**摘要及研究目的**

近來我國發生數起跨國境之經濟、貪凟案件，因被告將其犯罪利得移轉至境外，除造成案件偵查階段中，無法即時發現境外之犯罪利得而予以查扣，影響案件之偵審外，甚至於案件判決確定後，亦因欠缺適當之手段而使被告得以規避刑事沒收，使被告得享有不法犯罪利得。參考美國聯邦政府自1980年代起，運用刑事案件財產沒收制度作為毒品查緝作為打擊組織犯罪之主要武器，其後又擴及到打擊洗錢犯罪及恐怖活動犯罪，主要就是認為阻斷犯罪者享有犯罪利得，係有效防止犯罪萌生之手段。為達成此一目標，除針對犯罪利得的沒收制度採刑事、民事及行政沒收並行制外，並透過先前的各種保全、扣押手段，以期完善沒收法制。而國際間就跨國犯罪之防制，不問就洗錢或貪瀆等罪行均多次強調應加強國際合作，以期共同打擊跨國境犯罪行為及組織。沒收分享制度即是在國際擴大共同協力打擊跨國犯罪之趨勢下，對國際共同協力而查扣、沒收之犯罪利得，以公平方式對於付出相當成本之各協力國予以補償並予之分享之制度。

筆者很幸運於102年度獲得法務部選送出國從事專題研究，前往美國紐約大學進行學習，首先要感謝臺灣臺北地方法院檢察署各位學長們，於我進修期間共同分擔了我的工作份量。國際合作查扣犯罪所得後之國際分享此一主題，在國內不問是在學術界或實務界均屬一較新之議題，所待建立之資料、法制尚在起步階段，更多的是需要大量翻譯之國際間就此議題所為之公約、協定及相關文件，而就議題核心事項如沒收分享比例…等，亦非自他國常態性之公報即可取得，且不論就該業務之專責對辦窗口、沒收分享比例個案資料之整理、他國刑事案件沒收制度之瞭解以進而得依公平方式與他國磋商、所得分享款項對主管及協辦機關為成本上之補償及將來沒收分享協定之簽署等，尚需逐步建立完整之制度。本文在尚缺資料可參之情形下，試行指出建立沒收分享制度所應注意之要點，及過程中可能獲得之他國資料，為因筆者外文能力有限，在轉譯過程謬誤難免，惟仍抱著引玉之情，期盼國內法學與司法先進能參與指導。

就參考對象而言，沒收分享制度即屬國際間為打擊跨國境犯罪而生，以國際現實情形而言，如吾人所知，對我國而言美國實居於犯罪利得之主要流入國家之一，且美國亦與世界上大多數主要國家簽有司法互助的協定，其所處理相關沒收分享之經驗，當值得我國學習。而聯合國就跨國境犯罪所生議題亦訂有多個相關公約及範本，就瞭解該議題之國際共識時，亦屬必要之參考文件資料。故本文在第一部分，即以介紹與美國刑事案件沒收制度之相關議題為主，包括美國司法程序最高指導原則暨縱貫美國刑事程序各階段之美國憲法人權法案及相關之刑事訴訟程序，此部分內容主要為筆者在紐約大學進修期間之刑事訴訟課程中之講授重點。又由於沒收分享制度所涉甚廣，蓋得沒收分享者，以業經犯罪利得所在國之法院裁判確定得沒收或已經承認之他國法院沒收裁判而得執行者為前提，亦即沒收分享係建立在先就犯罪利得之辯識、查扣、保全、沒收等事項為前提，該等事項由各協力國共同完成後，得以享受之成果。所以討論沒收分享議題時，自難與先前之必要程序，如辯識、查扣、保全、沒收…等為分割。且國際間為如就沒收犯罪利得之分享及移轉支付而言，國際之共識仍由參與方就他方為共同查扣、沒收該等犯罪利得所付出之協力程序為考量，並由參與者共同決定相關之分享比例及增減項目等。故本文亦將之與沒收分享先後共列為第二部分之討論，並於第二部分之結尾提出心得及建議事項以代結論。

**第一部分**

**壹、前言**

美國聯邦憲法修正條文第一條至第十條即著名的權利法案，其目的係為限制聯邦政府的權力（其中尤以第四條、第五條、第六條、第八條為主要討論對象，至於州政府的權力限制部分，一般討論係集中於美國聯邦憲法修正條文第十四條[[1]](#footnote-1)），而保護犯罪嫌疑人（或被告）的權利，亦即為防止執法人員於執法過程中濫用權力，並侵犯憲法所保障之人民基本權，而在美修習刑事程序課程[[2]](#footnote-2)中，教授亦自第二堂課起即開始介紹美國聯邦憲法修正條文第四條，而直接進入此一美國刑事程序的核心，而透過上述憲法修正案而規範執法之正當程序並據此形成美國刑事程序之特徵。又美國各州間、各司法轄區間及重罪、輕罪之間，就案件之刑事程序本非完全一致，惟大致上仍可區分為三個階段，即審前之控訴(Complaint)、逮捕(Arrest)、預審(Preliminary Hearing)、起訴(Charging Process)、提訊(Arraignment)等程序、審理程序(Trial Process)及審理後之量刑(Sentencing)及上訴(Appeal)等程序，透過課程之學習，猶不免就臺灣與美國因在政府體制、社會觀念、經濟模式等多有不同，而有越屬細節性、技術性之規範及執行問題，兩者差異越大之感受，與此有關之衍生問題，當屬我國於參考美國相關法制時，於審酌兩地社政差異後究應如何採行一事，實屬值得吾人深思的問題。又為使我國讀者得以本國熟悉之法律用語理解全文，就相關問題之說明、翻譯時，係儘量以國內實務界之常用字彙為之，然因本人英文能力有限，為此說明、翻譯時恐難免有誤，亦請讀者於有疑惑時，能一併參考相關之英文原文而得以解惑。

**貳、美國憲法修正條文第四條之略述**

一、概述:１７８９年９月２５日提出，嗣於１７９１年１２月１５日生效之美國憲法第四修正案其原文為：“The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”對此，有認為憲法第四修正案之條文含混不清[[3]](#footnote-3)。而就該條文一般理解為，“人民對其身體、住宅、文件及財產有不受不合理搜索、扣押之權利，除有合理根據，以宣誓或代誓宣言擔保，併具體釋明搜查之地點及扣押之人或物外，不得簽發令狀[[4]](#footnote-4)。而在理解上開條文時，首應注意上開條文用語係針對人民（the people）而非針對個人（one person），即第四修正案所欲保護者及保護範圍為何？又一般就第四修正案可分為前後二部分之合理性條款（the Reasonable Clause）及令狀條款(the Warrant Clause)來理解，而據此衍生的問題極為廣泛、複雜，舉凡執法機關之行為究否屬第四修正案所稱之搜索、扣押？何謂不合理搜索、扣查？何謂合理根據？具體釋明程度？…等。其中尤以合理性條款與令狀條款間之關係究為何？令狀條款是否係為闡明合理性條款？是否未經合法簽發令狀之搜索、扣押均屬不合理？亦或二條款間係彼此獨立存在？令狀條款僅屬告知簽發令狀應具有合理之根據？此部分之爭論應屬第四修正案之重要內容[[5]](#footnote-5)。其他如關於何人有權於訴訟中主張第四修正案之權利？是否主張之人自己即為受不合理搜查、扣押之被害人？違反第四修正案的救濟手段？…等，亦屬美國相關實務問題常見之爭論。

二、憲法修正條文第四條所稱之搜索、扣押

(一)、適用範圍:在適用第四修正案之規範時，首要確定者，當屬執法機關對某處之行為，是否符合第四修正案所稱之搜索、扣押，否則自無適用該憲法條文之餘地，法律亦不會對它提出任何違憲法疑義[[6]](#footnote-6)。而執法機關所為之行為若非屬第四修正案所稱之搜索、扣押，自無庸再討論有關是否具有令狀？是否具有合理根據？等問題。且第四修正案之扣押所涉者，除對財產所為者外，尚包括對人身所為之扣押，就此而言，逮捕亦包含於對人身扣押之概念內。

(二)、相關實務見解

1、Olmstead v. United States

 依早期之最高法院見解，多著重在憲法針對私人財產之保護，故以人身、住宅、文件及財產之侵害而言，非屬物理方式之侵害者( physical intrusions)，即不屬第四修正案所規範之對象，以本案為例，執法者在未取得法院簽發之搜索令狀之情形下，即針對該案嫌疑人Olmstead 與他人間之通訊聯絡，以上線截取資訊之方式(wiretapping)進行監聽程序，因此種方式不會對受監聽人之財產造成物理方式之侵害，而經最高法院認定，上開監聽行為不屬第四修正案之規範範圍。

2、United States v. Lee

 此為另一則最高法院上述見解之代表，在該案中最高法院認為執法者以探照燈對嫌疑人之處所進行探照之行為，因為燈光探照方式不會對該處所之財產造成物理上之侵害，所以上述行為非屬第四修正案所稱之搜索。

3、Lopez v. United States

 就執法者經嫌疑人之同意進入其處所後，以所攜帶之隱藏式錄音設備，錄取該嫌疑人之不利於己之供述，因執法者進入該處所非屬違法侵入(trespassing)，故最高法院認為，上開執法者之行為俱不構成第四修正案所稱之搜索。

4、Katz v. United States

 此為一則影響深遠之判決，在本案中執法者係以電子錄音設備隱匿裝置於嫌疑人Katz所使用之公用電話之電話亭外壁處，並以此方式對該嫌。疑人進行監聽…，在本案判決中最高法院不採取上開物理上侵害之認定標準並表示否定之意見[[7]](#footnote-7), 且表示執法者上開行為係屬違反第四修正案之違法搜索行為, 並於該判決中表示第四修正案之保護客體係人而非場所，Katz所使用之公用電話並非封閉式，即其本即知使用該電話會使期暴露於眾，並開啟了下述合理的隱私期待(reasonable expectation of privacy, 學者有將之簡讀為r.e.o.p.)此一重要之問題[[8]](#footnote-8)。

 而依據大法官MR. JUSTICE HARLAN 的協同意見(concurring)，認為封閉之公用電話亭與私人住居所相同，而不同於開放空間(open fields)，故個人於封閉公用電話亭處得享有合理的隱私期待，且認為合理的隱私期待必須二個要件，其一，主張者必須有表現出其主觀上有隱私期待之事實，其二，其所表現出之主觀上隱私期待之事實必須是社會上認為係屬為合理的期待[[9]](#footnote-9)，必具備上開二要件，否則即不構成第四修正案所稱之搜索，亦即若Katz僅係單純在公用電話亭處，未將門關上，而處於大眾一覽無遺之情形下時，執法者之行為即非屬違法。

5、Bond v. United States

 本案中，最高法院就執法者就公共交通工具上之乘客所攜帶之行李物件進行探找之活動(exploratory manners)，認為公共交通工具上之乘客就其所攜帶之行李享有不受探找之合理的隱私期待。

6、United States v. White

 最高法院針對嫌疑人對於其對話相對人間之對話內容，就相對人不會立即或隨後向司法警察報告報告該內容之部分，並不得享有合理的隱私期待，亦即嫌疑人就其對話之相對人而言，無法針對相對人不向第三人傳述一事主張合理的期待。

7、Oliver v. United States

 在該案中，執法者在未取得搜索令狀之情形下，針對標示禁止進入及圍繞石牆、大門上鎖之處所，繞入後發現該處所內栽種大麻，最高法院針對人們在開放區域的活動部分，係表示除非執法者係以違反民、刑法的方式侵入，否則個人就此部分不享有合理的隱私期待，亦即就執法者進入開放區域(open fields)進行之行為，認不屬於第四修正案所稱之搜索，最高法院並表示禁止進入之標示並非屬有效地阻止行為，且執法者亦能從空中合法發現本案之違法事證，故戶主對該開放區域種植大麻的行為並不享有合理的隱私期待。

8、United States v. Dunn

 在本案中，執法者依據所得情資所示，Dunn在其所有之農場人種植毒品，而該農場設有圍欄，其內之住所外亦設有圍欄，執法者越過圍欄後進入農場，並以窺探方式發現農場內之穀倉內有毒品，最高法院認為本案中嫌疑人並未對該穀倉建置充分之護範措施，且認為開放區域固不受第四修正案之保護，惟個人住宅及其圍繞之一定範圍則屬第四修正案保護之客體，而就所謂受保護之一定範圍究如何界定一事，認為應參考下列四項事實:

①該處與住宅之臨近程度。

②該處是否包含在住宅之圍牆內。

③該處之通常使用方式。

④該處之居住者就該處不受路過者觀察之防範程度。[[10]](#footnote-10)

9、California v. Ciraolo

 在本案中，執法者依據所得情資所示，嫌疑人在其住處庭院內種植大麻，因為該處所外圍設有10英呎之高牆無法窺視其內情形，而以乘坐飛機飛越該處所上方之方式發現該處所之庭院內有毒品，就此最高法院認為雖就嫌疑人於該處設有10英呎高牆之事實，其有表示主觀上之目的，但該牆甚至無法阻止人在雙層車上窺得其內之事實，不認為該嫌疑人就執法者上述作為具備合理之隱私期待。

10、United States v. Knotts

 在本案中，執法者在未取得搜索令狀之情形下，在將要出賣予該嫌疑人之商品內置有無線追蹤裝置，以能取得嫌疑人之行蹤，嗣並依據執法者之跟監及該裝置所發出之信號所示而向法院聲請搜索票，對該嫌疑人所在處所進行搜索。就此最高法院認為，嫌疑人於駕車行於公路上時，其已將行動暴露於眾，且使用上開裝置進行追蹤，並不會顯示該嫌疑人在屋內之活動，僅具有有限的使用價值，故執法者上述之行為不屬第四修正案所稱之搜索。

11、California v. Greenwood

 在本案中，執法者將嫌疑人放置處所外之垃圾袋內之物品進行翻找，就此最高法院認為，對於置放於處所外待運之垃圾，個人就該垃圾不會被他人翻找乙情，不得主張享有合理的隱私期待。

三、關於證據排除法則( Exclusionary Rule )

 最廣泛的概念下理解之證據排除法則，即違反第四修正案所取得之證據，在審判程序中，應予排除之[[11]](#footnote-11)。但因證據排除法則並非與第四修正案同時誕生，且隨著時間的發展，其所適用的範圍也發生了變動。

1、聯邦法院就證據排除法則之適用

 Weeks v. United States

 在該案中最高法院認為違反第四修正案所取得之證據，在聯邦法院審理案件時應予排除之。惟該案之事實，係以違法搜索由聯邦執法官員所為者為前提。

2、州法院就證據排除法則之適用

1. Wolf v. Colorado

在該案中法院認為上開聯邦最高法院就Weeks v. United States案中之見解，並非源自於第四修正案之明確要求，並非基於立法權下之憲法表述，而是司法機關之暗示說明[[12]](#footnote-12)。

1. Mapp v. Ohio

在本案中執法者認為嫌疑人係藏匿於該處所內，於未取得搜索令之情形下對該處所進行搜索並於該處扣得猥褻物，就此最高法院認為Weeks v. United States案中所確認之證據排除法則，亦應適用予各州之刑事審判程序。

**參、美國憲法修正條文第五條之略述**

一、概述:依美國憲法第五修正案規定The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself…”, 意即任何人均不應被迫於刑事案件中，做為彈劾自己之證人，此即不強迫自證己罪之權。

 而關於第五修正案之延伸討論，得適用該修正案之主體包括任何人，即所有刑事程序中之證人均包括在內，故有謂基此規定，恐將造成無法迫使真正有罪之人到庭作證，使非真正犯行者之被告得以獲此重要事證而得無罪判決; 而所謂不應被強迫做為彈劾自己之證人，依據最高法院歷年來之見解，已漸發展成為就某些特定之情形下應予認可之。

二、相關實務見解

 1、Pennsylvania v. Muniz

在該案中最高法院認為，在三重殘酷困境(The Cruel Trilemma)下，即屬於被強迫作為彈劾自己證人之情形[[13]](#footnote-13)。

2、Schmerber v. California

在該案中最高法院認為，任何人被迫出庭作證，或係被迫供述之情形下，即屬於被迫作為彈劾自己證人之情形。若非屬供述證據之情形下，則非屬於被迫作為彈意自己證人者。

3、Ohio v. Reiner

在本案中嫌疑人涉嫌虐待兒童致死，並辯稱應由保姆負責，就此最高法院認為第五修正案之此項無自證己罪之權，適用於聲稱自己是無辜者，因此認為就否認自己涉嫌之保姆有權依第五修正案而拒絕出庭作證。

4、Hiibel v. Sixth Judicial District Court of Nevada

在本案中執法者要求嫌疑人告知身份，經其拒絕後，執法者依此為由對其進行人身扣押，就此最高法院認為執法者之行為並未違反第五修正案，因為告知身份並不會帶來自證己罪之風險。

5、Malloy v. Hogan

在本案中最高法院認為第五修正案之不被迫自證己罪之權係人民之基本權，且應透過聯邦憲法修正條文第十四條予以適用予各州。此後，任何人於州法院審理程序中，即得逕為主張不被迫自證己罪之權。

6、Bram v. United States

在本案中最高法院認為第五修正案之不被迫自證己罪之權，係非任意供述原則憲法上之規定，即出於任意性、自由性，沒有受任何形式不當影響下所為之供述，始得採為證據。

7、Chavez v. Martinez

在本案中最高法院認為被迫所為之不利於己之陳述，若原告未據此供述或其毒果為證，尚不得依據第五修正案提起侵權訴訟，惟仍得依正當程序條款提起侵權訴訟。

三、關於自白及正當程序

 (一)、就被告之自白而言，最高法院係依據聯邦憲法修正條文第五條、第六條及第十四條來架構自白證據能力的問題，即自1936年迄今，依第五、第十四修正案以排除非任意性自白;自1964年迄今，依第六修正案之辯護權亦適用於決定被告自白證據能力有無之條件;自1966年迄今，第五修正案之不強迫自證己罪之權，除嫌疑人基於認識並同意拋棄此權利外，適用於其偵訊階段之供述[[14]](#footnote-14)。

(二)Miranda v. Arizona

 在本案之前之Escobedo v. Illinois案件中，嫌疑人被逮捕、羈押後，在執法者對其進行詢問之過程中，執法者未告知嫌疑人有不被迫自證己罪之權並拒使嫌疑人接見其律師，嗣並要求嫌疑人與共犯進行對質，並於詢問程序中取得嫌疑人之自白，就此案最高法院認為該嫌疑人之自白，因違反第六修正案之辯護權而認不可採，且於該案中最高法院認為僅於特定條件下始能構成第六修正案之辯護權。

 而在Miranda v. Arizona所涉之相關案件之相同情形包括，嫌疑人均在押中且在接受警察詢問過程中，均未獲告知有不被迫自證己罪之權，就此最高法院認為於嫌疑人在押在所進行之詢問，對嫌疑人而言其處於該環境之下，且由警察居於主導之地位，其已被剝奪心理優勢，若無相對應的程序保障，則該嫌疑人之供述屬於以強迫方式取得者，而最高法院亦認為在相關案件中，執法者已透過其他偵查手段取得相當之積極事證，是以不認可執法者訊問嫌疑人所得有罪供述之利益高予第五修正案彰顯之價值，且認為嫌疑人能透過律師之建議而保持緘默。

 是以最高法院認為嫌疑人在押中接受詢問時，依第五修正案得享有不迫自證己罪之權，且嫌疑人在接受詢問前得享有咨詢律師之權，於詢問時亦得要求律師在場。且為了保障嫌疑人在押詢問時之不迫自證己罪之權，執法者於詢問前心須對嫌疑人告知下列事項:清楚、明確之措辭告知其有權保持緘默;向其說明放棄不迫自證己罪權之效果;清楚告知其有權請律師並於詢問過程中有權請律師在場;若係出於經濟原因，則得為其指定律師。

