Red-Handed Without a Defense: Avoiding Civil Forfeiture When Leasing to Lawful Marijuana Tenants

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† This Article is dedicated to my father, Leon-Maurice Fortin, for showing me that life's not worth living if you don't do it your way; to my mother, Maria Elena, for always being so eager to have something to brag about; and to everyone who has ever supported or taunted me in my endeavors. *Grandescunt Aucta Labore*.

"C'est impossible" dit la fierté; "c'est risqué" dit l'expérience; "c'est sans issue" dit la raison, "mais essayons" murmure le coeur. . .

I. INTRODUCTION

California made history in 1996 when it became the first state to legalize medical marijuana. Since then, twenty-three states and the nation's capital have legalized some form of medicinal marijuana[1] while Colorado,[2] Washington,[3] Alaska,[4] Oregon,[5] and the District of Columbia[6] have gone a step further and legalized recreational use. As the trend towards legalization continues, commercial property owners interested in leasing to marijuana-related businesses are facing complicated issues concerning the interplay between state and federal law. In addition to the remote possibility of arrest and prosecution by the U.S. Department of Justice ("DOJ") for violation of the federal Controlled Substances Act ("CSA"), landlords face the very real threat of losing their property to civil asset forfeiture—even in states where

1. Federal prohibition on marijuana means each state that adopts medical marijuana provisions is free (forced) to create its own rules and regulations. Currently, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington have legalized some form of medicinal marijuana. As a result, medical marijuana programs across the country vary as to qualifying health conditions, cultivation and possession limits, and even where and how the marijuana is grown and consumed. *See State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (June. 6, 2016), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx; *see also* Gina Warren, *Regulating Pot to Save the Polar Bear: Energy and Climate Impacts of the Marijuana Industry*, 40 COLUM. J. ENVTL. L. 385, 392–94 (2015) (analyzing the trend to legalize marijuana in the United States and the varying rules and regulations among medical marijuana states).

2. *See* COLO. CONST. art. XVIII, § 16, *amended by* COLO. CONST. amend. 64 (amendment 65 passed on November 6, 2012, and declared the use of marijuana be taxed and regulated in a manner similar to alcohol, legal for persons twenty-one years of age or older).

3. Initiative 502 ("I-502") passed by popular vote in Washington State November of 2012. I-502 authorizes the Washington State Liquor Control Board to regulate and tax recreational marijuana products. *See* Act of July 8, 2014, ch. 3, 2013 Sess. Laws Wash.

4. *See* ALASKA STAT. ANN. § 17.38.010 (West 2015) (Alaskan voters passed Proposition 2 on November 4, 2014, directing the Alcoholic Beverage Control Board to adopt regulations and regulate the marijuana industry).

5. On November 4, 2014, fifty-six percent of voters approved Oregon Ballot Measure 91 to legalize, regulate, and tax marijuana. *See Oregon Legalized Marijuana Initiative, Measure 91 (2014)*, BALLOTPEDIA, https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative,_Measure_91_(2014) (last visited Aug. 2, 2016). The initiative's purpose, among other things, was to "eliminate the problems caused by the prohibition . . . of marijuana," "establish a comprehensive regulatory framework concerning marijuana under existing state law," and to "permit persons licensed, controlled, regulated, and taxed by [Oregon] to legally manufacture and sell marijuana to persons 21 years of age and older." *See* Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, 2015 Or. Laws.

6. Ballot Initiative 71 passed by a margin of almost 65% on November 4, 2014. *Washington D.C. Marijuana Legalization, Initiative 71 (November 2014)*, BALLOTPEDIA, https://ballotpedia.org/Washington_D.C._Marijuana_Legalization,_Initiative_71_(November_2014) (last visited Aug. 2, 2016); *see generally* D.C. CODE § 48-904.01 (2015).

production, distribution, and sale of marijuana is legal under state law. In fact, the federal government's jurisdiction over marijuana is so strong, it is irrelevant whether the property owner[7] took part in, or had knowledge of, the marijuana-related activity. As a result, the loss to property owners has been alarming—reaching $4.5 billion in 2014 alone.[8]

The distribution and sale of marijuana is a federal crime;[9] however, in 2009, the United States Deputy Attorney General issued a guidance memorandum that led many to believe otherwise. The Memo, discussed in Part IV of this Article, stated that federal enforcement of state-level and other otherwise legal production, distribution, and sale of marijuana would become low priority.[10] Many misread the Memo as a green light to begin large-scale marijuana production, failing to realize that state and local laws permitting marijuana activity would not be a defense to federal prosecution. Indeed, property owners who lease to marijuana-related businesses not only continue to be subject to penalties under the CSA, but also run the risk of subjecting their leased property—be it a retail storefront, industrial space, or arable land—to civil forfeiture.

Lawful marijuana tenants ("LMT"), or tenants who lease property for the purpose of operating a marijuana-related business in compliance with the applicable marijuana provisions of their state, are demanding property and offering big bucks—leaving property owners in a precarious situation. This Article discusses the problem faced by

7. A landlord is a person who owns real property and rents or leases it to another. For the purposes of this Article landlord and property owner will be used interchangeably. *See* Barron's Law Dictionary (6th ed. 2010).

8. *See generally* Christopher Ingraham, *Law Enforcement Took More Stuff from People Than Burglars did Last Year*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/ (discussing how $4.5 billion represents thirty-five percent of the entire number of assets collected from 1989–2010 and more than the total amount of goods stolen by criminals in 2014 burglary offenses).

9. Marijuana is classified as a Schedule I drug, which means that—according to the CSA—marijuana has no medically accepted use and has a high potential for abuse. The cultivation, distribution, or possession of any amount of marijuana for any purpose other than bona fide, federally approved scientific research is considered a criminal offense. *See* 21 U.S.C.A. § 812(c) (West 2012); *see also* 21 U.S.C.A § 841(b) (West 2010); *see also* 21 U.S.C.A. § 844 (West 2010); s*ee generally* Lisa N. Sacco & Kristin Finklea, *State Marijuana Legalization Initiatives: Implications for Federal Law Enforcement*, CONG. RESEARCH SERV. (Dec. 4, 2014), https://www.fas.org/sgp/crs/misc/R43164.pdf.

10. There are some aspects of marijuana enforcement that are still priorities. These aspects, listed in the guidance memoranda, include preventing distribution to minors, preventing revenue from marijuana sales going to criminal enterprises, and preventing diversion of marijuana from states where it is legal under state law to other states where it is not legal. *See* Memorandum from Deputy Attorney Gen. David Ogden on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf [hereinafter Ogden Memo]. These guidelines are just that—guidelines—they neither have the force of law nor modify existing federal laws.

property owners wishing to lease premises to growers, processors, and sellers of marijuana in states that have adopted marijuana provisions and established regulatory frameworks.[11] In these states, marijuana provisions do not alter the respective state's landlord-tenant statutes, despite the various property-related requirements marijuana businesses must adhere to for licensure to operate.[12] Licensing requirements in states with regulatory frameworks in place have lured marijuana-related businesses from the shadows, leaving property owners unable to meet the requirements of any statutory or common law defense to civil forfeiture.[13] Part II of this Article discusses the history of civil forfeiture, focusing on the origin of the *guilty property* model and its introduction to America. Part III will introduce modern civil forfeiture statutes, their legislative history, and rationalize the government's use of civil proceedings over criminal proceedings before explaining the forfeiture process. Part IV briefly narrates marijuana's long history of legality in the United States before discussing its controlling federal statutes. Part V of this Article reveals the possible consequences of leasing property to marijuana-related businesses; the focus then turns to the unavailability of suitable defenses for real property owners who lease to LMTs. Part VI briefly describes the inadequacies of boilerplate provisions currently in standard lease agreements and suggests respective lease modifications property owners should be prepared to discuss with counsel and negotiate with prospective LMTs. Lastly, this Article concludes by reminding property owners that despite marijuana prohibition's significant progress over the last few years, it could all be undone when the next president takes office in 2017.

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11. Although Washington D.C. has legalized recreational and medicinal marijuana, Congress has repeatedly blocked D.C. from moving to tax and regulation. *See generally*, Warren, *supra* note 1 at 400–01 (discussing a $1-trillion bill passed by Congress that precludes funds from being used to "enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties" for a Schedule I substance such as marijuana) (citing Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235 § 809, 128 Stat. 2130, 2394 (2014)).

12. Most counties, municipalities, cities, and towns impose their own licensing schemes separate from those of its respective state. Generally, a license to operate involves meeting qualifications in the application process, and remaining in compliance with fees, packaging and labeling restrictions, advertising restrictions, record-keeping and security requirements, and reasonable restrictions on time, place, manner, and number of marijuana-related businesses. *See* Todd Garvey & Brian T. Yeh, S*tate Legalization of Recreational Marijuana: Selected Legal Issues*, Cong. Research Serv. (Jan. 13, 2014), https://www.fas.org/sgp/crs/misc/R43034.pdf.

