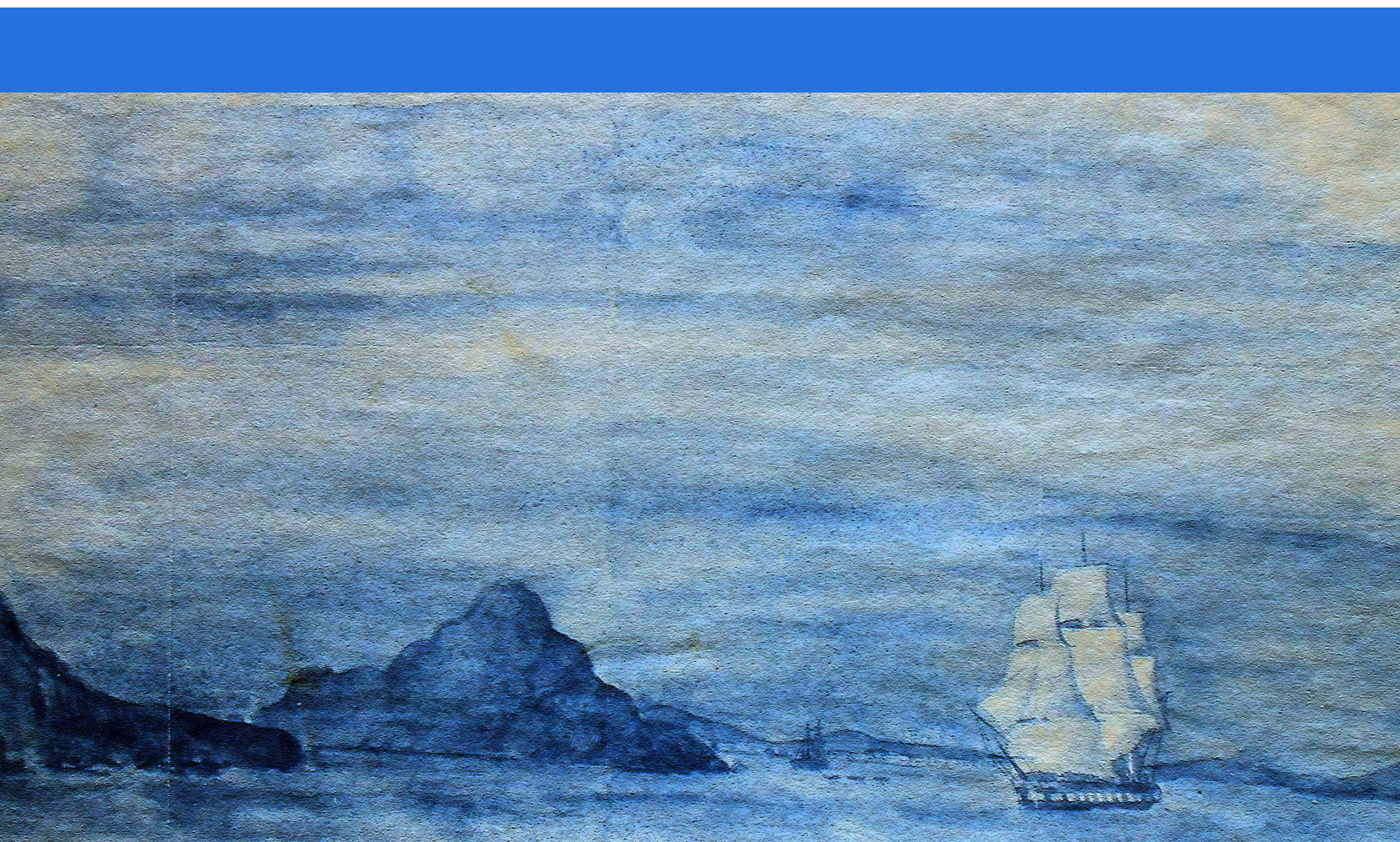




FROM THE HIGH SEAS TO HIGHWAY ROBBERY:

**How Civil Asset Forfeiture Became One of
the Worst Forms of Government Overreach**



Jason Pye, Luke Hogg, and Josh Withrow



From the High Seas to Highway Robbery: How Civil Asset Forfeiture Became One of the Worst Forms of Government Overreach

By Jason Pye, Luke Hogg, and Josh Withrow

A History of Civil Asset Forfeiture in the United States

Civil asset forfeiture is a process by which governments seize property suspected of having a connection to a crime – such as being used in the commission of an illicit act, or acquired with the profits of criminal activity. Unlike criminal proceedings, where charges are brought against an individual, governments bring their case *in rem*, or “against the property,” in civil asset forfeiture cases¹. Civil asset forfeiture is distinct from criminal forfeiture in which the state acts *in personam*, or against the person, where the government must indict “the property used or derived from the crime along with the defendant.”²

The critical distinction between civil and criminal forfeiture is whether or not the seizure of private property is directly tied to criminal prosecution and conviction. In criminal cases, assets are seized in conjunction with the criminal investigation and are temporarily held by the government until a judgment is reached.

In a civil asset forfeiture case, there is no such burden as the assets are not directly tied to a specific criminal charge. So long as the state has reason to believe the assets are the result of, or are being used for, illicit activity, then the burden is placed on the owner to prove otherwise.

Bringing a case against property creates a legal fiction. Inanimate objects cannot commit crimes, but civil asset forfeiture provides a means for governments to target property suspected of having a connection with criminal activity, without bringing actual criminal asset forfeiture proceedings. In most states and the federal government, the presumption of innocence does not exist in civil asset forfeiture proceedings. Property subject to these proceedings is guilty until proven innocent by the property owner, who often is never even charged with a crime.

