent knows
4 about financial investigations combined on the
5 same investigation.

6 Q I wonder if you can give the Commissioner a
7 sense of, if you were putting together a task
8 force to investigate a serious money laundering
9 operation, maybe operating at the
10 hundred million dollar level, how many agents or
11 investigators and prosecutors might be assigned
12 such a task force?

13 A Well, obviously every case is going to be
14 different, but it's unusual for there to be a
15 task force that has -- it's very different from
16 two or three agents and a prosecutor. A typical
17 case might be a prosecutor, two agents and a
18 financial analyst or something of that nature.

19 If you're going after Bernie Madoff, you
20 might have a much bigger team, but in another
21 case you might say sorry, Bob, you're going to
22 have to do this on your own; we can't afford the
23 time and expense of giving you any help. But
24 three or four folks would be a typical task
25 force.

1 Q Thank you. I wonder if you can comment on
2 expectations of police units investigating
3 offences that generate proceeds. Are they
4 typically in the United States expected to, in
5 addition to investigating the predicate offence,
6 conduct investigations for the purpose of
7 identifying assets that could be subject to
8 forfeiture, including assets that are
9 incidentally discovered as part of the predicate
10 investigation?

11 A Well, it's sort of back to what we were talking
12 about before about it would be wonderful if we
13 could get everybody to see things that way and
14 many people do but not everyone does, so in the
15 training that we give and the legal advice that
16 we give, we say really -- you're really missing
17 out if you don't include the financial aspects
18 of the investigation in the investigation from
19 the beginning. It is not a good idea to conduct
20 your investigation and leave the recovery of the
21 assets until the night before the indictment or
22 the day after the indictment, the money is going
23 to be gone and you will have missed the
24 opportunity to figure out if there was a money
25 laundering case here to add on or to charge

1 against people who only committed the money
2 laundering. So we make -- we spend a lot of
3 time trying to convince people to do exactly
4 what I've just described.

5 And to what you are asking about Patrick,
6 does everyone do it? No. We wouldn't need to
7 have special week-long courses on financial
8 investigation techniques if everyone was born
9 knowing how to do this and wanted to it.
10 Various DEA commissioners over time have, you
11 know, tried to convince DEA agents to spend more
12 time on recovery of the money and less time on
13 just doing buy-bust operations on street corners
14 because it has much more effect on the overall
15 ability of the drug trafficking organizations to
16 continue to do business but that doesn't mean
17 that we've gotten everyone to do it.

18 Q When you were prosecuting, what was your
19 expectation when you received a file? Did you
20 have an expectation that the investigation would
21 have also targeted the discovery of assets that
22 could be subject to forfeiture?

23 A Yes, absolutely. And the agents all knew, and
24 they came to the chief of the money laundering
25 section that it would be strange for him not to

1 say, and what did you do about trying to find
2 the money? And they didn't -- some said, you're
3 right, I love going after the money and here's
4 what I found out. And others who said oh, you
5 mean you're not going to charge this case until
6 I go back and do more work? Yes, that's what I
7 mean, you have to go do that. And some are
8 happy about it, some are not. It's just the way
9 the world works.

10 Q I wonder if you can speak about your views as to
11 the benefits in terms of disrupting organized
12 crime of really targeting assets beyond those
13 that are just incidentally identified through
14 the course of a predicate investigation.

15 A Well, there's no doubt but that -- and
16 economists have studied this, that you have much
17 more of an effect on, let's say, a drug
18 organization or similar organized crime
19 organization if you take their assets than if
20 you simply arrest low-level people.

21 You know, just use the drug case as the
22 prototypical example, you could arrest any
23 number of street sellers and take the cash that
24 was found on their persons or in their, you
25 know, the safe under the bed in their house and

1 they get replaced fairly quickly. It's the
2 large sums of money that are flowing back to
3 Mexico and other places in South America that
4 are the sustenance that of -- sustain the cycle
5 of a drug trafficking organization.

6 When we'd get a cooperator, when we'd get a,
7 you know, sort of low-level operative in a drug
8 organization to cooperate with the government
9 and plead guilty and testify, and we would ask
10 him what of our investigation was the most
11 effective in terms of slowing down the drug
12 operation that you used to be a part of? He
13 would say, those seizures; when you took
14 \$500,000 off the courier on the airplane, that
15 was the money that was going to buy the next
16 load and we had to start all over and raise that
17 money again before we can get another load, and
18 the supplier then went to somebody else and so
19 forth in Mexico and caused all kind of problems
20 for us.

21 And it's not just drug cases. I mean, you
22 could put this in any context. Wildlife
23 trafficking. You know, when we go to East
24 Africa and we say, you guys want to stop the
25 trafficking in elephants or rhinos or whatever

1 it is. Arresting the guy out in the bush with
2 the gun in the pickup truck isn't going to do
3 much because he can be replaced tomorrow;
4 stopping the money as it's flowing between East
5 Africa and China or Vietnam is the much more
6 effective way to stop the -- to put a dent in
7 the wildlife trafficking trade.

8 And then in cases involving sophisticated
9 money laundering by corrupt public officials or
10 kleptocrats around the world. We don't want in
11 the United States our financial institutions to
12 be used as the vehicles for hiding money from
13 the populations in developing countries. We
14 don't want our institutions like -- or markets
15 like the real estate in New York or financial
16 sector on Wall Street to be dominated in any way
17 by people with, you know, corrupt criminal
18 proceeds who don't have our interests at heart.
19 We don't want our -- we don't want the United
20 States to become the repository of the world's
21 criminal proceeds and we don't want our
22 financial institutions to be the avenues by
23 which money gets to North Korea and to Iran and
24 other places where it shouldn't go and be used
25 for wrong purposes. And the only way to do

1 that is to focus on these financial sides of
2 these crimes.

3 Q Thank you. I'd like to ask you about your
4 involvement and observations of jurisdictions
5 you've dealt with around the world. And the
6 FATF has certain expectations in terms of the
7 implementation of a strong criminal and asset
8 recovery regime and the United States appears to
9 be a country that's put in place that regime and
10 is using it. Do you come across jurisdictions
11 that have on paper a strong anti-money
12 laundering regime in terms of legislative
13 structure but perhaps aren't measuring up to
14 quite the same extent in terms of the
15 implementation, the enforcement?

16 A Yes, that's unfortunately quite common. And
17 I think the FATF has recognized the problem.
18 Going back to the very beginning of the 40
19 recommendations of the FATF and some of the
20 requirements to -- that any signatory to a UN
21 treaty are required to adopt, the emphasis was
22 on getting all of these countries to enact the
23 legislation, to enact anti-money laundering
24 legislation, to enact criminal forfeiture
25 legislation and increasingly to enact

1 non-conviction-based or civil forfeiture
2 legislation.

3 I would get called into some country and I
4 would say -- and they would say, can you please
5 come and do a week-long training conference on
6 the implementation of our money laundering
7 statute or our money laundering and forfeiture
8 statutes. And I'd say, well, that would be very
9 nice; I'd be happy to do that. I always like to
10 travel. Just like I'm happy to be in Vancouver
11 today. It's a beautiful city and I was glad to
12 volunteer to help you guys out.

13 And I would look at the statute and I'd say,
14 you have a very robust statute; in fact it's so
15 robust that I don't know why you've enacted it,
16 like, three times; you've have got three
17 different things that say the same thing in
18 three different places; but what I really want
19 to know is why you need me to do any training;
20 you've already got this wonderful statute. And
21 the answer is, no one's ever used it.

22 The reason -- what's happened is in order to
23 gain admission into the FATF or into the
24 European Union or to whatever body you want to
25 join, you have to show that you've enacted these

1 statutes but you don't have to show that you've
2 ever used them. So -- and they don't -- and
3 there's nobody in the country who was
4 participating in the drafting process. They
5 just copied somebody else's statute or they
6 copied it out of the UN treaty and they just
7 enacted it word for word and they have no idea
8 what it means. They've never used it. They
9 have no resources. There is no specialized
10 unit. There is no specialized training.

11 I at one time was in Kenya and said, you
12 guys have a forfeiture and money laundering
13 statute -- and I was being introduced to 15
14 people around a table who were their top
15 prosecutors in Nairobi -- have any of you ever
16 used this, or if not, what is it that you do?
17 And they went around the room, and every one of
18 the 15 people politely said that they'd never
19 used statute because they were all prosecuting
20 murders and that's -- there were many murders in
21 Nairobi that that's all they had time to do and
22 thank you very much for coming all the way to
23 tell us how to use our statute, but that's not
24 something we have time to do; thank you.