13. *See FAQs: Recreational Marijuana in Oregon*, Or. Liquor Control Comm'n, http://www.oregon.gov/olcc/marijuana/documents/measure91_faq.pdf (last visited Mar. 5, 2016) (clarifying that Oregon's Measure 91 does not affect landlord-tenant law); Bob Young, *Mercer Island Landlord Tries to Ban Pot in Apartment Building*, Seattle Times (Jan. 12, 2013), http://www.seattletimes.com/seattle-news/mercer-island-landlord-tries-to-ban-pot-in-apartment-building/ (stating state law allows property owners to ban smoking marijuana in their properties despite I-502).

II. Origins and History of Civil Forfeiture

The concept of civil forfeiture goes as far back as the biblical laws of Exodus and the pre-Judeo Christian concept that inanimate objects could be found guilty of wrongdoing.[14] Following the collapse of the Roman Empire, societies throughout Europe continued to develop institutions to pursue forfeiture actions on behalf of affected communities.[15] At its inception, forfeiture actions sought to destroy or remove *guilty property* from the affected community and almost never served as a substitute action against negligent or otherwise culpable owners.[16] In ancient Greece and numerous societies throughout the world, proceedings against inanimate objects historically existed as a means to rid the community of the moral taint attached to the guilty property.[17] For certain societies, restoring a sense of moral equilibrium within the wronged society required assigning guilt to the transgressing property.[18]

Deodand, derived from the Latin phrase *deo dandum* meaning, "to be given to God," was the term used for forfeiture that resulted when an animate or inanimate object owned by one individual directly or indirectly caused the death of another.[19] Because of the legal fiction that an object capable of killing a king's subject was capable of future harm, the property was destroyed or forfeited to the king or local lord. Later, deodand objects were no longer confiscated; instead, their

14. "If an ox gore a man or woman, and they die, he shall be stoned: and his flesh shall not be eaten, but the owner of the ox shall be quit." *Exodus* 21:28 (King James); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974) (quoting *Exodus* 21:28 to trace the historical origins of forfeiture); Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form Of Commercial Law?*, 62 Fordham L. Rev. 287, 289–90 (1993).

15. *See* Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 Yale J.L. & Human. 1, 23 (2013).

16. *Id.*

17. *Id.* at 21–22.

18. *Id.* at 22. According to Plato, if the murderer could not be found, the object used to commit the crime would serve as a proxy and banished from society:

> [I]f any lifeless thing deprive a man of life, except in the case of a thunderbolt or other fatal dart sent from the gods—whether a man is killed by lifeless objects falling upon him, or his falling upon them, the nearest of kin shall appoint the nearest neighbor to be a judge and thereby acquit himself and the whole family of guilt. And he shall cast forth the guilty thing beyond the border.

Id. at 22–23.

19. George Kurisky, *Civil Forfeiture of Assets: A Final Solution to International Drug Trafficking?*, 10 Hous. J. Int'l L. 239, 249–50 (1988) (briefly detailing the tradition and history of civil asset forfeiture in England and North America); *see also* Schwarcz & Rothman, *supra* note 14 at 290.

value was assessed and the amount was due to the Crown as forfeiture.[20]

Under English common law, forfeiture was justified on the basis that the property's seizure benefitted the masses through charitable means, although funds were seldom distributed among the poor.[21] Despite this, property owners under the king's jurisdiction were afforded a certain amount of due process in forfeiture proceedings.[22] Specifically, a twelve-person jury actively investigated and resolved all deodand proceedings, including determining the object or property subject to action. Originally, only guilty property was subjected to civil forfeiture. If the wheel of a mill dragged a person to their death, the wheel alone would be forfeited, not the entire mill. Similarly, if a portion of a mine collapsed, killing the person beneath, "the weight of earth is forfeit, not the whole mine."[23] Over time, however, English kings expanded deodand proceedings "to include all property and chattels belonging to criminals, serving, in principle, as a type of fine."[24]

A. *America's Adoption of Guilty Property Forfeitures*

Although largely disfavored and infrequently used,[25] forfeitures based on notions of guilty property were occurring in every colony across America by the seventeenth century.[26] In due time, however, forfeiture laws began to see extensive use.[27] In early colonial admiralty courts, ships were treated as live beings, and proceedings were initiated against vessels by name. This occurred, perhaps, because "only by supposing the ship to have been treated as if endowed with personality, [can] the arbitrary seeming peculiarities of the maritime law [ ] be made intelligible."[28] During the Civil War, civil forfeiture

20. *See* Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 185 (1973).

21. *Id.* at 182.

22. *See generally* MATTHEW HALE ET AL., THE HISTORY OF THE PLEAS OF THE CROWN: IN TWO VOLUMES, Vol. 1, 422–23 (London, Sollom Emlyn, Lincoln's-Inn 1800).

23. *See id.*

24. Schwarcz & Rothman, *supra* note 14 at 290 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–81 (1974)).

25. "Forfeitures were largely disfavored, primarily because the government's seizure of private property was a leading source of tension between the former colonists and the British Crown. In fact, the United States Constitution protects property not only through the Due Process Clause, but also through a specific limitation on the on the scope of forfeiture in the treason context." *Id.* at 291.

26. *See generally* Cyrus H. Karraker, *Deodands in Colonial Virginia and Maryland*, 37 AM. HIST. REV. 712, 713 (1932) ("Deodands occurred, it seems, in all the colonies.").

27. Schwarcz & Rothman, *supra* note 14 at 291.

28. *See generally* OLIVER W. HOLMES, JR., THE COMMON LAW 26–27 (Little, Brown, 1909).

legislation made way for the confiscation of property belonging to rebels and Southern sympathizers. The Supreme Court repeatedly upheld these types of forfeiture actions.[29]

B. *Guilty Property Today*

Modern forfeiture statutes, like those before it, are based on the fictional notion of "guilty property" which finds that property, through illegal activity or use, has become corrupt.[30] Because the property, and not the property owner, is party to the action, the property owner's guilt or innocence is irrelevant.[31] The prosecution of inanimate objects, such as real property, has been justified as a form of punishment for negligent owners; however, proceedings typically refer to the guilty property as the guilty party and have yet to adopt a narrative invoking negligence principles.[32] The legal fiction that civil forfeiture punishes only the property and not its owner has been used to justify courts' failure to apply the protections generally attached to criminal proceedings.[33] Pervasive use of civil forfeiture has also been justified by the same rationale offered by the government during the Civil War: "since the enemy threatens the very fabric of the nation, the strongest measures are required."[34]

III. Modern Civil Forfeiture Statutes

Commercial buildings, storefronts, and other real property may be seized by the Attorney General and forfeited to the United States any time the government has probable cause to believe that the real property is being used "to commit, or to facilitate the commission of" a felony violation. Section 511(a)(7) of the Comprehensive Drug Abuse Prevention and Control Act ("Comprehensive Act") presents a serious threat to property owners seeking to lease to LMTs by providing for forfeiture of real and personal property related to CSA violations that have not been criminally prosecuted.

Pursuant to 18 U.S.C §881(a)(7):

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29. Schwarcz & Rothman, *supra* note 14 at 291.

30. United States v. U.S. Coin & Currency, 401 U.S. 715, 719–20 (1971) (finding that modern forfeiture statutes are the direct descendants of traditional forfeiture actions that proceeded upon the fiction inanimate objects themselves could be guilty of wrongdoing).

31. *Id.*

32. Berman, *supra* note 15, at 29–30; *see also* 1 William Blackstone, Commentaries On The Laws Of England In Four Books *301 (George Sharswood ed., 1893) ("[Some deodands are] grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished for such forfeiture.").

33. George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit*, 65 St. John's L. Rev. 653, 654 (1991) (noting that the doctrine of civil forfeiture has survived because of its ability to "efficiently and quietly serve[ ] an important interest—the swift punishment of unacceptable conduct").

34. *Id.* at 664.

> The following shall be subject to forfeiture to the United States and no property right shall exist in them . . . [a]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.

A. *Legislative History*

In 1970, following a century of little use, civil forfeiture gained renewed acceptance as a powerful weapon in the War on Drugs.[35] That year the Ninety-first Congress, expressing a desire to punish and deter drug dealers through forfeiture proceedings,[36] enacted the Comprehensive Act, which included the country's first criminal forfeiture statute. Congress promised the legislation would serve as a "mighty deterrent to any further expansion of organized crime's economic power"[37] and a blow "to the growing menace of drug abuse."[38] As enacted, the Comprehensive Act provided for the forfeiture of real property "affording a source of influence over" a "continuing criminal enterprise."[39] However, by 1978 Congress determined that its goal of curbing the predatory business practices of drug traffickers was not being met. Remarks on the Senate floor from Senator John Culver noted that the provision's original language reached the property of individuals with no knowledge of the illegal transactions.[40] In turn, Congress sought to remedy this by expressly exempting from forfeiture the interests of persons who did not consent to, or have knowledge of drug crimes occurring by way of their respective property.[41] In

35. See Schwarcz & Rothman, *supra* note 14 at 292 (citing Pratt & Peterson, *supra* note 33, at 664).

36. Scott Alexander Nelson, Comment, *The Supreme Court Takes a Weapon From the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY'S L.J. 157, 168 (1994) (describing the origins and purpose of modern forfeiture statutes).