 米蘭達證據排除例外之相關實務見解:

1、Harris v. New York( Impeaching the Defendant)

在本案中嫌疑人因涉嫌販賣海洛因毒品被調查，於法院進行交互詰問時，該被告遭質疑其先前供述與詰證證言不一致，最高法院認為，被告先前於羈押偵訊時之供述與在法院審理時之供述不一致時，檢察官仍得以將其先前供述作為彈意證據使用。因法官認為米蘭達案所提供之保護不能反而成為充許嫌疑人作偽證之通行證而保護其不會受到先前不一致供述的質疑，且認為任何證人包含同意出庭作證之被告，均有俱實陳述之義務，就此而言檢察官應有權使用其先前之供述以之作為彈劾證據使用[[15]](#footnote-15)。

 惟在Mincey v. Arizona( Involuntary Confessions and Impeachment)案中，法院認為基於正當程序之要求，若被告自白非出於任意性，該自白即不得作為彈劾證據使用。

2、關於毒樹果實之例外(Admitting the Fruits of a Miranda Violation)

 在違反米蘭達規則之情形下，一般而言所取得之證據並無證據能力，然若執法者係依嫌疑人之供述又獲得其他之證據，或由嫌疑人相信其先前供述已始執法者取得資訊而放棄權利再次供述…等而取得之事證即所謂之派生證據，即屬於違反米蘭達規則之毒樹之果。就此毒樹之果之證據能力相關實務見解如下:

①Michigan v. Tucker( Leads to Witnesses)

在本案中執法者於逮捕涉嫌強制性交罪之嫌疑人後對其進行詢問時，即告知其所為之任何陳述都會成為反對其之證據並詢問其是否需要律師的協助，然執法者並未告知其若因經濟因素，得為其指定律師，而就此部分之違反米蘭達規則致使嫌疑人之供述於審理中予以排除，然就警方依嫌疑人之供述而知悉之證人，並經傳訊到庭作證時，該證人證述之證據能力如何，就此最高法院認為依比較該案之案件事實與不被迫自證己罪之權利誕生之歷史背景，可知該案中執法者之行為並非如歷史上剝奪其不迫自證己罪權利之情形，執法者僅係未完全遵守米蘭達案後之程序規定，並認為米蘭達警告本身並非憲法保障之權利，其僅係保障不被迫自證己罪權利的方式[[16]](#footnote-16)，並因此認為該證人之證述具有證據能力。

②Oregon v. Elstad( Subsequent Confessions)

在本案中執法者進入嫌疑人住宅內，在未對嫌疑者進行米蘭達警告之情形下對其進行詢問時，該嫌疑人為不利於己之供述，嗣於警局中，執法者始對為米蘭達警告，嫌疑人則放棄其權利而進行第二次不利於己之供述，是此部分而言其屬先前違反米蘭達警告之毒樹之果，就此最高法院認為本案中嫌疑人之供述受到違反米蘭達規則之行為之污染，若屬違憲行為則應依毒樹果實理論予以排除，然因米蘭達規則係依據第五修正案，且適用之範圍猶較第五修正案本身更廣，因此，縱不構成違反第五修正案，亦可能違反米蘭達規則。因此在具體案件中，若嫌疑人之第一次不利於己之供述係屬於正當程序條款下之非任意性供述，則第二次不利於己之供述若確屬來自於上開供述時，其即無證據能力[[17]](#footnote-17)。

③Missouri v. Seibert( Subsequent Confessions)

在本案中因執法者或有於進行米蘭達警告之前進行詢問以憑此獲得其他之物證或人證，甚有依此制定相關書面者，使執法者在未獲取嫌疑人之供述之前，不對其進行享有緘默或律師協助之權利告知，嗣待取得供述相關證據資料後，再對該嫌疑人進行米蘭達警告，並使該嫌疑人重述其先前不利於己之供述，在此背景下，本案嫌疑人遭受逮捕後移至警察局，在未對其進行米蘭達警告之情形下，執法者對其進行詢問時，其為不利於己之供述，嗣後之詢問中，執法者始對其進行米蘭達警告，嫌疑人則放棄該權利，執法者並取得其第二次之不利於己之供述，就此最高法院認為本案之情形非屬執法者因一時疏忽而未進行米蘭達警告，而與上開案件之情形不一致，且本案中就嫌疑人第二次不利於己之供述，米蘭達警告是否可以有地幫助嫌疑人做出真正自由的選擇，而其所作之供述應屬可採乙情，法院認為本案中米蘭達警告並不會產生此一影嚮，並認為本案就第一次詢問時之問答之全面性及詳細度及前後二次供述之內容之重覆程度，及前後二次詢問之時機、場景、詢問者等均有別於Oregon v. Elstad案[[18]](#footnote-18)，而認為正常情形下，將米蘭達警告能對第二次獨立之詢問活動發揮作用是不切實際之期待，即米蘭達警告無法向嫌疑人有交傳達其所享有之權利[[19]](#footnote-19)。

**肆、美國憲法修正條文第六條之略述**

一、概述:除美國聯邦憲法修正條文第五條之規定及正當法律程序之要求外，法院亦擴張憲法修正條文第六條之警察誘導自白之保護範圍，此即美國憲法關於律師辯護權之規定。憲法修正條文第六條規定:在一切刑事訴訟中，被告應享受下列之權利：發生罪案之州或區域之公正陪審團予以迅速之公開審判，其區域當以法律先確定之；要求通知告發事件之性質與理由；准與對造證人對質；要求以強制手段取得有利於本人之證人，並聘請律師為之辯護[[20]](#footnote-20)。其英文原文如下:In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

二、相關實務見解

1. Johnson v. Zerbst

在本案中最高法院表示, 在所有刑事程序中若非犯罪嫌疑人有律師為其辯護或其放棄律師為其辯護之權，否則依憲法修正條文第六條禁止聯邦法院依刑事訴訟剝奪犯罪嫌疑人之權利，認為一般人並不具備法律專業以保護自己，尤其在面對具豐富經驗、專業知識之法律工作者所提起之訴訟。爾後，對於經濟上貧困者即以政府出資方式為其選任律師為其辯護。

1. Gideon v. Wainwright

在本案中犯罪嫌疑人因以損壞門戶方式闖入營業場所，所涉非輕罪，該犯罪嫌疑人曾要求辯護律師之協助而未果，嗣經認定有罪並判處徒刑。嗣最高法院撤銷該有罪判決，並認為原判決違反了憲法要求被告應有律師為其辯護之權利，且透過憲法修正條文第十四條之規定，將修正條文第六條之律師辯護權擴展至各州，並將律師辯護權合併至正當程序條款內。

1. Scott v. Illinois

在本案中犯罪嫌疑人乃一經濟貧困者，其因涉犯竊盜之輕罪而經起訴，而該犯罪嫌疑人亦曾要求律師為其辯護而未果，嗣經法院判決有罪並處以罰金刑而非自由刑之處分。在上訴程序中，其仍要求律師為其辯護。本案中最高法院認為以犯罪嫌疑人實際上判處自由刑作為被告應否享有律師辯護之憲法權利之界限係一妥適之標準。

1. Alabama v. Shelton

在本案中犯罪嫌疑人亦屬經濟貧困者，其因涉犯可處1年之徒刑及罰金之攻擊罪而遭起訴，且州政府並未對該犯罪嫌疑人提供律師之協助，嗣遭法院判處自由刑，且嗣經緩刑，被告對此提出上訴，州最高法院最後仍其有罪並維持罰金刑，惟撤銷緩刑，蓋州最高法院認為緩刑本質上仍屬自由刑，故在被告未有律師辯護之情形下不得為緩刑，嗣聯邦最高法院亦贊同此見解。

1. Douglas v. California

在本案中最高法院認為基於憲法修正條文第十四條平等條款之要求，縱使各州無須就訴訟中之經濟上之富有者與貧困者給予絕對之平等，惟貧困者僅有的一次上訴若是在無律師幫助之情形下所進行，則此時仍不符合平等條款之要求，而認為經濟上之貧困者行使其依實定法之上訴權時，州政府應為其提供律師為其辯護。

**伍、關於起訴(Charging)**

一、概述:一般在被告未放棄其權利之情形下，正式之重罪起訴需有經大陪審團審查後所簽署之起訴書(Indictment)或由檢察官直接以州或國家之名義所提起者，經法院於經預審程序( Preliminary Hearing)後准許之起訴書(information)，始得為之。美國檢察官之起訴、不起訴之裁量權，就其所為之不起訴而言，原則上是一終局的決定，某些州之州檢察長固得承繼案件，然亦顯少有實際之案例，且檢察官之不起訴，並無外部監督機制;另就起訴而言，除實體法之要求外，檢察官不得出於種族歧視或政治上之偏見而起訴，且起訴時就被告所實施之犯行須有合理之依據，然與不起訴處分不同的是，對檢察官之起訴，仍有外部監督機制，其起訴裁量權包括決定是否起訴以及決定起訴之範圍等事項。檢察官決定是否起訴及起訴何犯行時，主要依據:犯罪嫌疑人是否有犯行、證據是否足以證明其犯行、起訴是否符合最佳之公眾利益[[21]](#footnote-21)，而美國律師會亦對檢察官是否起訴於個案中得審就之建議標準:如檢察官對被告確實涉有犯罪是否仍有合理懷疑、被告所涉犯行所造成之損害、被告之犯行與所受刑罰是否成比例、告訴告發者是否含有不正之動機、證人是否願意出庭作證、本案被告是否願協助其他案件之遂行及其他司法轄區就被告有無起訴等。請參考其英文原文如下American Bar Association, Standards for Criminal Justice, The Prosecution Function 3-3.9(b): The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative or the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others; and

(vii) availability and likelihood of prosecution by another jurisdiction.

二、起訴裁量:聯邦憲法就檢察官之起訴裁量權之規定，主要體現於憲法修正條文第五條之正當程序條款及第十四條第一項之平等條款: 凡出生或歸化於美國並受其管轄之人，皆為美國及其所居之州之公民。無論何州，不得制定或執行損害美國公民特權或豁免權之法律;亦不得未經正當法律手續使任何人喪失其生命、自由或財產;並不得否定管轄區內任何人法律上平等保護之權利[[22]](#footnote-22)。其英文原文參考如下:Amendment XIV Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.依此規定，檢察官之起訴決定自不得基於種族、宗教信仰…等而為違反平等權之規定或基於報復性之原因而起訴之，此時亦違反正當程序之要求。

三、預審程序(Preliminary Hearing)

 預審程序係治安法官(Magistrate Judge)對檢察官對某被告涉犯某案件之起訴(此時稱Complaint)是否具有合理之依據(probable cause)，若審查結果發現欠缺合理依據，則會駁回該起訴。被告亦有權決定是否放棄此一權利，若其放棄預審，則案件得直接進入審理程序。若案件係經大陪審團審查後決定起訴者，則不再經治安法官之預審程序，而直接進入審理程序。至於案件究係經治安法官為預審程序或經大陪審團之審查，被告有權決定之。若被告決定前者，則由治安法官依預審程序審查檢察官之起訴是否已通過起訴門檻，且經治安法官審查通過交予審理庭之起訴書則稱為information;若被告決定採取後者，則由大陪審團決定提否提起公訴，且經大陪審團審查通過交予審理庭之起訴書則稱為indictment。

 另依美國聯邦刑事訴訟規則第5.1條規定，若治安法官依事證認本案存在合理根據相信犯罪已經發生且係由被告所施行，則治安法官應在管轄法院訊問被告。而確定合理根據可以全部或部分依據傳聞證據。被告於預審程序中得對敵性證人進行交互詰問，也可以提出證據，但不得以證據係經非法程序取得為由而提出異議。若案件經治安法官經預審後認本案不存在合理根據相信犯罪已經發生或該案係被告所為，則治安法官應駁回檢察官之起訴，撤銷對本案被告之起訴。惟該撤銷並無排除政府機關就同一犯罪再次提出起訴之效力。

 該條英文全文如下:

**Rule 5.1. Preliminary Hearing**

**(a) In General.** If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony;

(4) the government files an information charging the defendant with a misdemeanor; or

(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

**(b) Selecting a District.** A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

**(c) Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody.

**(d) Extending the Time.** With the defendant’s consent and upon a showing of good cause—taking into account the public interest in the prompt disposition of criminal cases—a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

**(e) Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

**(f) Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

**(g) Recording the Proceedings.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.

**(h) Producing a Statement.**

**(1) In General.**Rule 26.2(a)–(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

**(2) Sanctions for Not Producing a Statement.**If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

四、大陪審團(The Grand Jury)

依聯邦憲法修正條文第五條之規定，非經大陪審團提起公訴，人民不受死罪或其他不名譽罪之審判，但戰時或國難時期服現役之陸海軍或國民兵所發生之案件，不在此限。同一罪案，不得令其受兩次生命或身體上之危險。不得強迫刑事罪犯自證其罪，亦不得未經正當法律手續剝奪其生命、自由或財產。非有公正賠償，不得將私產收為公用[[23]](#footnote-23)。其英文原文如下:No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.。其中所謂不名譽之罪應包含所有的重罪起訴，故經大陪審團提起公訴之案件，適用於所有重罪起訴。檢察官向大陪審團成員出示證據，若多數大陪審團成員認為證據以足證明犯罪嫌疑人所涉本案犯行，該等成員即會認定起訴之效力。大陪審團之調查程序非公開之程序，在聯邦大陪審團中，僅大陪審團成員、檢察官、證人及書記員在場。而大陪審團程序中亦無律師在場權之問題。大陪審團就事證之審查其標準係有無合理依據證明被告涉犯本案犯行，且若大陪審團已決定起訴某被告之某犯罪事實，則多數司法轄區之規定係此時法院就該案件之起訴證據質、量均不予審查。且大陪審團尚有證據調查權，而能強制證人出庭作證、或命其交付相關文件，縱使依修正條文第五條之規定被告有不自證己罪之權利，惟證人仍須出庭作證，僅係其證述不得用於反對該證人之用。

依美國聯邦刑事訴訟規則於第六條就大陪審團之設置、權益等亦設有相關規定如下:

（a）大陪審團之召集:

 （１）通則:基於公共利益所需，法院應召集一個或數個大陪審團。大陪審團應由１６至２３人所組成。法院應指示召集足夠的合格之陪審員候選人以供選任。

 （２）備位陪審員:當選任大陪審團時，法院得指定備位陪審員。備位陪審員之選任方式與陪審員相同，備位陪審員應以同樣順序遞補陪審員。其為遞補時應與陪審員一樣宣誓，而享有相同之權力。

 （b）對大陪審團或大陪審員提出異議

 （１）異議:雙方當事人均得以大陪審團係非依法定程序選任、召集為由，對大陪審團提出異議，也可以對個別陪審員以其不符法定資格為由提出異議。

 （２）撤銷經大陪審團簽發之起訴書:除了法院先前已依前款規定就同一異議之聲請為准駁決定者外，當事人得依據對陪審團或個別陪審員欠缺法定資格異議之聲請，進而聲請撤銷該大陪審團簽發的起訴書。聲請撤銷經大陪審團審查之起訴之法律依據，係依據美國法典第28 1876（e）之規定。且在一名陪審員不符法定資格情形下，若依記錄所示該起訴書仍經１２名以上陪審員同意簽發，則法院仍不能以此為由撤銷該起訴書。

 （c）陪審團長和副陪審團長

 法庭應指定陪審員中的一位為陪審團長，另外一位為副陪審團長。陪審團長得執行宣誓及聲明，簽署起訴書。陪審團長缺席時，由副團長代理，且陪審團長或經團長指定之陪審員將記錄同意簽署起訴書之陪審員人數，並將記錄送交書記官。然除經法院命令，否則該記錄不得公開。

 （d）

 大陪審團開庭時，檢察官、接受詢問的證人、通譯得出庭，速記員和錄音人員為記錄證據也可以在場。但大陪審團評議和表決時，除陪審員外，其他任何人不得在場。

 （e）程序之記錄和公開

 （１）所有過程，除大陪審團的審議和表決外，應由速記員記錄或使用適當之錄音設備記錄之。且非因故意而造成之記錄失敗，並不影響起訴之效力。除法院另有規定外，應由檢察官保存大陪審團之記錄、或其他相關書面資料。

 （２）依6(e)(2)(B)所生之保密義務，除另有規定外，大陪審團成員、通譯、書記官、錄音員、記錄員、檢察官或其他依據第（３）（A）（ii）規定可以在大陪審團開庭時在場者，均有保密義務。

 （３）例外

 （A）除大陪審員的決議和表決外，有關大陪審團審議過程，得於下列情形公開：

 （i）檢察官為履行職責所需要；

 （ii）檢察官認為對協助其履行聯邦刑法賦予職責所必要者。

 （iii）依據美國法典18 ，3322條規定授權者。

 （B）除依前述規定知悉者，為協助檢察官執行職務外，不得利用大陪審團審議過程之資料為協助檢察官執行職務外之使用。

 （C）在下列情況下，有關大陪審團開庭期間的資料得公開：

 （i）當法院預先指示公開或者司法程式要求公開時；

 （ii）在有跡象表明因發生在大陪審團開庭期間的情形而存在申請撤銷起訴書的理由，法院根據被告人的請求而批准公開時；

 （iii）檢察官對另一個聯邦大陪審團透露時；

 （iv）在有事證顯示這些資料對州或地方有關官員出於執行州刑法的目的，得證明違反州刑法之行為者，法院根據檢察官的請求而批准公開時；

 如果法院指示公開大陪審團審議期間的有關情況，應按照法院指示的方式、時間和條件進行公開。

 （D）按照本條第（e）（３）（C）（i）的規定請求公開的聲請書應在該大陪審團被召集的地區法院存檔。除非聽證是對一方進行的 （當檢察官提出申請時可能出現這種情況），否則申請者應對下列人員以書面方式送達關於聲請書的通知：

 （i）檢察官；

 （ii）訴訟當事人，如果公開資料與該訴訟有關；

 （iii）法院指示的其他人員；

 法院應當對上述人員提供合理的機會出席旁聽。

 （E）如果引起聲請的訴訟是在其他地區的聯邦地區法院進行的，受理的法院應將此事項移送該法院處理，但受理法院能合理地獲得有關該訴訟的充分資訊以確定公開材料是否合適時除外。如果可行，受理法院應當指令向接受法院移送被要求公開的有關大陪審團的材料和一份是否需要繼續將此材料保密的書面評估。接受移送的法院應當向前面所規定的人員提供合理機會出庭旁聽。

 （４）起訴書之保密

 受理起訴書的治安法官可以指示對起訴書保密至被告人被羈押或者被審判前釋放。此時書記官應將該起訴書封存，除出於簽署和執行逮捕令或傳票的需要外，任何人不得洩露起訴書。

 （５）秘密聽證

 在藐視法庭的訴訟中涉及公開聽證的權利時，法院應指示對影響大陪審團程式的事項進行聽證。聽證會應在為防止洩露大陪審團開庭期間情況所必要的範圍內進行。

 （６）記錄保密

 與大陪審團程式有關的記錄、指示和傳票應當在為防止洩露大陪審團開庭期間情況所必要的範圍和時間內密封保存。

 （f）大陪審團起訴書的裁決和返還

 只有在１２名以上（包括１２名）陪審員同意的情況下才能對大陪審團起訴書作出裁決，起訴書應當由大陪審團在法庭上公開返還治安法官。如果存在針對被告人的控告狀或檢察官起訴書，而１２名陪審員未同意簽署大陪審團起訴書，陪審庭庭長應當以書面形式向治安法官報告。

 （g）解散和免職

 大陪審團履行職務直至被法院解散，但期間不得超過１８個月。法院認為出於公共利益需要可以適當延長大陪審團的期間，但不得超過 ６個月。任何時候法院根據情況需要都可以暫時或永久撤免陪審員。在永久撤免的情況下，法院可以選任另外一人代替被免職的陪審員[[24]](#footnote-24)。

美國聯邦刑事訴訟規則第六條英文全文請參考如下:

Rule 6 of the Federal Rules of Criminal Procedure illustrates typical procedures of the grand jury.