Civil asset forfeiture has its roots in the Medieval concept of *in rem* forfeiture. “Kings, for instance, could seize an instrument that caused the death of another in order to

¹ The fact that property can be charged instead of its owners leads to absurd court cases such as: *United States v. \$127,700 in U.S. Currency*, 780 F.2d 533 (1985) and *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976 (2008). Fortunately, in both of these cases, the property was eventually returned to the claimant.

² U.S. Department of Justice, “Types of Federal Forfeiture,” Accessed July 2, 2019 <https://www.justice.gov/afp/types-federal-forfeiture>

finance the deceased's funeral mass,"³ Scott Bullock, a senior attorney at the Institute for Justice, explains. "The idea arose from a superstitious belief that objects acted independently to cause death."⁴ That civil asset forfeiture comes from a superstitious belief that inanimate objects could be held liable for death reveals a lot about this legal practice. However, civil asset forfeiture was relatively rare until the 17th century.

In 1651, the British Parliament passed the Navigation Ordinance,⁵ which prohibited the transport of goods via foreign ships to or from British and colonial ports. Meant to target the Dutch, violators of the Ordinance, which was one of the contributing causes of the First Anglo-Dutch War, faced seizure of their vessels.

Although King Charles II voided the Ordinance upon his restoration to the throne, parliament passed several other acts over the next half-century that allowed the British to seize foreign ships not in compliance with the stubbornly imperialist sentiments of the laws.

In 1733, parliament passed the Molasses Act,⁶ which imposed heavy duties on imported molasses. The intent of the Molasses Act was to force American colonists to purchase higher-priced molasses from the British West Indies, rather than non-British colonies. The law was widely evaded due to bribery of local officials and smuggling. Ships that were found in violation of the law were subject to seizure.

Laws that allowed for the seizure of property were not limited to maritime trade. "In the Colonial period, the English Crown issued writs of assistance that permitted customs officials to enter homes or vessels and seize whatever they deemed contraband," Sarah Stillman wrote in *The New Yorker*. "As the legal scholars Eric Blumenson and Eva Nilsen have noted, these writs were 'among the key grievances that triggered the American Revolution.'"⁷

These laws, which allowed government officials to seize citizens' property without criminal charges, were in absolute contradiction to our founders' vision of liberty. James Otis, a Massachusetts lawyer and one of the early American patriots, challenged the legality of British writs of assistance, or general warrants, in 1761 as a violation of English common law.⁸

"I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is," Otis said at the State House in Boston. "It appears to me the

3 Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture," Institute for Justice, Accessed July 2, 2019 http://www.ij.org/foreword-2#_edn1.

4 Ibid.

5 Parliament of the United Kingdom, "The Navigation Laws," Accessed July 2, 2019 <http://www.parliament.uk/about/living-heritage/transformingsociety/tradeindustry/importexport/overview/navigationlaws/>

6 Stamp Act, "Molasses Act," Accessed July 2, 2019 <http://www.stamp-act-history.com/molasses-act/sugar-and-molasses-act-of-1733-original-text/>

7 Sarah Stillman, "Taken," *The New Yorker*, August 12, 2013 <http://www.newyorker.com/magazine/2013/08/12/taken>

8 Constitution Society, "James Otis: Against Writs of Assistance," Accessed July 2, 2019 https://www.constitution.org/bor/otis_against_writs.htm

worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book.”

Summarizing what he had seen on that February day, John Adams, who would become one of the leading advocates for independence from the British crown, wrote that Otis “asserted that every man, merely natural, was an independent sovereign, subject to no law but the law written on his heart and revealed to him by his Maker, in the constitution of his nature and the inspiration of his understanding and his conscience. His right to his life, his liberty, no created being could rightfully contest. Nor was his right to his property less incontestable.”

The First United States Congress passed Virginia Congressman James Madison’s fourth proposal, which, in part, prohibited writs of assistance and “unreasonable searches and seizures.”⁹ The Fourth Amendment to our Constitution was largely based on this language.

The First United States Congress enacted a civil asset forfeiture statute based on British admiralty law. The statute was meant to aid in the collection of customs duties, which, at the time, was almost the sole source of revenue for the new federal government.

The first significant challenge to federal civil asset forfeiture laws came in 1827 via *The Palmyra* case.¹⁰ In this case, a privateer and his ship were captured while trying to destroy American ships. The privateer claimed his ship, which was commissioned by the King of Spain, could not be forfeited until he was convicted of a crime. The Supreme Court disagreed, ruling that the ship itself was guilty of the bad act, not simply the privateer.

In 1844, in *United States v. Brig Malek Adhel*,¹¹ Justice Joseph Story, writing for the majority, upheld the seizure of a vessel used in piracy even though the captain and the crew had not been charged with a crime.

“The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner,” Story wrote. This was justified, he explained, “from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party.”