25 The FATF has begun in its evaluations now to

1 evaluate not only the enactment of the statutes
2 but their implementation. Is -- are they
3 understood; is there training; are they
4 resourced; are they applying them in cases that
5 matter or are they only going after low-hanging
6 fruit; what are they doing. Some countries
7 still have very poor statutory schemes. Some
8 countries have very, but robust statutory
9 schemes but only a fraction of the latter are
10 actually using them effectively.

11 Q Do you have a view in terms of deterring a money
12 launderer from operating in a jurisdiction how
13 important it is to actually enforce the statutes
14 and conduct investigations and pursue
15 prosecutions?

16 A Well, sure. I mean, especially in the case of
17 third-party money launderers. If nobody is --
18 if the only money laundering prosecutions that
19 are brought are self-money laundering cases or
20 if no money laundering cases are brought, then
21 you know that you're missing all of the cases
22 where the money launderer was a professional.
23 Professional money laundering is a money
24 transmitting business. He's a lawyer; he's an
25 accountant; he runs a hawala. He's in all

1 respects facilitating the underlying crime by
2 making it possible to launder the money but he's
3 not the person who committed the underlying
4 offence. And if you don't use the money
5 laundering statute to go after these people,
6 then you're giving them a green light to do it.

7 Q The US is a jurisdiction that does, based on
8 your report, seem to leverage its legislative
9 framework through investigations and
10 prosecutions to a greater degree than Canada.

11 Are you able to comment on -- or are there
12 any metrics by which you can assess how
13 effective this approach has been in terms of
14 deterring conduct that's undesirable?

15 A I've never been able to come up with a metric
16 that measures the impact on crime. I mean, our
17 metrics measure how many dollars we recovered
18 and how much of it went back to victims. What
19 percentage of cases did we not only get a jail
20 sentence but we recovered some money.

21 But it's very difficult to say if we had not
22 done this would there have been more crime. I
23 can say as a matter of belief that if Congress
24 were to pass a statute that said that we are
25 allocating \$2 billion a year in taxpayer money

1 to criminals to use as they see fit, that that
2 would increase crime.

3 So if we instead take \$2 billion away from
4 criminals so they don't have it to commit crime,
5 then we probably have decreased crime. But I
6 don't know how to measure that. You know, all I
7 can say is that it's a way of helping to keep a
8 cap on the problem by forcing the money
9 underground, by forcing criminals to do riskier,
10 more complicated and more time consuming things
11 to hide their money. They can't simply just put
12 it in bank. They've got to try to smuggle it
13 out of the country. They've got to try to
14 create shell companies. They have to try to use
15 third parties. They have to do things that
16 expose them to greater risk and are much more
17 burdensome because we will prosecute the cases
18 where they don't exercise that degree of
19 diligence to hide their money, and we'll recover
20 the money.

21 And I know that we've recovered a great deal
22 of money for victims. Money that they would not
23 have had the resources to recover on their own.
24 And, you know, an impecunious victim going up
25 against a major criminal organization is not

1 going to be able to recover much. The
2 government has resources that allow us to
3 recover a great deal of money.

4 You know, I'm working on a case right now
5 where the victim is an investor who lost
6 \$6 million in an investment scheme and the FBI
7 has stepped in to investigate the case as a
8 criminal case and hopefully we'll end up
9 recovering the money which the victim never
10 would have had the resources to do. Never mind
11 the subpoena authority that the government has
12 which the victim does not have, but just the
13 resources to hire people to go out and trace the
14 money and try to get it back through judicial
15 action.

16 So it's I think essential to do it, but in
17 terms -- other than by giving you a number of
18 dollars that were recovered every year or the
19 number of victims who recovered money, it's hard
20 to say what impact that has on a crime.

21 Q Okay. Can you give the Commissioner a sense of
22 the volume of dollars that are recovered through
23 asset forfeiture in the United States through
24 the federal system, at least?

25 A Yeah. I've been out of government for

1 six years, so I don't have the most recent
2 statistics. They're publicly available. I just
3 haven't had any occasion to see them. I know
4 the most recent numbers that I saw, which I've
5 quoted in my report, were that on the order of
6 \$2 billion a year is recovered federally. In
7 some years much more because there's was a big
8 case. The year that the Bernie Madoff money was
9 recovered I think they hit \$4 billion in a
10 single year.

11 But \$2 billion a year is roughly the --
12 including white collar cases where the money is
13 not staying with the government but going back
14 to victims and including the drug cases and the
15 other cases where there is no victim and the
16 money does stay with the government and
17 including the cases where the money is returned
18 to a foreign government that asks the US's
19 assistance in recovering the money.

20 Q And is there also a significant volume of assets
21 that are recovered through the state system that
22 is not reflected in those numbers?

23 A Yeah. Every state has its own forfeiture laws
24 and I don't really have any expertise or any
25 working knowledge of what each day does, but

1 they all have their own forfeiture provisions.

2 Q Okay. The Commissioner's heard some evidence on
3 unexplained wealth orders. Is that a mechanism
4 you have available in the United States?

5 A No, we don't have that. I've seen those. The
6 UK enacted one recently. Other countries have
7 done so. Unexplained wealth orders, as I
8 understand it without having been a party to the
9 enactment of any or the use of any, are
10 typically used when you have public officials
11 who have modest salaries but great wealth and
12 there's an inference that they derived that
13 money illegally. While we certainly have public
14 officials who fall in that category in the
15 United States, that's not the overwhelming
16 problem in the United States as it is in
17 developing countries around the world.

18 I tend to think it was, would be politically
19 difficult to get an unexplained wealth statute
20 enacted in the United States. But I certainly
21 understand their utility in other countries and
22 why they're doing it.

23 Q I wonder if you have any comment on the
24 advantages in terms of deterrent effect of those
25 types of statutes or any words of caution with

1 respect to the advisability of such orders --
2 such a regime, pardon me.

3 A Yeah, I mean, when we are trying to prove that
4 the money in question in a case is the proceeds
5 of crime, one of the ways we do it is a matter
6 of just the building blocks of evidence that
7 you'd put together is by showing that the person
8 is involved in criminal activity and had no
9 other source of legitimate income. I alluded to
10 that earlier when I said we look at his tax
11 returns and so forth.

12 So it's a piece of evidence in combination
13 with other evidence to show that his property is
14 criminally derived. But the caution would be --
15 it's got to be in combination with other
16 evidence. The fact that somebody has a lot of
17 money cannot in and of itself be evidence that
18 it's criminally derived in our system. I just
19 think that in the United States -- maybe we're
20 the same as rest of the world, maybe we're
21 different, but there's this notion that the --
22 how I got my money is not the government's
23 business, you know; don't ask me. If you think
24 I've committed a crime and you can show that and
25 you want to show that the money that now you're

1 after is the proceeds of that crime, that's
2 okay, but the fact that I happen to have a lot
3 of money is my business and not yours.

4 And so there is -- it would be really
5 baiting the tiger to go -- you know, the civil
6 libertarians and the libertarians who think that
7 the government is -- should stay out of
8 everybody's life. We can't even get people to
9 wear masks in this country during an epidemic,
10 never mind going after people because just
11 because they seem to have a lot more than we
12 think that they ought to.

13 So it's -- you know, for political reasons I
14 would stay away from.

15 MR. MCGOWAN: Thank you for your thoughts on that.

16 Mr. Commissioner, I am either at or very
17 near the conclusion of my questions. I'm going
18 to suggest the morning break.

19 THE COMMISSIONER: All right. Thank you,
20 Mr. McGowan. We'll take 15 minutes.

21 THE WITNESS: What time should I be back, then?
22 15 minutes from now would be at 35 past the
23 hour?

24 MR. MCGOWAN: Yes.

25 THE REGISTRAR: Yes.

1 THE WITNESS: Very good.

2 THE REGISTRAR: This hearing is adjourned for a
3 15-minute recess until 11:35 a.m. Please mute
4 your mic and turn off your video.

5 **(WITNESS STOOD DOWN)**

6 **(PROCEEDINGS ADJOURNED AT 11:20 A.M.)**

7 **(PROCEEDINGS RECONVENED AT 11:35 A.M.)**

8 **STEFAN CASSELLA, for the**
9 **commission, recalled.**

10 THE REGISTRAR: Thank you for waiting. The hearing
11 is resumed, Mr. Commissioner.

12 THE COMMISSIONER: Thank you, Madam Registrar. Yes,
13 Mr. McGowan.

14 MR. MCGOWAN: Yes, Mr. Commissioner. I have no
15 further questions for this witness.

16 Mr. Cassella, thank you for answering my
17 questions.

18 THE COMMISSIONER: Thank you. I'll now call on
19 Ms. Addario-Berry on behalf of the province,
20 who's been allocated 20 minutes.

