CIVIL FORFEITURE REFORM

Congress should

- amend the Civil Asset Forfeiture Reform Act to require, in most cases, a criminal conviction to be obtained before assets may be forfeited to the government;
- prohibit federal agencies from "adopting" state or local asset forfeiture cases and engaging in the "equitable sharing" of any forfeited property in such cases;
- require forfeited property to be assigned to the federal treasury rather than to the agencies executing the forfeiture;
- short of those reforms, adopt stronger nexus and proportionality requirements for asset forfeitures and require proof by at least a clear and convincing standard, if not beyond a reasonable doubt; and
- require the government to have the burden of proof in establishing whether someone is an "innocent owner."

States should

- eliminate civil forfeiture by requiring a criminal conviction before assets can be forfeited;
- short of that, adopt stronger nexus and proportionality requirements for asset forfeitures and require proof by at least a clear and convincing standard, if not beyond a reasonable doubt;
- prohibit state and local law enforcement agencies from participating in federal "equitable sharing" programs;
- require any forfeited assets to be deposited in the state's general fund rather than given to the law enforcement agencies that initiated the seizures; and
- require law enforcement agencies to file timely annual reports concerning all aspects of their seizure and forfeiture activities.

American asset forfeiture law has two branches: criminal forfeiture and civil forfeiture. *Criminal* forfeiture is usually fairly straightforward, whether it concerns contraband, which as such may be seized and forfeited to the government, or ill-gotten gains from crimes and instrumentalities of crime. Pursuant to a criminal conviction, any proceeds or instrumentalities of the crime are subject to seizure and forfeiture. Courts may have to weigh the scope of "proceeds" or "instrumentalities." Or they may have to limit statutes that provide for excessive forfeitures. But forfeiture follows conviction, with the usual procedural safeguards of the criminal law.

Not so with *civil* forfeiture, where most of the abuses today occur. Here, law enforcement officials often simply seize property on mere suspicion of a crime, leaving it to the owner to try to prove the *property's* "innocence," where that is allowed. Unlike *in personam* criminal actions, *civil* forfeiture actions, if they are even brought, are *in rem*—brought against "the thing" on the theory that it "facilitated" a crime and thus is "guilty." That is why forfeiture cases have names like the *United States v. $19,356.76*.

Forfeiture outrages span the country. In Volusia County, Florida, it's standard practice for police to stop motorists going south on I-95 and seize any cash they're carrying in excess of $100 on suspicion that it's money to buy drugs. After seizure, it's left to the victim to prove that the money is not for buying drugs. New York City police routinely seize cars from those accused of a DUI (driving under the influence). In 2010, Philadelphia police tried to seize a grandmother's house and car because, without her knowledge, her son sold less than $200 worth of marijuana from the house. In 2017, the Pennsylvania Supreme Court overturned the seizure. Philadelphia has abused civil forfeiture so brazenly—seizing over 1,000 homes, more than 3,000 vehicles, and $44 million in cash over an 11-year period—that the Institute for Justice filed a class-action suit that was settled in 2018 with the city agreeing to reform its practices.

In each such case, the property is seized for forfeiture to the government, not because the owner has been found guilty of a crime but because the property is said to "facilitate" a crime, whether or not a crime was ever proved or a prosecution even begun. And if the owner wants to try to get his property back, the cost of litigation, to say nothing of the threat of an *in personam* criminal prosecution, is frequently an insurmountable bar to reclaiming the property.

Behind all these seizures are perverse incentives: the police themselves or other law enforcement agencies often keep the forfeited property—an arrangement rationalized as a cost-efficient way to fight crime. The incentives thus skew toward ever more forfeitures. Vast state and local seizures aside, according to federal government records, Justice Department seizures alone went from

$27 million in 1985 to $556 million in 1993 to nearly $4.2 billion in 2012. Since 2000, states and the federal government have seized for forfeiture at least $68.8 billion, and, with many states not providing full data, the number is surely much higher.

Grounded in the "deodand" theories of the Middle Ages when the "goring ox" was subject to forfeiture because "guilty," this practice first arose in America in admiralty law. Thus, if a ship owner abroad—and hence beyond the reach of an *in personam* action—failed to pay duties on goods he shipped to America, officials could seize the goods through *in rem* actions. Except for such uses, forfeiture was fairly rare until Prohibition. With the war on drugs, it came to life again. And today, officials use forfeiture well beyond the drug war. As revenue from forfeitures has increased, federal, state, and local officials across the country have become addicted to the practice, despite periodic exposés in the media.

In some cases, of course, the use of civil forfeiture might be justified simply on the facts, as in the admiralty case just noted. Or perhaps a drug dealer, knowing his guilt but also knowing that the state's evidence is inconclusive, will agree to forfeit cash that police have seized, thereby avoiding prosecution and possible conviction. That outcome is simply a bow to the uncertainties of prosecution, as with any ordinary plea bargain. But the rationale for the forfeiture in such a case is not "facilitation." Rather, it is the alleged ill-gotten gain.

By contrast, when police or prosecutors, for acquisitive reasons, use the same tactics with *innocent* owners who insist on their innocence—"Abandon your property or we'll prosecute you," at which point the costs and risks surrounding prosecution surface—they are employing the facilitation doctrine to justify putting the innocent owner to such a choice. In those cases, the doctrine is pernicious: it's simply a ruse—a fiction—serving to coerce acquiescence.