Although the use of civil asset forfeiture was typically, if not exclusively, limited to maritime law, it was rarely used until the late twentieth century outside of two brief periods, as Bullock notes: the Civil War and Prohibition.¹²

9 Rutgers University, “Proposed Amendments to the Constitution,” Accessed July 2, 2019 <http://www.let.rug.nl/usa/presidents/james-madison/proposed-amendments-to-the-constitution.php>

10 25 U.S. 1 (1827)

11 43 U.S. 210 (1844)

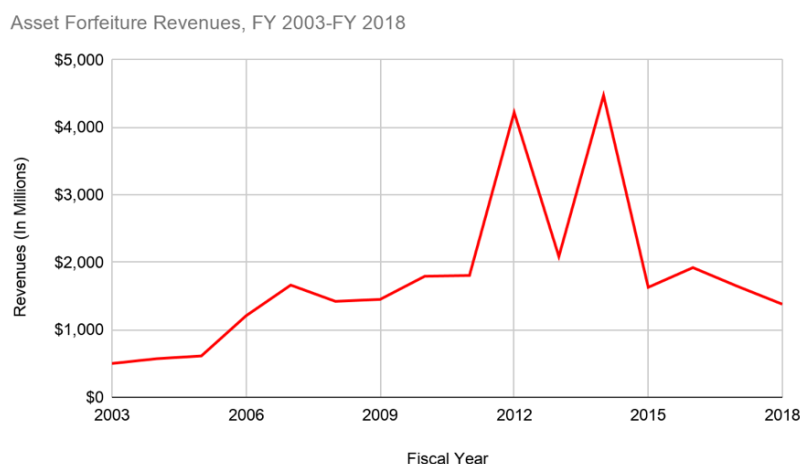
12 Scott Bullock, “Policing for Profit: The Abuse of Civil Asset Forfeiture,” The Institute for Justice, Accessed July 2, 2019

1984: Congress Creates a Profit Motive

While waging the so-called “War on Drugs” in the 1980s, well-intentioned lawmakers escalated policies intended to target illicit drug activity, much like illegal spirits were targeted during Prohibition. In 1984, Congress passed the Comprehensive Crime Control Act, which created the Justice Department’s Assets Forfeiture Fund. The use of civil asset forfeiture subsequently exploded.¹³

Indeed, investigative reports have shown that forfeiture has been used to take cash and property from people who are never charged with a crime. These reports highlight the stories of those who have had their property seized — both temporarily and permanently — and paid a heavy price in their efforts to get it returned.

Between 1986 and 2006, annual deposits to the Fund skyrocketed, from about \$94 million to over \$1.2 billion, according to the Government Accountability Office.¹⁴ Since 2006, even disregarding the two massive cash seizures from the Bernie Madoff Ponzi scheme case in 2012 and 2014 (\$2.2 billion and \$1.7 billion, respectively),¹⁵ annual forfeiture revenues have *averaged* more than \$1.75 billion per year through FY 2018.



Source: Government Accountability Office, “Justice Assets Forfeiture Fund: Transparency and Controls Over Equitable Sharing Should be Improved,” July 2012; Department of Justice

While deposits to the Assets Forfeiture Fund came by way of seizures by federal law enforcement agencies, state and local law enforcement agencies can, through “adoptive seizures,” send confiscated property and cash to the federal government. Through the Department of Justice’s Equitable Sharing Program, another product of the Comprehensive Crime Control Act, state and local law enforcement can receive

<https://ij.org/report/policing-for-profit/foreword/>

¹³ Government Accountability Office, “Justice Assets Forfeiture Fund: Transparency of Balances and Control over Equitable Sharing Should Be Improved,” July 2012 <http://www.gao.gov/assets/600/592349.pdf>

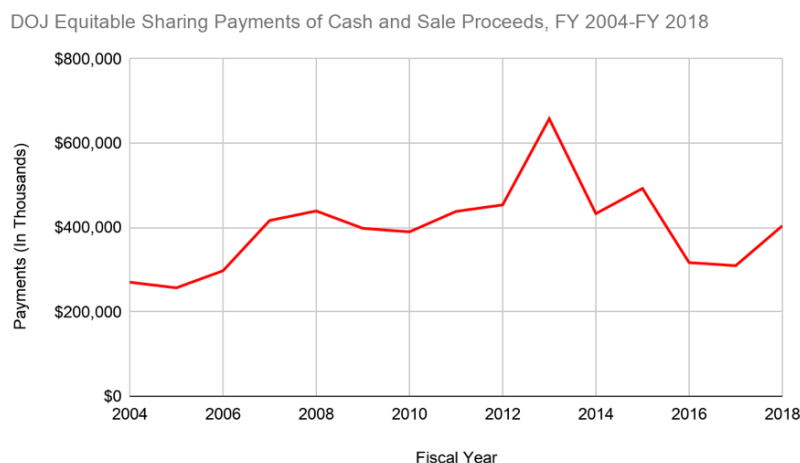
¹⁴ Ibid.

¹⁵ Department of Justice Office of Inspector General, “Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements,” fiscal years 2012 and 2014: <https://oig.justice.gov/reports/2013/a1307.pdf>, <https://oig.justice.gov/reports/2015/a1508.pdf>

up to 80 percent of the proceeds from forfeitures under this arrangement.¹⁶ Since FY 2010, equitable sharing payments to state and local law enforcement agencies have averaged \$432.8 million annually, more than double the amount from FY 2000.¹⁷

There are minimum thresholds on what property can be adopted by the federal government. The minimum threshold for vehicles and cash seizures is \$5,000, for example, and any miscellaneous personal property must total at least \$2,000.¹⁸ Cash seizures of \$10,000 or less are subject to a higher standard of safeguards than for larger amounts.¹⁹ The Department of Justice's forfeiture manual does note at the end of its guidelines, however, that "[i]t is understood that in some circumstances an overriding law enforcement interest may require the seizure/forfeiture of an asset that does not meet the criteria described above."²⁰

The fact that current statute allows law enforcement broad exceptions to forfeiture procedure, but stringently controls victim restitution highlights the hypocrisy of modern civil asset forfeiture. Though police often claim that they seize assets for the greater good, the vast majority of that money goes directly into law enforcement slush funds from which victims rarely ever see a penny.