37. *Id.*

38. Pratt & Peterson, *supra* note 33, at 664.

39. Until amended in 1984, the section regarding a "continuing criminal enterprise" read in relevant part:

> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States –
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> . . .
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a)(2), 84 Stat. 1236, 1265–66.

40. 124 Cong. Rec. 23,056 (1978) (statement of Sen. Culver).

41. Section 301 of the Act amended 511(a)(codified at 21 U.S.C. 881(a)) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 by adding the following section:

> (6) All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for a con-

1984, Congress once again amended the Comprehensive Act to add a provision enabling the seizure of real property—declaring that all right and title to property vest in the United States "upon commission of the act giving rise to forfeiture."[42]

1. Forfeiture of Real Property Under the Comprehensive Act

Through civil forfeiture statutes, Congress has expanded the nation's war on drugs to every physical object involved in the narcotics trade.[43] In 1984, the Comprehensive Act expanded its scope to reach real property, holding that:

> (a) [t]he following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used or intended to be used in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment. . .[44]

Despite language courts have called "at best, confusing,"[45] the statute holds that no real property may be forfeited if the claimant establishes that the drug activity took place "without the knowledge or consent" of the claimant. In other words, all marijuana-related businesses operating under the regulatory framework of their state are vulnerable to

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> trolled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a)(1), 511(a)(6), 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)).

42. 21 U.S.C. § 881(h) (West 2002).

43. Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 82 (1993) (Thomas, J., concurring in part and dissenting in part).

44. § 881(a)(7).

45. *See* United States v. 141st St. Corp., 911 F.2d 870, 878 (2d Cir. 1990). Circuit Judge Thomas Joseph Meskill, in determining that allowing a property owner to avoid forfeiture by establishing a lack of consent will not undermine congressional intent, noted that:

> [c]ongress' use of the disjunctive "or" suggests that a claimant should succeed by establishing either lack of knowledge or lack of consent. On the other hand, inclusion of the word "without" before the phrase "knowledge or consent" might be interpreted to mean that an innocent owner must be without both knowledge and consent.

Id.

forfeiture by virtue of their state-law abiding visibility. Often enough, an internet search will identify the nature of the property's use and satisfy the probable cause necessary for the federal government to initiate forfeiture proceedings. Section 881(a)(7) of the Comprehensive Act contains no limit as to how much of a property owner's land or dwelling can be subject to forfeiture. In fact, the federal government once argued that all of Texas would be forfeited under a literal reading of section 881(a)(7), if Texas were owned by one person that had knowledge of or consented to a drug deal occurring on one acre of the state.[46]

B. *Civil Versus Criminal Forfeiture Proceedings*

Every year, police and prosecutors across the country seize billions of dollars of property through civil forfeiture proceedings, despite the availability of criminal forfeiture statutes.[47] In fact, civil forfeiture proceedings far outpace criminal ones—with 83% of all forfeitures between 1997 and 2013 proceeding as civil actions.[48]

Civil forfeiture procedures greatly favor the government for many reasons. First, civil forfeiture is simply faster; the government need not wait for a criminal prosecution to proceed to seize property or initiate a civil forfeiture action. Second, the government's likelihood of success in a civil forfeiture is much greater. In a criminal forfeiture proceeding, the government must prove each element of the underlying offense beyond a reasonable doubt.[49] By comparison, probable cause in civil forfeiture actions merely requires the government demonstrate "reasonable grounds, rising above the level of mere suspicion, to believe that certain property is subject to forfeiture."[50] In other words, the government need not show prima facie proof or satisfy evidence standards applicable to most civil suits.[51] In fact, the proof necessary to establish probable cause can traditionally be established by hearsay.[52] Lastly, criminal forfeiture proceedings are *in per-*

46. *See* United States v. Sixty Acres, 727 F. Supp. 1414, 1422 (N. D. Ala. Jan. 5, 1990), *vacated on other grounds* 736 F. Supp. 1579 (N.D. Ala. May 11, 1990).

47. *See generally* DICK CARPENTER ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 13 (Institute for Justice, 2d ed. 2015), http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

48. *See id.*

49. Damon Garett Saltzburg, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. Rev. 217, 224 (1992).

50. United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990).

51. As the court stated in *United States v. One 56-Foot Motor Yacht Named Tahuna*, "[t]he determination of probable cause in a forfeiture proceeding simply involves the question whether the information relied on by the government is adequate and sufficiently reliable to warrant the belief by a reasonable person that the vessel was used to transport controlled substances." 702 F.2d 1276, 1281–82 (9th Cir. 1983).

52. *See* 19 U.S.C. § 1615 (2016).

sonam and proceed as part of the criminal prosecution rather than as a separate proceeding, and adjudicate the government's title only as to the named defendants.[53] In civil asset forfeiture cases involving real property, on the other hand, the government actually sues the property itself and the property owner is treated as a third party claimant.[54]

Property owners face other hurdles unique to civil asset forfeiture. Specifically, the burden of proof in civil forfeitures is reversed because once the federal government has shown probable cause, the burden of proof shifts to the property owner.[55] The property owner must then prove by a preponderance of the evidence that the property was not, in fact, used or intended to be used in a proscribed manner, or that operation of the marijuana related business occurred without the property owner's knowledge or consent.[56] There is no requirement that the property owner be prosecuted in relation to the marijuana business operating on his or her property. Put simply: by virtue of the forfeiture's civil nature, the government can avoid providing property owners with many other protections the Constitution typically affords criminal defendants.[57]

There are also other, less obvious, reasons the federal government opts for civil asset forfeiture. First, the constantly expanding public approval of medical marijuana makes criminal charges appear as though the federal government is targeting sick people.[58] Second, the threat of civil asset forfeiture alone is often sufficient for the federal government to secure the closure of marijuana businesses.[59] According to a U.S. Attorney's Office for the District of California, warning letters threatening forfeiture action for failure to comply with federal law typically result in "the landlord kicking out the offending enter-

53. Brad A. Chapman & Kenneth W. Pearson, Comment, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 TEX. TECH. L. REV. 2127, 2129 (1990).

54. *Id.* at 2128–29.

55. *Id.* at 2152–53. Not only does the burden shift to the claimant opposing forfeiture, but the claimant's burden is heavier than the government's. While the government, to establish a prima facie case for forfeiture, need only demonstrate "reasonable grounds," the owner of the seized property must prove that the defendant property is legitimate "by a preponderance of the evidence," a more stringent standard. *Id.*

56. Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 370 (1996) (stating that property owners "face the unenviable task of proving a negative: that they did not have knowledge of or did not consent to the illegal use").

57. *Id.* at 362–63.

58. "If you bring criminal charges against these medical marijuana businesses, the federal government gets pilloried in the press for attacking California law and sick people." Brett Wolf, *U.S. Targets Landlords in Fight Against Medical Pot*, REUTERS (June 14, 2012, 6:05 AM), http://www.reuters.com/article/us-usa-marijuana-landlords-idUSBRE85D0JA20120614 (quoting Greg Baldwin, a partner at the Miami law firm Holland & Knight and a former federal prosecutor).

59. *Id.*

prise."[60] This method has proven to be incredibly effective because few property owners have the resources to pay "hundreds of thousands of dollars to defend against a government lawsuit to keep a tenant, let alone risk losing their investments."[61] Moreover, property owners must overcome the government's upper hand without the right to appointed counsel, and attorneys cannot accept civil forfeiture cases on a contingent fee basis because winning only results in retaining the property.[62] Ultimately, civil forfeitures are just plain easier and require less manpower. Federal agents can simply search the internet, identify marijuana businesses, verify that they are operating, and serve them with a warning letter.[63]

1. Civil Forfeiture Proceedings

The government begins forfeiture proceedings by filing a complaint against the property in question, pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, and taking actual or constructive seizure of the property.[64] As previously discussed, the initial warrant for the property merely requires that the government's complaint allege specific facts supporting a reasonable belief that a given property is subject to forfeiture.[65] Although the specific facts relate to violations of criminal law, the government's burden is fractional to that typically associated with criminal proceedings.[66] Once the warrant is issued, the government has five years from the discovery of the alleged offense to commence a forfeiture action.[67]

In proving its case, the government need only demonstrate a reasonable belief that a connection exists between the commission of a federal drug violation and the real property subject to forfeiture, and may use certain types of evidence normally excluded in criminal proceedings.[68] Specifically, hearsay and circumstantial evidence is admis-

60. *Id.*

61. *Id.*

62. Guerra, *supra* note 57, at 364. Currently, North Carolina is the only state that allows an attorney to charge a contingency fee for representation in a civil asset forfeiture proceeding, if not otherwise prohibited by law. *See* Variations of the ABA Model Rules of Professional Conduct: Rule 1.5 Fees, ABA (Nov. 5, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.authcheckdam.pdf.