(a) Summoning a Grand Jury.

(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors*.* When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under [Rule 6(b)(1)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_b_1). The motion to dismiss is governed by 28 U.S.C. §1867 (e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting*.* No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with [Rule 6(e)(2)(B)](http://www.law.cornell.edu/rules/frcrmp/rule_6).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under [Rule 6(e)(3)(A)(ii)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_A_ii) or [(iii)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_A_iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. §3322.

(B) A person to whom information is disclosed under [Rule 6(e)(3)(A)(ii)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_A_ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in [50 U.S.C. 3003](http://www.law.cornell.edu/uscode/text/50/3003)), or foreign intelligence information (as defined in [Rule 6(e)(3)(D)(iii)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_D_iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under [Rule 6(e)(3)(D)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under [Rule 6(e)(3)(D)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under[Rule 6(e)(3)(D)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in [Rule 6(e)(3)(D)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_D), the term “foreign intelligence information” means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

• actual or potential attack or other grave hostile acts of a foreign power or its agent;

• sabotage or international terrorism by a foreign power or its agent; or

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under [Rule 6(e)(3)(E)(i)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_E_i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in [Rule 6(e)(3)(F)](http://www.law.cornell.edu/rules/frcrmp/rule_6#rule_6_e_3_F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing*.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of [Rule 6](http://www.law.cornell.edu/rules/frcrmp/rule_6), or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under [Rule 6](http://www.law.cornell.edu/rules/frcrmp/rule_6), may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

**陸、審前動議-關於證據排除聽證程序(Pretrial Motion-Suppression Hearings)**

何種證據得被排除

在美國得被排除之證據一般可區分為:① 被告之承認犯罪及其他不利於己之供述，以及警察依據被告之供述而取得之其他人證及物證;②依非法搜索而取得之物證;③違反法律之規定所進行含暗示性、誘導性之對被告之指認。

 雖然被告於訊問過程中有權要求律師在場，且依法律規定犯罪嫌疑人業已請求律師在場者，此時訊問應立即中止待律師在場之庭期。如果在偵訊被告時已有律師在場，一般情形下律師多建議當事人行使緘默權，惟有時在檢察官保證被告此時所作之供述將不會於嗣後之程序中作為不利於被告之證據，則被告可能不行使緘默權。又若被告在羈押期間對警察之詢問做出了供述，此後又以該供述係詢問者以非法之方式、手段所取得而更異其詞以進行翻供，此時律師就必須通過向法庭聲請動議對被告所辯稱之上開非法取得之供述證據進行排除。

動議之形式、聲請之條件及期限

為了排除證據被告向法院聲請排除證據之程序時，必須通過提交排除動議來聲請進行該證據排除之程序。該動議通常會包括一個對該動議進行聽證的聲請。而法院對於被告聲請開啟證據排除程序多會准許。多數司法轄區的法律要求以書面方式提交該證據排除動議。該書面動議亦須具體表明被告想要排除之證據，並且具體說明其主張該證據應予排除之相關法律依據。

而併與動議一併提交予法院的尚有宣誓陳述書(Affidavit)，該宣誓陳述書係針對事實為描述之書面，出具者須宣誓並簽名於其上，而自負偽證之責。該宣誓陳述書係由被告本人出具，出具者對於其所述之事實須有非屬傳聞所得之直接證據。縱被告為此宣誓陳述書，亦非表示被告對緘默權的放棄，且該等書面資料原則上亦不會作為審判時之依據。

司法轄區就聲請證據排除者會要求其等須向法庭提交一份支持該動議的法律要點和淵源的書面資料。所有這些資料都必須在合理的時間送達予公訴人，以使公訴人有充足時間進行書面答覆; 被告亦得再就公訴人之答覆進行書面答辯。一般情形下，縱使被告僅泛稱係因為其未放棄緘默權或是未放棄訊問時之律師在場權，所以其先為所為之某不利於己之供述，係違反米蘭達原則下所為，抑或其先前所為之某不利於己之供述，係其在非任意性之情形下所為者，此時美國法院均從寬審認而倾向於舉行證據排除之聽證序。蓋在美國實務上，若在此情形下未舉行證據排除聽證程序，嗣於本案判決後上訴程序中主張及此時，較之沒有對該證據舉行聽證所為之判決，與聽證之後所為之判決則較少被上級審推翻。

若被告所聲請排除之證據係以違反米蘭達權利為由，此時被告必須先提出事實情况说明供述作出時被告確實係人身受到拘束之情形下接受詢問，且被告為此供述時係在未經告知米蘭達權利或係未經過法定程序以放棄該權利所為。至於被告人身是否確有受到拘束則應依據當時客觀事證綜合判斷之，而警方之詢問係指由警方對犯罪嫌疑人所實施具有誘導性之詢問，使犯罪嫌疑人因此做出該不利於己之供述。若被告主張其所為之不利於己之供述，係出於非任意性所為者，而向法院聲請排除該證據，則其於聲請動議須提出具體事實說明該供述是在被迫下所為。依美國法規定，聲請證據排除，若僅以被告受有脅迫、誘導或受到不當之影嚮，此種非具體之陳述尚不足以使法院發動證據聽證程序。被告之聲請必須提出更為具體之事實，如時間、地點、方式、手段等舉例說明究係於何時、何地、接受何人之詢問，何人在場、何人先發問、犯罪嫌疑人是否非在人身受拘束之情形下所為等情，均被認認係被告於證據排除聲請時應予說明者。惟如前所述，多數法院就證據聽證程序聲請之標準係予以寬認之。

美國多數司法轄區的刑事訴訟法律規定，多要求排除聲請應在審理前的某一確定期間內為之，並應給予檢察官為答復、準備聽證的適當期間。為了在期限內向法庭提交排除聲請，刑事辯護律師可以請求公訴人出示所有依法應當開示之證據，包括被告之供述。在審理前對證據的證據能力進行判斷，亦有助於將審理集中焦點，而焦中審理於對被告有罪、無罪之事實認定，而非與有罪、無罪判定無關的證據上;同時亦得為當事人雙方之認罪協商過程和舉證策略的選擇上，提供更為準確之資訊。若被告確曾於期限內向法院聲請證據排除，嗣為法院所駁回者，審理時被告又對此提出異議，此時被告可就法院對該聲請之駁回提起救濟;若被告在審理時未及時提出此項異議或其異議無正當理由，則視為放棄該異議權。若被告在審理中有提出此項動議，此時法院有自由裁量權以決定是否允許提出及准許該聲請。聽證程序舉行之前，法院可要求檢察官向辯方提供包括警察詢問筆錄在內之先前證人之證述資料，辯護律師得於交互詰問時使用該等資料詰問證人。

就證人到庭作證時之程序

證據排除聽證程序主要包含證人到庭作證、對物證之說明及為最後之言詞辯論。當事人雙方均有權要求所有包含警察在內之必要證人請其等出庭作證，並對證人進行詢問。檢察官通常在此情形下負有舉證責任，所以通常情形下係由檢察官先聲請傳訊證人(通常是警察)作證。被告也可以聲請傳訊證人出庭作證，以證明與上開動議相關之事實。而由法官基於各證人證述之可信性對排除動議作出裁決。在多數排除聽證程序中，被告縱有證人之適格及有權到庭作證，但多不親自作證。且排除聽證程序中，基於聯邦憲法增修條文第六條規定:在一切刑事訴訟中，被告應享受下列之權利：發生罪案之州或區域之公正陪審團予以迅速之公開審判，其區域當以法律先確定之；要求通知告發事件之性質與理由；准與對造證人對質；要求以強制手段取得有利於本人之證人，並聘請律師為之辯護。被告仍享有相關之對質權，即被告仍得聲請傳訊對其不利之敵性證人，並對其進行交互詰問，亦得聲請傳訊對其有利之友性證人到庭作證，惟與審判時相較，此時被告所享有之上開權利仍受有較多的限制。在聽證程序中證據資料是依據對證人進行交互詰問及訊問而取得。聽證程序中之證據係限於證據排除關聯性之證據，而非針對本案犯罪事實。聽證程序其實類似小型之審理程序，當事人會對證人證述之可信性等進行言詞辯論。未進行聽證程序者，因警方提出之書面資料不具證據適格，即無相關事證在案。且聽證程序中之證據法則相對於審理程序而言較為寬鬆，故通常排除證據之聲請，法院不能單憑書面資料逕行決定。證據排除聽證程序中檢察官仍負有舉證之責，惟此時證明之標準是出示優勢證據，即相較於他方係屬「更有可能」者，例如被告聲請提出被告供述時，其米蘭達權利受到侵害，並有證據證明被告供述時，確實在人身受到拘束下對其進行詢問，此時檢察官機必須提出優勢證據證明:警察對被告進行詢問時確實有對被告進行米蘭達警告，且被告確係在明知、理智、自願之情形下放棄相關權利而為供述。又若被告辯稱其所為之供述係非自願所為，而應予排除，此時檢察官亦應依優勢證據證明其所為之相關供述，確係被告出於任意性所為。又如被告辯稱，聲請排除之證據是警察以刑求逼供…等違反正當法律程序或以其他不正方式所取得，此時檢察官自應依優勢證據駁斥之。

若被告有經濟上之困難，則被告之辯護人得提出由國家負擔被告聲請傳訊證人的費用。此一聲請必須釋明被傳喚之證人之待證事項，並表明該等待證事實確屬進行充分辯護所必要者。若法院准許該聲請，書記官會準備正式傳票交予被告填寫其欲聲請傳喚之證人並送達之，請其到庭作證。經傳訊之證人若無正當理由不到庭而違反法院之傳喚者，可能須負藐視法庭之刑事責任，且此時法院得簽發令狀拘提該證人。若檢察官未盡其舉證之責，此時法院得以此為由認為檢察官未能舉證以實其說。

證據排除聽證程序應具備之基本條件

某些司法管轄區對證據聽證程序之基本條件有具體規定。被告有義務就聽證程序和證據排除所要求之事實上及法律上之依據舉證。且只有法官有權决定是否舉行證據排除聽證程序。准許與否亦由法官依據下述之標準自由裁量之:①在動議所述的具體事實確實存有疑點或争議，且無法依書面審查即得以釐清該等事實者，此時法官自須准許該聽證之聲請。最重要的是，被告必須表明若其所主張之抗辯事實證明屬實者，其即能取得證據排除之效果之關聯性。動議和宣誓陳述亦須明確、具體、非屬推斷，以使法院能夠得出上開論點，而認為被告所提之證據排除聽證之聲請應予准許。至少，依被告所提之書面資料必須指出理由以支持該動議之法律依據，亦須同時列出法律上支持該等理由之事實(經宣誓者)。且其所述之事實尚需基於其個人之認識、經驗即直接取得者，而非據稱或推測所得者。

傳喚證人出庭及證人之證述

證據排除聽證程序主要包括證人到庭作證、對證據資料為說明及為最終的言詞辯論。雙方均有權要求所有必要的證人，包含警察出席聽證程序，並對此等證人進行詢問。基於公訴人對犯罪事實有舉證責任，所以通常情形下由檢察官聲請傳訊證人(通常是警察)作證。被告也可以聲請傳訊證人出庭作證，以證明與上開動議相關之事實。而由法官基於各證人證述之可信性對排除動議作出裁決。

在多數排除聽證程序中，被告縱有證人之適格及有權到庭作證，但多不親自作證。且排除聽證程序中，基於聯邦憲法增修條文第六條規定:在一切刑事訴訟中，被告應享受下列之權利：發生罪案之州或區域之公正陪審團予以迅速之公開審判，其區域當以法律先確定之；要求通知告發事件之性質與理由；准與對造證人對質；要求以強制手段取得有利於本人之證人，並聘請律師為之辯護。被告仍享有相關之對質權，即被告仍得聲請傳訊對其不利之敵性證人，並對其進行交互詰問，亦得聲請傳訊對其有利之友性證人到庭作證，惟與審判時相較，此時被告所享有之上開權利仍受有較多的限制。

若被告有經濟上之困難，則被告之辯護人得提出由國家負擔被告聲請傳訊證人的費用。此一聲請必須釋明被傳喚之證人之待證事項，並表明該等待證事實確屬進行充分辯護所必要者。若法院准許該聲請，書記官會準備正式傳票交予被告填寫其欲聲請傳喚之證人並送達之，請其到庭作證。經傳訊之證人若無正當理由不到庭而違反法院之傳喚者，可能須負藐視法庭之刑事責任。

法院之裁定及證據排除聲請動議之結束

待對所有證人之訊問及交互詰問結束後，當事人雙方會進行言詞辯論，針對具體之判決例於聽證程序中之相關爭點進行說明，嗣後法院會當庭或於庭後一段期間內進行裁定，並於裁定中說明理由。若法院裁定排除本案主要或全部積極證據，法院此時可宣布駁回本件起訴，或由公訴方自行撤回本件起訴。被告及其辯護人亦得聲請法院駁回本件起訴。反之，若法院僅排除部分事證，而不影響全案之審理者，本案之審理程序仍將在排除該等證據後續行。又若法院完全駁回被告證據排除之聲請者，於後續審理程序中，該等證據自仍有證據之適格，而得於審理中作為認定事實之證據。

另被告究係選擇認罪或行使其要求審理之權利，通常取決於檢方出示之積極事證是否足以證明本案犯罪事實、及被告所有之證據是否足以支持其抗辯、被告認罪後可能面對之刑罰及不認罪後可能之刑罰，影響足大。是當事人針對法院就證據排除聽證程序所為之裁定，自得於本案判決後以上訴一併救濟之，若上級審法院認為該法院排除某事證之裁定不當時，上級審法院可自行判決或發回重審。且縱使法院駁回證據排除之聲請，檢察官於審理中就被告不利於己之供述係出於其任意性之事實仍負有舉證之責

為使我國實務工作者得以本國熟悉之法律用語理解全文，就此部分之說明、翻譯本人已儘量以國內實務界之常用字彙為之，然因本人英文能力有限，為使讀者於有疑惑時能有資料得以解惑，爰將上開說明之英文原文一併供作讀者之重要參考:

1. What Can Be Suppressed?

In the U.S., evidence that can be 'suppressed" falls into three basic categories: 1) a defendant's confession Or other statements and the evidence, either testimonial or physical, that was found by the police as a result of the defendant's statements;2) physical evidence seized through an illegal search, with or without a warrant; and 3) illegally suggestive identification procedures of the defendant. We will focus here on the suppression of a defendant's statements because China now has this type of exclusionary rule. Although a defendant has a right to have a lawyer present during interrogation, attorneys are rarely called when a suspect asks for an attorney, since most police agencies are neither equipped nor willing to provide lawyers for indigent suspects upon request. As a result, a suspect's request for counsel during interrogation requires the prompt termination of the questioning and 1he return of the defendant to detention to await his appearance in court.,, if counsel is present, he will usually advise his client to assert his right to refuse to answer questions unless the prosecutor has agreed to not use any statement made by the defendant against him. If a defendant in custody makes a statement to the police and later seeks to suppress that statement on the ground that it was obtained illegally his lawyer must a file a motion in court to suppress the statement.

2. Form of the Motion, Threshold Showing, and Timing Constraints

a. Motion to Suppress, Affidavit, and Memorandum of Legal Points & Authorities

In order to suppress evidence a defendant must file a-motion to suppress. Such a motion usually include a request to hold a hearing on the motion, and a hearing is usually granted.

Most jurisdictions' local rules require that a motion to suppress be in writing. The motion must identify the evidence the defendant seeks to suppress and specify the legal grounds with particularity. An affidavit (a written statement of facts, signed under oath and penalties of perjury), by someone with direct knowledge of the facts averred-usually the defendant- must accompany the motion. The affidavit is not a waiver of the defendant's right to silence, and is generally inadmissible at trial, with some exceptions. Many jurisdictions also require a memorandum of legal points and authorities in support of the motion. The prosecution must be notified of and given copies of the motion papers, and is entitled to sufficient time to respond in writing; the defense may also submit a reply brief. In general, American courts are willing to hold hearings based on a minimal statement that the defendant's statement was obtained in violation of his rights under Miranda or other involuntariness grounds because he did not waive his right to silence or his right to have an attorney present. This is because it is less likely for a court's decision to be reversed on appeal if the judge makes a decision after hearing the evidence.

b. Threshold Showing Required to obtain an Evidentiary Hearing

A jurisdiction's decision on the threshold showing necessary to obtain a hearing is a critical one. The initial burden is on the defendant to present a factual and legal basis fora hearing and for suppression of evidence. Only a judge may decide whether to grant an evidentiary hearing; this decision is in the judge's discretion, based on the following standards. A hearing must be granted only if the motion states specific grounds for Suppression, making an initial showing that material facts are in doubt or dispute and that such facts cannot reliably be resolved on a paper record. Most importantly, 1he defendant must show that there are factual disputes which, if resolved in his favor, would entitle him to the requested relief.,, The motion and affidavit(s) should be sufficiently definite, specific, and non-conjectural to enable the trial court to conclude that a substantial claim is presented and the hearing is warranted. At a minimum, the papers should allege a ground constituting a legal basis for the motion, with swore allegations off act that, as a matter of law, support this ground. If possible, allegations should be based on personal knowledge. Affidavits based upon "information and belief' (as opposed to direct knowledge) are also acceptable if they provide the sources for the information and the basis for the beliefs.

When the motion is to suppress the defendant's statements obtained in violation of his Miranda rights, he must make a threshold showing of facts that indicate he was "in custody and under interrogation" when the statements were made, and that he was either not informed of his Miranda rights or was made to waive them unlawfully. "Custody' is determined based on the "totality of the circumstances," and "interrogation" is defined as words or conduct by police that are 'reasonably likely to elicit an incriminating response from the suspect", but also applies to nonverbal conduct that is the "functional equivalent" of interrogation. Likewise, if the defense moves to suppress a statement based on its involuntariness, the defendant must declare specific facts in the motion that support the conclusion that it was made under coercive circumstances, based on the totality of the circumstances. Alleging, in a conclusory fashion, only that a defendant was "coerced", "cajoled", and "subjected to undue influence", has been held insufficient to require the court to hold an evidentiary hearing on a motion to suppress statements. More specific facts, such as the time, place, manner, and means-i.e., when the questioning took place, where, who was present, who initiated questioning, whether the defendant was free to leave or not (if not, why), etc., must be alleged for a defendant moving for suppression of statements to be granted a hearing. However, as noted above, most courts are fairly lenient in granting motions for evidentiary hearings.

c. Constraints on Time for Filing; Consequences of Late Filing

Rules of criminal procedure in most U.S. jurisdictions require that a motion to suppress be filed prior to trial, within certain time limits, and the prosecution must be allowed time to respond and prepare for a hearing. Defense counsel can request disclosure by the prosecution of all required discovery including defendant's statements, for purposes of timely filing of a motion to suppress. Determination of admissibility before trial helps keep the trial focused on the issue of guilt or innocence as opposed to the unrelated issue of suppression; it also helps the parties make informed plea agreement decisions and tactical decisions about evidence at trial. If the motion is timely filed but fails, the objection is preserved for appeal if raised again at trial. If not timely made, without justification, the objection could be deemed waived on appeal. If made at (rather than before) trial, a court has discretion whether to hear the motion, unless the defense shows ''good cause" for the delay (such as having no earlier opportunity for a hearing, or the discovery of new grounds).Before the hearing, the prosecutor may be required to provide the defense with any previous written statements of the witness, including police reports. The defense may use those statements to cross-examine the witness.