Source: Department of Justice

As critiques of civil asset forfeiture have grown in recent years, and since Congress has been characteristically slow in passing reforms, various agencies have attempted to reform the practice internally. In 2015, U.S. Attorney General Eric Holder

16 U.S. Departments of Justice and the Treasury, "Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies," 2019, pg. 9 <https://www.justice.gov/criminal-afmls/file/794696/download>

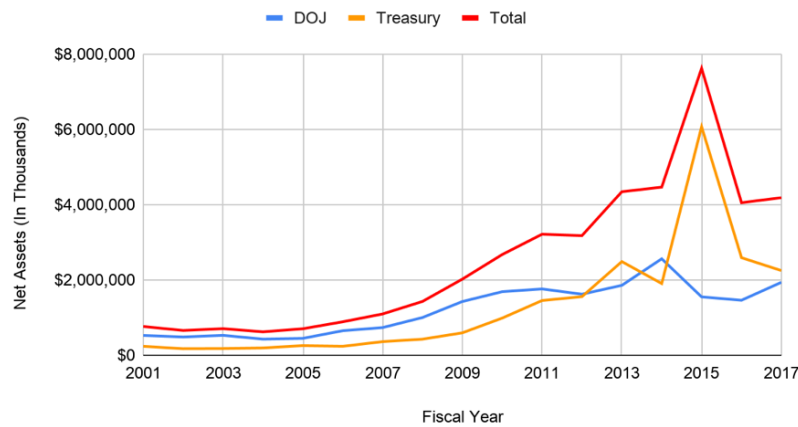
17 Government Accountability Office, "Justice Assets Forfeiture Fund: Transparency of Balances and Control over Equitable Sharing Should Be Improved," July 2012 <http://www.gao.gov/assets/600/592349.pdf>, and annual Department of Justice Reports to Congress

18 U.S. Department of Justice, "Asset Forfeiture Policy Manual," 2019, pp. 27-28 <https://www.justice.gov/criminal-afmls/file/839521/download>

19 Ibid., pg. 64

20 Ibid., pg. 28

Federal Forfeiture Fund Net Assets, FY 2001-FY 2017



Sources: Department of Justice Assets Forfeiture Fund Annual Financial Statements; Department of Treasury Forfeiture Fund Accountability Reports

implemented a new policy prohibiting the federal agency forfeiture, or “adoptions” of, assets seized by state and local law enforcement agencies, with a limited public safety exception. In 2017, U.S. Attorney General Jeff Sessions reversed that policy, allowing the federal government to take all assets associated with federal crimes that have been seized lawfully by state and local governments, and reviving the Equitable Sharing Program.”²¹

Several states and municipalities themselves have also begun responding to calls for reform. As of 2018, 18 states require a criminal conviction in order to seize property. North Carolina, New Mexico, and Nebraska all have recently-passed laws on the books outright abolishing civil asset forfeiture, and 33 states in total have made at least some positive reforms to their forfeiture laws. With two-thirds of the states implementing forfeiture reform within four short years, it is clear that sweeping national reform is long overdue.²²

Note: Although this publication focuses primarily on federal forfeiture history, other publications offer an in-depth look at state forfeiture laws. For example, the Institute for Justice’s report, Policing for Profit: The Abuse of Civil Asset Forfeiture, provides excellent analyses of state forfeiture laws.

²¹ Anne Teigen and Lucia Bragg, “Evolving Civil Asset Forfeiture Laws,” National Conference of State Legislatures, February 2018 <http://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx>

²² Institute for Justice, “Civil Forfeiture Reforms on the State Level,” Accessed July 2, 2019 <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/>

Due Process Denied

The “presumption of innocence” is a foundational principle of the American legal system. Although this principle is not specifically enumerated in the Bill of Rights, legal scholars have found its roots in the Fifth, Sixth, and Fourteenth Amendments.²³

The Supreme Court, in *Coffin v. United States* (1895),²⁴ firmly established the implied principle of a presumption of innocence, which, justices noted, dated back to Roman law and was reflected in English common law. Justice Edward White, who was appointed to the High Court by President Grover Cleveland, offered the legal background of the principle in his majority opinion in *Coffin*, and firmly stated its role in the American legal system.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law,” White wrote, “axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”

White called the presumption of innocence “evidence in favor of the accused” and explained the meaning of guilt “beyond a reasonable doubt” as understood through centuries of law. “It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause,” he explained. “It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect.”

“To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, make more apparent the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist,” White added.

The presumption of innocence is a feature of the American legal system, not a bug. What civil law does is muddy the water of this foundational principle. Under criminal law, governments, which bring charges, must prove “beyond a reasonable doubt” that the accused is guilty of the alleged crime. But, under civil law, the threshold is lower and can prove perilous for innocent individuals and their property.

The reason the United States and other common law countries make a distinction between criminal and civil cases is that each ought to have its specific purpose. The

²³ University of Missouri-Kansas City Law School, “Exploring Constitutional Conflicts: The Right of Privacy,” Accessed July 2, 2019 <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html>

²⁴ 162 U.S. 664 (1895)

civil courts are supposed to be the place where private citizens can settle grievances with one another and so have a lower burden of proof. The criminal courts are supposed to be the place where the government can settle their accusations against an individual.