63. *See* Wolf, *supra* note 59.

64. 21 U.S.C. § 881(b) (West 2002).

65. United States v. $ 38,000 in United States Currency, 816 F.2d 1538, 1548 (11th Cir. 1987) (holding that a § 881(a) forfeiture complaint must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture).

66. *See supra* notes 47–48 and accompanying text.

67. The statute of limitations is determined under the customs laws as stated in § 881(d). The customs laws state that the government must initiate a forfeiture action within five years of the date on which the offense was first discovered. 19 U.S.C. § 1621 (2016).

68. *See* United States v. Route 2, Box 61-C, 727 F. Supp. 1295, 1298 (W.D. Ark. 1990).

sible to prove probable cause in a civil forfeiture proceeding.[69] If the government can show probable cause, the burden shifts to the property owner to show by a preponderance of the evidence that the property is not subject to forfeiture, or that a defense to forfeiture applies.[70] As such, if the property being leased is made available to host a section 881(a)(7) violation, such as a marijuana-related business, the property is forfeitable.

IV. The Legal History of Marijuana

For much of our nation's history, the cultivation and sale of marijuana has been a common and lawful practice.[71] The marijuana plant is believed to have first made its American debut in 1545, when the Spanish introduced it to the New World;[72] however, it was not until the English brought it to Jamestown in 1611 that marijuana became one of the country's most valuable cash crops for its use in hemp production.[73] Within decades, and until the early 1800s, marijuana was a widely used form of legal tender.[74] Even as cotton replaced hemp as the leading textile fiber crop, the cultivation and sale of the plant remained legal. In fact, the country's first drug control law, the federal Harrison Narcotic Act of 1914,[75] did not address marijuana.[76] By the 1920s, marijuana gained cultural acceptance among the jazz community, and marijuana clubs—then known as 'tea pads'—began operating in all major cities across the country.[77]

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69. *See* United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 728 (5th Cir. 1982) (affirming hearsay as constituted sufficient evidence to make a finding of probable cause in a 21 U.S.C. § 881 forfeiture proceeding); United States v. One 1974 Porsche 911-S Vehicle, 682 F.2d 283, 286 (1st Cir. 1982) (holding hearsay may contribute to probable cause for issuance of a search warrant, if there is substantial basis for crediting the hearsay); *see also* United States v. Thirteen Thousand Dollars in United States Currency, 733 F.2d 581, 584 (8th Cir. 1984) (holding the government carried its burden of probable cause by providing circumstantial evidence the property owner used a false name for the purpose of purchasing illegal drugs).

70. *See Route 2*, 727 F. Supp. at 1298.

71. Mark Eddy, Cong. Research Serv., RL33211, Medical Marijuana: Review And Analysis Of Federal And State Policies 1 (2010), http://fas.org/sgp/crs/misc/RL33211.pdf. ("For most of American history, growing and using marijuana was legal under both federal law and the laws of the individual states.").

72. Marijuana's history dates back to 2737 B.C. when it was first described in the writings of Chinese emperor Shen Nung, referencing the plant as a psychoactive agent. *See History of Marijuana*, NARCONON, http://www.narconon.org/drug-information/marijuana-history.html (last visited Feb. 29, 2016).

73. *See* K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 Wake Forest L. Rev. 221, 275 (2005).

74. *Id.*

75. Harrison Narcotic Act of 1914, 63 Pub. L. No. 223, 38 Stat. 785, 63 Cong. Ch. 1 (1914) (repealed by the Controlled Substances Act of 1970).

76. Instead, the Harrison Act of 1914, addressed the importation of opium for medicinal purposes and the interstate trade of cocaine, morphine, and heroin. *See id.*

77. *See* Kasey C. Phillips, *Drug War Madness: A Call for Consistency Amidst the Conflict*, 13 Chap. L. Rev. 645, 648–649 (2010).

A. *Smoke Signals from Congress*

In the 1930s, however, the Federal Bureau of Narcotics began paving way for a campaign to prohibit marijuana.[78] Enacted in 1932, the Uniform Narcotic Drug Act ("UNDA") had the dual purpose of impeding illegal drug trade and regulating the sale and distribution of narcotics.[79] Although the UNDA did not classify marijuana as a controlled substance, it contained a footnote suggesting statutory language for states wanting to regulate the plant.[80] The federal government got a step closer to prohibition in 1937, when it explicitly began taking control of marijuana regulation for the first time. That year, Congress passed the Marihuana Tax Act ("Tax Act"),[81] which did not expressly prohibit the possession or sale of marijuana, but rather "imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana."[82]

Finally, in 1970, the federal government solidified its control over marijuana regulation with the passage of the Controlled Substances Act ("CSA") as Title II of the Comprehensive Drug Abuse Prevention and Control Act.[83] The CSA replaced over fifty pieces of drug legislation and established a single system of control for both narcotic and psychotropic drugs—a first in American history.[84] Moreover, and

78. The Federal Bureau of Narcotics is now known as the Bureau of Narcotics and Dangerous Drugs. Prior to the creation of the DEA, drug enforcement rested in the hands of two federal offices: The Bureau of Narcotics in the Treasury Department and the Bureau of Drug Abuse Control (BDAC) in the Department of Health, Education, and Welfare. *See U.S. Drug Enforcement Administration (DEA)*, ALLGOV, http://www.allgov.com/departments/department-of-justice/us-drug-enforcement-administration-dea?agencyid=7195 (last visited Feb. 26, 2016). The Bureau of Narcotics was responsible for the control of marijuana and narcotics, while the BDAC was responsible for the control of drugs, including depressants, stimulants, and hallucinogens. *Id.* By 1968, America's recreational drug use was steadily rising and President Lyndon Johnson responded by introducing legislation that combined the Bureau of Narcotics and the BDAC into one new agency—the Bureau of Narcotics and Dangerous Drugs (BNDD), located in the Department of Justice. *Id.*

79. *See* People v. Van Alstyne, 121 Cal. Rptr. 363, 372 (Cal. Ct. App. 1975).

80. *See id.*; Specifically, the UNDA instructed states to include "cannabis" to its state law's definition of "narcotics." Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHX. L. REV. 415, 423 (2012).

81. The Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970), was a United States Act that placed a tax on the sale of cannabis.

82. Gonzales v. Raich, 545 U.S. 1, 11 (2005); *see also* United States v. White Plume, 447 F.3d 1067, 1071 (8th Cir. 2006) (describing how legitimate users of industrial hemp were subject to a small tax ($1 per year), and by contrast, a prohibitively high tax ($100 per transfer) applied to anyone who had not registered with the government to discourage illegal use).

83. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236.

84. Thomas A. Duppong, *Industrial Hemp: How the Classification of Industrial Hemp as Marijuana Under the Controlled Substances Act has Caused the Dream of Growing Industrial Hemp In North Dakota to Go Up In Smoke*, 85 N.D. L. REV. 403, 416–417 (2009).

of relevance to landlords in states that have legalized marijuana, the CSA, unlike the Tax Act and UNDA, includes marijuana among its classifications of controlled substances and makes it illegal "to manufacture, distribute, dispense, or possess" it.[85] In fact, the CSA classifies marijuana among the most harmful and dangerous drugs, along with LSD and heroin.[86] Accordingly, the manufacture, distribution, orpossession of marijuana is a criminal offense where simple possession is a misdemeanor; and possession of larger amounts; possession with intent to distribute; distribution; and cultivation of the plant are felonies subject to severe penalties.[87] Since cultivating, manufacturing, and distributing marijuana are federal crimes, real property used to facilitate the commission of those acts is subject to asset forfeiture.

1. Leasing to Marijuana-Related Businesses Under the Controlled Substances Act

The CSA provides that property owners that conspire or aid marijuana-related businesses by renting property to them are acting in violation of federal law. Specifically, section 856(a) of the CSA provides that:

> [I]t shall be unlawful to—
>
> (1) knowingly open, *lease*, *rent*, use or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
>
> (2) manage or control any place, whether permanently or temporarily, *either as an owner*, lessee, agent, employee, occupant, or mortgagee, and *knowingly and intentionally rent*, *lease*, *profit from or make available for use*, *with or without compensation*, the place for

85. 21 U.S.C. § 841(a)(1) (West 2010).

86. *See id.*

> In enacting the CSA, Congress debated whether marijuana should even be included in Schedule I. The legislative history for the CSA notes that marijuana is not narcotic, not addictive, and does not cause violence or crime. Marijuana was retained in Schedule I only because the U.S. Assistant Secretary of Health and Scientific Affairs recommended this classification "at least until the completion of certain studies now underway."