3. Compelling Witness Presence &Testimony

A suppression hearing consists mainly of witness testimony, some introduction of physical evidence, and time at the end for oral argument. Both parties are entitled to summons and question all witnesses necessary to the hearing, including police officers. The prosecution usually bears the burden of persuasion, so he usually calls the witnesses, who are usually police officers. A defendant may also call police witnesses to establish facts pertinent to the motion. A judge's suppression decision, therefore, often depends on his explicit assessment of each officer's credibility. (In most suppression hearings, the defendant does not testify, though he has a right to testify.) The defendant has reduced Sixth Amendment rights to confrontation and compulsory process at suppression hearings, meaning that although he is entitled to cross-examine the witnesses against him, to summons (legally compel) witnesses in his favor and have their testimony heard by the judge,. these rights are reduced in comparison to the full set of rights at trial. If the defendant is indigent, his attorney may file a motion to summons a witness at government expense. The motion must include a summary of expected testimony demonstrating that it is "necessary to present an adequate defense." If the judge allows the motion, a subpoena form bearing court seal is produced by the clerk for the defense to fill out, and is sewed on the witness at a specified. The process server can be any person over age 18 who is not a party in the case. If the Subpoena is successfully sewed, the process server must fill out a ''proof of service" form. If the defense or prosecution can prove that any witness-including a law enforcement officer-has been properly sewed with a subpoena, but failed to obey it, without an adequate excuse, that and a warrant may be ordered and issued for that person's arrest. Of course, if the prosecution fails to produce a necessary witness the court may find that he has not met his burden of proving that the statement was obtained lawfully.

4. Basics of an Evidentiary Hearing on Motion to Suppress

At a suppression hearing, the prosecution bears the burden of persuasion, and the standard of proof is the preponderance of the evidence, or "more likely than not" standard. Evidence at the hearing is introduced through testimony in response to direct and cross- examination. The scope of the evidences limited to the suppression issue and does not include guilt or innocence. The hearing resembles a mini-trial, followed by oral argument by both sides based on the testimony and how the law applies to it. Without the hearing, there are no ''facts" on the record, because police reports and other written statements are not admissible for their truth, though evidentiary rules at the hearing are more relaxed than at trial. As a result, motions to suppress generally cannot be decided on the basis of written pleadings and documents alone. In a motion alleging a Miranda violation, if testimony establishes that the defendant was "in custody" and under "interrogation" at the time statements were made, the prosecution bears the burden of proving, by a preponderance, that Miranda rights to silence and counsel by the defendant. If the defendant is alleging that his statement should be suppressed because it was not made voluntarily, the prosecution also has the burden of proving that the statement was voluntary, by a preponderance of the evidence. If it was alleged that statements were obtained as the product of police misconduct, such as physical abuse or torture, that offends due process or shocks the conscience, the prosecution must prove that this was not so, by a preponderance. Otherwise, the defendant will win the motion and the statements will be excluded.

5. The Conclusion and Consequences of the Motion

When the direct and cross-examination of all witnesses is finished, the judge will allow both the prosecution and defense to make a legal argument, applying detailed case law to the facts presented in the testimony at the hearing. Either immediately, or within a designated period of time prior to trial (unless there is good cause for delay), the judge must make a decision regarding the suppression of each piece of evidence challenged in the defendant's motion, and must state all essential findings on the record. If the judge grants suppression of all or most of the evidence, the judge may dismiss the case or the prosecution may decide to do so, on its own. It is not uncommon for the defense to move for dismissal in either of these two scenarios. If the judge suppresses only some of the evidence, or the prosecution still has sufficient evidence on which to try the case, the case will proceed without the suppressed evidence. Finally, if the judge denies the motion entirely, the case will proceed with the questioned evidence. in the last two scenarios, it is common for plea bargaining to occur, Or for the defendant to plead guilty regardless of the prosecution's Offer; the strength of the remaining evidence, and any available defense evidence, as well as sentence estimates on a plea versus after conviction at trial, will determine whether the defendant will exercise his right to go to trial or decide to plead gully. The prosecution may appeal the judge's decision prior to trial; the defense may appeal it as well but must wait until after the case has a final judgment and sentence. If an appellate court finds that the lower court should have excluded evidence, it can overture a conviction and/or remand the case back to the lower coon.

Even if the court denies the motion to suppress, the prosecution still has the burden of proving at trial that the defendant's statements were made voluntarily.[[25]](#footnote-25)

**柒、證據開示(Discovery)及有罪答辯與認罪協商程序(Guilty Pleas and Bargaining)**

一、證據開示

(一)概述:所謂證據開示，簡言之即被告於審理前對檢察官所持之證據有權知悉，而檢察官亦有向被告方出示該等證據之義務。而基於憲法修正條文第五條、第十四條規定之要求，聯邦最高法院認為若某證據對於案件是否成立或刑罰之科處具實質影響者，檢察官不得排除對被告有利之證據，否則有違正當程序條款之規定。原則上就檢察官之開示義務而言，係啟於被告之聲請，至於證據開示之範圍，依聯邦刑事訴訟規則第16條之規定，包含被告之供述、物證、書證、證人之證述、犯罪記錄、鑑定結果等。

(二)相關實務見解

1、Brady v. Maryland

在本案中犯罪嫌疑人因涉犯殺人罪嫌遭起訴，該被告並曾於偵查中供承實施殺人行為者係另一共犯，惟於審理中並未出現該份有利於該被告之證據，嗣該被告仍經判處死刑，該被告上訴後，最高法院認為該被告先前有利於己之供述未經呈現於法院而被審酌，對其刑之量處有實質影響而撤銷原判決。

2、United States v. Agurs

在本案中犯罪嫌疑人因涉犯殺人罪嫌遭起訴，於審理程序中被告辯稱其所為者係實施正當防衛，惟法院未採其前開辯解而判處其刑，嗣於上訴程序中被告主張檢察官就被害人先前曾有攜帶致命武器、攻擊等犯罪記錄未予呈現於審理庭，而請求撤銷原判決，嗣最高法院認為被害人之犯罪記錄對於被告之罪、刑並不具實質影響性，而駁回被告之聲請。

3、United States v. Bagley

在本案之偵查階段，某證人應向警察作證指證犯罪嫌疑人之犯行而獲得費用之給付，且於審理中被告確曾提出就任何交易、承諾、誘因等證據之聲請，惟檢察官因不知悉而未將該事證呈現於法院，嗣最高法院認為，就此而言該證據僅屬彈劾證據，不具實質影響性。

二、有罪答辯與認罪協商程序

若被告於刑事程序中為有罪之答辯者，經法院審酌確認其所為之有罪答辯確係出於任意性，且被告亦明瞭其為有罪答辯後之效果者，即表示其放棄由陪審團審理及法院審理之權利，法院得逕為判決。依聯邦刑事訴訟規則第十一條(b)(2)之規定，第一審法院應在公開法庭上親自告知被告之方式確認該有罪答辯係出於該被告之任意性而非出於脅迫、恐嚇或其他不正方式者，並確定被告理解其所為之答辯性質及相關問題、法律效果後，始認該有罪答辯係屬有效。其英文原文如下:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

 (2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

 又依聯邦訴訟規則第十一條(b)(3)之規定，法院在對被告有罪答辯作出判斷之前，須確認被告之有罪答辯確有事實基礎之存在。其英文原文如下:

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

認罪協商程序係被告，為換取來自他方當事人之承諾而為之有罪答辯程序。依聯邦訴訟規則第十一條(c)之規定，通常情形下，雙方當事人進行認罪協商程序時，法院不得參與其中，而就已受刑事訴追起訴之被告，為取得檢察官之某些承諾，如撤銷部分起訴、起訴之範圍、罪名等而與檢察官於法庭外所進行之磋商、談判後，所為之有罪答辯。當雙方達成認罪協商之協議時，應告知法院，而法院對雙方之協議得接受或拒絕，若法院接受該協議，則應通知被告准依其等協議內容為判決。就檢察官、法院而言，認罪協商程序則使司法資源得以撙節、避免不必要之時間勞費，亦得以避免審判之不確定性。在美國司法實務上，認罪協商程序實係被大量的採用，在有些州以認罪協商程序處理之案件，甚至超過百分之九十。

聯邦訴訟規則第11條(c)英文全文如下:

(c) Plea Agreement Procedure.

(1) In General*.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement*.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in [Rule 11(c)(1)(A)](http://www.law.cornell.edu/rules/frcrmp/rule_11#rule_11_c_1_A) or[(C)](http://www.law.cornell.edu/rules/frcrmp/rule_11#rule_11_c_1_C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in [Rule 11(c)(1)(B)](http://www.law.cornell.edu/rules/frcrmp/rule_11#rule_11_c_1_B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

**捌、審理程序及量刑與上訴**

一、概述:美國刑事訴訟之審理程序，大致上來說其進行如下:選定陪審團(Jurors Selection)依憲法修正條文第六條之規定，被告有權由公正陪審團迅速公開審理之權，依最高法院判例認定，被告享有陪審團審理之權係以受六月以上自由刑以上刑之案件為準，在聯邦訴訟程序中，陪審團一般由12人所組成，且其等就被告有罪之認定，需一致通過陪審團之成員應來自各不同階層，而有廣泛之代表，並經挑選程序而決定;開場陳述(Opening Statement)，在進行審理程序時，係由檢察官先向陪審團簡要說明案件之性質及事證，以使陪審團成員得以大致瞭解案情;檢方出證(Presentation of Government’s Case)，於開場陳述後，負有舉證責任之檢察官即向法院提出本案犯罪事實之相關證據，並聲請傳訊相關證人及調查相關物證;辯方出證(Presentation of Defendant’s Case)，待檢方舉其積極事證後，被告應就其辯解提出相關證據以實其說;言詞辯論(Closing Arguments), 待相關證據調查完畢後，當事人應就本案進行言詞辯論;指導陪審團(Instructing the Jury)言詞辯論後，在陪審團進行評議之前，法官應就陪審團所負之相關義務、與本案有關之法律規定、本案事證所涉爭議…等，對陪審團予以說明;評議與判決(Deliberations)，法官以指定陪審團長或由陪審團選出一名陪審團長及副團長後，進入評議室內進行評議，聯邦法院審理程序，係對被告有罪之認定，需由全體陪審團成員一致同意，惟有些州不要求陪審團就被告有罪之認定，需經全體陪審員一致同意為必要，若評議後無法得結論者，即為無效審判，而另組成陪審團重新審理。

二、量刑與上訴(Sentencing and Appeal)

於陪審團對被告作出有罪之判決後，法官在陪審團之有罪判決範圍內對被告量刑，美國之刑罰種類，包括死刑、自由刑(含無期、有期及非確定期自由刑)、罰金刑及沒收、緩刑。法院在對被告量刑時，應給予被告說明之機會，另關於被告之家庭、經濟、前科等背景資料之緩刑監視報告亦會提出於法院，供法院審酌。且若大陪審團簽發之起訴書或經治安法官審查後之檢察官起訴書中業已聲請就犯罪所得之財產、利益應予沒收者，應對該等客體宣告沒收之且當陪審團之決定應予沒收者，應由檢察官執行之。

不論在聯邦或各州之刑事訴訟程序，被告均享有上訴權，在某些州，檢察官亦有權對被告之有罪判決提起上訴。惟上訴時上訴人或上級審法院均不得就陪審團認定之事實再為爭執或更異其決定，只得就實體法或程序法上之適用為爭執，故其上級審係法律審而非事實審，惟就一審法院關於證據排除與否之裁定，經當事人於期限內異議者，上級審仍得審就，若該證據之裁定嗣經撤銷而足以影響陪審團之判決者，得以此為由撤銷原判決。

 **第二部分 美國刑事案件財產沒收制度概述[[26]](#footnote-26)及沒收後之分享**

1. **美國沒收制度:**

一、概述:美國聯邦刑事案件沒收制度起源於英國習慣法，嗣並逐漸擴大沒收範圍及於犯罪利得、犯罪工具及其他便利犯罪行為之財物等之沒收，其中沒收範圍最廣者係屬美國政府在911事件後，為對抗恐怖主義所制定之有名的愛國者法案(Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism USA PATRIOT ACT)，依據該法美國政府得沒收犯罪行為人的任何財物，甚至不問該等財物與犯罪行為是否有關聯性。財產沒收的主要目的[[27]](#footnote-27)：1、執法人員除了要將刑事犯罪者予以逮捕並於判決確定後送入監獄執行刑罰外，為了避免犯罪工具在外流通以致日後遭釋放之被告或其他組織成員再利用於犯罪，故應將犯罪工具沒收。就此而言，財產沒收是種防範犯罪發生的手法。2、在財產犯罪的場合，於法院審理期間，扣押犯罪者資產以便審理終結後以之補償無辜的被害人是執法機關分配沒收財產的第一要務且為最有效的補償被害人方案[[28]](#footnote-28)。3、透過剝奪犯罪所得之方法向大眾傳遞犯罪之不法利益只是一時性，達到抑制一般人犯罪的動機。4、財產沒收也是刑事司法中處罰或報應的一種形式。

而美國聯邦刑事案件沒收所得財物，自1984年起係直接作為司法部與財政部之沒收公基金(Asset Forfeiture Funds)而無庸再上繳國庫，並以之為保管、處理、抵押、留置該等沒收財產之成本，第三人異議時之相關費用[[29]](#footnote-29)，及作為美國聯邦執法機構之經費、被害人之補償及線民報酬等，並得聯邦最高法院之認可[[30]](#footnote-30)。

美國聯邦刑事涉案財物沒收制度可分為刑事、民事及行政沒收，其中，最具影響力的是刑事沒收（Criminal Forfeiture）與民事沒收（Civil Forfeiture），此兩種沒收係屬有法官參與者，是一種司法（Judicial）程序，而行政沒收則沒有法官之參與，屬非司法（Non-Judicial）程序。 刑事沒收，也稱為對人訴訟（ *in personam* Action），它是作為對被告定罪後判刑的一部分，即刑事沒收是一種刑罰措施。 由於是一種刑罰措施，刑事沒收必須以認定被告犯罪為前提，且只能針對有罪被告適用，而且沒收的財物必須是與被認定構成犯罪的行為有關聯性。 民事沒收，也稱對物訴訟（ *in rem* Action），它是針對與犯罪行為有關的財物提起的一種民事訴訟，被告是物而非人。 在民事沒收中，雖然擬沒收財物與犯罪行為有關，但它並不以某人的定罪為前提，它可以在刑事起訴前提起，也可以在刑事起訴後提前，甚至在沒有刑事起訴時也可提起[[31]](#footnote-31)。行政沒收是指特定執法機關如聯邦調查局、毒品執法機關等在偵查特定犯罪過程中，發現可沒收財物後，通過扣押與特定期限的沒收公告，如無人提出異議，這些執法機關就作出沒收這些涉案財物的宣告，該宣告具有司法命令的法律效力。 由於其簡潔性與高效性，美國聯邦大部分涉案財物都是通過行政沒收解決[[32]](#footnote-32)。

在適用對象上，這三種沒收並不完全一樣，行政沒收適用對象是除不動產與超過50萬元的個人財物（Personal Property）以外的與刑事案件有關的財物；刑事沒收不能沒收第三人財物，只能沒收被定罪之被告的財物，包括被告犯罪利得、被告自己所有的用於犯罪之財物，但在因為被告的原因導致前兩種財物消失時，可以沒收被告人的替代性財產（Fungible/Substitute Property），即與前兩種財物價值相等之被告其他財物，或在被告已經處理前兩種財物，或檢察機關無法找到前兩種財物時，也可以沒收被告一定數額之金錢。民事沒收則可以沒收第三人財物，但只能沒收與犯罪行為有關聯性，且沒收時仍然存在之財物，如犯罪收益、犯罪工具或者便利犯罪行為之財物，但不能沒收替代性財產，若上開財物於沒收時已不存在，民事沒收就不能再適用。 司法實務上，雖然執法機關較偏愛民事沒收，但一般情況下是同時提起民事沒收與刑事沒收，以確保涉案財物之沒收。亦即若無法律限制，則一方面先進行行政沒收，另一方面通過刑事起訴提出刑事沒收。 因為在行政沒收中，如果有人提出異議，執法機關就可通過一定程序轉入民事沒收程序，從而可與刑事沒收同時進行[[33]](#footnote-33)。

至於美國執法機關於實施財產保全、扣押及沒收前之相關準備程序，因此等程序涉及具體請求司法互助以查扣、追回犯罪利得、犯罪工具時涉及相關請求之程序、要件，故併予說明之[[34]](#footnote-34)。就沒收前之準備，包括:1、確認識別沒收之標的範圍。2、確認該等沒收標的之財產價值。3、確認識別是否第三人就沒收標的享有權利。4、第三人是否屬善意。而我國目前尚無行政、民事沒收相關法律制度之建制，在相關沒收制度之說明中，本文基於實際操作時較可能適用者，即刑事沒收制度，另予獨立說明，而就民事沒收、行政沒收說明如下:

二、美國民事沒收制度[[35]](#footnote-35)

美國民事沒收訴訟是以財產做為起訴的對象，而非以被告刑事案件判決有罪為前提之財產沒收制度。該制度優點甚多，尤以在刑事沒收無從發生之情形下，如被告逃匿、死亡、有刑事豁免權、沒收客體屬第三人所有，或無法證明被告犯行之情形下，仍得以民事沒收制度，由法院就犯罪利得、犯罪工具宣告沒收[[36]](#footnote-36)。民事沒收訴訟之管轄，除了財產所在地外，導致民事沒收之原因刑事犯罪行為地或起訴地之法院俱有民事沒收訴訟之管轄權。在刑事被告是財產所有人的情況下，被告所在地之法院亦有管轄權。一般而言，民事沒收的管轄係因財產的扣押行為而發生，然而聯邦最高法院認為在不動產的情形，法院的管轄權並非因扣押而發生[[37]](#footnote-37)，因為其認為不動產不具移動性，即便未對之先行扣押，法院的管轄權也不因此受影響，透過在其上張貼通之及交付占有人程序通知複本，即可取得管轄權。至於案件上訴後，縱使政府將扣押中之財產基於保存之必要予以出賣或移轉也不影響案件原先的管轄[[38]](#footnote-38)。

就不動產之扣押程序而言，依 18 U.S.C.§985(a)規定: 原則上在給予不動產所有人扣押前之通知及聽證程序後，方可扣押不動產。政府須通知法院其欲在審判前扣押不動產之主張，隨後由法院核發申請令狀的通知並送達予不動產所有人且張貼於該不動產上，並踐行聽證程序[[39]](#footnote-39)，該公聽會之目的在於決定不動產是否有予以扣押的合理理由(probable cause) 。法院若認有合理理由，則應核發扣押命令，主張權利之人對法院的此一決定並無抗告之權，僅可透過日後請求賠償扣押期間不動產所生之租金及利益來循求救濟。