One of the biggest problems with civil asset forfeiture proceedings is that the state is effectively acting as a private citizen, suing the property as a way to circumvent constitutional protections for private property. Civil asset forfeiture cases are effectively criminal cases that are contorted and skewed by legal jargon to be allowed in civil court because it is easier to get the state's desired outcome when you ignore due process.

The profit motive that exists under federal forfeiture law is worsened by the low standard of proof the government must meet to subject property to forfeiture. Federal prosecutors need only show a preponderance of the evidence to forfeit property. Even worse, the burden of proof is placed on the claimant. In other words, it is up to the individual whose property was seized to prove that his or her property was not being used illegally in order to have it returned.²⁵ Even intuitively, this is the opposite of the American principle of due process.

Property that is seized is presumed guilty under federal forfeiture law. Rather than pay the high costs of fighting an uphill battle to get their property returned, most walk away from their property, resulting in administrative forfeiture.

Testifying before the Senate Judiciary Committee in April 2015, Darpana Sheth, an attorney at the Institute for Justice, noted that “from 2008 to 2013, 64 percent of all forfeitures were administrative, while only 14 percent were civil, with the remaining 22 percent criminal.”²⁶

Federal forfeiture statutes are not limited to drug crimes. “Today,” Sheth explained in her testimony, “there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.” The laundry list of crimes for which property can be seized has gotten so ridiculous that “[i]n Detroit, cops seized over a hundred cars owned by patrons of an art institute event—because the institute had failed to get a liquor license.”²⁷ In an October 2014 analysis, the *Washington Post* determined that no indictments were obtained in 81 percent of federal forfeiture cases.²⁸

Innocent people are the most negatively impacted by forfeiture. Joseph Rivers, a

25 8 U.S.C. § 983.d1 General rules for civil forfeiture proceedings

26 Darpana Sheth, “The Need to Reform Asset Forfeiture,” Written Statement before the United States Senate Committee on the Judiciary, April 15, 2015 <http://www.judiciary.senate.gov/imo/media/doc/04-15-15%20Sheth%20Testimony.pdf>

27 Jason Snead, “Civil Asset Forfeiture: 7 Things You Should Know,” The Heritage Foundation, March 26, 2014 <https://www.heritage.org/research/reports/2014/03/civil-asset-forfeiture-7-things-you-should-know>

28 Robert O’Harrow Jr., et al. “Asset seizures fuel police spending,” The Washington Post, October 11, 2014 <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/>

22-year-old Michigan man, dreamed of pursuing a career in the music industry.²⁹ With the help of his family, he saved \$16,000 and departed for Los Angeles in April 2015 to fulfill his dream.

When his train arrived at a stop in Albuquerque, New Mexico, agents with the Drug Enforcement Administration (DEA) boarded the train and singled him out. The agents quizzed him on his plans and asked to search his bags. Believing he had nothing to hide, Rivers consented to the search.

The agents found the \$16,000 and seized it. Rivers pleaded with them to let him keep the cash. He called his mother, who corroborated his story. But the agents took the cash anyway, on the suspicion that it was connected to drugs. Rivers was never charged with a crime.

When interviewed by The Atlantic about the ordeal, Rivers' response demonstrates beautifully how such forfeiture practices border on racketeering. "These officers took everything that I had worked so hard to save and even money that was given to me by family that believed in me. I told [the DEA agents] I had no money and no means to survive in Los Angeles if they took my money. They informed me that it was my responsibility to figure out how I was going to do that."³⁰

A spokesperson with the DEA's Albuquerque office later confirmed the injustice of federal forfeiture law. "We don't have to prove that the person is guilty," he said. "It's that the money is presumed to be guilty."³¹

Joseph Rivers' story highlights another violation of due process that so often occurs in civil asset forfeiture proceedings. Because Rivers was never charged with a crime, the courts were not required to provide him with a defense attorney. In effect, these sorts of actions are simply a regressive backdoor tax on individuals who can't afford an attorney.

The Sixth Amendment to the Constitution and later developments of its principles through cases like *Gideon v. Wainwright*³² and *Strickland v. Washington*³³ have established unequivocally that American citizens are entitled to effective assistance of counsel when accused of any criminal act. This right does not extend to traditional civil cases that are citizen versus citizen.

Since civil asset forfeiture cases are tried in civil court, there is no federal requirement

29 Christopher Ingraham, "How the DEA took a young man's life savings without ever charging him with a crime," The Washington Post, May 11, 2015 <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/11/how-the-dea-took-a-young-mans-life-savings-without-ever-charging-him-of-a-crime/>

30 Conor Friedersdorf, "The Injustice of Civil Asset Forfeiture," The Atlantic, May 12, 2015. <https://www.theatlantic.com/politics/archive/2015/05/the-glaring-injustice-of-civil-asset-forfeiture/392999/>

31 Walter Olson, "We don't have to prove that the person is guilty.... It's that the money is presumed to be guilty," Overlawyered, May 11, 2015 <http://overlawyered.com/2015/05/we-dont-have-to-prove-that-the-person-is-guilty-its-that-the-money-is-presumed-to-be-guilty/>

32 372 US 335 (1963)

33 466 US 668 (1984)

that an individual be provided counsel for such cases. Since many cannot afford to pay the high cost of a private attorney to challenge the seizure, a large proportion of seizures go uncontested. This creates a feedback loop for law enforcement whereby they can, and often do, target low-income areas and individuals for higher rates of seizure with the understanding that the majority of those individuals have no means to challenge the monolith of the state in court.

Forfeiture Funds or Slush Funds?