DuVivier, *supra* note 74, at 279.

87. 21 U.S.C. §§ 841, 844 (2012). In 2014, a total of 21,907 people were sentenced under federal drug guidelines. 3,971 of those offenders were sentenced for offenses related to marijuana. *Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type (Option 1: Three Categories)*, U.S. Sentencing Comm'n, http://isb.ussc.gov/Login (follow "All Tables and Figures" hyperlink; follow "Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type (Option 1: Three Categories)" hyperlink; then follow "Filter on Years/Circuits/Districts" hyperlink; then select "2014"; then select "apply") (last visited Feb. 25, 2016). There is only one exception to the prohibition of Schedule I drugs. A Schedule I drug may be legally used in connection with government-approved research projects. *See* Marvin L. Longabaugh, *Medical Marijuana vs. ADA in the Workplace*, NAT'L JURIS UNI., http://juris.nationalparalegal.edu/(X(1)S(0xn21tchc4wys2tmw0rqlrlf))/MedicalMarijuana.aspx?AspxAutoDetectCookieSupport=1 (last visited Feb. 20, 2016).

> the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.[88]

After the passage of the CSA, marijuana became illegal in all fifty states but state marijuana laws provided the basis for almost all marijuana-related arrests in the country—that is, until states began rethinking prohibition in 1996.[89] Initially motivated by medical marijuana's renewed acceptance, states quickly began citing other reasons for legalizing: the racially disparate impact of prohibition; the financial cost of enforcement; and the futility of criminalizing a substance universally available.[90] When California became the first state to legalize the use of marijuana for medical purposes, it became the model for Alaska, Oregon, and Washington to follow two years later.[91]

By the time Barack Obama took office in January of 2009, thirteen states had legalized access to medical marijuana.[92] Today, twenty-eight states and the District of Columbia have enacted laws to legalize medical marijuana,[93] but only eight states and the country's capital have legalized both recreational and medical marijuana.[94]

B. *High Quantities of Marijuana-Related Businesses Under the Obama Administration*

1. Ogden Memo

On October 19, 2009, Deputy Attorney General David Ogden issued a much-publicized memorandum ("Ogden Memo") intended to guide United States Attorneys in investigating and prosecuting mari-

88. 21 U.S.C. § 856 (2012) (emphasis added).

89. *See* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 84 (2015) ("Since the CSA's implementation more than forty years ago, nearly all marijuana enforcement in the United States has taken place at the state level. For example, of the nearly 900,000 marijuana arrests in 2012, arrests made at the state and local level dwarfed those made by federal officials by a ratio of 109 to 1.").

90. *Id.* at 84–85.

91. ALASKA STAT. §§ 17.37.010-080 (2013); OR. REV. STAT. § 475.300 (2007); WASH. REV. CODE § 69.51A (2007); HAW. REV. STAT. §§ 329-121-128 (2013); COLO. CONST. art. XVIII, § 16 (2013).

92. No state had legalized access to recreational marijuana when Barack Obama took office. *See Milestones in U.S. Marijuana Laws*, N.Y. TIMES (Oct. 26, 2013), http://www.nytimes.com/interactive/2013/10/27/us/marijuana-legalization-timeline.html?_r=0#/#time283_8152.

93. *28 Legal Medical Marijuana States and DC*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Nov. 9, 2016, 11:49:11 AM PST).

94. On November 8, 2016, an additional four states voted in favor of recreational marijuana: California, Nevada, Maine, and Massachusetts all voted in favor of legalized use, sale, and consumption of recreational marijuana. *See generally* Ben Gilbert, *4 States just Voted to Make Marijuana Completely Legal — Here's What we Know,* BUS. INSIDER (Nov. 9, 2016), http://www.businessinsider.com/marijuana-states-legalized-weed-2016-11.

juana-related offenses in light of various state laws permitting the cultivation, sale, and consumption of marijuana for medical purposes.[95] The Ogden Memo reaffirmed the illegality of marijuana; however, it noted that the prosecution of individuals and caregivers in clear and unambiguous compliance with existing state law was an inefficient use of limited federal resources.[96]

States with medical-marijuana provisions saw the Ogden Memo as an opportunity to set up shop, with marijuana dispensaries outnumbering Starbucks in California that year.[97] However, a closer look at the Ogden Memo's direction reveals that property owners who were quick to hand over their property to marijuana-related businesses were either "careless or delusional."[98] The Ogden Memo expressly states that marijuana-related businesses remain a priority for federal enforcement, even if the business complies with state laws.

2. Cole Memo

Eight months later, on June 29, 2011, Ogden's successor Deputy Attorney General James Cole released a memorandum ("Cole Memo") affirming how seriously many had misread the Ogden Memo. Although the Cole Memo conceded that efficient use of limited federal funding, as articulated in the Ogden Memo, would remain unchanged, it also warned that the Ogden Memo was never intended to shield marijuana-related businesses from federal enforcement action "even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling, or distributing marijuana, *and those who knowingly facilitate such activities*, are in violation of

95. Ogden Memo, *supra* note 10.

96. *Id.*

97. *See In California, Marijuana Dispensaries Outnumber Starbucks*, NPR (Oct. 15, 2009), http://www.npr.org/templates/story/story.php?storyId=113822156 ("There are more medical marijuana dispensaries than Starbucks"); W. Zachary Malinowski, *Colorado's Marijuana Dispensary Boom, Now Undergoing Regulation, Leads to Explosion of Patients Seeking Licenses*, 420MAGAZINE http://www.420magazine.com/forums/medical-marijuana-news/138451-colorado-s-marijuana-dispensary-boom-leads-explosion-patients- seeking-licenses.html (last visited Feb. 1, 2016) (noting that after the Ogden Memo, the number of patients seeking medical marijuana cards skyrocketed to over 1000 per week).

98. Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 882 (2013)

> A close reading of the Ogden memo shows that the optimistic interpretation of those who rushed into the marijuana business in 2009 was either careless or delusional. Although it was read by many as a pledge not to enforce federal marijuana laws in those states that have adopted MMJ laws, the Ogden memo in fact comes closer to doing the opposite: "The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives."

Id. (quoting Ogden Memo, *supra* note 10).

the [CSA], regardless of state law."[99] The Cole Memo goes on to clarify that "[s]tate laws or local ordinances are not a defense to civil . . . enforcement of federal law with respect to such conduct, including enforcement of the CSA."[100]

The Cole Memo's assertions began to find validation in the months that followed when marijuana-related businesses and their landlords began receiving cease and desist letters and numerous other marijuana-related businesses faced federal grand jury indictments.[101] Moreover, the Cole Memo's promise of civil enforcement was not an empty one: landlords in violation of the CSA have been, and continue to be, subject to civil forfeiture.

V. Just Because You Can Does Not Mean You Should

Landlord-tenant law is an entirely state governed regime where commercial landlords are unique from their residential counterparts. The CSA does not purport to prohibit property owners from housing drug users; however, it unambiguously prohibits property owners from leasing their property to marijuana-related businesses.[102] Therefore, residential landlords in the handful of states that prohibit property owners from discriminating against medical marijuana patients on their status alone are less likely to face civil forfeiture actions.[103] Commercial landlords, alternatively, are not prevented from creating lease agreements that prohibit the use, sale, and possession of the substance on their properties. Property owners who fail to consider marijuana legislation when negotiating lease agreements face dire consequences. Specifically because once a property owner has leased property to a marijuana-related business, it becomes difficult to evict the tenant on the basis of a federal law violation.[104] LMTs may successfully argue that the property owner had knowledge and consented to the marijuana-related use, which is legal under state law.[105] If successful, the property owner will be estopped from evicting the marijuana-related

99. Memorandum from Deputy Attorney Gen., James M. Cole on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf (emphasis added).

100. *Id.*

101. Kamin, *supra* note 98, at 883 (citing *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, KABC-TV (Oct. 7, 2011), http://abclocal.go.com/kabc/story?section=news/state&id=8383655).

102. 21 U.S.C. § 856(a)(1)–(2).

103. *See* Ariz. Rev. Stat. Ann. § 36-2813(A) (Supp. 2012); Del. Code Ann. tit. 16, § 4905A(a)(1) (Supp. 2011); Me. Rev. Stat. Ann. tit. 22, § 2423-E(2) (Supp. 2011); R.I. Gen. Laws § 21-28.6-4(c) (West Supp. 2011); Conn. Gen. Stat. § 21a-408p(b)(2) (West 2016).

104. *See* Marcus Painter, *Rents, Refi's, and Reefer Madness: How Legal Is Legalized Marijuana for Landlords and Their Lenders?*, 29 Prob. & Prop. 10, 19 (Jan./Feb. 2015).

105. *See id.*

business and left incapable to adhering to the demands of the government's cease and desist letter.