而提起不動產沒收程序：政府提出沒收訴訟的請求、在該不動產上張貼起訴書並將連同起訴書副本的通知送達予不動產所有人[[40]](#footnote-40)。倘不動產所有人因逃亡或居住於他國以致無法循法定方法送達通知或詳為查證仍無法確定其所在，政府可依不動產所在州法的法律推定之送達方式[[41]](#footnote-41)。踐行上開程序後，若所有人仍占有不動產，為了保護政府對於不動產之利益，政府可請求在不動產所有權上註記其處於訴訟狀態或請求法院核發檢查及清點不動產之命令[[42]](#footnote-42)，或者請求法院採取下列措施以扣押、確保、維持或保存不動產之存在：核發限制或禁止令；命提出相當的保證金；指定破產管理人；指定保管人、監管人、鑑定人、會計或受託人[[43]](#footnote-43)。該審前限制命令，除法院認為有正當理由予以延長或提起沒收訴訟外，僅有90天之效力[[44]](#footnote-44)。另在通知不動產所有人將危急不動產存在之情況，政府可向法院提出相當理由的證明，請求核發僅有10天效力之暫時性限制命令，但法院須在該命令失效前儘速進行聽證程序[[45]](#footnote-45)。當然政府也可依先前所述之緊急情況來實行扣押程序以保障其利益。違反財產沒收所核發的命令、損壞或隱匿應予扣押之財產或洩漏限制或扣押命之訊息以阻撓財產沒收，將處以罰金或五年以下有期徒刑之刑事責任[[46]](#footnote-46)。

就動產之扣押程序而言，聯邦最高法院認為權利人在動產扣押前未經通知或賦予聽證程序，並不違反正當法律程序的保障[[47]](#footnote-47)。大多數的沒收程序因執法機關對財產之扣押而發動，在執法機關取得對財產的支配後，政府可以發動行政沒收程序，倘權利人提出異議，政府可選擇向法院提起民事沒收或在刑事沒收訴訟請求予以沒收。扣押財產也是法院對於案件取得管轄權的要件，未合法正確的扣押財產將導致法院對民事沒收案件欠缺管轄權。

關於扣押的標準及方法: 審查標準係以是否有合理理由認為該等財產與犯罪行為間有關連性(a nexus between property and illegal activity)，該財產即可予以民事扣押，傳聞證據允許使用在釋明合理理由的存在[[48]](#footnote-48)。此相當理由標準較輕於之後民事沒收審理程序，政府必須以優勢證據 (preponderance of the evidence)證明財產應予沒收之標準[[49]](#footnote-49)。對財產的扣押方式則有下列方法可供選擇：

(1)提出以宣誓擔保的起訴及法院已核發之對物扣押令(a sworn complaint and Issuance of a Warrant):依18 U.S.C. §981(b)(2)(A)規定向聯邦地方法院提起民事沒收起訴(complaint)且法院核發對物的查封令(arrest warrant)後，即可允許對於財產予以扣押。該沒收請求係以踐行宣誓來擔保之，經提出後法院書記官即必須製發查封令交予執法人員予以執行查封或扣押財產。法院在財產遭扣押後即取得案件之管轄權。該沒收請求的提出不須達到審判時所需的沒收相當理由的標準，僅需建立日後在審判程序時政府依法對物有相當理由予以沒收的合理確信即可。該沒收請求不須提出特定財產遭不法沾污的事實，而是要提出政府可證明該財產遭不法沾污的事實之合理確信事實[[50]](#footnote-50)。

(2)依照已核發的搜索狀而予以扣押財產:依18 U.S.C. §981(b)(3)規定依照聯邦刑事訴訟規則第41條之規定，由聯邦檢察官或執法單位向聯邦治安法官或財產所在地的州法院法官聲請核發沒收財產的扣押令。同時也規定日後提起沒收訴訟的法院也可以核發對物扣押令。該扣押命令可以藉由宣誓書(affidavits)或電話的口頭證詞或傳真文件取得[[51]](#footnote-51)。

(3)無令狀扣押:雖然美國司法部在財產扣押手冊中建議使用扣押令狀扣押沒收財產，然18 U.S.C. 981(b)也規定了美國憲法第四修正案例外允許無令狀扣押的情況，其中最常引用的例外是汽車除外條款。在Florida v. White[[52]](#footnote-52)一案中，該汽車停放在被告雇主所有的開放車庫內且在執法人員目視所及範圍，最高法院認為:警員在公共場合發現且認該汽車有相當理依法可以沒收，則實施無令狀的扣押並未違反憲法第四修正案令狀搜索的要件。又執法人員在執行搜索或扣押令狀之際，在目視所及(a plain view)情況下所發現具有相當理由可予以沒收的財產時，雖該財產非令狀所載範圍可以予以實施無令狀扣押，例如在執行搜索令時，附隨發現可能是不法所得或幫助不法之槍枝珠寶或交通工具[[53]](#footnote-53)。附隨於合法逮捕時，有相當理由認為可予以沒收的財產也可實施附帶扣押—例如逮捕嫌犯後對於地點清理時所發現的財產或者在緊急狀況不及申請扣押命令的情況下也可以實行無令狀扣押。另執法人員對於遭棄置的財產也可實施無令狀扣押。

關於暫時性的保全命令:在財產未經政府先行扣押的情況下，政府仍可依18 U.S.C. §983（j）規定，向法院聲請核發限制命令，其規定如下：

1. 在符合以下要件，政府可向法院提出聲請，針對欲沒收之財產核發限制命令或禁止令,或要求財產所有人提出一定的保證金、創設財產管理人、鑑價人、監管人、會計師或受託人或其他可以維持或保存沒收財產價值及存在之措施：
2. 已提起民事沒收訴訟主張該財產應予沒收
3. 起訴前，對該財產享有利益之人予以通知並賦予聽證之後，法院認為：

政府有實質可能贏得沒收訴訟且不核發限制令將導致財產毀損或遷出法院管轄範圍或使沒收不可能（滅失）；且確保沒收財產的存在甚於命令核發對象因此所陷入之經濟上困頓

（2）上開命令的有效期限僅有90天，除非釋明有正當理由經法院延長，或提起沒收訴訟的請求。

（3）沒收訴訟起訴前，倘政府可以釋明有相當理由可認為該財產依法應予沒收且踐行聽證程序的通知將危急財產的存在，法院可以核發暫時性限制命令，然該限制命令只有10天的效力，除非政府釋明有正當理由或核發命令之對象同意延長。關於限制命令的聽證程序需在失效前10日內儘早召開。該聽證程序法院可以審酌傳聞證據。

三、美國行政沒收制度[[54]](#footnote-54)

美國政沒收機關執行行政沒收之程序，法院並未介入。依據美國法典18 U.S.C. §§1607-1609；21 U.S.C. §881(d)規定，得不經司法訴訟程序而執行行政沒收之行政機關包括緝毒署Drug Enforcement Administration(DEA)、聯邦調查局Federal Bureau of Investigation (FBI)、移民關稅局Bureau of Immigration & Customs Enforcement(ICE)、菸酒槍械管制局Bureau of Alcohol, Tobacco and Firearms (ATF)、國稅局International Revenue Service (IRS)等。

至於行政沒收之客體，依18 U.S.C. §985(a)規定，除不動產外，任何財產均得作為行政沒收之標的。美國對於可能係犯罪所得或供犯罪之用的現金並無沒收上限之法律規定，但針對現金外之個人資產，例如交通工具、金融票據或有價證券等，則以50萬美金為上限，一旦超過50萬美金，則不得作為行政沒收之標的，應以司法沒收程序為之。

依18 U.S.C. §981(b)(3)、19 U.S.C. §1603規定，行政沒收機關只要有合理理由

相信該財產在相關聯邦沒收法律下得為行政沒收之物品時，原則上即應向財物發現地或沒收程序地之聯邦地方法院取得法院扣押令狀(seizure warrant)後，進行扣押。但在下列情形，行政沒收機關得為無令狀扣押後沒收：(1).合於美國憲法第4增修條文所定例外情形；如邊境搜索、汽車搜索、同意搜索、追捕搜索、學校搜索、警勤搜索、逮捕後之搜索、緊急搜索等。(2).該物品已經州或地方政府之偵查機關合法扣押後，再轉由聯邦行政沒收機關繼受(18 U.S.C. §981(b)；21 U.S.C. §881(b))。行政沒收機關聲請扣押命令之程序大致上與聯邦刑事訴訟程序下之搜索命令之聲請程序相同；需由負責之偵查員至法官辦公室宣誓並提出相當之聲請理由。扣押後的物品，係交由聯邦法院事務官(U.S. Marshals)或財政部委託之EG & G機關之公基金。

為沒收目的而扣押之現金應於扣押後60日內或起訴後10日內存入扣押資產存款帳戶（the Seized Deposit Fund）內，至執行沒收為止，蓋美國扣押資產存款帳戶制度之重要性在於，當犯罪行為人在外國銀行帳戶內有待沒收之金錢時，為沒收便利起見，會在法律之適當監督下，先以偵查幹員之名義在任一銀行開設帳戶，再要求犯罪行為人將同意沒收之金錢直接轉入該幹員之帳戶後，最後由幹員帳戶將沒收金錢直接移轉至扣押資產帳戶，如此可免跨國銀行間因公文往來之繁瑣程序而降低沒收效率。惟若該現金同時為刑事證據時，且金額在美金5,000元以內時，得在檢察機關之監督（a Supervisor in the United States Attorney’s Office）下例外處理。超過美金5,000元部份之現金，則必須經財產沒收及洗錢部門（AFMLS）之首長同意後，才得作例外處理。

依18 U.S.C. §983(a)(1)(A)(I)及(iv)規定，一旦物品經行政沒收機關扣押後，必須在60日內將前項扣押事由通知物品權利人。若該財物係先經州或地方偵查機關(law enforcement)扣押後再移轉聯邦行政機關繼受之情況，行政沒收機關應自州或地方政府第1次扣押時起90日內，將扣押命令及行政沒收處分寄達所有已知之權利人，並應於新聞報紙持續公告3星期。屆期若無人聲明不服，則於行政沒收決定生效後，財物即歸國家所有（檢察及法院均未介入）。對於在扣押後、沒收處分前始知悉之所有權人或利害關係人，可例外在權利人身分確認後60日內為通知。對車輛進行扣押時，尚須於扣押當時給予駕駛人扣押通知書，若駕駛人不在現場，則應將該通知書副本張貼於扣押地點。

當行政機關之扣押通知有引起他人(如潛在證人)生命安全受威脅、被告因此有逃匿之虞、證物有遭毀棄或損害之虞，或其他危害偵查、不當延滯訴訟等情節重大之不利情形時，行政沒收機關可檢具本案偵查員之宣誓書，向法定沒收單位（Legal Forfeiture Unit，簡稱LFU）申請30日延期通知。屆期若仍有延期之必要，則再向法院聲請延展60日。

若行政沒收機關未遵期為前項通知時，須立即將扣押物返還權利人。惟若該物品同時為刑事證物時，行政沒收機關應立即將扣押物交由聯邦檢察署進行刑事沒收程序，以維持國家之刑事沒收程序中物之占有人身分，此時例外不須將沒收物返還權利人或解除扣押。

1. **美國刑事沒收制度**

美國刑事沒收即為刑罰之一種，自屬於量刑階段之程序，依據美國聯邦刑事訴訟規則第32.2條規定，當案件進入量刑程序時，法院及相關人應如何進行刑事沒收之程序，然此並非謂所有刑事沒收程序全屬量刑階段之事項，而另有多項刑事沒收之審前保全措施，如審前保全命令(Protective Orders)、刑事扣押令( Warrant of Seizure )、提出與提存令(Order to Repatriate and Deposit)、審前變賣(Interlocutory Sale)…等，以下擇要說明之:

1. 刑事審前保全措施
2. 刑事審前保全命令(Protective Orders)

依據美國聯邦防制毒品濫用與管制法第853條之規定(21 U.S. Code §853)，聯邦法院依據檢機關之聲請，為確保刑事沒收之執行，根據下列情形，得簽發限制令（restraining order）或禁止令（injunction），要求其等履行相關義務，或採取相關措施。1、就檢察機關已經起訴，並經合理理由釋明，被告若經定罪就需要沒收這些財物。或2、法院對於檢察機關無沒收客體已進行公告，使利害關係人有聽證之機會，並符合以下條件者，亦得於檢察機關尚未起訴之案件，簽發審前保全命令：(1)就是否應沒收涉案財物之爭議，檢察機關具有勝訴之實質可能性者，且若不簽發保全命令，將造成涉案財物毀損、滅失、或被移出法院管轄外、或導致刑事沒收無法執行；(2)透過簽發該命令以保全財產執行所得者，超過對因簽發該命令而受影響之利害關係人所造成的不利益。 除了以上所述外，就檢察機關尚未起訴者所簽發之命令至多只有90天的效力，除非法院基於合理理由延長期限或檢察機關向法院提起刑事訴訟。另外，法院也可在檢察機關起訴前，就未經檢察機關公告者，簽發保全命令，惟此時其有效期限至多只有14天，除非法院基於合理理由延長該期限，或經命令相對人同意延長期限。

 法院於決定是否簽發審前保全命令，或是否延長期限時，不受聯邦證據法則的限制，且在證明力之要求，檢察機關僅需提出合理理由，且得依該案件業經大陪審團簽發起訴為合理理由之釋明，惟檢察機關除得依據大陪審團簽發起訴書這一事實來釋明合理理由外，亦得依證人之證言來釋明之。

依據第853條第（e）項規定，任何違反審前保全命令者，應負以民事或刑事藐視法庭之責，而被告更可能因此而加重其刑。

聯邦防制毒品濫用與管制法第853條(e)英文全文參考如下:

**(e)** **Protective orders**

**(1)** Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

**(A)** upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

**(B)** prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

**(i)** there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

**(ii)** the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

**(2)** A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

**(3)** The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

至於審前保全命令現在各聯邦法院基本上已有共識，認為得適用於第三人的財產，只要該財產有可能被刑事沒收。然就審前保全命令能否適用於與被訴犯罪行為有直接關聯的財物不存在時，作為沒收對象之替代性財產。 對此問題，大部分聯邦法院認為，根據第853條第（e）項，該命令之適用對象仍限於與被訴犯罪行為有直接關聯性的財物，亦即得直接回溯至犯罪行為之財物（Property Directly Traceable to the Offense），而替代性財產既與犯罪行為沒有直接聯繫，尚不能作為審前保全命令之客體。惟聯邦第四巡迴法院一直堅持所有可被沒收的財物都可作為審前保全命令之客體，不論其與犯罪行為是否有直接聯繫。 其理由是根據刑事沒收對象的先前相關理論（The Relation Back Doctrine），當被告與犯罪行為有直接關聯性的財物不存在時，檢察機關的財物沒收利益就立即轉移到被告的替代性財物上，為了保證將來刑事沒收判決的可執行性，應當將替代性財產納入審前保全命令之客體。

關於不服審前保全命令之救濟[[55]](#footnote-55): (一)被告不服時:被告在法院簽發該命令前，並無權要求獲得通知或聽證，但在法院簽發後，則可聲請法院就該命令之適當性進行聽證，此即有名的瓊斯-法瑪規則（Jones-Farmer Rule）。 它是根據1998年的US v. Jones案與2001年的US v. Farmer案建立起來的，其目的在於平衡被告之解除財產管制及避免檢察機關過早揭露證據之衝突。根據該規則，被告不服法院審前保全命令時，其救濟程序需分為：第一是被告須向法院聲請解除或修正該命令。這種聲請須明確指出請求事項在於要求法院就解除或修正該命令舉行聽證，否則不能引起相應的法律效果，而其聲請之理由得以:1、該審前保全命令涉及聯邦憲法第六修正案，導致被告人無錢聘請律師行使辯護權;2、被告人亦得以財物受禁止、限制後無法支撐其正常與合理的生活費用；第二則是被告需提出表面證據（Prima Facie）證明對受限制、禁止之財物採取刑事沒收沒有合理理由，法院若認為被告之聲請有理由，則應舉行聽證會，對檢察機關沒收之財物是否具有合理理由進行聽證。 由於該聽證會的內容是聯邦最高法院在United States v. Monsanto案中建立的，該聽證會也被稱為蒙桑托聽證會（Monsanto Hearing）。若檢察機關在聽證會中就受管制財物應予沒收提供了合理理由，即使被告確實沒有其他財產聘請律師，法院亦應當駁回被告的聲請。若有部分受管制財產檢察機關不能提出合理理由，法院即應解除該部分的財產管制命令。對於法院經聽證後所作出的裁定，檢察機關與被告若有不服者，得立即提出抗告救濟。在此救濟過程中的主要問題是聽證會的證明問題。 一是聽證會需要證明的對象。 先前有的聯邦法院要求有兩個方面問題需要得到證明：一方面為是否有合理理由證明被告的犯罪行為存在，另一方面為是否有合理理由釋明受管制的財產將被刑事沒收。 目前，大多數法院認為被告人只能針對後一個問題提出異議，不能針對前一問題提出異議。換言之，聽證會的證明對象只是受管制財產的可沒收性。 二是聽證會的舉證責任之問題。 在此問題上，有些法院認為應當由檢察機關承擔舉證責任，即在被告提供一些表面證據否定檢察機關的合理理由後，由檢察機關就受管制財產的可沒收性存在合理理由承擔舉證責任。但也有的法院認為應當由被告就受管制財產的可沒收性的缺乏合理理由承擔舉證責任[[56]](#footnote-56)。

第三人不服審前保全命令者，是否與被告一樣，如果不服該命令得聲請舉行聽證會，或者於被告聲請的聽證會中主張自己的權利？ 對此問題，各聯邦法院在2007年以前一直沒有明確答案，2007年以後，聯邦法院對此問題的態度逐漸明朗。 大部分聯​​邦法院認為，第三人不能在審前針對審前保全命令提出異議，而只能在審判程序的附屬程序針對有關涉案財物主張權利。 其理由，一方面是被告之所以能夠針對審前保全令提出異議，係因為審前保全令涉及被告行使聯邦憲法第六修正案規定的聘請律師權；另一方面是第五巡迴法院在United States v. Holy Land Foundation for Relief and Development案中所說的，將第三人的異議限制在附屬程序，有利於保全程序的流暢性，同時也不違反​​正當程序，而允許第三人在審前提出異議，對原告是一個很重大的負擔。

(二) 刑事扣押令( Warrant of Seizure )

依據聯邦防制毒品濫用與管制法第853條（f）之規定，檢察機關可在審判前依據聲請搜索令的程序向法院聲請扣押令，以扣押擬沒收的涉案財物。 但並不是所有的涉案財物都可扣押，大多數法院認為，對於替代性財產，在審前既不能對之採取財產管制措施，也不能採取扣押措施[[57]](#footnote-57)。而法院應予簽發扣押令的條件有二：一是有合理理由相信擬扣押財物若被告被定罪時就會被沒收；二是根據前開審前保全命令仍然不足以保證有足夠財物可供沒收時。 其中，如何才算有合理理由，一般是要求不僅有合理理由釋明犯罪行為的發生，而且有合理理由釋明擬扣押財物與犯罪行為之間有關聯性。但法院在審查是否有合理理由相信犯罪行為已經發生時，可考慮大陪審團有關起訴是否有合理理由的裁決。根據聯邦民事沒收程序，檢察機關在民事沒收時，也可聲請民事扣押令，但期限只有60天，為避免這一期限限制，檢察機關往往會同時根據民事沒收程序與刑事沒收程序聲請一份具有雙重性質的扣押令。這是因為根據第853條第（e）項，刑事扣押令並沒有期限限制，它不會強制檢察機關在規定期限內向法院起訴。在聲請扣押具體程序上，根據聯邦最高法院在United States v. James Daniel Good Real Property案中的裁決，未經事先通知與聽證，檢察機關不能以沒收為目的扣押『不動產』。但大多數法院認為，這一裁決不能適用於扣押動產的情形，即對不動產以外的其他財產進行扣押者，不需要事先通知與聽證。

至於不服扣押令，究應如何進行救濟？ 若屬違法扣押之情形，大多數法院認為，這並不影響法院在量刑程序中沒收被扣押的財物[[58]](#footnote-58)，被告唯一的救濟方式，是依證據排除法則，聲請將此財物作為非法證據予以排除，而不能針對刑事沒收裁定提出抗告[[59]](#footnote-59)；其次，雖然被告在民事沒收時，可以生活困難為由聲請解除部分被民事扣押的財物，但卻不能以生活困難為由聲請法院解除刑事扣押的財物；且第三人不服扣押措施的，也無權在審前提出異議，而必須等到附屬程序才能主張自己的權利。