21 MS. ADDARIO-BERRY: Thank you, Mr. Commissioner.

22 **EXAMINATION BY MS. ADDARIO-BERRY:**

23 Q Mr. Cassella, can you hear me okay?

24 THE COMMISSIONER: I think you're muted,
25 Mr. Cassella.

1 THE WITNESS: Now I'm back. Yes, I can hear you just
2 fine.

3 MS. ADDARIO-BERRY: Thank you. I have some questions
4 regarding the contents of the report which you
5 prepared for the commission.

6 Madam Registrar, could I please ask you to
7 pull up exhibit 969. Thank you. And I'd like
8 to turn to page 4 of the report.

9 Q Mr. Cassella, my first question for you relates
10 to the bottom paragraph of this page. You
11 write:

12 "But most prosecutions of currency
13 reporting offenses involve elaborate
14 attempts to divide large sums of money
15 into smaller amounts to evade the CTR --"
16 Which I believe is currency transaction
17 reporting.

18 "-- requirements."

19 Is that correct?

20 A Yes, that's right.

21 Q And you write:

22 "This is commonly called 'structuring.'"
23 My question for you is why in your opinion is
24 structuring the most heavily prosecuted offence,
25 and how is this type of conduct monitored and

1 identified?

2 A Well, the reason it's that -- most positions
3 involve structuring as opposed to the simple
4 failure to file or the simple filing of a false
5 or incomplete report is that people are trying
6 to evade the filing of the report altogether by
7 deceiving the bank into believing that they have
8 conducted transactions below the \$10,000
9 threshold. So rather than file a false report
10 or an incomplete report or rather than, in the
11 case of the bank, failing to file the report at
12 all, what we're seeing repeatedly are people who
13 attempt to divide the amount of money up into
14 smaller amounts so that the \$10,000 threshold
15 isn't triggered. So we end up with -- somebody
16 goes to the bank every other day with the \$9,900
17 or he goes to three different banks on the same
18 day with \$9,900 or he in some other way tries to
19 avoid the reporting requirement.

20 How is it detected. The banks are required
21 to file suspicious activity reports and when a
22 bank detects this type of activity happening,
23 structuring activity, they have to file a report
24 with the Treasury Department, and those reports
25 are made available to prosecutors on a monthly

1 baseless in batches. And each prosecutor's
2 office has a different system of doing so, but
3 they typically would have a group that would go
4 through the reports and try to spot this type of
5 activity. So that's one way.

6 And the other way would be if you're
7 conducting a criminal investigation, you would
8 normally go and subpoena the bank records for a
9 particular target, and the bank records show
10 such a pattern of sub \$10,000 transactions.
11 Even if you didn't spot it on a suspicious
12 activity report, now you're aware of it you
13 might include a structuring charge in the
14 indictment based on that as well.

15 Q Okay. So I would imagine that the subpoena
16 would come after there had already been some
17 suspicion around this particular defendant's
18 financial activities.

19 A That's right. What I would do -- typically we
20 would get a suspicious activity report. Of
21 course we would get a batch of them. We get
22 several hundred every month. We go through them
23 and pick out ones that seem to be particularly
24 significant and then we would send a subpoena to
25 the bank saying, based on your suspicious

1 activity report, we see that in account XYZ or
2 that in these three accounts all held by the
3 same person you identified some suspicious
4 transactions involving sub \$10,000 cash
5 transactions; give us all the records for the
6 last three years and we'll take a look and see
7 what's going on.

8 Q Okay. And so is it fair to say that the
9 banks -- the information provided by the banks
10 plays a fairly significant role in identifying
11 these sort of structuring offences?

12 A Yes. I'm not -- I can't give you a percentage,
13 whether it's half or more or less, but in these
14 cases a large percentage of the cases are
15 triggered by the suspicious activity reports
16 provided by the banks.

17 Can I just add that it's sort of ironic in
18 that if I'm criminal and I'm trying to hide my
19 cash from the government, I'm much more likely
20 to tip the government off to look at me by
21 breaking the amounts under -- to amounts under
22 \$10,000 thus triggering the bank to file a
23 suspicious activity report than if I had simply
24 just put the \$50,000 in the bank all at once
25 because that would not generate a report and

1 different crimes."

2 And do I understand your evidence this morning
3 to be that you view it would be better to enact
4 legislation which uniformly authorizes criminal
5 and civil forfeiture for all property that's
6 involved in any domestic or foreign criminal
7 offences, including the proceeds of the offence,
8 any facilitating property and any commingled
9 property?

10 A Yes, very much that's my view. I think that the
11 sensible statutes that I've seen around the
12 world simply say the government may recover --
13 they talk about the procedure separately,
14 civilly or criminally. But the government may
15 recover the proceeds of any crime, foreign or
16 domestic, any property used to facilitate or
17 commit such offence. And if you've got a money
18 laundering statute, you probably need to use
19 other language like "all property involved in
20 the offence" because otherwise you have
21 answer the question for what crimes should the
22 criminal be allowed to keep the proceeds. I
23 can't think of a reason why you'd of ever have a
24 list of exemptions. And so if you would never
25 have a list of exemptions, why would you go off

1 a list-based approach rather than simply say
2 "all crimes."

3 Q So you don't think that there's any compelling
4 rationale for perhaps a legislative intent
5 behind the so-called piecemeal approach that
6 you're seeing in the US statutes?

7 A I know there wasn't any legislative intent. I
8 know that this was -- you know, this committee
9 in the 1970s is responsible for drug cases.
10 This committee in the 1980s is responsible for
11 pornography cases. This committee in the 1990s
12 is responsible for federal healthcare offences
13 and they pass different legislation at different
14 time with no overarching objective of trying to
15 unify the approach. It's all historical
16 accident.

17 MS. ADDARIO-BERRY: Okay. Madam Registrar, can we
18 scroll down to page 37 and 38 of the PDF -- or
19 of the report, please. And this is under the
20 heading of "Civil Forfeiture."

21 Q Are you with me, Mr. Cassella?

22 A Yes, I am. Go ahead.

23 Q At the bottom of 37 you write:

24 "As in a criminal forfeiture case, the
25 Government must establish the second

1 element - the nexus between the property
2 and the offense - by a preponderance of
3 the evidence."

4 Do you -- are you familiar with the burden of
5 proof of balance of probabilities?

6 A Balance of probabilities and preponderance of
7 the evidence is the same.

8 Q That was my question. Thank you for clarifying
9 that.

10 A Sure.

11 Q Okay. And continuing down to page 40 -- the
12 bottom of 40 and top of 41. This under the
13 heading of "When Does the Government Use Civil
14 Forfeiture?"

15 A Right.

16 Q And you say:

17 " There is no distinction between criminal
18 courts and civil courts. There are only
19 federal courts of general jurisdiction.
20 Moreover, there is no distinction within
21 federal law ... between those authorized
22 to bring criminal prosecutions and those
23 authorized to bring civil forfeiture
24 actions."

25 You discussed this earlier as well, but you

1 mention that:

2 "The same federal prosecutors are
3 authorized to commence a given case as a
4 criminal prosecution [or] a civil
5 forfeiture, or ... both."

6 Do you have any comments around what the pros
7 and cons are of having the same prosecutors
8 authorized to decide which route to go about?

9 A Yeah, I do think that it makes sense to have the
10 prosecutorial function all in one place, and I
11 consider bringing a civil forfeiture action or a
12 criminal forfeiture action just as two ways of
13 exercising the prosecutorial function. I don't
14 see civil forfeiture in the same way that -- and
15 I think the name "civil forfeiture" is
16 unfortunate in that it connotes this in the same
17 way that you would bring a civil action to
18 recover, you know, overpayments to defence
19 contractors who defraud the pentagon or in some
20 other way try to, you know, get some civil
21 remedies.