A. *Innocent Owners of Guilty Property*

Throughout most of civil asset forfeiture's history, the court's religious adherence to guilty property fictions meant that the pleas of innocent property owners were ignored.[106] In 1974, dicta from a United States Supreme Court decision hinted at the possibility of a defense for truly innocent owners based on the Fifth Amendment's Takings Clause. A decade later, Congress began amending a series of civil drug forfeiture laws to include the illusion of an innocent-owner defense.[107]

B. *Constitutional Defenses*

Although the U.S. Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co*. ultimately held that the Constitution did not prohibit Congress from authorizing the forfeiture of illegally-used property from owners who had no involvement with or knowledge of the alleged offense, it noted in dicta that seizing property belonging to truly innocent owners gave "rise to serious constitutional questions."[108]

In 1971, Pearson Yacht Leasing Company ("Pearson") leased a yacht to Donovan and Lorreta Olsen, two Puerto Rican residents.[109] The leasing agreement provided that the yacht would be used only for "any and all legal purpose."[110] A year later, the couple was arrested for possessing marijuana on board Pearson's yacht.[111] The amount of marijuana is unclear, with some speculating it was merely a joint.[112] Authorities seized the yacht almost immediately,[113] citing the Controlled Substances Act of Puerto Rico, which provided for the forfeiture of conveyances used "in any manner to facilitate the transportation" of marijuana.[114] Following the seizure, the lessees de-

106. Guerra, *supra* note 57, at 364–65.

107. *See generally* Psychotropic Substances Act of 1978, Pub. L. No. 95-633, sec. 101, § 801a, 92 Stat. 3768, 3768–772; 21 U.S.C.A. 881(a)(6) (West 2002).

108. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974).

109. *Id.* at 665.

110. Brief for the United States as Amicus Curiae, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (No. 73-157), 1974 WL 185609, at *3.

111. *See Calero-Toledo*, 416 U.S. at 665.

112. *See* Christine Meyer, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 Notre Dame J.L., Ethics & Pub. Pol'y 853, 862 (1991).

113. The lessees in *Calero-Toledo* were arrested in early May 1971, after a year and two months in exclusive possession of the yacht. *Id.* at 665-68. Authorities seized the yacht on July 11, 1972, without prior notice to Pearson Yacht Leasing Company or the two lessees. *Id.*

114. Controlled Substances Act of Puerto Rico, P.R. LAWS ANN., tit. 24, § 2512 (Supp. 1973), similar to the then Federal Act, 21 U.S.C § 801. tit. 24, § 2512 (a)(4) of the Controlled Substances Act of Puerto Rico, provided for forfeiture of:

faulted on the yacht's rental payments and Pearson attempted to recover possession; in doing so, Pearson became aware of the seizure and immediately filed suit seeking permanent injunctive relief on two grounds.[115] First, Pearson claimed the lack of notice preceding the seizure violated his Fifth Amendment Due Process rights.[116] Second, Pearson alleged its property was seized for public use without just compensation and thus in violation of the Fifth Amendment's Takings Clause.[117]

On Pearson's due process claims, the government argued that a "seizure" did not become a "forfeiture" until after the case was tried; without a "forfeiture," the government was not "depriving" Pearson.[118] Pearson, on the other hand, argued that the forfeiture statute did not meet due process requirements because it called for "the seizure of property without a hearing and before judgment;" did not provide "an adequate and meaningful hearing;" presumed illegal use; placed the burden of proof on the claimant; and provided limited defenses.[119] Agreeing with Pearson, the district court found the forfeiture statute to be unconstitutional on its face because it failed to include a provision whereby the seizure could be contested before being executed.[120]

The district court also agreed that Pearson's property had been taken for public use without just compensation. Relying on a recent U.S. Supreme Court opinion and several federal court opinions prior to it, the district court rejected the legal fiction that civil forfeiture depends upon, noting that the "imposition of forfeiture on the [property owner] is penal and causes an unconstitutional deprivation of personal property 'without just compensation.'"[121]

The Supreme Court, however, reversed, explaining that the forfeiture survived constitutional challenge because of its underlying public policy rationale—that forfeiture prevents property from being used to perpetuate unlawful activities.[122] With this latent justification exposed,

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(4) all conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [a controlled substance] described in clauses (1) or (2) [of this subsection].

115. *See* Pearson Yacht Leasing Co., Div. of Grumman Allied Indus., Inc. v. Massa, 363 F. Supp. 1337, 1340 (D.P.R. 1973).

116. *See id.*

117. *See id.*

118. Appellee's Brief, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (No. 73-157), 1973 WL 172407, at *2.

119. *Pearson Yacht*, 363 F. Supp. 1337 at 1342 (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).

120. *Id.*

121. *Id.* at 1341 (quoting *McKeehan v. United States*, 438 F.2d 739, 745 (1971)).

122. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686–89; *see generally* H. R. REP. NO. 76-1054, at 2–3 (1939); S. REP. NO. 76-926, at 2 (1939):

The present legislation is necessary because there are no laws which subject to forfeiture vessels, vehicles, and aircraft employed to facilitate violations of

the Court stated that if an owner proved "that he was uninvolved in and unaware of the wrongful activity," and "that he had done all that reasonably could be expected to prevent the proscribed use of his property, . . . it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[123]

Yet in dicta, Justice William O. Douglas's dissent created a narrow exception for property owners who could demonstrate a higher degree of innocence. Justice Douglas suggested that innocent property owners could potentially avoid forfeiture of their property by showing that the illegal act had been done "without . . . privity or consent," such that the property owner was "uninvolved in and unaware of the wrongful activity," and "had done all that reasonably could be expected to prevent the proscribed use of his property."[124]

Currently, federal courts are divided as to whether *Calero-Toledo* means that property owners claiming a lack of consent must prove they did all that reasonably could be expected to prevent the proscribed use of their property. Specifically, the Second, Fourth, and Eleventh Circuits expressly incorporate the *Calero-Toledo* standard into the statutory definition of consent while the First, Sixth, and Eighth Circuits expressly reject the absorption of the *Calero-Toledo* standard. In Washington D.C. and the four states that have legalized all forms of marijuana, the federal appellate courts either do not address the constitutional defense proposed by *Calero-Toledo* or leave its application to the district courts.[125]

Despite well-founded and persistent concerns over the summary nature of section 881(a)(7) proceedings, courts have been reluctant to extend property owners any constitutional protections. In fact, courts across the country have uniformly held that the Eighth Amendment prohibitions against cruel, unusual, or disproportionate punishment does not apply to section 881(a)(7) forfeitures because the statute is civil, not criminal, in nature.[126] The United States Supreme Court itself has repeatedly affirmed that civil forfeiture does not violate a

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the counterfeiting laws or the National Firearms Act. and because tile statutory provisions for forfeiting vessels, vehicles, and aircraft used to facilitate violations of the narcotic laws are entirely inadequate. It is made doubly necessary, because not infrequently the means of transportation employed in violations of the laws involved in the present bill are peculiarly adapted to such type of work as, for instance, high-speed powerboats, fast cars with secret compartments, and aircraft. If such means of transportation are not forfeited, they will be readily available for future violations.

123. *Calero-Toledo*, 416 U.S. at 689–90.

124. *Id.* at 689.

125. *See* Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner"*, 70 NOTRE DAME L. REV. 369, 394 (1994).

126. Seizure or forfeiture of real property used to illegally possess, manufacture, process, purchase, or sell controlled substances under § 511(a)(7) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.A. § 881(a)(7)), 104 A.L.R. 288 (1991).

property owner's rights under the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.[127] Similarly, courts have rejected the notion that civil forfeiture proceedings have the potential to amount to double jeopardy where the property owner also faces a criminal prosecution.[128]

C. *Innocent-Owner Defense*

The most common non-constitutional defense is the "innocent-owner" defense provided for in Section 881(a)(7). A majority of jurisdictions have held that the property owner's mental state must demonstrate a lack of knowledge of or lack of consent to the use or intended use of the property in question for illegal narcotics activity.[129] The Comprehensive Act's innocent-owner defense clearly excludes real property that was unlawfully in the possession of another from forfeiture; however, the exception does not clearly cover real property lawfully in the possession of another as a tenant or lessee. The innocent-owner defense to forfeiture is contained in section 881(a)(6) and states in pertinent part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . .

127. *See* Bennis v. Michigan, 516 U.S. 442 (1996). In a 5-4 decision, the Court upheld the forfeiture of a car jointly owned by a married couple and seized by the state upon a finding that the husband had used it for purposes of soliciting sexual activity with a prostitute. *Id.* The wife claimed that her lack of knowledge or consent of the unlawful activity rendered her "innocent," and therefore the forfeiture violated her rights under the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment. *Id.* at 449–50. For a more in-depth look at the Due Process portion of the *Bennis* opinion, *see* George M. Dery III, *Adding Injury to Insult: The Supreme Court's Extension of Civil Forfeiture to its Illogical Extreme in* Bennis v. Michigan, 48 S.C. L. REV. 359 (1997) (focusing on the Due Process portion of the *Bennis* Court's opinion).