聯邦防制毒品濫用與管制法第853條(f)英文全文參考如下:

**(f)** **Warrant of seizure**

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

1. 美國聯邦刑事訴訟程序之規定

依據美國聯邦刑事訴訟規則第32.2條規定，當被告經刑事定罪後，訴訟進入量刑階段時，相關之刑事沒收程序可分為：1、由法官裁判或陪審團議決有罪後，決定是否需要刑事沒收；2、法院作出刑事沒收預備令（A Preliminary Order of Forfeiture）；3、將上開預備令通過適當形式進行公告或通知；4、是正式就刑事沒收作出裁判；5、如果有第三人針對預備令沒收之財物提出異議，即啟動附屬程序，以解決第三人的異議問題；6、依據附屬程序的結果，調整刑事沒收裁判內容。 以下分別論述之[[60]](#footnote-60):

(一)、陪審團之裁決:雖然刑事沒收是量刑問題，但依據2009年修正之聯邦刑事訴訟規則第32.2條規定，不論是檢察機關或被告，都有權要求陪審團就刑事沒收事項作出裁決，而且法官在陪審團進行評議之前，亦有義務詢問檢辯雙方是否要求陪審團就刑事沒收問題進行裁決。 但從有關規定與判例來看，這種陪審團裁決有嚴格限制條件：一是只有犯罪事實認定也是由陪審團裁決的案件才可聲請陪審團裁決刑事沒收事項，那些由法官認定犯罪事實的案件或者通過認罪協商解決定罪問題的案件則不能聲請陪審團裁決；二是雖然第32.2條要求陪審團就特定財物的可沒收性進行裁決，但大多數法院認為，陪審團只能就特定財物與犯罪行為之間是否有聯繫的事項進行裁決，而不能裁決這些財物是否可以沒收，財物是否可以沒收，屬於法官之職權；另外，涉案財物的所有權問題也不是陪審團的裁決事項；三是前一條件的限制，大多數法院認為只有刑事沒收的對象屬特定財物時才可聲請陪審團裁決，如果刑事沒收對象是被告一定數額的金錢，無權聲請陪審團裁決，而只能由法官裁決；與此類似者，陪審團亦不得就替代性財產的沒收進行裁決，因為替代性財產之所以具有可沒收性，並非與犯罪行為有實際聯繫，而是因為與犯罪行為有聯繫的財物已不存在或無法獲取。依據該條規定，一旦決定由陪審團就刑事沒收事項進行裁決，檢察機關必須向法庭提交一份特殊裁決建議表，該表除了要列明所需刑事沒收的財物以外，還應當請求陪審團裁決檢察機關是否已經證明了列舉財物與犯罪行為之間具有法定的聯繫。

(二)、刑事沒收預備令(Preliminary Order of Forfeiture):依據聯邦刑事訴訟規則第32.2條規定，它是法院認為需要沒收被告的某財物，而在對被告定罪後、正式判刑之前，就應予沒收被告哪些財物所作出的初步決定。 其目的在於正式判刑之前給予被告以及第三人針對刑事沒收範圍提出異議的機會。 刑事沒收預備令一般應當詳細註明應當沒收的金錢數額、具體指明所需要沒收的涉案財物或者替代性財產。如果法官在正式判刑之前無法確定所需要沒收的具體財物，或無法確定金錢的具體數額，也可作出一個概括的刑事沒收令。

該沒收 預備令可以包含如下內容：已經可以具體化的涉案財物清單、用概括性語言描述的其他財物，以及在其他財物可具體確定或有關金錢數額可具體計算時可以修改該沒收令的說明等。由於刑事沒收預備令直接關係到被告的財產權，故在法官作出該命令之前，被告可以提出異議，檢察機關也應當就有關財物的可沒收性承擔證明責任。 根據聯邦刑事訴訟規則第32.2條規定，如果對於是否應當沒收有爭議時，法官必須根據任一方的聲請，就此問題舉行一個聽證會。又由於刑事沒收問題屬於量刑問題，因此聯邦證據規則並不適用，法官可直接根據定罪程序的證據或記錄、認罪協商協議，甚至傳聞證據作出決定；雖然檢察機關需要承擔證明責任，但此證明責任不同於定罪的證明責任，其證明標準是優勢證明，而非排除合理懷疑。檢察機關需要證明的問題，根據沒收對象的不同而有所不同。 如果刑事沒收對像是特定物，即犯罪所得或犯罪工具、供犯罪所用的財物，檢察機關需要用優勢證據證明特定物與犯罪行為之間具有實質關聯，或是直接來源於犯罪行為，或是用於實施該犯罪行為的工具，或者對該犯罪行為所用者。 如果刑事沒收對象是替代性財產，檢察機關就需要用優勢證據證明符合U.S.C.第853條第（p）規定的條件，即由於被告的行為或疏忽，導致檢察機關已經盡最大努力尋找與犯罪行為直接關聯的財物，但仍然沒有找到；財物已經轉移、出賣或處分而給予第三人；財物已經轉移出司法管轄權之外；財物已經貶值；財物已經與其他合法財物混同而無法區分等。 如果刑事沒收客體是特定數額的金錢，檢察機關需要證明的是被告的犯罪所得以及檢察機關已經盡合理努力尋找與犯罪行為有直接關聯的財產，但仍然無法找到。 但也有的法院認為，沒收特定數額的金錢，實際也是沒收替代性財產的一種，因此，也應當證明符合第853條第（p）項的要求。

在法律效力方面，一旦法官作出刑事沒收預備令，檢察機關就可直接扣押沒收令所列舉的財物，可採取法官認為適當的任何措施，以確定、發現或處理相關財物，法官也可在沒收令中規定一些在上訴期間用以保證沒收裁決可執行性的處分。 另外，一旦法官作出刑事預備沒收令，第三人也就可以啟動附屬程序。 根據聯邦刑事訴訟規則第32.2條的規定，一旦進入正式量刑程序，該刑事沒收預備令對被告人來說，就是最後的決定。 為此，被告人或檢察機關如不服此預備令，就必須在正式量刑之前提出異議，否則只能提出上訴。

(三)、刑事沒收的公告或通知

在法院作出刑事沒收預備令之後，如果涉及沒收特定的財物，檢察機關應依據聯邦民事訴訟法的相關規定進行公告與送達。 公告與送達的內容為：擬沒收財物的描述、不服沒收而提出異議的期限、受理異議聲請的機關以及聯繫方式等。 公告期間是連續三個星期，每星期一次，如果在起訴前的行政沒收階段執法機構已經在有關沒收的網站連續公告30日，或者通過在管轄或財物所在地發行的報刊連續公告三個星期，也可公告一次。 公告方式：如果財物在美國，就通過在管轄法院所在地、或財物扣押地或者財物所在地發行的報刊公告；如果財物不在美國，就在管轄法院所在地、財物所在國家發行的報刊，或者財物所在國家發行的法律公告進行公告；另外也可直接在有關沒收的官方網站連續公告至少30日。 除進行公告外，檢察機關還應當向通過各種現象表明有資格提出異議的第三人送達書面通知。依據有關判例，是否有資格提出異議，並不是只要具有親屬關係就滿足條件。但是，依據聯邦民事訴訟法有關送達的規定，如果第三人實際已經知道了爭議財物的沒收事宜，就不能再以未接到書面通知為由提出抗辯。

(四)刑事沒收的正式裁決:刑事沒收預備令只是一個初步決定，被告或第三人仍然可以採取措施改變其內容。 但是，依據聯邦刑事訴訟規則第32.2條，刑事沒收預備令進入最後的量刑程序後，對被告而言就是最後的正式裁決，或者在量刑程序之前，如果被告同意該刑事沒收預備令，也是最後的正式裁決；對於案外第三人來說，在附屬程序終結之時，如果沒有修改，就是最後的正式裁決。 刑事預備沒收令成為最後的決定後，法官在口頭宣告被告人的刑罰時，應當宣布刑事沒收事宜，或者必須通過其他方式確保被告人知道刑事沒收的內容；法官在製作判決書時，也應當將刑事沒收內容直接或間接地寫入判決書的刑罰部分。有問題的是，如果法官在口頭宣告判刑或製作判決書時遺漏了刑事沒收內容，該刑事沒收還是否有效？ 在2009年以前，對此問題有不同的做法。 有的法院認為，這種現象屬於一種嚴重錯誤，此後不能再將刑事沒收內容補入判決內容，即刑事沒收沒有法律效力。但有的法院認為，這僅僅是一種技術性錯誤，可事後補正。還有的法院認為，在陪審團就刑事沒收作出裁決的情況下，這種現象才屬於一種可補正的技術性錯誤。為解決此爭議，2009年修改的聯邦刑事訴訟程序規則明確規定，在出現這種現象時，法院在任何時候都可根據聯邦刑事訴訟程序規則第36條規定進行補正。 雖然有此規定，但仍然有人認為，這種補正只能在裁判記錄明確顯示被告人已經知道刑事沒收內容的情形下使用，否則有違程序正義性。

(五)、刑事沒收裁決的調整:依據聯邦刑事訴訟規則第32.2條第（d）、（e）項規定，在上訴期間，法院作出的刑事沒收裁決仍然可以修正。 可導致這種修正的情形有兩種：一是附屬程序的結果導致已有刑事沒收裁決的修正。 對於案外第三人，在附屬程序終結之前，刑事沒收令並不是最後的決定。 在第三人針對刑事沒收令擬沒收的特定財物提出異議而啟動附屬程序後，如果第三人的主張在該程序獲得法院的支持，法院必須將此特定財物從刑事沒收裁決中刪除；二是作出刑事沒收裁決後，檢察機關又發現可沒收財物。 在法院作出刑事沒收裁決後，檢察機關仍然可以採取相應措施查獲可沒收的財物；U.S.C第853條第（m）項也允許檢察機關在刑事沒收裁決後查獲這些可沒收的財物。 根據第32.2條第（e）規定，在以下兩種情形，法院可根據檢察機關的聲請修正刑事沒收裁決：第一種情形是某特定財物根據刑事沒收裁決應當沒收，但在刑事沒收裁決作出後才被查獲與確定；第二種情形是在刑事沒收裁決後才發現可沒收的替代性財產。 在程序上，一旦檢察機關有證據證明具有這兩種情形，法院就應當修正已有的刑事沒收裁決；如果有第三人提出異議，就啟動附屬程序。 但是，在這兩種情形下，被告無權要求陪審團裁決。

(六)、關於刑事沒收附屬程序:

刑事沒收附屬程序，係依據聯邦刑事訴訟規則第32.2條第（e）項規定，它是指在第三人針對法院刑事沒收預備令沒收某特定財物（不包括特定數額的金錢）不服而提出異議時，法院就此進行聽證裁判的一種程序。 就沒收財物權屬問題進行裁決，這是刑事沒收附屬程序的唯一目的，第三人不能以程序不合法或者擬沒收財物與犯罪行為沒有關聯為由針對財物的可沒收性提出異議，也不能要求在此程序就第三人與被告的其他民事糾紛進行裁決。該程序是第三人不服刑事沒收而參與刑事訴訟的唯一救濟途徑，因為第三人無權針對審前各種保全措施不服，也無權參與法院作出刑事沒收預備令前的聽證會，也不能通過另行提起民事訴訟主張擬沒收財物的權利。該程序雖然解決的是第三人對擬沒收財物是否存在合法權屬的問題，是刑事訴訟的必要部分，但本質上卻是一種民事訴訟程序；雖然涉及量刑的刑事沒收對象問題，聯邦刑事訴訟程序規則卻明確規定它不屬於量刑程序的一部分。

第三人啟動刑事沒收附屬程序的條件:依據相關規定與判例第三人的申請只有符合以下條件才能啟動刑事沒收附屬程序：

1、第三人必須具有聲請資格。 這種聲請資格依據第853條規定，就是聲請人必須是除被告人以外、對擬沒收財物具有合法權利的人。 這種合法權利一般是指第三人對擬沒收物具有優先利益（Superior Legal Interest），或者屬於善意購買者（Bona Fide Purchaser）。 因為根據第853條規定，第三人只有證明具有兩種情形之一，才可能在此附屬程序中獲得法院的支持。 根據此要求，被告人沒有申請資格，無擔保的一般債權人沒有申請資格，代理人沒有聲請資格，被侵權人也沒有申請資格。

2、第三人必須在期限內提出聲請。 該期限是法律明確規定的，一般是30日，即第三人在接到實際通知或最後一次公告後的30日內，必須提出聲請。 依據相關判例，此期限不僅限制第三人的聲請行為，而且也限制第三人的聲請理由，即在此期限內，第三人必須將所有聲請理由寫入聲請書，超過此期限，第三人不能再補充聲請理由。而且，在有些法院，此期限是強制性的，即使檢察機關沒有針對申請超過期限提出異議，法院也必須駁回此申請。

3、聲請必須具有確實理由。 第三人提出申請時，必須在申請書具體說明相關理由，而不能只簡單地主張自己對擬沒收財物具有合法權利。 而且這種理由必須確實存在，如果第三人做虛偽陳述，將會面臨司法制裁。

依據第853條與第32.2條的相關規定，刑事沒收附屬程序是按民事訴訟程序進行的，一般經過以下幾個階段：首先是聲請階段：第三人向有管轄權的法院提出聲請書，該法院只能是作出沒收決定的法院；其次是動議階段：並不是所有聲請都會引起聽證，在第三人提出聲請之後，檢察機關可以第三人無聲請資格、超過聲請期限或者聲請理由不合法等為由，向法院提出動議，直接駁回第三人的聲請；再次是證據開示階段：在處理完檢察機關的動議之後，如果法院認為有必要，可組織檢察機關與第三人進行證據開示，根據證據開示結果，任何一方都可申請法院進行簡易裁決；最後是聽證階段：該聽證由法官主持，第三人無權要求陪審團聽證；在聽證過程中，雙方都可以提出證據進行辯論。 如果被告人已就刑事沒收提出上訴，該上訴並不影響聽證的繼續進行。 根據聽證結果，如果法院准許第三人的聲請，就會據此而修改先前之刑事沒收裁定，且第三​​人可根據《平等獲得正義法》（the Equal Access to Justice Act）要求賠償聘請律師參加附屬程序的費用，但檢察機關有正當理由相信第三人不是真正所有人者除外；若法院駁回第三人聲請，此前的刑事沒收裁定對第三人即是最後的決定。 對聽證結果不服者，第三人可以提出上訴。 但是，如果聽證涉及數個第三人聲請的，必須是所有第三人聲請都解決後，才可提出上訴，除非法官認為有合理理由不能耽擱。

關於刑事沒收附屬程序之證明:首先是可使用的證據。 根據第853條規定，第三人可在附屬程序提出各種證據來證明自己的聲請，檢察機關也可提出相應證據進行反駁，最主要的是該規定要求法院必須考慮刑事案件審判記錄有關證據的記錄，即法院可以使用傳聞證據。其次是證明對象。 根據第853條規定，第三人在刑事沒收附屬程序取得勝訴只有兩種可能：一是證明自己對擬沒收財物具有優先權；二是證明自己對擬沒收財物是善意購買者。 據此，刑事沒收附屬程序的證明對象只能是第三人對擬沒收財物是否具有優先權，或者第三人是否屬於善意購買者。 由於刑事沒收的先前相關理論以及第853條第（c）項規定，政府對擬沒收財物的沒收利益產生於導致該沒收的犯罪行為發生之時，如果需要證明的是第三人對擬沒收財物是否具有優先利益，就必須證明第三人在犯罪行為發生之前就 ​​已經對擬沒收財物存在合法利益；如果需要證明的是第三人屬於善意購買者，就需要證明下列事項：1、第三人對擬沒收財物具有合法利益，即第三人不是通過非法途徑取得擬沒收財物；2、第三人獲得擬沒收財物是通過支付對價即購買所得的，通過贈予、繼承等取得的，不屬於善意購買者；3、第三人獲得擬沒收財物時確實不知道也不可能知道該財物已經被列入刑事起訴書的沒收範圍或已經被採取未決訴訟提示措施。

再次是證明責任的履行。 由於刑事沒收附屬程序實質上是一種民事訴訟程序，證明責任是按照“誰主張、誰舉證”原則分擔的，第三人主張對擬沒收財物具有合法權利，因此第853條規定承擔證明責任的是作為聲請人的第三人。依據第853條規定，證明標準也是民事訴訟程序的標準，只需要一種優勢證據，而非排除合理懷疑，也非合理理由。

聯邦刑事訴訟規則第32.2條英文全文如下:

**Rule 32.2. Criminal Forfeiture**

**(a) Notice to the Defendant.** A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

**(b) Entering a Preliminary Order of Forfeiture.**

**(1) Forfeiture Phase of the Trial.**

(A) Forfeiture Determinations.As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing.The court’s determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party’s request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party’s interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property’s value pending any appeal.

**(4) Sentence and Judgment.**

(A) When Final*.* At sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) Notice and Inclusion in the Judgment.The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court’s failure to do so may be corrected at any time under Rule 36.

(C) Time to Appeal.The time for the defendant or the government to file an appeal from the forfeiture order, or from the court’s failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

**(5) Jury Determination.**

(A) Retaining the Jury.In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) Special Verdict Form.If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

**(6) Notice of the Forfeiture Order.**

(A) Publishing and Sending Notice*.* If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice*.* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) Means of Publication; Exceptions to Publication Requirement*.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice*.* The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure.