The underlying legal basis for civil asset forfeiture is the noble cause of victim recovery. When people make massive profits through socially damaging criminal activity, the victims and damaged community should deserve some reparation. Thus, seized assets are supposed to be used primarily to pay out damages to the victims in one of two ways.

Victims who are directly harmed by the criminal activity can file a motion in court to receive a percentage of the seized assets as recompense for incurred damages. For more broad-reaching damages, the Department of Justice implemented the Victim Asset Recovery Program to maximize victim recoveries.

Unfortunately, as asset forfeiture revenues have ballooned in recent years, the federal and state asset forfeiture funds are being used increasingly to finance the buildup and militarization of American police forces. Through loopholes established by federal programs like Equitable Sharing, as much as 80 percent of seized assets are used by law enforcement to buy new equipment and other accouterments instead of going to victims, as was originally intended.³⁴ Most states allow law enforcement to keep part or all of the proceeds from permanently seized cash or property.

Arguments in support of forfeiture laws almost always include claims that law enforcement is underfunded and the proceeds from seizures allow them to purchase equipment they need, hire additional personnel, and, ultimately, keep communities safe. But, many, if not most, states do not place restrictions on how these funds can be spent.

“There’s some limitations on it. Actually, there’s not really on the forfeiture stuff. We just usually base it on something that would be nice to have that we can’t get in the budget, for instance,” a Missouri sheriff told a local government panel in November 2012. “We try not to use it for things that we need to depend on because we need to have those purchased.”³⁵

“It’s kind of like pennies from heaven,” he boasted. “It gets you a toy or something that

³⁴ William H. Freivogel, No Drugs, No Crime and Just Pennies for School: How Police Use Civil Asset Forfeiture, Pulitzer Center, February 18, 2019 <https://pulitzercenter.org/reporting/no-drugs-no-crime-and-just-pennies-school-how-police-use-civil-asset-forfeiture>

³⁵ Government Accountability Office, “Justice Assets Forfeiture Fund: Transparency of Balances and Control over Equitable Sharing Should Be Improved,” July 2012 <http://www.gao.gov/assets/600/592349.pdf>

you need is the way that we typically look at it, to be perfectly honest.”³⁶

Civil asset forfeiture has become the prime example of law enforcement corruption. Often times, police officers specifically target low-income individuals for seizure with the understanding that those individuals are much less likely to challenge the seizure in court. A recent Vice News video report highlights this very occurrence. When interviewing Barry Cooper, a former Texas State Narcotics Officer turned activist, Cooper details how law enforcement uses bully tactics to extort innocent individuals.³⁷

“The most egregious thing I see about asset forfeiture is law enforcement’s habit of manipulating the citizen out of their money by threatening an arrest if they answer the seizure papers. For example, when I was a police officer and we caught somebody with a large amount of money, whether it was drug money or not, we straight up told them on the side of the highway, ‘We’re not taking you to jail right now for money laundering...although we could. Within thirty days, you’re going to get a letter in the mail saying you’re being sued for this money because we think it’s drug money. If you answer the charges and you fight for this money then I’m going to come after you with an arrest warrant for money laundering and we’re going to arrest you, put you in jail. If you choose not to answer the civil paperwork, we will win the money in default and you’ll never hear from us again.’”

Further examples of law enforcement abuses of forfeiture funds abound. A Georgia sheriff spent \$90,000 on a Dodge Viper for his county’s drug awareness program and \$35,000 to build a “party house.”³⁸ A prosecutor in Texas dropped more than \$267,000 on travel expenses, which included trips to casinos.³⁹ Another Texas prosecutor purchased booze and a margarita machine with forfeiture proceeds.⁴⁰

An Atlanta prosecutor used forfeiture funds to rent out a movie theater just three months before mandating ten furlough days for employees due to budget shortfalls. He used funds to pay for home security, an office softball team, a photoshoot, dinners, and tickets to see singer and rapper CeeLo Green.⁴¹

Another example of the abuse of forfeiture proceeds comes from Pinal County, Arizona, where a former sheriff, Paul Babeu, and county attorney, Lando Voyles, were indicted after questionable for “eyebrow-raising” spending with those dollars. The pair were not prosecuted, however, due in bad bookkeeping.⁴²

36 Ibid.

37 Vice, “How Police Departments Use Civil Forfeiture to Collect Billions,” March 2017

https://video.vice.com/en_us/video/civil-forfeiture/56e2ecf5af6e21ec361d8afd

38 Nick Sibilla, “The 14 Most Ridiculous Things Police Bought with Asset Forfeiture,” Community on Buzzfeed, June 24, 2013 <http://www.buzzfeed.com/nicks29/the-14-most-ridiculous-things-police-bought-with-a-4y3w>

39 Ibid.

40 Ibid.

41 Willoughby Mariano, “DA’s spending of federal forfeiture money in question,” Atlanta Journal-Constitution, October 5, 2013 <http://www.myajc.com/news/news/das-spending-of-federal-forfeiture-money-in-questi/nbFGb/>

42 Robert Anglin, “State won’t charge former Pinal County officials for ‘eyebrow-raising’ use of RICO funds,” Arizona

As if seizures by licensed peace officers were not bad enough, private firms are also capitalizing on civil asset forfeiture. For example, Joe David, a former California Highway Patrolman, has made a thriving business off of civil asset forfeiture. In 1989, David opened a law enforcement training firm, Desert Snow, to teach police around the country about his highly effective stop-and-seizure techniques. After testifying before the Senate in 2003 as an advocate for civil asset forfeiture, David founded another business: Black Asphalt.