22 I think that this is all part of a law
23 enforcement action and it's a law enforcement
24 tool. The same investigators are investigating
25 the same facts, all of which in the elements of

1 the crimes are the same. The standard of proof
2 is slightly different. The procedures obviously
3 are different. But the -- it makes sense to
4 have in one place the decision as to who to
5 target, for what crime and to what tool to be
6 used to achieve the interests of justice. And
7 if that tool is in one case a criminal
8 prosecution and in another case a civil
9 forfeiture, it seems to me that that decision is
10 made by the same person who has already decided
11 whom to target and for what crime and to how to
12 conduct the investigation.

13 Q So it's fair to say that the versatility and
14 flexibility that you see in having the
15 prosecution entitled to determine which route to
16 go outweighs any specialized knowledge that
17 might be lacking by sort of putting it all into
18 one?

19 A Well, let me hasten to add that within a
20 prosecutor's office there is a need to have
21 specialized expertise with respect to money
22 laundering and forfeiture. Money laundering as
23 we discussed at length earlier today normally
24 can be prosecuted and investigated by anyone,
25 but sometime it's extremely sophisticated.

1 Forfeiture is definitely an area that
2 requires specialized expertise, but that doesn't
3 mean putting it in a different agency. There
4 needs to be within every prosecutor's office a
5 person or a cadre of persons who understand the
6 ins and outs of what can be fairly arcane. In
7 forfeiture law you need to deal with third
8 parties and third-party rights all the time. So
9 you need to deal about -- you need to know
10 property law. You need to know about trusts and
11 estates. You need to know about marital rights
12 and the consequences of divorce settlements.
13 You need to know about, you know, liens held by
14 financial institutions and mechanics. All kinds
15 of things that the federal prosecutor doesn't
16 normally have to deal with.

17 Some people become federal prosecutors
18 simply because they never wanted to have to have
19 to learn all that stuff and maybe I was one of
20 them when I started out, but that doesn't mean
21 that you'd go to a different agency because then
22 you create all kind of bureaucratic walls and
23 communication problems that are the bane of
24 effective law enforcement. I think that what --
25 the ideal is that the same people get to choose

1 to decide whether to do a case criminally or
2 civilly but within their unit. Down the hall is
3 somebody who has some expertise in how to do a
4 non-conviction based forfeiture or who has some
5 expertise in dealing with third-party rights in
6 a criminal case who can advise, who can even
7 step in to second chair a case.

8 But the idea that I've seen in other
9 countries unsuccessfully of saying, we're going
10 to farm the forfeiture function or the money
11 laundering function out to these other people in
12 some other part of town who have a different
13 boss and different priorities and different
14 resources, that -- I have not seen that ever
15 work. Much, much better to have a unit within
16 the prosecutor's office that just provides that
17 expertise and can step in to handle the more
18 complicated case when the time is right.

19 I mean, to take your point, you can't -- if
20 you have a prosecutor's office with
21 50 prosecutors, you can't simply say, it is
22 everybody's job to do forfeiture and money
23 laundering because then it is nobody's job.
24 Everybody will say somebody else will do it.
25 But if you say its everybody's job to consider

1 the money laundering and forfeiture and to
2 include it in their case and to go down the hall
3 to Bob, who is your expert when you have a
4 problem in the office and to get some help, that
5 works effectively.

6 MS. ADDARIO-BERRY: Okay. Madam Registrar, could we
7 scroll down a little further to page --
8 the bottom of 42, top of 43.

9 Q And I believe this is under the question of
10 "When the Government Will Use Civil Forfeiture."
11 The first example you have provided is:

12 "When the property is seized but the
13 forfeiture is unopposed."

14 And you write:

15 "It is commonplace in the [US] for a
16 defendant accused of a criminal offense to
17 waive his right to contest the forfeiture
18 of the money, firearm or other property
19 seized from his possession at the time of
20 his arrest."

21 Why is this a commonplace situation, and is
22 there any benefit for the accused of waiving
23 this right if they still have to face criminal
24 charges ultimately?

25 A Well, let me give you the typical example. A

1 drug dealer is arrested. He is indicted and
2 charged with being a drug trafficker and at the
3 time of his arrest property is seized. Under
4 federal law -- if we start the case off as we
5 almost always do by sending him notice of the
6 seizure and his right to contest the forfeiture,
7 he would get a notice that effectively says
8 this: on the 10th of May we've searched your
9 house and we recovered \$100,000 in cash wrapped
10 in rubber bands, two loaded firearms and a kilo
11 of cocaine; if you wish to contest the
12 forfeiture of this property, you have 30 days in
13 which to do so.

14 Many criminal defendants facing trial see no
15 advantage in claiming that property. And so it
16 is extremely common for those cases to go
17 uncontested.

18 Q Okay. And next question I have is a bit further
19 along in your report.

20 Could we scroll down to 55/56.

21 A Okay, I'm there.

22 Q So at the bottom of 55 you write:

23 "In civil forfeiture cases, the claimant/
24 property owner can force the Government to
25 divulge evidence and produce witnesses in

1 advance of trial that the Government would
2 not be required to divulge or produce in a
3 criminal case."

4 You cite a case, *United States v. Approximately*
5 *\$69,577 in U.S. Currency*. And in the summary
6 that you provide, you write:

7 "(Government is entitled to stay if
8 providing discovery to defendant's family
9 members in the civil case would provide
10 defendant with earlier and broader
11 discovery than he could obtain in his
12 criminal case)."

13 A Right.

14 Q If I understand the principle correctly, it
15 sounds to me that this contradicts the notion
16 that the claimant could force the government to
17 divulge evidence more broadly in the civil case
18 than the criminal proceeding. So I'm just
19 wondering, is this not a binding case authority
20 or could you explain this a little further.

21 A Sure. No, I understand the reason for your
22 question. Okay. So in a criminal case the
23 government is required to produce very limited
24 evidence in discovery pre-trial. It has to
25 produce exculpatory evidence. It has to produce

1 statements the defendant has made previously.
2 It does not have to produce -- it does not have
3 to identify its witnesses or produce statements
4 that its witnesses intend to make or anything of
5 that nature.

6 It's all about protecting the secrecy and
7 integrity of investigation and protecting the
8 witnesses from intimidation prior to trial and
9 protecting against the manipulation of evidence
10 prior to trial. That's in a criminal case.

11 In a civil case there is no such rule. So
12 in a civil case the government has to reveal
13 everything. It has to provide all of the
14 evidence it intends to introduce at trial. It
15 has to make all of its witnesses available for
16 pre-trial deposition.

17 Now, if there's only a civil case, my point
18 was only to make the point that in civil cases
19 the rights of the accused, if you will, are
20 actually broader than they are in a criminal
21 case because they have the right to this
22 information. Now, what happens if there are
23 both cases pending at the same time. If there's
24 a civil case pending where broad discovery is
25 available, in a criminal case pending where

1 broad discovery is not available, how do you
2 resolve the conflict? And the reason -- the way
3 you resolve the conflict and what this case
4 stands for the proposition is that you stay the
5 civil case and make the criminal case go first.

6 And then -- so the criminal case goes first.
7 The defendant goes to trial. He is convicted or
8 he's not convicted. And then when the civil
9 case comes, now the government has to reveal all
10 of its evidence and so forth, but it's not
11 jeopardizing its criminal case anymore because
12 the criminal case is over at that point.

13 Q Thank you for clarifying that.

14 MS. ADDARIO-BERRY: Mr. Commissioner I note the time,
15 and I do still have a few questions remaining
16 for Mr. Cassella. I was wondering if you might
17 indulge me with an extra ten minutes to wrap up.

18 THE COMMISSIONER: Very well.

19 MS. ADDARIO-BERRY: Thank you.

20 Q If we could continue down to page 68 of your
21 report. I'm sorry page 64, not 68.

22 A Okay. 64.

23 Q And this is under the heading of "Assessment of
24 Effectiveness." You have a footnote at the
25 bottom of this page regarding the quantum of

1 asset forfeiture funds.

2 A Right.

3 Q And I was wondering if you tell the commission a
4 little bit about who decides how the funds that
5 are derived from asset forfeiture are to be
6 distributed?

7 A That's a very good question. So first we have
8 to distinguish between money that is going into
9 the federal assets forfeiture fund and money
10 that is going to be shared with state and local
11 law enforcement agencies. There is a federal
12 statute that says if a state or local agency
13 participates in a federal investigation that the
14 state or local agency, you know, the sheriff's
15 department of, you know, Podunk County
16 someplace, is entitled to a share of the
17 forfeited funds. And so off the top in such
18 cases some fraction of the money gets allocated
19 to the state or local law enforcement agency to
20 reflect their participation in the case. And we
21 can talk about what the reason is for that
22 statute, if you wish, later.