**(7) Interlocutory Sale.**At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

**(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.**

**(1) In General*.*** If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

**(2) Entering a Final Order*.*** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

**(3) Multiple Petitions.**If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

**(4) Ancillary Proceeding Not Part of Sentencing*.*** An ancillary proceeding is not part of sentencing.

**(d) Stay Pending Appeal.** If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party’s rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

**(e) Subsequently Located Property; Substitute Property.**

**(1) In General.** On the government’s motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

**(2) Procedure.**If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

**(3) Jury Trial Limited.**There is no right to a jury trial under Rule 32.2(e).

1. **沒收後之分享-心得及建議事項**

一、國際潮流趨勢與沒收分享: 關於打擊犯罪，追求安居樂業的社會，本是世界各國政府努力追求的目標，然而現今犯罪科技及手法日新月異，因此犯罪成員組織或行為分擔跨越國境之情形亦愈加嚴重，世界各國為追求社會之良好的治安水準，各國之執法機關均紛紛進行打擊犯罪之合作，期使犯罪無所遁形。以聯合國之國際公約而言，涉及犯罪利得之查扣、追回有關者，包括:聯合國反腐敗公約(The United Nations Convention against Corruption, UNCAC)、聯合國打擊跨國有組織犯罪公約( The United Nations Convention against Transnational Organized Crime )、聯合國禁止非法販運麻醉藥品與精神藥物公約( The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances)、歐盟關於洗錢、搜索、扣押及沒收犯罪利得公約(European Treaty Series-No.141. Convention on Laundering Search Seizure and Confiscation of The Proceeds from Crime)等，可知針對跨國境之犯罪問題，已是國際上非常重視的問題，也是國際間透過上開公約以加強國際間之合作欲打擊之重點趨勢。而在國際共同協力對犯罪利得予以沒收之情形，若雙方均得依公平之制度，對各協力參與犯罪利得查扣、沒收之國家，就沒收之不法財產得予分割後共同分享之，就犯罪利得之追回而言，除能補償各協力國在協力過程中所產生之相關必要費用，使其不會因為財政上困難，而就沒收協力所帶來之財政上壓力得以緩解，進而對各協力國之共同打擊跨國境犯罪，產生激勵作用，而能更有效加強國際間之合作。依據美國司法部就2013財會年度之統計公布資料所示，該年度所取得之不法利得總淨值為美金(下同)2,084,563,742元，其中美國司法部與他國基於公平分享者，共計877,697元，包括分享給巴哈馬112,644元、加拿大122,721元、安提瓜及巴布達15,364元、開曼群島119,459元、盧森堡246,599元、瑞士27,250元、英國133,660元、烏拉圭100,000元。可見沒收分享措施，已為現今國際公認對打擊跨國境犯罪最有效之方法之一。雖然沒收分享與傳統之司法助協議不同，甚至不以訂立司法協助協議為前提，且得以常態性或個案方式進行合作[[61]](#footnote-61)，然各國為更加有效地進行跨國境犯罪所得之追回，業紛紛與他國共同合作建立相關之查扣、沒收犯罪利得之管道及後續之沒收分享磋商與協商，我國亦應在此國際趨勢下，盡力與國際接軌克服現實上之困難。以下就沒收分享相關事項中，業經國際社會認可之重要範本，即聯合國分享沒收的犯罪所得或財產的示範協定說明之。

二、聯合國分享沒收的犯罪所得或財產的示範協定:聯合國經濟及社會理事會回顧2005年1月26日至28日，在維也納舉行之關於聯合國打擊跨國有組織犯罪公約，和1988年聯合國禁止非法販運麻醉藥品和精神藥物公約所規範之犯罪所得沒收後處分問題雙邊示範協定草案的政府專家組會議，相信訂立關於分享沒收的犯罪所得或財產的雙邊示範協定有助於便利此一方面之開展及擴大國際合作。基於關於分享沒收的犯罪所得或財產的雙邊示範協定第3條所提及之聯合國打擊跨國有組織犯罪公約第14條第2項之規定，締約國應在本國法律許可之範圍內，優先考慮將沒收的犯罪所得或財產交還請求締約國，以便對犯罪被害人進行賠償，或將該等犯罪利得交予合法之所有人，而於2005年7月22日定有關於分享沒收的犯罪所得或財產的示範協定如下[[62]](#footnote-62):

\_\_\_\_\_\_\_\_\_\_\_\_\_ 國政府與 \_\_\_\_\_\_\_\_\_\_\_\_\_ 國政府關於分享沒收的犯罪所得或財產的示範協定

國政府與 國政府（以下稱“雙方”），回顧聯合國打擊跨國有組織犯罪公約，尤其是第 12 條第 1 款、第13 和第 14 條，還回顧 1988 年聯合國禁止非法販運麻醉藥品和精神藥物公約 ，尤其是第 5 條第 1、第 4 和第 5 款，認識到本協定不應當影響聯合國反腐敗公約所規定的原則或其後 所制定的便利該公約的執行的任何適當機制，重申本協定的各項規定不應當對 1988 年聯合國禁止非法販運麻醉藥 品和精神藥物公約和聯合國打擊跨國有組織犯罪公約所規定的國際合 作方面各項規定和原則有任何影響，並且本協定旨在加強這些公約中所設想 的國際合作的有效性，考慮到如雙方之間存在司法協助條約則提及該項條約，希望建立一個分享沒收的犯罪所得或財產的適當框架，茲商定如下：

在本協定中：

第 1 條 定義
(a) “犯罪所得”、“沒收”和“財產”等術語應當按照《聯合國打擊 跨國有組織犯罪公約》第 2 條和 1988 年《聯合國禁止非法販運麻醉藥品和 精神藥物公約》第 1 條的定義理解；
(b) “合作”意指《聯合國打擊跨國有組織犯罪公約》第 13、第 16、 第 18 至 20、第 26 和第 27 條或者 1988 年《聯合國禁止非法販運麻醉藥品 和精神藥物公約》第 5 條第 4 款、第 6、第 7、第 9 至 11 條和第 17 條所述 的任何援助以及《聯合國打擊跨國有組織犯罪公約》第 7 條所設想的各實體 之間的合作，這種合作是由一方提供的，並促成或便利了犯罪所得或財產的沒收。

第 2 條 適用範圍
本協定的目的僅僅是為了雙方之間的相互協助。

第 3 條 沒收的犯罪所得或財產[可以][應當]予以分享的情形
在不影響《聯合國打擊跨國有組織犯罪公約》第 14 條第 1、第 2 和第3(a)款以及 1988 年《聯合國禁止非法販運麻醉藥品和精神藥物公約》第 5 條第 5(b)㈠款中列明的原則的情況下，如一方佔有所沒收的犯罪所得或財產 並與另一方進行了合作，或獲得了另一方的合作，則該方[可以][應當]根據本協定與另一方分享這類犯罪所得或財產[[63]](#footnote-63) 。

第 4 條 關於分享沒收的犯罪所得或財產的請求

1. 關於分享沒收的犯罪所得或財產的請求應當在雙方商定的時間期限 內提出，應當說明與請求有關的合作情況，並應當列入充分的詳細資訊以確認 案件、沒收的犯罪所得或財產以及所涉及的機構或雙方可能商定的其他資訊。

備選案文 1
[2. 在收到根據本條規定提出的關於分享沒收的犯罪所得或財產的請求後，沒收的犯罪所得或財產所在的一方應當經與另一方協商，根據本協定 第 3 條考慮是否分享這類犯罪所得或財產。]

備選案文 2
[2. 在收到根據本條規定提出的關於分享沒收的犯罪所得或財產的請求後，沒收的犯罪所得或財產所在的一方應當根據本協定第 3 條與另一方分享這類犯罪所得或財產。]

第 5 條 沒收的犯罪所得或財產的分享

備選案文 1
[1. 一方提出與另一方分享沒收的犯罪所得或財產，應當：
(a) 根據其國內法律和政策按在其看來與另一方給予的合作相稱的程度自行確定擬分享的沒收的犯罪所得或財產的比例；
(b) 根據本協定第 6 條將與以上(a)項所述比例相應的款項轉讓給另一方。
2. 在確定轉讓金額時，持有沒收的犯罪所得或財產的一方可以納入所沒收的犯罪所得或財產的利息和升值，並可以扣減促成沒收犯罪所得或財產 的偵查、起訴或審判程式所產生的合理費用。]

備選案文 2
[1. 在根據本協定分享沒收的犯罪所得或財產時：

(a) 擬分享的沒收的犯罪所得或財產的比例應當由雙方在合理金額或 雙方商定的任何其他合理的基礎上確定；
(b) 持有沒收的犯罪所得或財產的一方應當根據本協定第 6 條將與以 上(a)項所述比例相應的款項轉讓給另一方。
2. 在確定轉讓金額時，雙方應就與沒收的犯罪所得或財產的利息和升 值以及促成沒收犯罪所得或財產的偵查、起訴或審判程式所產生的合理費用 的扣減有關的任何問題達成一致意見。]

3. 雙方商定，只要經過事前協商，沒收的犯罪所得或財產價值很小時不宜分享。

第 6 條 分享的犯罪所得或財產的支付

1. 除非雙方另有約定，根據本協定第 5 條第 1(b) 款轉讓的任何款項 均應當以如下方式支付：
(a) 以犯罪所得或財產所在的一方的貨幣計價；
(b) 通過電子資金匯劃或支票的方式。
2. 任何這類款項的支付均應當：
(a) 在 國政府收款的任何情況下，支付給[此處指明請求中所列明的有關辦公室或指定帳戶]；
(b) 在 國政府收款的任何情況下，支付給[此處指明請求中所列明的有關辦公室或指定帳戶]；或者
(c) 支付給接受付款的一方為本條之目的可能不時通知指定的其他收款人。

第 7 條 轉讓條件

1. 在進行轉讓時，雙方承認對所轉讓的犯罪所得或財產的全部權利或 所有權和權益均已經過判決，不必要通過其他審判程式即可完成沒收。一旦犯罪所得或財產已被轉讓，轉讓該犯罪所得或財產的一方即不對其承擔任何賠償責任或責任，並放棄對所轉讓的犯罪所得或財產的全部權利或所有權和權益[[64]](#footnote-64) 。
2. 除非另有約定，在一方根據本協定第 5 條第 1(b)款轉讓犯罪所得或財產的情況下，另一方應將該犯罪所得或財產用於自行確定的任何合法用途。

第 8 條 通信管道

雙方之間根據本協定的規定進行的所有通信應當通過[依據本協定前言提及的條約中關於司法協助的第[…]條指定的中央權力機關]或通過下述機 構進行：
(a) 對於 國政府，通過 辦公室進行；
(b) 對於 國政府，通過 辦公室進行；
或者
(c) 通過雙方為本條之目的可能不時通知指定的各自提名機構進行。

第 9 條 適用領域
本協定適用于[需要時指定各自政府擴大適用本協定的領域]。

第 10 條 修正
本協定可在雙方書面同意時加以修正。

第 11 條 磋商

雙方應在對方提出請求時迅速就本協定的解釋、適用或執行進行一般磋商或針對一具體案例的磋商。

第 12 條 生效
本協定一俟雙方簽署或雙方通知已完成必要的內部程式[[65]](#footnote-65)即告生效。

第 13 條 協定的終止

任何一方可以在任何時候以書面通知另一方終止本協定。終止應予於到通知 月後生效。但是，各項規定應繼續適用於根據本協定擬分享的已沒收的犯罪所得或財產。

關於分享沒收的犯罪所得或財產的示範協定之英文版如下:

Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property

Agreement between the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_and the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_regarding the sharing of confiscated proceeds of crime or property

The Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (hereinafter referred to as “the Parties”),

Recalling the United Nations Convention against Transnational Organized Crime, in particular its article 12, paragraph 1, and articles 13 and 14,

Recalling also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, in particular article 5, paragraphs 1, 4 and 5,

Recognizing that this Agreement should not prejudice the principles set forth in the United Nations Convention against Corruption or the development, at a later stage, of any appropriate mechanism to facilitate the implementation of that Convention,

 Reaffirming that nothing in the provisions of this Agreement should prejudice in any way the provisions and the principles on international cooperation set forth in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Convention against Transnational Organized Crime, and that this Agreement is intended to enhance the effectiveness of international cooperation envisioned in those Conventions,

Considering [reference to a treaty on mutual legal assistance if one exists between the Parties],

Desiring to create an appropriate framework for sharing confiscated proceeds of crime or property,

Have agreed as follows:

Article 1 Definitions

 For the purposes of this Agreement:

 (a) The terms “proceeds of crime”, “confiscation” and “property” shall be understood as defined in article 2 of the United Nations Convention against Transnational Organized Crime and article 1 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;

 (b) “Cooperation” shall mean any assistance described in articles 13, 16, 18-20, 26 and 27 of the United Nations Convention against Transnational Organized Crime or article 5, paragraph 4, and articles 6, 7, 9-11 and 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as well as cooperation between entities foreseen in article 7 of the United Nations Convention against Transnational Organized Crime, which has been given by one Party and which has contributed to, or facilitated, confiscation of proceeds of crime or property.

 Article 2 Scope of application

 This Agreement is intended solely for the purposes of mutual assistance between the Parties.

 Article 3 Circumstances in which confiscated proceeds of crime or property [may] [shall] be shared

 Where a Party is in possession of confiscated proceeds of crime or property and has cooperated with, or received cooperation from, the other Party, it [may] [shall] share such proceeds of crime or property with the other Party, in accordance with this Agreement, without prejudice to the principles enumerated in article 14, paragraphs 1, 2 and 3 (a), of the United Nations Convention against Transnational Organized Crime and article 5, paragraph 5 (b) (i), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

Article 4 Requests for sharing confiscated proceeds of crime or property

 1. A request for sharing confiscated proceeds of crime or property shall be made within a time limit to be agreed between the Parties, shall set out the circumstances of the cooperation to which it relates and shall include sufficient details to identify the case, the confiscated proceeds of crime or property and the agency or agencies involved or such other information as may be agreed between the Parties.

Option 1

 [2. On receipt of a request for sharing confiscated proceeds of crime or property made in accordance with the provisions of this article, the Party where confiscated proceeds of crime or property are located shall consider, in consultation with the other Party, whether to 10 It may be necessary to insert a specific provision in the agreement regarding the return of works of art or archeological objects that have been purchased or exported illegally from their country of origin. share such proceeds of crime or property, as set out in article 3 of this Agreement.]

Option 2

 [2. On receipt of a request for sharing confiscated proceeds of crime or property made in accordance with the provisions of this article, the Party where confiscated proceeds of crime or property are located shall share with the other Party such proceeds of crime or property, as set out in article 3 of this Agreement.]

Article 5 Sharing of confiscated proceeds of crime or property

Option 1

 [1. Where a Party proposes to share confiscated proceeds of crime or property with the other Party, it shall:

 (a) Determine, at its discretion and in accordance with its domestic law and policies, the proportion of the confiscated proceeds of crime or property to be shared, which, in its view, corresponds to the extent of the cooperation afforded by the other Party; and

 (b) Transfer a sum equivalent to that proportion set forth in subparagraph (a) above to the other Party in accordance with article 6 of this Agreement.

 2. In determining the amount to transfer, the Party holding the confiscated proceeds of crime or property may include any interest and appreciation that has accrued on the confiscated proceeds of crime or property and may deduct reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to the confiscation of the proceeds of crime or property.]

Option 2

 [1. In sharing confiscated proceeds of crime or property in accordance with this Agreement:

 (a) The proportion of the confiscated proceeds of crime or property to be shared shall be determined by the Parties on a quantum meruit basis or on any other reasonable basis agreed upon by the Parties;

 (b) The Party holding the confiscated proceeds of crime or property shall transfer a sum equivalent to that proportion set forth in subparagraph (a) above to the other Party in accordance with article 6 of this Agreement.

 2. In determining the amount to transfer, the Parties shall agree on any issues related to interest and appreciation that has accrued on the confiscated proceeds of crime or property and the deduction of reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to the confiscation of the proceeds of crime or property.]

 3. The Parties agree that it may not be appropriate to share where the value of the confiscated proceeds of crime or property is de minimis, subject to previous consultations between them.

Article 6 Payment of shared proceeds of crime or property

 1. Unless the Parties agree otherwise, any sum transferred pursuant to article 5, paragraph 1 (b), of this Agreement shall be paid:

 (a) In the currency of the Party where the proceeds of crime or property are located; and

 (b) By means of an electronic transfer of funds or by cheque.

 2. Payment of any such sum shall be made:

 (a) In any case in which the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is receiving payment, to [identify the pertinent office or designated account as specified in the request];

 (b) In any case in which the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is receiving payment, to [identify the pertinent office or designated account as specified in the request]; or

 (c) To such other recipient or recipients as the Party receiving payment may from time to time specify by notification for the purposes of this article.

Article 7 Terms of transfer

 1. In making the transfer, the Parties recognize that all right or title to and interest in the transferred proceeds of crime or property have already been adjudicated and that no further judicial proceedings are necessary to complete the confiscation. The Party transferring the proceeds of crime or property assumes no liability or responsibility for the proceeds of crime or property once they have been transferred and relinquishes all right or title to and interest in the transferred proceeds of crime or property.

 2. Unless otherwise agreed, where a Party transfers confiscated proceeds of crime or property pursuant to article 5, paragraph 1 (b), of this Agreement, the other Party shall use the proceeds of crime or property for any lawful purpose at its discretion.

Article 8 Channels of communication

 All communications between the Parties pursuant to the provisions of this Agreement shall be conducted through [the central authorities designated pursuant to article [...] of the treaty on mutual legal assistance referred to in the preamble to the agreement] or by the following:

 (a) For the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, by the Office of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_;

 (b) For the Government of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, by the Office of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; or

(c) By such other nominees as the Parties, for their own part, may from time to time specify by notification for the purposes of this article.

 Article 9 Territorial application

 This Agreement shall apply [if applicable, designate any territories to which the agreement should be extended for each Government].

Article 10 Amendments

 This Agreement may be amended when both Parties have agreed in writing to such amendment.

 Article 11 Consultations

 The Parties shall consult promptly, at the request of either Party, concerning the interpretation, application or implementation of this Agreement, either generally or in relation to a particular case.

 Article 12 Entry into force

 This Agreement shall enter into force upon signature by both Parties or upon notification by the Parties that the necessary internal procedures have been completed.

 Article 13 Termination of the Agreement

 Either Party may terminate this Agreement, at any time, by giving written notice to the other Party. Termination shall become effective […] months after receipt of the notice. The provisions shall, however, continue to apply in relation to confiscated proceeds of crime or property to be shared under this Agreement.

上開聯合國關於分享沒收的犯罪所得或財產的示範協定，現已為國際間就沒收犯罪所得或財產分享簽訂協定時之共同參考規範，以美國為例，其與摩納哥政府於2007年3月間所簽署之沒收分享協定，該協定之內容即以聯合國之沒收分享協定為其基本架構，而僅作部分細節之變更[[66]](#footnote-66)，其中就沒收分享之比例亦規定於第五條:一方決定與他方分享業經沒收之犯罪所得及財產時，其應斟酌情形，依據其國內法律及相關政策，並就其認為他方所提供之協力程序，以決定沒收分享之比例，並將與該比例相當額度之金錢或其他項目移轉於他國，該等規定原則上與聯合國上開示範協定並無太大差異，較不同者在於在決定移轉額度之情形下，示範協定係規定就與犯罪利得之利息、增值及由相關偵查、起訴或審理產生之合理費用之加計、扣除等事項，雙方應達成協議，而美國與摩納哥政府之沒收協議，則約定持有經沒收之犯罪利得之一方得決定是否就犯罪利得加計利息、增值或扣除相關偵查、起訴或審理產生之合理費用。

再就實際發生案例分析，以美國於1992 年6 月與香港就關於充公和沒收販毒得益和販毒工具的協議為例[[67]](#footnote-67)，香港政府於羅氏販毒案中，由於該案被沒收之犯罪所得分別存在於香港及美國，在1993 年4 月考慮美國政府的要求後，雙方決定先行從中扣除20%之相關支出成本後，按50:50 的比率分享充公的販毒得益，亦即香港政府就香港地區充公的財產，共取得60%，美國政府共取得40%; 反之，就美國地區充公的財產而言，香港政府共取得40%，而美國政府共取得60%。 惟上開之案件在雙方協力下，分別在雙方轄區均有沒收犯罪利得之情形，若僅一方應他方請求而在其轄區內完成犯罪所得之沒收時，就該請求方而言，其所得請求之額度是否亦能比照上開扣除勞費後雙方按50:50 的比率分享，依示範協定之規定雙方固得共同決定之，然就受請求方所支出之合理費用等，自仍應予以扣除補償之。

三、心得及建議事項:以沒收分享協定之簽署而言，我國首要之務應在沒收制度上先與國際通用之制度即上開聯合國接軌，蓋沒收分享尚與司法互助不同，並不以有簽定相關協定為前提，一方面多蒐集國際間相關之沒收分享案例，而得於必要時作為雙方磋商時之依據及參考。就此而言，於全世界多數國家均有司法互助的美國，其所累積的案例即具有相當之參考價值，惟由於此種沒收分享之個案磋商條件多屬細節性規定，與主管機關之年報統計結論不同，且多屬未公開之文件而在各主管機關持有中，而需從相關的主管機關，如美國司法部、財政部處，另闢管道取得，或經由國會於審查、結算相關預算時之中間文件去查悉內容，然究此而言，確屬較耗費時間、人力等成本之工作，然就相關制度之建立及未來擴大與國際間(不問與其間有無簽署司法互助協定)就共同協力沒收分享跨國境之犯罪人利得而言，即屬必要且持續不斷進行之工作，蓋跨國境犯罪此一國際趨勢，在未來只會愈來愈多，分工愈精細，造成國內相關犯罪偵查、審判的進行更加困難，對於政府打擊犯罪、保護人民生活、財產之努力目標，確有極大的威脅。目前依美國司法部之策略性目標[[68]](#footnote-68)係擴大國際合作夥伴，共同打擊跨國境犯罪及犯罪利得之沒收分享，並對外國檢察官及相關機關就針對犯罪利得之辯識、扣押、保全及沒收等事項，提供建議、技術性的協助及訓練，我國既與美國簽訂有司法互助協定，亦屬其國際合作夥伴，法務部係就業經法院判決確定沒收之犯罪利得之後續執行處分之主管機關，且符合聯合國沒收分享範本中所規範之主要業務對辦窗口[[69]](#footnote-69)，而得就此業務與美方之相關業務承辦單位進行接觸，進而取得上述資料，以利本國沒收分享制度之訂定及相關進行中經司法互助查扣之犯罪利得，進行更進一步之磋商，進而累積一定之案例，為將來沒收分享協定之簽署奠定基礎。

