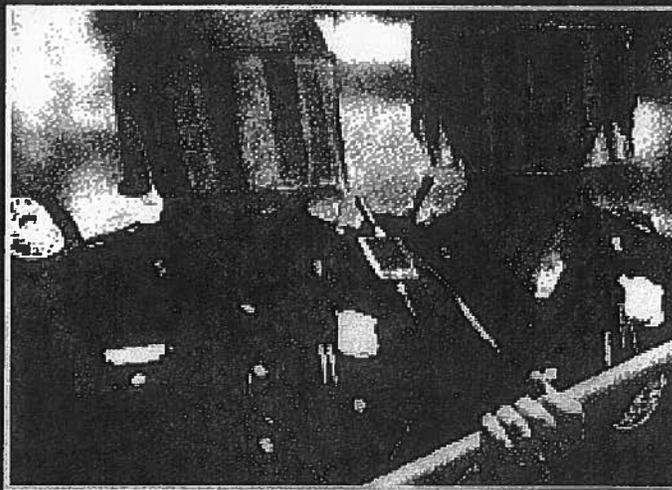


FORFEITING OUR PROPERTY RIGHTS

*Is Your
Property
Safe from
Seizure?*



Rep. Henry Hyde

Forfeiting Our Property Rights

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Seizure?

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Foreword

The stories in this book will make your blood boil. Is this America at the close of the 20th century? If it seems more like medieval Europe, when lords held all but unaccountable power over their subjects, it is because that is the origin of modern American forfeiture law. Revived and driven by the war on drugs, that law today is being used across this nation to make a mockery of our rights to property and due process and is now reaching well beyond the war on drugs. It is to the credit of Henry Hyde—no pandering liberal he—that a spotlight is shining at last on this dark corner of our law.

What are we to say when officers in the Sheriff's Department in Volusia County, Florida, stop thousands of motorists traveling Interstate 95 who fit a "drug-courier profile," then simply confiscate, on the spot, any funds those motorists are carrying in excess of \$100; when a Minneapolis man convicted of selling seven "obscene" magazines and videotapes is fined \$100,000, given a sentence of six years, and then made to forfeit 10 pieces of commercial real estate, 31 current or former businesses, including all of their assets, and nearly \$9 million; when police drain the bank account of a Bakersfield, California, woman after her son, who had not lived with her for 10 years, is arrested on drug trafficking charges; or when 30 local, state, and federal agents burst into a Malibu, California, home—nominally in a fruitless search for drugs, but actually, as a subsequent investigation brings out, as part of a forfeiture action—during the course of which they shoot and kill the owner?

Those examples of modern forfeiture law in practice are not made up. What is worse, they are a tiny sample of the kinds of abuses of government power we find everywhere today under this body of law, which encourages and even sanctions practices we would never tolerate in other areas of our law. If he had done nothing else, then, Congressman Hyde would deserve our thanks for having drawn

together in one place so wide a variety of such cases, to give life to the problem before us and hope to the victims of this runaway law.

But he has done much more in this book. Among other things, Mr. Hyde helps us to see just how we got into this mess, through an accumulation of "hoary doctrines" resurrected from the past, only to be given judicial and statutory sanction over the years. And he helps us too to see our way out, with his own proposed bill to bring much-needed reform to this law.

Finding its roots in the Old Testament—in the idea that objects and animals could be "guilty" of wrongdoing; in medieval doctrine—in the forfeiture of such "deodands" to the Crown; and in admiralty law—in the seizure of ships and cargo for failure to pay customs duties, forfeiture has been with us since our inception as a nation. With the war on drugs, however, it has taken on a life of its own.

Although modern asset forfeiture law varies by federal or state statute, the essence of the law is simple and stark. Stated operationally, under most civil asset forfeiture statutes, as opposed to criminal statutes, law enforcement officials can seize a person's property, real or chattel, without notice or hearing, upon an *ex parte* showing of mere probable cause to believe that the property has somehow been involved in a crime. Proceeding thus *in rem*—against the property, not the person—the government need not charge the owner or anyone else with a crime, for the action is against "the property." The allegation of "involvement" may range from a belief that the property is contraband to a belief that it represents the proceeds of crime (even if the property is in the hands of someone not suspected of a crime), that it is an instrumentality of crime, or that it somehow "facilitates" crime. And the showing of probable cause may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party with interests adverse to the owner.

Once the property is seized, the burden is upon the owner, if he wants to try to get his property back, to prove its "innocence," not by a probable-cause but by a preponderance-of-the-evidence standard. Until recently, that proof has been all but impossible because the thing is considered to be the offender. Imbued with personality, the thing is said to be "tainted" by its unlawful use. Thus, the rights of the owner never come into consideration. Given the manifest injustice in that, Congress and several states in the 1980s enacted innocent-owner defenses. But under those defenses the owner must prove that he

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lacked both control over the property's unlawful use and knowledge of the use—negatives that are often impossible to prove. Moreover, before the Supreme Court reined in the “relation-back” doctrine in 1993—which holds that title to property vests in the government at the time it is used illegally, even if the property changes hands many times after that—those few owners who could prove their innocence often lost because the relation-back doctrine was said to trump the innocent-owner defense.

The substantive and procedural hurdles owners face are only compounded by the practical hurdles. Deprived of their property, ranging from homes, cars, boats, and airplanes to businesses and bank accounts, owners are at a distinct legal and practical disadvantage if they want to wage a costly legal battle against the government to recover the property. Moreover, if the owner has been involved in activity that in any way might lead to criminal charges—however trivial or baseless those charges might ultimately prove to be—the risk of self-incrimination entailed by any effort to get the property back has to be weighed against the value of the property, which means that the owner will often simply not make the effort.

In contrast with the civil forfeiture law just outlined, criminal forfeiture is a recent development in American law, stemming from the enactment by Congress in 1970 of the Racketeer Influenced and Corrupt Organizations Act (RICO). Although Congress has steadily increased its reach—and the RICO statute itself is extraordinarily vague—criminal forfeiture is relatively less objectionable than civil forfeiture because it is justified as punishment for a crime and thus follows only after an *in personam* proceeding against the person, not an *in rem* proceeding against the property. Defendants are thus entitled to the procedural protections of the criminal law, including the requisite burdens and standards of proof. And forfeiture turns on conviction, not on the antiquated fictions of civil forfeiture. Although criminal forfeiture is in a sense broader than civil forfeiture in that under it the government can reach even “untainted” assets, that result follows simply from the different rationales for criminal and civil forfeiture. Under criminal forfeiture, property is forfeited because of the guilt of the owner, not the “guilt” of the property.

Clearly, there is much that is wrong in this law, and much in it that helps to explain just why the abuses Mr. Hyde so richly documents have come about. The reader will find in this book not only an account

of those wrongs but an explanation of how they lead to the abuses. Whether the remedy Mr. Hyde proposes goes far enough—whether his preservation of the “facilitation” doctrine, for example, can be justified—must be left to the reader to decide. At the least, now that Mr. Hyde is chairman of the House Judiciary Committee, there is hope for relief. This book should help to create the climate of public opinion that will be necessary to bring about that relief.

ROGER PILON