23 With respect to the money that stays
24 federal, it does not necessarily go to the
25 agency that brought the case. Just because it

1 was a drug case doesn't mean the DEA gets to
2 keep the money. Just because it was a terrorism
3 case does not mean that the FBI gets to keep the
4 money. It goes into a pool and that pool is
5 appropriated out every year to the respective
6 federal law enforcement agencies based on
7 showing of need for training or equipment or
8 whatever they need the money for irrespective of
9 how much they contributed to the pool in the
10 first place.

11 So in the federal system there is no
12 one-to-one correspondence between seizures,
13 forfeitures and allocations. It has simply to
14 do with need and that's based on an
15 appropriations process.

16 Let me add one other thing. And none of
17 that happens until after the victims have been
18 compensated. The victims' money comes first
19 before any of that -- of what I just said
20 happens.

21 Q And is that the same across all the States?

22 A I don't know what states do, but federal money
23 does not go a state and local agency until
24 victims have been compensated.

25 Q Okay. My last set of questions relates to the

1 addendum you've provided.

2 MS. ADDARIO-BERRY: Madam Registrar, could we open up
3 exhibit 970. Thank you.

4 Q And here you've provided a comparison between US
5 federal civil forfeiture law and the provincial
6 civil forfeiture in British Columbia; is that
7 right?

8 A Yes. As I understood it, I was working off of a
9 report on the British system that was provided
10 by my colleague Jeff Simser.

11 Q The British system?

12 A The British Columbian system is what I meant to
13 say.

14 Q Okay.

15 A Yeah.

16 Q And to confirm, you have never prosecuted a
17 money laundering or proceeds of crime matter in
18 British Columbia; is that correct?

19 A Certainly not, no.

20 Q Or you've also never prosecuted a civil asset
21 forfeiture in British Columbia?

22 A I have not.

23 Q And you've given evidence in this addendum
24 regarding some of the broad similarities between
25 the asset forfeiture regime in the US and

1 British Columbia. But I take it that with
2 respect to matters relating to the BC civil
3 asset forfeiture regime, you would defer to
4 others with direct knowledge and experience of
5 that system?

6 A Yeah, of course. This addendum was requested of
7 me after Jeff Simser wrote a report on the
8 British Columbia system. And I was asked to add
9 an addendum that compared what he said of the
10 British Columbian system was to what the US
11 system was so that that might be of use to
12 somebody trying to compare the two systems.

13 Q Okay. And in the third paragraph of this
14 addendum you write:

15 "Administrative forfeiture may be employed
16 when the property is personal property
17 having a value of \$500,000 or less."

18 Do you have any sense of how this \$500,000 limit
19 for administrative forfeiture was determined?

20 A Well, first when I was reading over this, this
21 morning I realized that there's an error in that
22 statement. More accurately it should have said:

23 "Administrative forfeiture may be employed
24 when the property is [currency in any
25 amount] or personal property having a

1 value of \$500,000."

2 And the rationale was -- and this was in 1988 as
3 I recall, this was enacted. The thought was
4 valuable property and real property of any value
5 should go through a judicial officer before any
6 final transfer of title takes place, but the
7 property of low value could be forfeited
8 administratively if due process was done, notice
9 was given and the property -- forfeiture of the
10 property was uncontested.

11 The number 500,000 was arbitrary. It had
12 been 100,000 in the past and there was some
13 showing that there were a lot of uncontested
14 cases where the property was worth between
15 100,000 and 500,000. The idea was to try to
16 just keep out of the judicial system the low
17 value cases that were uncontested so as -- for
18 efficiency reasons. And 500,000 just seemed
19 like a reasonable number at the time back in
20 1988.

21 Q Do you see a high incidence of default -- I'm
22 not sure if you're aware that the administrative
23 regime in British Columbia, the monetary limit
24 is considerably lower at 75,000. Of course
25 different currency as well, but with this limit

1 of 500,000 do you still see a high incident of
2 default in these proceedings?

3 A 80 percent of all forfeitures in the United
4 States are uncontested.

5 Q So that presumably generates a considerable
6 amount of revenue. Would you agree?

7 A Yeah, I mean, I think that the last numbers I
8 had -- and I think they're in one of the
9 footnotes in the report -- say that in 2017
10 something like 25 percent of all forfeited money
11 came from uncontested administrative
12 forfeitures. And the balance divided somewhat
13 equally between judicial forfeitures that were
14 criminal and judicial forfeitures that were
15 civil.

16 So back to my original point that, you know,
17 in the vast majority of these criminal
18 prosecutions where money is seized at the time
19 of the arrest, the criminal decides not to
20 contest it and it's forfeited administratively.

21 The alternative would be to just keep it
22 lying around for a year or two until the
23 criminal case is over and then you'd have
24 storage and maintenance problems and so forth
25 and this was just a way of sort of flushing

1 those cases through the system more quickly.

2 Q And are you seeing a corresponding reduction in
3 crime with this -- the revenue from the
4 administrative forfeiture proceeding?

5 A Well, that's the question Patrick asked me
6 earlier. It's impossible to know how much crime
7 is reduced by not allowing criminals to keep
8 their money. I mean, I suppose the murder rate
9 would be higher if we stopped prosecuting
10 murderers too, but I can't tell you how many
11 murders weren't committed because we prosecute
12 murderers.

13 MS. ADDARIO-BERRY: Thank you, Mr. Cassella, and
14 thank you, Mr. Commissioner. Those are my
15 questions.

16 THE WITNESS: Thank you.

17 THE COMMISSIONER: Thank you. We'll now turn to
18 Mr. Duong on behalf of the BC Lottery
19 Corporation, who has been allocated five
20 minutes.

21 MR. DUONG: Thank you, Mr. Commissioner. I have no
22 questions for the witness.

23 THE COMMISSIONER: Thank you, Mr. Duong.

24 I'll turn now Ms. Magonet for the British
25 Columbia Civil Liberties Association, who has

1 been allocated 15 minutes.

2 MS. MAGONET: Thank you, Mr. Commissioner.

3 **EXAMINATION BY MS. MAGONET:**

4 Q Mr. Cassella can you hear me okay?

5 A Yes. Yes, ma'am, I can.

6 Q Okay. Excellent. My first questions for you
7 relate to an article that I circulated before
8 your appearance today, and it was already an
9 exhibit before this commission. It's
10 exhibit 379. The titled of the article is
11 "Seizing Family Homes From the Innocent" by
12 Professor Rulli.

13 MS. MAGONET: And if I could ask, Madam Registrar, if
14 could you please bring that up.

15 Q And are you familiar with this article,
16 Mr. Cassella?

17 A Ma'am, I saw that it was circulated last
18 Friday and I saw what it was about. I have not
19 read the article, but I went through it to see
20 what the subject of it was, and so I'm familiar
21 with the topic.

22 Q No problem. Thank you. So my first question,
23 Mr. Cassella, is whether you'd agree me in this
24 article Professor Rulli raises the concern that
25 civil forfeiture in the United States has a

1 agency priorities. In some cases, civil
2 forfeiture proceeds have been handed back
3 to prosecutors as bonuses."

4 Do you agree that this is what Professor Rulli
5 has said in his paper?

6 A Sure.

7 Q And do you have any reason to dispute this
8 finding?

9 A Well, it's not a finding. It's an opinion.
10 What they do in Pennsylvania or they do in any
11 one of the other 50 states, I don't know. I can
12 tell you about the sharing of federal forfeited
13 money with state and locals and the criticism
14 about, you know, the incentives that that
15 provides and I can discuss that, if you like.

16 Q Well, in your opinion is it inappropriate for
17 law enforcement to have a direct and significant
18 pecuniary interest in funds that are forfeited?

19 A No.

20 Q And why not?

21 A Well, it's an incentive; right? I mean the
22 question is not whether it provides an incentive
23 but whether it's an incentive you want to
24 provide. If I had it my way, would I provide
25 this incentive and create the appearance of some

1 problem that we then have to respond to all the
2 time? I might come up to -- I might come to a
3 different conclusion but I don't see that
4 there's anything wrong with providing incentive.

5 There are two things you want to incentivize
6 if you're the federal system sharing money with
7 state and local law enforcement. One is you
8 want to incentivize cooperation between local
9 police departments and state police departments
10 and sheriff department on the one hand and
11 federal authorities on the other who are often
12 not very numerous in rural areas. And so if you
13 want to build team work and you want to build
14 cooperation, which is essential in a county our
15 size, one way to incentivize that is to say, if
16 you guys work with us, you'll get to keep some
17 of the money.