再就資產沒收分享之比例而言，就雙方所得分享之客體所在地而言，可能僅存在一方，也可能在雙方管轄地均有查扣犯罪利得，不一而足，而在雙方共同協力下完成該利得之查扣、沒收後，於分享時究應按照如何之比例計算，以聯合國之範本第五條為例，係由雙方勘酌他方所提供之協助所費程度，依其國內法制、政策，由雙方共同確定之。即應針對具體個案之實際情況，審酌協力方為提供本件犯罪利得之查扣…等相關處分所付出之勞費程度，與他方磋商分享比例，在此情形下，若得引據他方先前類此情形下之沒收分享案例，自得取得較為公平之磋商結果。另為考量為查扣、沒收此類跨國境犯罪人之利得，所必須耗費之人力、物力成本較之查扣國內之資產尤為鉅，恐因此造成主管機關之業務支出費用上龐大壓力，因此即使富裕如美國，其作法亦將該等沒收之犯罪利得交由司法部及財政部之沒收公積金，並由主管機關就該等收入為妥適之運用，而非上繳國庫。且該等為查扣、沒收犯罪利得由主管機關及協力機關所付出之龐大勞費，除違禁物、應發還予被害人者，另依各國內國法之規定外，國際上亦咸認為係優先應予補償之項目。我國法務部就跨國境犯罪近年來積極推展，不問在具體個案中或係司法互助協定之簽署均已有豐盛之收獲，當此大步邁前之際在可見的未來，所需處理之跨境犯罪項目，應會愈來愈多，所需處理之犯罪利得亦將增加，若能參考美方上述作法，對於主管機關為處理具體個案之相關時間、勞力費用之支出作出補償，並能保障將來為處理跨國境犯罪之所需後勤資源預作充分之準備。而沒收分享既不以訂立司法協助協議為前提，且得以常態性或個案方式進行合作已如前述，且鑑於各國均積極與他國共同合作建立相關之查扣、沒收犯罪利得之管道及後續之沒收分享磋商與協商，我國自應盡力與國際接軌，就已簽訂共同打擊犯罪之司法互助協議之國家、地區，如美國、大陸地區…等，在國際上處理此一議題之共識上，續行提出沒收分享之協商，並與尚未與之簽訂司法互助協議之國家，亦應本於國際間就沒收分享之共識及平等互惠原則，積極推動國際合作，以營造國際間共同合作打擊跨國境犯罪之氛圍，以抑制跨國犯罪組織或行為，進而保障世界安全。

**附錄**

**AGREEMENT BETWEEN THE GOVERNMENT OF H. S, H. THE PRINCE OF MONACO AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING THE SHARING OF CONFISCATED PROCEEDS OF CRIME OR PROPERTY**

The Government of H,S,H, the Prince of Monaco and the government of the United States of America, hereinafter referred to as the Partie.s'.

Recalling the United Nations Convention against Transnational Organized Crime, done at New York 15 November 2000, in particular its article 12, paragraph 1, and articles 13 and 14,

Recalling also the United Nations Convention against Illicit trafific in Narcotic Drugs and Psychotropic Substances done at Vienna 20 December 1988.

Recalling further the international Convention for the Suppression of the Financing of Terrorism, done at New York 9 December 1999,

Affirming that nothing in the provisions of this Agreement should prejudice in any way the provisions and the principles on international cooperation set forth in aforementioned Conventions and that this Agreement is also intended to enhance the effectiveness of international cooperation envisioned in those Conventions,

Desiring to create an .appropriate framework for sharing confiscated proceeds of crime or property,

Have agreed as follows:

**Article I**

**Definitions**

For the purposes of this Agreement:

(a) The terms "proceeds of crime", "confiscation" and "property " shall be understood as defined in article 2 of the United Nations Convention against Transnational Organized Crime and article I of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

(I)) "Cooperation" shall mean any assistance which has been by either Party and which has contributed to, or facilitated, confiscation of the proceed s of crime or property from any criminal offense.

**Article 2**

**Scope of application**

This Agreement is intended solely for the purposes of mutual assistance between the Parties in all confiscation matters and does not give rise to any rights in favor of third parties.

**Article 3**

**Circumstances in which confiscated proceeds of crime or property may be shared**

Where a Party is in possession of confiscated proceeds of crime or property and has cooperated with, or received cooperation from, the other Party, it may share such proceeds of crime or property with the other Party, in accordance with this Agreement, without prejudice to the principles set forth in the aforementioned Conventions.

**Article 4**

**Requests for sharing confiscated proceeds of crime or property**

1, A request for sharing confiscated proceeds of crime or property may be made before the confiscation occurs, but unless otherwise agreed between the Parties, shall be made no later than one year from the date that the relevant order of confiscation becomes final. A request for sharing shall set out the circumstances of the cooperation to which it relates, and include sufficient details to identify the case, the confiscated proceeds of crime or property, the agency or agencies involved, and such other information deemed necessary for the execution of the request.

2. On receipt of a request for Sharing confiscated proceeds of crime or property made in accordance with the provisions of this article, or upon its own initiative, the Party where confiscated proceeds of crime or property are located shall consider whether to share them with the other Party pursuant to article 1 of this Agreement.

**Article 5**

**Sharing of confiscated proceeds of crime or property**

1, Where a Party decides to share confiscated proceeds of crime or property with the other Party, it shall:

(a) determine, at its discretion and in accordance with its domestic law and policies, the proportion of the confiscated proceeds of crime or property to be shared, which, in its view, corresponds to the extent of the cooperation afforded by the other Party; and

(b) transfer to the other Party in accordance with subparagraph (a) above:

(i) a sum of money, after the sale or conversion of confiscated items if necessary; or

(ii) one or more confiscated items.

2. In determining the amount to transfer, the Party holding the confiscated proceeds of crime or property may include any interest and appreciation , that has accrued on the confiscated proceeds of crime or property and may deduct reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to the confiscation of the proceeds of crime or property.

1. The Parties agree that it may not be appropriate to share where the value of the confiscated proceeds of crime or property is de minimis(法律不管的瑣事), subject to previous consultations between them.

**Article 6**

**Methods of payment**

1. Unless the Parties agree otherwise, any sum transferred pursuant to article 5, paragraph 1 .(b)(i), of this Agreement shall be paid:

(a) in the currency of the Party where the proceeds of crime or Property are located; and

(b) by means of an electronic transfer of funds or by check,

2. Payment of any such sum shall be made:

(a) In which the Government of the United States of America is the Party receiving payment, to the pertinent office or designated account of the Department of Justice or the Department of Treasury as specified in the request,

(b) in any case in which the Government of H.S.H. the Prince OF Monaco is receiving payment to the Treserorie Generale des Finances; or

(c) to such other recipient or recipients as the Party entitled to payment may designate for the purposes of this article.

**Article** 7

**Terms of transfer**

1. In making the transfer, the Parties recognize that all right or title to and interest in the transferred proceeds of crime or properly has already beep adjudicated and that no further judicial proceedings are necessary to complete the confiscation. The Party transferring the proceeds of crime or property assumes no liability or responsibility for the proceeds of crime or property once they have been transferred and relinquishes all right or title to and interest in the transferred proceeds of crime or property.

2. Unless otherwise agreed, where a Party transfers confiscated proceeds of crime or property pursuant to article 5, paragraph I (b), of this Agreement, the other Party shall use the confiscated proceeds of crime or property for any lawful purpose at its discretion.

**Article 8**

**Competent authorities**

All communications between the Parties pursuant to the provisions of this Agreement shall be conducted through or by the following;

for the government of the United States, the Office of International Affairs of the United States Department of Justice; provided, however, that a request for sharing may be concurrently transmitted to the Asset Forfeiture and Money Laundering Section, or to another relevant component of the United States Department of Justice involved in the confiscation, or to , or to the relevant component of the United States Department of Homeland Security or the United States Department of Treasury involved in the confiscation;

(b) for the Government of H.S.H. the Prince of Monaco, the Direction des Services judiciaries; or

(c) by such other nominees as the Parties, for their own part, May from time to time designate for the purposes of this article,

**Article 9**

**Amendments**

This Agreement may be amended when both Parties have agreed in writing to such amendment,

**Article 10**

**Consultations**

The Parties shall consult promptly, at the request of either Party, concerning the Interpretation, application or implementation of this Agreement, either generally or in. relation to a particular ease.

**Article 11**

**Entry into force**

This Agreement shall enter into force on the first day of the third month after written through the diplomatic channel by the Parties indicating that they have completed their respective internal procedures for entry into force and also will apply to all confiscation cases pending, but not yet completed, before such time.

**Article 12**

**Termination of the Agreement**

Either Party may terminate this Agreement at any time, by giving written notice to the other Party, Termination shall become effective three (3) months after receipt of the notice. The provisions of this Agreement shall, however, continue to apply in relation to confiscated proceeds of crime or property the sharing of which had been requested prior to the effective date of termination.

1. “Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding”, 2 Stan. L. Rev. 5(1949) [↑](#footnote-ref-1)
2. American Criminal Procedure Case and Commentary by Stephen A. Saltzburg and Daniel J. Capra 。 [↑](#footnote-ref-2)
3. Jacob W. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 42(1966). [↑](#footnote-ref-3)
4. memo:

Right Protection in→ persons, houses, papers, and effects.

Warrant Issuing upon→ probable cause by→oath, affirmation, and particularly describing the searching places and the seizing persons and things. [↑](#footnote-ref-4)
5. The Fourth Amendment is set forth in two parts, the first dealing with unreasonable searches and the second dealing with warrants. Because the term” unreasonable” is use first , it might be thought to predominate so that all searches and seizures must satisfy its command, whereas the warrant clause would come into play only when a warrant is sought to justify government action. One observer has suggested that the Court has “stood the amendment on its head” by reading the warrant clause as the controlling clause of the Amendment. T Taylor, Two Studies in Constitutional Interpretation 23-24(1969). [↑](#footnote-ref-5)
6. Charles E. Moylan, “the Fourth Amendment Inapplicable vs the Fourth Amendment Satisfied: the NEGLECTED threshold of so What”?, 2S. Ill. U. L. J. 75, 76(1977). [↑](#footnote-ref-6)
7. …bad physics as well as bad law… , Katz, 389 U.S. 362 [↑](#footnote-ref-7)
8. … Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth. Whether physical penetration of a constitution of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.…For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private , even in an area accessible to the public , may be constitutionally protected…. The Fourth Amendment governs not only the seizure of tangible items , but extends as well to the recording of oral statements, overheard without any technical trespass under…the government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a search and seizure within the meaning of the Fourth Amendment…, Katz, 389 U.S. 347. [↑](#footnote-ref-8)
9. …that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment…that the invasion of a constitutionally protected area by Federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant…. there is two folder requirement, first that a person have exhibited an actual (subjective) expectation of privacy and , second , that the expectation be one that society is prepared to recognize as reasonable. Thus a man’s home is , for most purposes, a place where he expects privacy, but objects, activities, or statement that he exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable…, Katz, 389 U.S. 347. Mr. Justice, concurring. [↑](#footnote-ref-9)
10. The proximity of the area claimed to be curtilage to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by. [↑](#footnote-ref-10)
11. The exclusionary rule, in its broadest conception, provides that evidence obtained in violation of the Forth Amendment must be excluded from trial. [↑](#footnote-ref-11)
12. In Weeks v. United States, this court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling… was not derived from the explicit requirements of the Forth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. [↑](#footnote-ref-12)
13. … the line between testimonial and non-testimonial evidence must be determined by whether the witness faces the cruel trilemma in disclosing the evidence. [↑](#footnote-ref-13)
14. The United States Supreme Court has replied on three constitutional provisions in regulating the admissibility of confessions:

①From 1936 to the present, the due process clauses of the Fifth and Fourteenth Amendments has been used to exclude involuntary confessions.

②From 1964 to the present, the Sixth Amendment right to counsel has been applied in determining the admissibility of a confession obtained from a defendant who has been charged with a crime.

③From 1966 to the present, the Fifth Amendment’s privilege against self-incrimination has been applied to statements made during custodial interrogation, unless the suspect, after receiving warnings, makes a knowing and voluntary waiver of the right. [↑](#footnote-ref-14)
15. The impeachmentprocess here undoubtedly provided valuable aid to the jury in assessing petitioner’s credibility, and the benefits of this process should not be lost , in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct , sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner’s credibility was appropriately impeached by use of his earlier conflicting statements. [↑](#footnote-ref-15)
16. … Justice Rehnquist, writing for the majority, declared that exclusion of this reliable evidence was not required simply because it proceeded from Tucker’s Miranda-defective confession. He concluded that the Miranda warnings were procedural safeguards that were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. [↑](#footnote-ref-16)
17. The court held that since there was no actual infringement of the suspect’s constitutional rights the case was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed. … if Elstad’s first confession was involuntary within the meaning of the Due Process Clause, then the second confession would have to be excluded if it were derived from the first. [↑](#footnote-ref-17)
18. The contrast between Elstad and this case reveals a series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first. [↑](#footnote-ref-18)
19. … Since a reasonable person in the suspect’s shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission. [↑](#footnote-ref-19)
20. 資料來源:司法院網站: http://www.judicial.gov.tw [↑](#footnote-ref-20)
21. the decision whether to charge depends on the prosecutor’s belief that 1. the suspect is guilty, 2. The evidence is sufficient to secure conviction, and 3. It is in the community’s best interest to prosecute the suspect. [↑](#footnote-ref-21)
22. 資料來源，司法院網站http://www.judicial.gov.tw [↑](#footnote-ref-22)
23. 資料來源:司法院網站http://www.judicial.gov.tw/db/db04/db04-03.asp [↑](#footnote-ref-23)
24. 參考卞建林譯美國聯邦刑事訴訟規則。 [↑](#footnote-ref-24)
25. Sharon Chaitin Pollak, 2012.12非法證據排除聽證程序, 頁46-57，紐約大學法學院亞美法研究所。 [↑](#footnote-ref-25)
26. 酌參吳光升，美國聯邦刑事沒收程序及其借鑒意義。 [↑](#footnote-ref-26)
27. 詳參吳協展，美國犯罪所得單獨沒收之法制研究。 [↑](#footnote-ref-27)
28. 18 U.S.C. §981(e)(6)。 [↑](#footnote-ref-28)
29. The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund to receive the proceeds of forfeiture and to pay the costs associated with such forfeitures, including the costs of managing and disposing of property, satisfying valid liens, mortgages, and other innocent owner claims, and costs associated with accomplishing the legal forfeiture of the property. [↑](#footnote-ref-29)
30. 詳前註1，頁3。 [↑](#footnote-ref-30)
31. *United States v. Cherry* , 330 F.3d 658(4th Cir. 2003). [↑](#footnote-ref-31)
32. Simon NM Young. Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime . Edward Elgar Publishing Limited. 2009. p37. [↑](#footnote-ref-32)
33. 詳參前註1，頁2-4。 [↑](#footnote-ref-33)
34. 詳參邱智宏，建立跨部會專責聯繫機制，強化查扣犯罪所得。 [↑](#footnote-ref-34)
35. 詳參前註2、頁18-26。 [↑](#footnote-ref-35)
36. 郭瑜芳，非以定罪為基礎之資產沒收。 [↑](#footnote-ref-36)
37. United States v. James Daniel Good Real Property, 510 U.S. 43, 56(1993). [↑](#footnote-ref-37)
38. Republic Nat’1 Bank v. United States, 506 U.S. 80(1992). [↑](#footnote-ref-38)
39. 18 U.S.C.§985(d)(1)(A)-(B)(i). [↑](#footnote-ref-39)
40. 18 U.S.C.§985(c)(1)(A)-(C). [↑](#footnote-ref-40)
41. 18 U.S.C.§985(c)(2)(A)-(C). [↑](#footnote-ref-41)
42. 18 U.S.C.§985(b)(2). [↑](#footnote-ref-42)
43. 18 U.S.C.§983(j)(1). [↑](#footnote-ref-43)
44. 18 U.S.C.§983(j)(2). [↑](#footnote-ref-44)
45. 18 U.S.C.§983(j)(3). [↑](#footnote-ref-45)
46. 21 U.S.C.§2232(a)-(c). [↑](#footnote-ref-46)
47. Ｕnited States v. Monsanto,491 U.S. 600, 615(1989). [↑](#footnote-ref-47)
48. United States v. Property, Parcel of Aguliar , 337 F.3d 225, 229 (2nd Cir.2003). [↑](#footnote-ref-48)
49. United States v. Melrose East Subdivision, 357 F.3d 493, 504(5th Cir.2004). [↑](#footnote-ref-49)
50. United States v. United States Currency in the Amount of $150,660.00, 908 F.2d 1200, 1204-1205. [↑](#footnote-ref-50)
51. FED.R.CRIM. P.41(C)(1)&(2). [↑](#footnote-ref-51)
52. 526 U.S. 559(1999). [↑](#footnote-ref-52)
53. United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 875-76 (10th Cir.1992). [↑](#footnote-ref-53)
54. 詳參陳雅譽，論美國洗錢防制下之財產沒收制度並與我國相關制度之比較。 [↑](#footnote-ref-54)
55. 詳參前揭註1。 [↑](#footnote-ref-55)
56. US v. Kaley, 579 F.3d 1246, 1258 (11th Cir. 2009) [↑](#footnote-ref-56)
57. US v. Floyd, 992 F.2d 498, 501–02 (5th Cir. 1993). [↑](#footnote-ref-57)
58. Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco and Firearms, 401 F.3d 419, 435–36, 2005FED App.. [↑](#footnote-ref-58)
59. United States v. Harvey, 2006 . [↑](#footnote-ref-59)
60. 詳參前註1，頁11-14。 [↑](#footnote-ref-60)
61. 謝立功，加強國際合作，共同打擊犯罪。 [↑](#footnote-ref-61)
62. 聯合國文件:E/2005/INF/2/Add.1 [↑](#footnote-ref-62)
63. 可能有必要在協定中插入一項關於從原所在國被非法購買或出口的藝術作品或考古文物的返還的具體條文。 [↑](#footnote-ref-63)
64. 若一國之內國法要求其出售所沒收的犯罪所得或財產，並僅允許分享資金，本條文可能是不必要的。 [↑](#footnote-ref-64)
65. 可以是簽署、批准、在官方公報上發表或其他方式。 [↑](#footnote-ref-65)
66. 詳參附錄。 [↑](#footnote-ref-66)
67. 參見香港政府財務委員會2011年1月14日討論文件「與美國政府分攤充公的販毒得益-羅氏案」 [↑](#footnote-ref-67)
68. 參見美國司法部網站之資產沒收計畫。U.S. Department of Justice Asset Forfeiture Program Strategic Objective4 Program Growth. [↑](#footnote-ref-68)
69. 第8條 通信渠道。 [↑](#footnote-ref-69)