Because it lends itself to such abuse, therefore, the facilitation doctrine should be unavailable to any law enforcement agency once an owner challenges a seizure of his property. Once he does, the government should bear the burden of showing not that the *property* is guilty but that the *owner* is; therefore, his property may be subject to forfeiture if it constitutes ill-gotten gain or was an instrumentality of the crime, narrowly construed (e.g., burglary tools, but not cars in DUI arrests or houses from which drug calls were made). In other words, once an owner challenges a seizure, *criminal* forfeiture procedures should be required. Indeed, "civil" forfeiture, arising from an allegation that there was a *crime*, is essentially an oxymoron. The government should prove the allegation, under the standard criminal law procedures, before any property is forfeited.

Many of these abuses take place at the state level, of course. Yet Congress can take steps not only to reform federal law—which often serves as a model

for state laws—but to affect state laws as well. States can also take the lead in reforming their forfeiture laws and policies, and 36 states and the District of Columbia have enacted some type of civil forfeiture reform since 2014. Four states—Maine, Nebraska, New Mexico, and North Carolina—eliminated the practice entirely by requiring a criminal conviction. And despite the warnings of police unions and other law enforcement groups, eliminating civil forfeiture did not result in a rise in those states' crime rates.

On the federal level, the Civil Asset Forfeiture Reform Act of 2000, brought to fruition by the efforts of the late Rep. Henry J. Hyde (D-IL), implemented several procedural reforms. But it left the underlying substantive problem, the facilitation doctrine, untouched. The abuses have thus continued, so much so that in 2014 two former directors of the Justice Department's civil forfeiture program wrote in the *Washington Post* that "the program began with good intentions but now, having failed in both purpose and execution, it should be abolished."

If abolition of civil forfeiture is not possible, Congress should make fundamental changes in the program. In particular, if a crime is alleged, federal law enforcement officials should have the power to seize property for subsequent forfeiture under only three conditions: (1) when *in personam* jurisdiction is unavailable, as in the admiralty example; (2) when, in the judgment of the officials, the evidence indicates that a successful prosecution is uncertain, but there is a high probability that the property at issue is an ill-gotten gain from the alleged crime *and the target does not object to the forfeiture*, as in the drug-dealer example; and (3) when the property would be subject to forfeiture following a successful prosecution, and there is a substantial risk that it will be moved beyond the government's reach or otherwise dissipated prior to conviction; but such seizures or freezes should not preclude the availability of funds sufficient to enable the defendant to mount a proper legal defense against the charges, even though some or all of the assets may be dissipated for that purpose.

Those reforms would effectively eliminate the facilitation doctrine, except for a narrow reading of "instrumentalities," and would largely replace civil forfeiture proceedings with criminal proceedings. Still, the doctrine may continue to be employed by state and local officials. Because of that, and out of respect for federalism more broadly, Congress should prohibit the practice of "adoption" or "equitable sharing" whereby federal agencies adopt cases brought to them by state and local enforcement agencies, then share the forfeited assets with those agencies. In such cases, the usual motive is to circumvent state restrictions aimed at stopping abuses by requiring, for example, that forfeited assets be directed to state education departments rather than kept by the state

or local law enforcement agencies. Thus, here again, forfeiture's perverse incentives drive this practice while undermining state autonomy in the process.

Consistent with that reform, Congress should put an end to the underlying incentive structure by requiring that forfeited assets be assigned to the federal treasury rather than to the enforcement agencies—which should not be allowed, in effect, "to police for profit." In 2021, the federal Asset Forfeiture Fund exceeded $2.4 billion, having more than doubled since 2008 and increased 20-fold since it was created in 1986. Not coincidentally, the growth in civil forfeiture closely parallels the ability of law enforcement agencies to profit from their activities. In fact, a veritable cottage industry has arisen that instructs officers how to stretch their legal authority to the absolute limit and beyond. It's a system that resembles piracy more than law enforcement.

At the least, if the reforms suggested here are not made, Congress should require the government to show, if challenged, that the property subject to forfeiture had a significant and direct connection to the alleged underlying crime, not simply that it was somehow "involved" in the crime, as now. And the standard of proof should be raised from a mere preponderance of the evidence to at least clear and convincing evidence. Beyond a reasonable doubt—the same burden of proof required for criminal convictions—would be even better. Florida recently raised the burden for civil forfeiture to the beyond-a-reasonable-doubt standard.

Moreover, a proportionality requirement should be imposed to ensure that the government does not seize property out of proportion to the offense. Congress should require officials to consider the seriousness of the offense, the hardship to the owner, the value of the property, and the extent of a nexus to criminal activity. If a son living in his parents' home is convicted of selling $40 worth of heroin and officials try to take the home, as happened in Philadelphia, a proportionality requirement ensures that prosecutors cannot take a home for a $40 crime.

Finally, if Congress cannot eliminate the facilitation doctrine, it should strengthen the innocent owner defense. Under current law, the burden is on the owner to prove his innocence by a preponderance of the evidence. Just as people enjoy the presumption of innocence in a criminal trial, property owners never convicted or even charged with a crime should not be presumed guilty in civil forfeiture proceedings. The burden of proof should be on the government to show, by at least clear and convincing evidence, that the owner knew or reasonably should have known that the property facilitated a crime and he did nothing to mitigate the situation or that the property reflected the proceeds of a crime. (A higher standard, such as beyond a reasonable doubt, would be preferable.)

The Civil Asset Forfeiture Reform Act of 2000 has proved inadequate for curbing abuses as countless Americans across the nation, having done nothing wrong, continue to lose their homes, businesses, and, sometimes, their very lives to the aggressive, acquisitive policing that civil forfeiture encourages. There is broad agreement today that Congress should act quickly and decisively to fix a system that is badly in need of reform.

Suggested Readings

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