The Black Asphalt Electronic Networking and Notification System “enabled officers and federal authorities to share reports and chat online.”⁴³ Operating with practically no government oversight, Black Asphalt collected and distributed “sensitive information about traffic stops and seizures, along with hunches and personal data about drivers, including Social Security numbers and identifying tattoos.”⁴⁴

Most recently, this private security force reminiscent of Blackwater was contracted by Caddo County, Oklahoma as a “roving private interdiction unit,” pulling in over \$1 million in seizures within six months. Desert Snow, which hosts Black Asphalt, have demonstrated quite clearly that policing for profit produces a perverse profit incentive so large that even private firms can capitalize on the illegal seizure of private property.

Government officials are well aware of the power they wield through civil asset forfeiture. A New Mexico city attorney, speaking at a conference to educate law enforcement on how to seize property, was caught on video boasting, “We could own the city. We could be in the real estate business.”⁴⁵

The Department of Justice’s Equitable Sharing Program does have limitations on how proceeds can be used. Using equitable sharing payments for salaries, overtime, new and temporary positions, and food and beverages are included as “impermissible uses.” The program also prohibits anticipated payments from being budgeted.

These restrictions, however, are not always, if ever, meaningfully enforced by the Department of Justice. A Drug Policy Alliance study noted that several Los Angeles-area law enforcement agencies have used equitable sharing payments to entirely supplant their budgets and hire and pay for personnel.⁴⁶

A Department of Justice spokesperson seemingly brushed off the violations of the program. “Administering this requirement can be difficult in periods where budget reductions are common,” he said. “In determining whether supplantation

Republic, April 10, 2019 <https://www.azcentral.com/story/news/local/arizona-investigations/2019/04/10/paul-babeu-ex-pinal-sheriff-county-attorney-lando-voyles-prosecuted-rico-funds/3426837002/>

43 Robert O’Harrow Jr., Michael Sallah, and Steven Rich, “Police intelligence targets cash,” Washington Post, September 7, 2014 <https://www.washingtonpost.com/sf/investigative/2014/09/07/police-intelligence-targets-cash/>

44 Ibid.

45 Nick Sibilla, “‘IF IN DOUBT...TAKE IT!’ Behind Closed Doors, Government Officials Make Shocking Comments About Civil Forfeiture,” BuzzFeed, November 10, 2014 <http://www.buzzfeed.com/nicks29/aif-in-doubtatake-ita-behind-closed-doors-4y3w>

46 Drug Policy Alliance, “Above the Law: An Investigation of Civil Asset Forfeiture in California,” April 20, 2015 http://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Above_the_Law_Civil_Asset_Forfeiture_in_California.pdf

has occurred, the Justice Department examines various factors including the law enforcement agency's budget as a whole and its relation to other fiscal measures undertaken by the governing body."

Law enforcement should, of course, be funded to the fullest extent possible so they can fulfill their duties, but this responsibility should fall on local and state governments. It should not come from the perverse profit motive created by civil asset forfeiture, which, far too often, involves proceeds from property wrongfully taken from innocent people.

States Lead the Way on Reform

While the federal government has been busy increasing their abuses of American civil and property rights, state legislatures, the laboratories of policy innovation, have been hard at work attempting to address these injustices.

In April 2015, New Mexico enacted a comprehensive reform law that is considered the "gold standard" of state asset forfeiture reform. The law not only eliminated civil asset forfeiture from state law, requiring instead a criminal conviction to forfeit property, but also restricted state and local law enforcement from circumventing the law through federal forfeiture laws.⁴⁷

New Mexico is far from the only place to begin tackling civil asset forfeiture at the state level. Two-thirds of the states and the District of Columbia have enacted and implemented some form civil forfeiture reform, with varying degrees of intensity and success. Although the substance of their reforms varies greatly, the fact that so many states have independently acted to reform civil forfeiture demonstrates clearly that this is a national issue that isn't going away anytime soon unless the federal government acts.

As of 2019, 18 states now require a criminal conviction to permanently seize property connected to a crime. Seven other states have evidentiary standards that the government must meet of "clear and convincing" or higher to seize property.

47 Scott Shackford, "Great News: New Mexico's Asset Forfeiture Reform Bill Signed by Governor," Reason, April 10, 2015 <http://reason.com/blog/2015/04/10/great-news-new-mexicos-asset-forfeiture>

EVIDENTIARY STANDARDS FROM CIVIL ASSET FORFEITURE REFORM STATES

STATE	REQUIREMENT OR EVIDENTIARY STANDARD ⁴⁸	REFORM BILL	ENACTMENT
ARIZONA	Clear and Convincing	HB 2477	April 12, 2017
ARKANSAS	Criminal Conviction Required	SB 308	March 18, 2019
CALIFORNIA	Criminal Conviction Required	AB 114	August 19, 1994
COLORADO	Clear and Convincing	HB 1404	May 31, 2002
CONNECTICUT	Criminal Conviction Required	HB 7146	July 9, 2017
FLORIDA	Beyond a Reasonable Doubt	SB 1044	April 1, 2016
IOWA	Criminal Conviction Required	SF 446	May 9, 2017
MARYLAND	Clear and Convincing	HB 336	May 19, 2016
MICHIGAN	Criminal Conviction Required	HB 4001/HB 4002/ SB 2	May 14, 2019
MINNESOTA	Criminal Conviction Required	SF 874	May 6, 2014
MISSOURI	Criminal Conviction Required	SB 180	August 28, 1993
MONTANA	Criminal Conviction Required	HB 463	May 5, 2015
NEBRASKA	Criminal Conviction Required	LB 1106	January 20, 2016
NEVADA	Criminal Conviction Required	SB 138	June 9, 2015
NEW HAMPSHIRE	Criminal Conviction Required	SB 522	June 24, 2016
NEW MEXICO	Criminal Conviction Required	HB 560	April 10, 2015
NORTH CAROLINA	Criminal Conviction Required	N/A	N/A
NORTH DAKOTA	Criminal Conviction Required	HB 1286	May 2, 2019
OHIO	Criminal Conviction Required	HB 347	January 4, 2017
OREGON	Criminal Conviction Required	Ballot Measure 53	November 7, 2000
PENNSYLVANIA	Clear and Convincing	SB 8	June 29, 2017
WISCONSIN	Criminal Conviction Required	SB 61	April 3, 2018
WYOMING	Clear and Convincing	SF 46	February 28, 2016
VERMONT	Criminal Conviction Required	S. 102	June 15, 2015
VIRGINIA	Clear and Convincing	SB 457	April 1, 2016