18 And the second thing you want to do is you
19 want to get police to focus on the financial
20 side of crime and not just on making arrests of
21 low-level dealers. And one way in which to
22 incentivize that is to say that if you seize
23 money, then you get to retain some of the money.
24 It's not a secret that if -- you know, when I
25 wanted to get my kids the mow the lawn, if I pay

1 them \$20 they're more likely to do it than if I
2 didn't pay them \$20. So this is not a surprise.

3 The question is does that in any way violate
4 anybody's rights or does it create an appearance
5 of impropriety? I will grant you that it
6 creates an appearance that gives rise to a lot
7 of criticism which makes it difficult to bring
8 to bear all of the tools that we have in the
9 process for other reasons.

10 You know, every time I want to go off and do
11 a civil forfeiture of a case involving, you
12 know, some corrupt African dictator who
13 launderers money in the United States, I'm using
14 the same statute that some police officer uses
15 in Nebraska when he wants to, you know, seize
16 money from a drug courier. And if the political
17 reaction to what the police officer is doing in
18 Nebraska is that there's going to be some
19 diminution of the ability of the government to
20 use civil forfeiture generally, then we've just
21 created incentive for corrupt African dictators
22 to launder money in the United States and green
23 light to do so.

24 So we have to be careful about throwing the
25 baby out with the bath water while we deal with

1 this. So the question really seems to me is
2 whether or not you protect the civil liberties
3 of the people whose property is seized, not
4 whether there's an incentive to the police but
5 do you protect their rights. And, you know, we
6 could talk at length about what the rights are
7 in civil forfeiture cases, but I think that they
8 are appropriately protected and therefore I
9 think it's a system that works as well as it
10 could work notwithstanding the appearance
11 problem that you allude to.

12 MS. MAGONET: Okay. Thank you. Madam Registrar, you
13 can take this article down now. And if I could
14 ask for you to please bring up a different
15 document that I circulated. This one is not yet
16 an exhibit and it's -- well, it's really more of
17 a book than an article. Or a report rather.
18 It's called *Policing For Profit: The Abuse of*
19 *Civil Asset Forfeiture*. Thank you.

20 Q And, Mr. Cassella, are you familiar with this
21 report?

22 A Oh, yes.

23 MS. MAGONET: Mr. Commissioner, if I could please ask
24 this that this be marked as the next exhibit.

25 THE COMMISSIONER: Yes. Very well.

1 THE REGISTRAR: Exhibit 971.

2 **EXHIBIT 971: Policing for Profit: The Abuse of**
3 **Civil Asset Forfeiture, 3rd Edition - December**
4 **2020**

5 MS. MAGONET: Madam Registrar, if you could please go
6 to page 7 of the PDF.

7 Q Mr. Cassella, for your reference this is page 5
8 of the report. And just let me find this --
9 yes, this is the right page. Let me just find
10 the right spot. Okay, yes. Here we are.

11 Mr. Cassella, in this report the authors
12 discuss the fact that New Mexico actually
13 abolished its civil forfeiture regime in 2015
14 and now relies exclusively on criminal
15 forfeiture. And in the -- according to the
16 research done by the authors, they say that this
17 hasn't had an impact on public safety. And on
18 page 5 here they write:

19 "The study examines New Mexico's best in
20 the nation forfeiture laws adopted in 2015
21 to see whether abolishing civil forfeiture
22 negatively impacted public safety. This
23 study compares New Mexico's crime rates to
24 those of neighbouring Colorado and Texas
25 before and after reform. Contrary to

1 claims that abolishing civil forfeiture
2 would increase crime rates, multiple
3 analyses across five different measures of
4 crime find no evidence of any negative
5 effects from New Mexico's reform. It
6 states overall crime rates did not rise
7 following reform nor did arrest rates
8 drop, strongly suggesting civil forfeiture
9 is not an essential crime fighting tool."

10 Do you agree that this is what the authors found
11 in their research?

12 A I agree that's what the authors say.

13 Q And do you have any thoughts on, you know, how
14 this evidence suggests that public safety can be
15 preserved without resorting to civil forfeiture?

16 A We don't have enough time for me to tell you all
17 the reasons why I don't think much of the
18 Institute For Justice, which is financed by the
19 Koch brothers, and their efforts to abolish
20 civil forfeiture.

21 I can tell you that where they say "New
22 Mexico's best in the nation forfeiture law" I of
23 course would amend that to worst in the nation
24 forfeiture law.

25 The Institute For Justice wants to abolish

1 civil forfeiture everywhere all the time.
2 That's -- read their website. That's what they
3 say. They think if we find a painting that was
4 stolen from a Jewish family during the Holocaust
5 in an auction house in New York, too bad. It
6 doesn't -- we can't use civil forfeiture to get
7 it back. If we find money that has been
8 laundered by General Abacha when he stole
9 \$4 billion from the Nigerian people passing
10 through our US banks, not our problem. Let him
11 keep it. If we find that somebody has stolen
12 money from, you know, terminally ill cancer
13 patients and hidden the money in Oklahoma and
14 fled to Mexico, bring her back from Mexico and
15 prosecute her; otherwise too bad; that's not our
16 problem.

17 I think all of those are serious problems
18 and we need to use civil forfeiture to do it. I
19 think we need to do that federally. I think the
20 people in New Mexico would be better off if they
21 had a civil forfeiture statute. It is an
22 absolutely essential law enforcement tool.
23 Without it you cannot recover money when the
24 defendant is dead, when he is unknown, when he
25 is a foreigner, when he is fighting extradition,

1 no matter how many people in the United States
2 he has victimized and how much money he has
3 stolen. And I think that's wrong.

4 I think Jeffrey Epstein's money should be
5 taken back and given to the victims of the child
6 exploitation, sexual exploitation that he
7 committed even though he's dead. I don't think
8 that we tell those victims, too bad; he hung
9 himself; you lose.

10 That's my view and I'm afraid I disagree
11 with the Institute For Justice on that point.
12 If there's statistics that show that New
13 Mexico's criminal violations have not much
14 changed, you need to ask the federal prosecutors
15 who now have to do all the forfeitures in New
16 Mexico because they can't do them on the state
17 side.

18 MS. MAGONET: Okay. Thank you. Madam Registrar, if
19 you could please go to page 8 of this report, of
20 the PDF. And -- oh, yes. Sorry. No, that is
21 the right page. Let me find where this quote
22 is. Yes, here it is. If you could scroll down
23 just a little bit, Madam Registrar. And keep
24 going. Here we are.

25 Q Mr. Cassella, earlier today in your evidence I

1 understood it to be your view that criminal
2 forfeiture is the default and there are these
3 discrete situations where it's appropriate to
4 rely on civil forfeiture. According to this
5 report and the statistics they have from the
6 Department of Justice, they write:

7 "Civil forfeiture greatly outpaces
8 criminal at the federal level and in the
9 three states that track this information."

10 I understand your expertise is in the federal
11 level. Do you have any reason to dispute this
12 conclusion that criminal forfeiture is relied on
13 more often than civil forfeiture?

14 A You're saying the conclusion is that criminal
15 forfeiture is relied on more often than civil
16 forfeiture?

17 Q Yes.

18 A I think in the federal system that's true.

19 Q Okay. Thank you. And then also on this page --
20 just a moment.

21 THE COMMISSIONER: Ms. Magonet, I'm not sure if I
22 understood the answer. You put to Mr. Cassella
23 civil forfeiture greatly outpaces criminal at
24 the federal level. Is that correct? That was
25 what you --

1 MS. MAGONET: Yes.

2 THE COMMISSIONER: I'm --

3 THE WITNESS: I don't -- I'm sorry, Mr. Commissioner.
4 I didn't mean to interrupt.

5 THE COMMISSIONER: No, go ahead.

6 THE WITNESS: I think that the numbers change over
7 time and when I left government they might be
8 different than what they are now, but the most
9 recent statistics I saw was that the number of
10 dollars recovered is about equal in civil and
11 criminal forfeiture if you discount the
12 uncontested cases.

13 MS. MAGONET:

14 Q And if you don't discount them, given that we
15 know that's a significant number of the cases?

16 A Well, it depends on where you want to allocate
17 the uncontested ones. If the uncontested ones
18 are civil in the sense there was no criminal
19 judgment but they were uncontested because the
20 person was prosecuted criminally and chose not
21 to contest them.