128. *See generally* United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994) (finding the civil forfeiture of a home used for an illegal gambling operation was not barred by double jeopardy, even though the defendant had previously been punished by a criminal conviction for the same gambling offense); United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993) (finding that double jeopardy was not implicated because the criminal and civil forfeiture actions were part of a single proceeding, despite the fact that the actions were filed separately with their own docket numbers), *cert. denied*, 114 S. Ct. 922 (1994); United States v. Nakamoto, 876 F. Supp. 235, 238–39 (D. Haw. 1995) (finding no double jeopardy where the property owner voluntarily chose not to contest the civil forfeiture and was not a party to that proceeding), *aff'd*, 67 F.3d 310 (9th Cir. 1995); United States v. Walsh, 873 F. Supp. 334, 337 (D. Ariz. 1994) (finding that the defendant waived his right to assert double jeopardy because he elected not to be a party to the civil forfeiture proceeding); Crowder v. United States, 874 F. Supp. 700, 703 (N.C. 1994) (finding that double jeopardy was not implicated when the defendant was convicted of conspiracy, while the property was forfeited for its connection to the underlying substantive crime).

129. *See* Franze, *supra* note 125 at 394.

> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. 801-904] . . . except that no property shall be forfeited under this paragraph, to the extent of the interest of the owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.[130]

Parsed with the negatives, the statutory language is not only unclear in its application to marijuana-related tenants, but courts have gone so far as to call its draftsmanship "impenetrable."[131] Nevertheless, the innocent-owner defense provided for in section 881(a)(6) has generally been interpreted to mean that an innocent property owner can satisfy the defense by showing either a lack of knowledge or a lack of consent. The issue then, is how the jurisdiction in which the property sits will interpret "without . . . the knowledge or consent of the owner," terms not defined by the statute.[132]

The most widely accepted definition of knowledge requires awareness, holding that a person acts knowingly when he or she is aware that it is practically certain that his or her conduct will cause a certain result.[133] Similarly, consent requires "compliance or approval . . . of what is done or proposed by another."[134] Naturally then, in order to consent, one must have knowledge of it. Both elements are easy to demonstrate in proceedings against property owners leasing to LMTs because state licensure requirements to operate marijuana-related businesses require both the knowledge and consent of the property owner.[135] Although the statutory innocent-owner defense came about as Congress expanded the reach of civil forfeiture law to real property, it did not create a defense outside those already provided in *Calero-Toledo*.

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130. 21 U.S.C. § 881(a)(6).

131. *See generally* United States v. Goodman *ex rel.* One 1973 Rolls Royce, 43 F.3d 794, 814 (3d Cir. 1994) (applying the rule of lenity after concluding that there is an ambiguity in the statutory language of § 881(a)(4)).

132. 21 U.S.C.A. § 881(a)(7).

133. MODEL PENAL CODE § 2.02(2)(b)(ii) (Proposed Official Draft 1962). This is the most widely accepted definition of knowingly. *See also* LaFave & Scott, Substantive Criminal Law § 3.5(b), at 218 (2d ed. 1986).

134. *Consent*, MERRIAM-WEBSTER ONLINE DICTIONARY, 2016, http://www.merriam-webster.com/dictionary/consent.

135. In *United States v. 141st St. Corp.*, the court held that once a property owner learns of the illegal activity, he, or she must prove they did all that reasonably could be expected to prevent the illegal activity. 911 F.2d 870, 878 (2d Cir. 1990). Most states regulating the possession, sale, and cultivation of marijuana require the property owner sign off on the marijuana-related business; therefore, property owners leasing to LMTs gain actual awareness of the federally illegal activity before the tenant occupies the premises.

VI. RECOMMENDATIONS

The CSA, like the laws of many states, bases prohibition on the assumption that property owners have a duty to keep their property safe; however, landlords typically have little control over the property or retail space once it is leased. Furthermore, standard commercial lease agreements do not adequately protect property owners involved with marijuana-related businesses. Accordingly, property owners bold enough to lease property to marijuana-related businesses must carefully modify existing lease provisions, and in some cases, wholly create new lease provisions to insulate or minimize risks posed by the interplay between state and federal regimes. Boilerplate provisions within standard commercial leases address important legal underpinnings; however, standard lease agreements have failed to keep pace with the boom in lawfully operating marijuana businesses. Improperly or vaguely drafted lease provisions can have significant legal consequences that render the property vulnerable to civil forfeiture.[136] The following suggest lease modifications property owners and respective counsel should consider before leasing real property to LMTs.

A. *Compliance with Law Provision*

A property owner's first benchmark will be determining whether the property is eligible to be leased to a marijuana-related business. Commercial leases almost always contain a use of premise and compliance with law provision that will, in some language, require the tenant to use the premises and operate its business in a manner that complies with "federal, state, county, municipal and other governmental statutes, laws, rules, orders and regulations affecting tenant's use of the premises."[137] However, boilerplate clauses and blanket requirements demanding compliance and making *any illegal* activity by the tenant a default may not be effective to shield landlords from liability, particularly when compliance with all federal law is impossible.[138] Accordingly, compliance with law provisions must be modified to require not only compliance with all applicable federal laws—to the extent they are not inconsistent with the LMT's right to use the premises to operate a marijuana-related business—but also all applicable state and local laws as well as state and local marijuana regulations.

Specifically, lease agreements must be sure to account for the power of cities, towns, municipalities, and counties to regulate, restrict, and proscribe the possession, cultivation, and sale of marijuana among its borders. For instance, Seattle recently voted to require marijuana-re-

136. *See* Jerald M. Goodman et al., *Ten Lease Provisions That Get No Respect*, 28 GP SOLO 2 (July/Aug. 2010), http://www.americanbar.org/publications/gp_solo/2011/march/ten_lease_provisions_that_get_no_respect.html.

137. *Id.*

138. *Id.*

lated businesses to obtain and maintain licensing from both its state regulatory system (the Washington State Liquor and Cannabis Board), as well as the newly created Seattle Marijuana Regulatory Business License department.[139] Marijuana businesses that do not apply for local licensing by July 2016 must cease operations; those that refuse will be assessed civil penalties by Seattle's Department of Finance and Administrative Services before criminal charges are considered.[140] Similarly, and despite popular belief, cities and counties across Colorado have passed bans on marijuana retailers or have delayed their decisions and placed a hold on the law. In fact, most areas of Colorado are not allowing recreational cultivation or sales, despite the state's active and leading regulatory system.[141] Property owners in states regulating marijuana must amend their lease agreements in accordance to current and upcoming legislation in their state, county, and city. Property owners must also remain cognizant that a LMT in one county may be an unlawful one in another.

B. *Permitted Use Provision*

Although commercial property owners typically require the lease agreement to list the activities a tenant can conduct on the premises, many property owners have been hesitant to discuss marijuana-related operations in their lease agreements. Because all states with regulatory systems in place require specific licensing, addressing permitted uses with specificity is key to identifying when a tenant has violated the contract's terms. Accordingly, landlords seeking to lease commercial property to LMTs should consider modifying their permitted use provision to specifically identify whether the tenant will be

139. For the respective laws concerning licensing, *see* SEATTLE, WASH MUN. CODE ch. 6.500 (2015), https://www.municode.com/library/wa/seattle/codes/municipal_code?nodeId=TIT6BURE_SUBTITLE_IVNELICO_CH6.500MABU_6.500.030LIRE#. Sponsored by Nick Licata, a retired member of the Seattle City Council and passed by Seattle City Council and Mayor Murray, An Ordinance Related to the Regulation of Marijuana Businesses went into effect on August 17, 2015. *See generally Mayor's Office Releases Draft of Proposed Medical Cannabis Ordinance*, BALLARD NEWS-TRIBUNE (Nov. 26, 2014) http://www.ballardnewstribune.com/2014/11/26/news/mayors-office-releases-draft-proposed-medical-can. The ordinance requires marijuana-related businesses operating in Seattle, and those that come into Seattle to engage in marijuana-related business, to obtain and maintain a license with the Washington State Liquor and Cannabis Board (WSLCB) as well as a Seattle Marijuana Regulatory Business License and a Seattle Business License Tax Certificate. *Id.*

140. CITY OF SEATTLE, DEP'T OF FIN. & ADMIN. SERVS., SEATTLE MARIJUANA REGULATORY BUSINESS LICENSING INFORMATION, http://www.seattle.gov/Documents/Departments/FAS/RegulatoryServices/MJ-Business-License-Tip-5501.pdf (last updated Feb. 24, 2016).

