

## CHAPTER 5

### ENDING LEGALIZED PIRACY

#### Civil Asset Forfeiture Reform

Congress should

- amend the Civil Asset Forfeiture Reform Act to require, in most cases, that a criminal conviction 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 that forfeited property 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 a clear and convincing standard; and
- require the government to have the burden of proof in establishing that someone is not an “innocent owner.”

American asset forfeiture law has two branches. One, *criminal* asset forfeiture, is usually fairly straightforward, whether it concerns contraband, which as such may be seized and forfeited to the government, or ill-gotten gain and instrumentalities. 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* asset forfeiture, where most of the abuses today occur. Here, law enforcement officials often simply seize property for forfeiture 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.”

In Volusia County, Florida, police 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. New York City police make DUI arrests and then seize drivers’ cars. District of Columbia police seize a grandmother’s home after her grandson comes from next door and makes a call from the home to consummate a drug deal. Officials seize a home used for prostitution and the previous owner, who took back a second mortgage when he sold the home, loses the mortgage. In each case, the property is seized for forfeiture to the government not because the owner has been found guilty of a crime but because it is said to “facilitate” a crime, whether or not a crime was ever proven or a prosecution even begun. And if the owner does want to try to get his property back, the cost of litigation, to say nothing of the threat of an in personam criminal prosecution, often puts an end to that.

Behind all of this are perverse incentives since the police themselves or other law enforcement agencies usually keep the forfeited property—an arrangement rationalized as a cost-efficient way to fight crime. The incentives are thus skewed 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 2001 the federal government has seized \$2.5 billion without either bringing a criminal action or issuing a warrant.

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 seized the goods through in rem actions. But except for such uses, forfeiture was fairly rare until Prohibition. With the war on drugs, it again came to life, although officials today use forfeiture well beyond the drug war. And as revenue from forfeitures has increased, the practice has become a veritable addiction for federal, state, and local officials across the country, despite periodic exposés in the media.

There will be some cases, of course, in which the use of civil asset forfeiture might be justified simply on the facts, as in the admiralty case just noted. Or perhaps a drug dealer, knowing his guilt but knowing also that the state’s evidence is inconclusive, will agree to forfeit cash that police have seized, thereby to avoid 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—it’s 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—it’s the facilitation doctrine they’re employing to justify putting the innocent owner to such a choice. In such 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. And once he does, the government should bear the burden of showing not that the *property* is guilty but that the *owner* is and, 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” asset forfeiture, arising from an allegation that there was a *crime*, is essentially an oxymoron in such cases. The government should prove the allegation, under the standard criminal law procedures, before any property is forfeited.

Many of these abuses take place today 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 law—but to affect state law as well. The Civil Asset Forfeiture Reform Act of 2000, brought to fruition by the efforts of the late Henry J. Hyde of Illinois, made several procedural reforms, but it left in place the basic substantive problem, the “facilitation” doctrine. The abuses have thus continued, so much so that two former directors of the Justice Department’s civil asset forfeiture program recently 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 that is not possible, Congress should make fundamental changes in the program. In particular, if a crime is alleged, federal law enforcement officials should have power to seize property for subsequent forfeiture under only three conditions: first, when in personam jurisdiction is not available, as in the admiralty example above; second, 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 above; and third, 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. But the doctrine may continue to be employed by state and local officials. Because of that, and from 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. 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 2013 the federal Asset Forfeiture Fund exceeded \$2 billion, having more than doubled since 2008 and increased twentyfold since it was created in 1986. Not coincidentally, the growth in civil asset 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 more resembles piracy than law enforcement.

At the least, if the reforms above 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, again as now, to clear and convincing evidence. Similarly, 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 recently happened in Philadelphia, a proportionality requirement ensures that prosecutors cannot take a home for a \$40 crime.

Finally, assuming that the facilitation doctrine is not eliminated, current law affords an innocent owner defense, but 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 asset forfeiture proceedings. The burden of proof should be on the government to prove, by 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.

The Civil Asset Forfeiture Reform Act of 2000 has proven 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 this law 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 READING

Dick M. Carpenter II, Larry Salzman, and Lisa Knepper, "Inequitable Justice: How Federal 'Equitable Sharing' Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain," Institute for Justice, October 2011, <http://www.ij.org/inequitablejustice>.

Henry J. Hyde, *Forfeiting Our Property Rights* (Washington: Cato Institute, 1995).

Roger Pilon, "Can American Asset Forfeiture Law Be Justified?" *New York Law School Law Review* 39 (1994): 311.

Roger Pilon, "Forfeiting Reason," *Criminal Law & Procedure News* 1, no. 2 (May 1, 1997).

Michael Sallah, Robert O'Harrow Jr., and Steven Rich, "Stop and Seize," *Washington Post*, September 6, 2014.

Sarah Stillman, "Taken," *New Yorker*, August 12, 2013.

Tim Walberg, "Stopping the Abuse of Civil Forfeiture," *Washington Post*, September 4, 2014.

Marian R. Williams et al., "Policing for Profit: The Abuse of Civil Asset Forfeiture," Institute for Justice, March 2010.

John Yoder and Brad Cates, "Government Self-Interest Corrupted a Crime-Fighting Tool into an Evil," *Washington Post*, September 18, 2014.

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