22 Q Okay. Fair enough. And do you have any
23 knowledge if you -- how the two would stack up
24 to each other, not in terms of dollars forfeited
25 but simply the number of people who are targeted

1 by these cases?

2 A I don't. I mean, I think that you probably
3 would find a larger number of actual cases in
4 the smaller dollar amounts and a smaller number
5 of cases in the large dollar amounts. That
6 would be normal. You'd expect that. But yeah.
7 And are smaller ones more likely to be civil
8 cases that are uncontested? You know, I don't
9 know.

10 MS. MAGONET: Okay. Thank you. You can take this
11 report down, Madam Registrar. Thank you.

12 Q And I have just one more question for you,
13 Mr. Cassella. In your report you explained that
14 civil forfeiture is sometimes relied on when
15 there's insufficient evidence to prove that the
16 criminal offence occurred on the beyond a
17 reasonable doubt standard. Do you think this
18 creates a risk that civil forfeiture will be
19 overly relied on and used as a shortcut to avoid
20 investing the time and resources to investigate
21 and prosecute a criminal case?

22 A Yes, I think that is a concern and I've written
23 an article on that. I don't know if you've seen
24 it, but I've written an article on exactly that
25 question. My view is that it does accommodate

1 better because they tend not only to be the
2 right thing to do, but they tend to determine
3 that you actually are part of a larger drug
4 organization and you're going to bring in more
5 victims -- I mean more defendants and more
6 people to prosecute and have a greater effect on
7 the criminal problem that you're trying to
8 contest.

9 I made a case in Baltimore involving
10 \$500,000 that was taken off a courier going to
11 Jamaica. Rather than just take the money off,
12 the courier we did an investigation. Who gave
13 you the money and why did she give you the money
14 and how often did this happen and so forth, and
15 it ended up being a murder case before we were
16 done because it turned out the person was the
17 head of a large international drug ring
18 operating out of Baltimore who had murdered two
19 of her subordinates.

20 So I think those investigations should be
21 done. And I think it's unfortunate that
22 sometimes the police are a little bit lazy and
23 don't what they should do, but that's not a
24 reason not to do this.

25 MS. MAGONET: Thank you, Mr. Cassella. Those are my

1 questions, Mr. Commissioner.

2 THE COMMISSIONER: Thank you, Ms. Magonet. I'll call
3 on Mr. Rauch-Davis for Transparency
4 International Coalition, who has been allocated
5 15 minutes.

6 MR. RAUCH-DAVIS: Thank you.

7 **EXAMINATION BY MR. RAUCH-DAVIS:**

8 Q Mr. Cassella, can you hear me okay?

9 A Yes. Very well.

10 Q Excellent. My first question comes off your
11 report. Your report outlines the currency
12 reporting statutes which create offences for
13 things like failing to report among others. My
14 question is is it your experience that the
15 threat of prosecution on these types of offences
16 provides prosecutors with leverage over an
17 accused that often leads to kind of information
18 on bigger fish or other criminal networks or
19 enterprises?

20 A Oh, very much so. As you I'm sure know and
21 members of the commission know, prosecutors work
22 up the chain in organized crime cases. And the
23 easiest way to start is with the person who was
24 the -- we call them smurfs, the people who went
25 around distributing cash to different banks in

1 small amounts to avoid the currency transaction
2 reports because you can get a conviction there
3 and then find out who gave them the money and
4 why.

5 Q Right. And that leads to unearthing of larger
6 money laundering networks, criminal networks and
7 predicate offence as well; right?

8 A Absolutely. I mean, in the example I just gave
9 the last questioner, the money that was being
10 smuggled to Jamaica led to a large international
11 criminal organization and extremely serious
12 crimes involving murder and corruption of
13 diplomats and all sorts of things that we would
14 not have known about if we hadn't started working
15 up from the cash that was smuggled out by the
16 couriers who didn't report it.

17 Q Right. And I wonder -- this isn't in your
18 report but I thought I might draw on your
19 experience as a prosecutor. I wonder if you
20 could tell the commission a bit about
21 non-prosecution agreements and deferred
22 prosecution agreements and how those impact the
23 money laundering regime in the United States.

24 A There's a very interesting question. They
25 typically involve financial institutions that

1 have violated the money laundering laws
2 vicariously through the acts of their employees
3 and they could be prosecuted criminally either
4 because of that vicarious liability for the acts
5 of their employees or because they have failed
6 to maintain adequate anti-money laundering,
7 know-your-customer policies to have detected
8 this practice while it was happening and before
9 it resulted in losses.

10 And typically what happens is the case is
11 investigated, a draft indictment is prepared and
12 then the bank says, if you don't prosecute us,
13 we agree to being monitored and pay huge sums of
14 money in terms of fines or forfeitures and we'll
15 pay for the monitoring going forward.

16 This is somewhat of an ironic consequence of
17 legislation that was enacted, like -- it seems
18 to me in the late 1980s that said that a bank
19 convicted of money laundering loses its charter.
20 And no one really wants to shut down, you know,
21 Wells Fargo Bank and put all of its employees
22 out of business and deprive all of the people
23 who deposit their money there of access to the
24 bank by causing it to lose its charter if --
25 which would be the consequence of a criminal

1 prosecution. So the deferred prosecution
2 agreement seems to be the compromise between the
3 extremes.

4 Q Right. And is it your experience that they're
5 pretty commonly used in the United States?

6 A Yes. Many -- I don't know how many per year or
7 how many there have been altogether, but every
8 year we here about a couple of more. And there
9 is a unit within the criminal division in the
10 money laundering and asset recovery section that
11 seems to specialize in these bank cases.

12 Q And in your opinion have they proven quite
13 useful to the AML regime in the United States?

14 A Well, they have in the sense that they have
15 gotten the attention of the banks. One can
16 cynically say that the banks are not necessarily
17 model citizens until it's going to cost them an
18 awful lot of money. And the banks view AML
19 requirements and regulations and know-your-
20 customer rules as cost centres. It costs them
21 money to do all of this prophylactic work and it
22 also costs them customers who might go elsewhere
23 if they think the bank is being too vigorous.

24 And so how do you convince the bank to do
25 what they ought to do. And just like my example

1 earlier about paying \$20 to my kid to mow the
2 lawn, if you tell the bank they're going to face a
3 billion dollar fine, well, maybe they'll figure
4 out that they should implement these AML
5 regulations and know your customer rules.

6 Q Right. So I take it you'd agree it fosters
7 cooperation from the banks and financial
8 institutions as well as voluntary disclosures?

9 A Yes, it certainly does. Whether they like it or
10 not.

11 Q And then in addition to that there's also been
12 billions of dollars in terms of settlement
13 funds, if I can put it that way?

14 A That's right. And they have to pay for their
15 own monitorships too.

16 Q Right. My last set of questions is just going
17 to touch on some evidence you gave this morning
18 about how prosecutors should not just go after
19 the low-hanging fruit, it should go after more
20 complicated, serious cases. And you mentioned
21 that there might be a temptation on prosecutors
22 to settle a money laundering charge early if
23 they have a lot of work on their docket, things
24 like this.

25 But my question is isn't there also a real

1 personal risk to the prosecutor in that if they
2 fail on this money laundering charge, their
3 career or promotion type of -- there's an impact
4 on their career path. Would you agree with
5 that?

6 A That's a really interesting question. My old
7 boss Jim Comey, who gained some notoriety
8 internationally when he was fired as the FBI
9 director by the former president whose name is
10 never mentioned, used to say, if you've never
11 lost a case, then you weren't doing your job.
12 Because you need to press. You never bring a
13 case that you don't think is righteous. You
14 never bring a case that you can't prove, but you
15 don't only bring cases that are guaranteed slam
16 dunks either because sometimes complicated cases
17 are hard to explain to a jury, and you've got to
18 take a chance. And if you think you're right,
19 you think you can prove your case beyond a
20 reasonable doubt that the people are guilty and
21 you have the evidence, then you should go for it
22 and not only take the safe route because
23 that's -- your job is not just to sit back and
24 take the easy ones.

25 Q Right. Given the limitations you did

1 identify -- and this is a big question, but I
2 wonder if -- do you know how -- let me put
3 another way. How do you think you could foster
4 a culture that encourages prosecutors to go
5 after these more difficult cases?

6 A Well, I mean, I think that it's -- within public
7 service there are no financial incentives;
8 right? I always used to say that after 30 years
9 in the Department of Justice I now could proudly
10 say that my salary was equal to what it would be
11 if I were a new graduate out of law school and
12 took a job on Wall Street and had no experience
13 whatsoever. And there was -- and there are --
14 no way that they could give me any financial
15 bonuses or rewards or anything else.