141. *See* John Aguilar & Jon Murray, *Colorado Cities and Towns Take Diverging Paths on Recreational Pot*, DENVER POST, http://www.denverpost.com/2014/12/19/colorado-cities-and-towns-take-diverging-paths-on-recreational-pot-2/ (last updated Oct. 2, 2016, 3:53 PM) (noting that only 23 of Colorado's 64 counties have opted to allow retail marijuana sales).

cultivating, processing, transporting, or selling recreational or medicinal marijuana. In the case of sales, leases should specify whether the marijuana will be sold in bud form, leaf form, as plants or plant parts, resin, or edibles.[142] When the tenant intends to use the property to cultivate marijuana, the permitted use provision should specify the maximum amount of plants permitted by the cultivator's license. In all cases, the license under which the marijuana-related business is operating, as well as its terms and obligations, should be included in the lease agreement because all state, county, and city regulations require compliance with its respective regulations. Property owners must be aware that LMTs will be subject to random inspections of leased premises by state, county, or city officials. Violations related to a leaseholder's license to operate may result in civil penalties, license suspension, license revocation, or criminal charges[143]—all of which heighten the property's vulnerability to civil asset forfeiture.

C. *Right to Inspect Provision*

In tune with assuring that compliance with law and permitted use provisions are being actively complied with, a property owner must protect its general right to enter and inspect the premises for compliance; however, state regulations heavily limit access to the leased property. Specifically, all regulatory systems in place emphasize security in the marijuana industry and most state laws require marijuana establishments limit access to storage, sales, and other sensitive areas.[144] Accordingly, boilerplate inspection clauses must be modified to balance the landlord's right to inspect the property with the tenant's

142. *See* Michael N. Widener, *Medical Cannabis Entrepreneurs as Commercial Tenants: Assessment and Treatment*, 46 REAL PROP., TR. & EST. L. J. 38 (2011).

143. *See* SEATTLE, WASH MUN. CODE ch. 6.500 (2015), https://www.municode.com/library/wa/seattle/codes/municipal_code?nodeId=TIT6BURE_SUBTITLE_IVNELICO_CH6.500MABU_6.500.030LIRE#; *see also* CITY OF GRESHAM ORE., *Marijuana Businesses: Rules & Regulations*, https://greshamoregon.gov/Marijuana-Businesses/ (last visited Nov. 13, 2016) (including "random inspections at any time during business hours" as a condition to obtaining a marijuana business license); DJ Summers, *Anchorage Regs Would Levy Fines, Ban Pot Clubs*, JUNEAUEMPIRE.COM (Jan. 19, 2016, 12:03 AM), http://juneauempire.com/state/2016-01-19/anchorage-regs-would-levy-fines-ban-pot-clubs (describing an ordinance that would allow city officials to inspect and levy fines for marijuana business violators); COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION – STATEMENT OF UNDERSTANDING 1 (Aug. 15, 2015), https://www.colorado.gov/pacific/sites/default/files/Medical%20Business%20Renewal%20Statement%20of%20Understanding.pdf (requiring that "licensed premises, including any places of storage where medical marijuana and/or retail marijuana and/or infused products are stored, sold, dispensed or tested shall be subject to inspection by the state or local jurisdictions and their investigators, during all business hours and other times of apparent activity").

144. "Nearly every state has security requirements for dispensaries and cultivation sites. Particularly thoughtful are Oregon's detailed requirements, including security cameras, commercial grade locks, panic buttons, and tall fences. In Connecticut, the state can even require a supervised watchman if a dispensary raises certain security concerns." *See generally* Tyler Cole, *All State Marijuana Laws Are Not Created Equal*,

right to operate a state sanctioned business. Property owners should inspect the property regularly to confirm the absence of issues that may implicate violations of marijuana provisions. By remaining informed of the status of the LMT's operations, a property owner will be prepared to exercise its remedies without delay.

D. *Indemnification Clause*

As it is, commercial leases typically require the tenant to indemnify the property owner for claims, liabilities, and damages that arise out of a tenant's operation of a business in the leased space;[145] however, standard indemnification clauses are not enough to protect property owners from the special risk incurred by leasing to marijuana-related businesses. In addition to standard indemnity language covering damage to the property, leases involving marijuana-related operations must list instances that will necessitate indemnification. For instance, LMTs must be prepared to indemnify property owners for damage to the leased premises resulting from break-ins or rent interruption from forced closure. More importantly, lease agreements must be drafted to provide compensation to property owners in the event of civil forfeiture; however, despite a growing number of insurance companies serving lawfully operating marijuana businesses,[146] none of them offer insurance in the event of civil forfeiture.[147] Nevertheless, a select few marijuana-related insurance companies do offer coverage against federal raid operations, purportedly protecting legally operating medical marijuana businesses against the economic impact of a raid by state or local law enforcement agencies.[148] Though federal prohibition makes

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THIRD WAY (Feb. 17, 2016), http://www.thirdway.org/report/all-state-marijuana-laws-are-not-created-equal.

145. *See generally* Jennifer Cobb, Esq., *Negotiating Key Lease Provisions*, 9–10, 12, 42 http://www.lawseminars.com/materials/06ACLWA/aclwa%20m%20cobb%2012-05.pdf (last visited Nov. 16, 2016) (proposing indemnification clause hold that "[t]enant shall indemnify and hold harmless Landlord against and from any and all damages, liabilities, claims and expenses . . . arising from Tenant's use of the Premises or the conduct of its business or from any activity, work, or thing done, permitted or suffered by the Tenant in or about the Premises. . .").

146. *See, e.g.*, *Medical & Recreational Marijuana*, HAYES INS. AGENCY, http://www.hayesbrokers.com/industries/medical-recreational-marijuana/ (last visited Nov. 14, 2016) (offering insurance for various aspects of a medical marijuana dispensary).

147. *See generally Marijuana Business & Professional Insurance Providers*, MARIJUANA BUS. DAILY, https://mjbizdaily.com/industry-directory/insurance-providers/ (last visited Nov. 14, 2016) (listing over two-hundred insurance companies serving marijuana-related businesses; none of which are known to offer this specific type of insurance).

148. To qualify for "State Raid Insurance," the insured must be found not guilty of all charges; the maximum limit to liability is $5,000 per occurrence and $10,000 aggregate. *See* Medical Marijuana Insurance, http://www.mmdinsurance.com (last visited Mar. 6, 2016) (follow link on left side of webpage entitled "State Raid & Legal Defense").

these insurance policies inherently imperfect, they offer property owners opportunities to negotiate with prospective tenants.

E. *Early Termination Clause*

Property owners also face a number of legal risks unrelated to civil forfeiture, such as: federal criminal prosecution for conspiracy to sell, produce, or transport a controlled substance; nuisance claims and fines for smoke, odors, or loiterers; and even foreclosure. As discussed in Part III, the threat of civil forfeiture alone is often enough to shut down marijuana-related operations. However, a problem arises when the tenant, a business operating lawfully under state law, refuses to cease its operations. An early termination clause specifically defining the events that trigger a property owner's right to terminate a lease can help minimize the property owner's risk of finding itself unable to evict its tenant and heightens the owner's chance of appeasing federal threats. Prosecution, or threat of prosecution, by a U.S. attorney under the CSA or other drug laws must be grounds for termination of the lease at the election of the landlord. Additionally, property owners may want to entertain providing LMTs with their own early termination right, should the business become subject to new marijuana regulations it cannot afford to comply with.

VII. Conclusion

The coming years will continue to foster a great deal of uncertainty for property owners wishing to lease to marijuana-related businesses. There have been eight presidential administrations since Richard Nixon established the Drug Enforcement Administration in 1973. Seven of those administrations aggressively prosecuted marijuana-related crimes; only the Obama administration took a different approach and discouraged prosecution—but with just a few short months left in office—President Obama has repeatedly stated that marijuana is not on his list of end-of-term priorities.[149] Accordingly, when a new president takes office on January 20, 2017, he or she would be well within their constitutional rights to opt for an aggressive stance on marijuana, one that disregards the Ogden and Cole Memos credited for the massive economic boom seen by the marijuana industry. Should that occur, the effect might be minimal or inexistent for property owners because the Memos only created a demand for real property to conduct marijuana related activities on, but it did not truly restrain prosecution or serve as a defense. Going forward, one thing is certain: leasing real property to LMTs will remain federally illegal

149. *See* Devin Dwyer, *Marijuana Not High Obama Priority*, ABC NEWS (Dec. 14, 2012), http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783; *see also* Christopher Ingraham, *Obama says marijuana reform is not on his agenda for 2016*, Washington Post (Jan. 29, 2016).

when the next president takes office and property owners will continue to be lured in by lucrative rent streams. Property owners, and their counsel, need to be hyper-vigilant of the constantly evolving regulatory schemes applicable to their respective properties and clients. Although lease agreements can be tricky to negotiate, even in the most ordinary of circumstances, a careful, detailed lease agreement coupled with artful negotiation can serve as a property owner's best defense of their interests.