16 So that's not what it's about. It's about
17 reputation among your peers. It's about the
18 sense of feeling like you did your job well and
19 that you were creative and that you got money
20 back to victims and that you helped a lot of
21 people and that you rewarded the agents who
22 spent their time investigating a very difficult
23 case and going out on a limb to spend time on a
24 case that might not be successful and
25 recognizing such people in the appropriate way.

1 Whenever I gave -- I mentioned earlier the
2 National Advocacy Center. I taught there over a
3 hundred times. And I would always, when I was
4 discussing a case, make sure I knew whether the
5 person who had that case was in the audiences,
6 and I would single this person out and say, as
7 Bob did in this case. Or when someone asked a
8 question, I'd say, great question because we
9 need to do more of that. And I would make sure
10 that we had, you know, lunch together and dinner
11 together and people -- and in a group, you know,
12 recognize people.

13 When I publish my monthly digest I always
14 put the name of the prosecutor who won the case
15 on the bottom of the summary so that they would
16 be recognized among their peers for having done
17 something. And people become federal
18 prosecutors not because it's easy but because
19 it's hard. That's why you do it. And you do it
20 because you want to be recognized among your
21 colleagues as having done good work.

22 And I think as long as you recognize that
23 and then there are people who get awards for
24 having, you know, done good things and get
25 invited to give talks about the good things that

1 they did, I think that is the proper incentive.
2 Even though the financial limit on what you can
3 give someone for doing that is the equivalent of
4 the value of a baseball cap, literally -- that's
5 why everyone gets baseball caps when they give
6 talks at federal conferences -- that seems to be
7 good enough for people who work in that process.

8 MR. RAUCH-DAVIS: All right. Thank you, sir. Those
9 are my questions.

10 THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

11 Anything arising, Ms. Magonet?

12 MS. MAGONET: Nothing arising, Mr. Commissioner.

13 THE COMMISSIONER: Ms. Addario-Berry.

14 MS. ADDARIO-BERRY: Yes, I do have one question, if I
15 may.

16 THE COMMISSIONER: Yes.

17 MS. ADDARIO-BERRY: This relates to addendum prepared
18 by Mr. Cassella. Mr. Cassella -- or, Madam
19 Registrar, could we have that document up one
20 more time. Thank you. If you could scroll down
21 a little bit further so we can see the top of --

22 THE COMMISSIONER: Sorry, we're looking for the
23 addendum, are we?

24 THE WITNESS: There you go.

25

1 **EXAMINATION BY MS. ADDARIO-BERRY (continuing):**

2 Q In the last paragraph you write with respect to
3 civil forfeiture proceedings in the US that:

4 "Many cases are resolved on a motion to
5 dismiss the challenge to the forfeiture
6 for lack of standing."

7 What sort of situations give rise to a lack of
8 standing?

9 A Well, this is very, very common. This -- we
10 litigate standing more often than almost any
11 other issue in a civil forfeiture case. Now,
12 remember what a civil forfeiture case is. It's
13 the government saying, this pile of money or
14 this handgun or this motorcycle was derived from
15 or used to commit a crime; anyone with an
16 interest in this property come forward and
17 contest it in this courtroom now. That is why
18 we style it United States versus one motorcycle
19 or, you know, United States versus \$16 million
20 found in a bank account.

21 When people read that on the internet these
22 days -- it used to be in the newspaper; now it's
23 on the internet -- they say oh, I have an
24 interest in recovering \$16 million; I think I'll
25 make a claim.

1 My very first case was a case involving a
2 bank called the Bank of Credit and Commerce
3 International, BCCI, and we recovered
4 \$1.2 billion and I had to publish then in the
5 newspaper a notice that said, anyone with an
6 interest in \$1.2 billion write to me, Stef
7 Cassella, in, you know, Washington, DC. And I
8 had 177 different claims from around the world
9 of people who'd like to have \$1.2 billion. But
10 what real interest do they have in the money?
11 Are they people who just read about in the
12 newspaper? Are they the spouse of the person
13 who committed the crime who may or may not have
14 an interest in the property under state law?
15 Are they a minor child who intended to inherit
16 it some day in the future? Are they the
17 fellow's ex-girlfriend whose -- to whom he owes
18 child support? Are they people who have a
19 lawsuit pending in a slip and fall action
20 against the defendant? Are they just, you know,
21 anyone who lived in the same house.

22 There's a famous case I think it's out of
23 Ohio where the government gets a search warrant,
24 goes into the house and finds in a safe tens of
25 thousands of dollars in what the government

1 believes to be drug proceeds. And the claim is
2 filed by everybody who lived in the house and
3 all of their relatives, the parents, a cousin, a
4 boarder who lived upstairs. You know, anyone
5 who says well, that guy owed me money; I'm going
6 to file a claim.

7 Or the money is in a -- it's a vehicle and
8 it's been titled in the name of a straw owner.
9 Drug dealers love to title their cars in the
10 names of their girlfriends or sometimes their
11 mother or sometimes their aunt who lives in
12 Vermont who they've never -- who's never
13 actually ever seen the vehicle. And these
14 people come forward as straw owners saying hey,
15 I'm innocent and it belongs to me. Well, we
16 don't get to the question of innocence unless we
17 get past the "it belongs to me" part. And if
18 the criminal is the one who -- was the one who
19 purchased the vehicle, exercised dominion and
20 control over it and the other person simply is a
21 straw owner, that person doesn't have standing.

22 So the way to flush out all of the these
23 false claims and the courts repeatedly say -- if
24 you read the opinions they say, the standing
25 issue is important to flush out false claims

1 which are endemic in civil forfeiture actions
2 because you're not bringing the action against a
3 person, you're bringing the action naming the
4 property, and anybody who thinks he has some
5 interest in the property can come forward. You
6 have to litigate standing to flush out those
7 claims.

8 Q You also mentioned in your report that:

9 "A claimant who refuses to answer any
10 questions regarding his relationship to
11 the property in a civil forfeiture case
12 may find that he is unable to satisfy his
13 burden of establishing standing to contest
14 the forfeiture."

15 So I can see how everything you just explained
16 would certainly flush out illegitimate
17 challenges to the civil forfeiture proceeding,
18 but is there also this issue with claimants who
19 don't answer the questions posed to them on
20 discovery?

21 A Sure. So, for example -- and you make a very
22 valid point. The claimant has the burden of
23 showing that he or she has the real interest in
24 the property. It's ownership interest, lien
25 holders' interest, bailees' interests. They

1 have a real interest. They have to prove that.
2 If they chose to not answer any questions
3 because they have a pending criminal case and
4 they want to invoke their fifth amendment right
5 against self-incrimination, then they're not
6 able to make -- establish their burden of proof.

7 What's the protection against that? Stay
8 the civil case until the criminal case is over.
9 We have a statute that says that either party,
10 the government or the claimant, can move to stay
11 the civil case until a criminal case is over to
12 avoid fifth amendment issues on the part of a
13 claimant to avoid pre-trial -- premature
14 disclosure of criminal investigative evidence in
15 the government's case but either party can ask
16 for that stay and it's mandatory to be granted
17 if the showing is made.

18 MS. ADDARIO-BERRY: Thank you.

19 THE WITNESS: Sure.

20 THE COMMISSIONER: Mr. McGowan, anything arising?

21 MR. MARTLAND: No, thank you, Mr. Commissioner.

22 THE COMMISSIONER: Well, thank you very much for
23 taking the time to provide us with your
24 experience, your expertise and your insights,
25 Mr. Cassella. It has been most helpful in

1 providing us with the kind of information we
2 need to grapple with, the issues that we're
3 confronted with in this commission. So thank
4 you, and you're excused from further testimony.

5 THE WITNESS: Thank you, Mr. Commissioner. It was my
6 pleasure. Good luck to you.

7 THE COMMISSIONER: Thank you. Mr. McGowan, we'll
8 adjourn until tomorrow at 9:30, I think.

9 MR. MCGOWAN: Yes, that's correct.

10 THE COMMISSIONER: Thank you.

11 THE REGISTRAR: The hearing is now adjourned to
12 May 11th, 2021 at 9:30 a.m. Thank you.

13 **(WITNESS EXCUSED)**

14 **(PROCEEDINGS ADJOURNED AT 12:38 P.M. TO MAY 11,**
15 **2021)**

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