⁴⁸ There may be some nuance in state law, such as the total monetary value of the property, as is the case in California, Iowa, which have different thresholds. Unlike most states, North Carolina never created civil asset forfeiture laws, making the need for reform a moot point. The information provided above was taken from several sources, including the Institute for Justice's report, Policing for Profit: The Abuse of Civil Asset Forfeiture, and relevant state legislative websites or statutes.

States have also taken reform a step further by placing strict limits on adoptive seizures. The Department of Justice's Equitable Sharing Program allows law enforcement in states with forfeiture laws that protect innocent individuals to circumvent these laws. Federal agencies will "adopt" property or money for forfeiture through federal law. By working with state and local police, the federal government receives 20 percent of the proceeds.

Seven states and the District of Columbia have passed legislation designed to limit circumvention of protective state forfeiture laws. This mitigates the use of the Equitable Sharing Program by state and local law enforcement.⁴⁹

ANTI-CIRCUMVENTION LAWS IN THE STATES

STATE	MONETARY THRESHOLD FOR ADOPTION	BILL	ENACTMENT
ARIZONA	Exceeds \$75,000	HB 2477	April 12, 2017
CALIFORNIA	Not less than \$40,000	SB 443	September 29, 2016
COLORADO	Exceeds \$50,000	HB17- 1313	June 9, 2017
DISTRICT OF COLUMBIA	Prohibited	B20-0048	June 16, 2015
MARYLAND	Exceeds \$50,000	HB 336	May 19, 2016
NEBRASKA	Exceeds \$25,000	LB 1106	January 20, 2016
NEW MEXICO	Exceeds \$50,000	HB 560	April 10, 2015
OHIO	Exceeds \$100,000	HB 347	January 4, 2017

Although state efforts have been generally successful, law enforcement is often an obstacle because proceeds from permanently seized property are used to supplement or supplant their budgets. The funds, they say, are crucial to their efforts to combat drug crime. Often, law enforcement points to vehicles seized that are now used to wage the war on drugs and to the ability to stymie organized crime by seizing financial assets, disrupting cash flows.

For example, past reform efforts in Georgia were opposed by the Georgia Sheriffs' Association, the members of which alleged that a previous sponsor of legislation was "coddling drug dealers."⁵⁰ Law enforcement in California worked with the Department of Justice and the Department of the Treasury to thwart a legislative effort. In this instance, the federal government threatened to decertify law enforcement in the state from the Equitable Sharing Program.⁵¹

49 Ibid.

50 Willoughby Mariano, "Forfeiture reforms up for Senate vote," The Atlanta Journal-Constitution, March 24, 2015 <https://www.ajc.com/news/state--regional-govt--politics/forfeiture-reforms-for-senate-vote/IIC22HVArIESKDFpZTUIL/>

51 End Civil Forfeiture, "Documents: Feds Stymieing State Civil Forfeiture Reform Efforts by Cutting Off Funds," September 8, 2015 <http://endforfeiture.com/documents-feds-stymieing-state-civil-forfeiture-reform-efforts-by-cutting-off-funds/>

More recently, a Texas sheriff used a meeting with President Donald Trump to antagonize a state senator who “was talking about introducing legislation to require conviction before we could receive that forfeiture money.” President Trump replied, “Who is the state senator? Do you want to give his name? We’ll destroy his career.”⁵² Since the exchange, several states passed forfeiture reforms that increased evidentiary standards, either to clear and convincing evidence or to require a criminal conviction, or to close the federal loophole.

As state lawmakers consider reforms, it is vital to remember that while an increased evidentiary standard is necessary, other reforms are also vital to address the full scope of forfeiture. These additional reforms should include anti-circumvention language to prevent state and local law enforcement from using the federal loophole, directing proceeds from forfeiture to the general fund of the state, and thorough reporting requirements.

Federal Reform Efforts Have Not Gone Far Enough

In April 2000, President Bill Clinton signed the Civil Asset Forfeiture Reform Act (CAFRA) into law.⁵³ A bipartisan effort, the bill passed a Republican-controlled Congress with little opposition. It was intended to rein in abuse of federal forfeiture laws.

House Judiciary Committee Chairman Henry Hyde (R-Ill.), who authored the bill, had criticized use of federal forfeiture laws. In 1995, he authored a book, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure*, which was published by the Cato Institute, a prominent libertarian think tank.⁵⁴

When Rep. Hyde introduced CAFRA in May 1999, the language was strong and clearly shifted forfeiture proceedings to provide more protections to innocent property owners. For example, the evidentiary standard in the original text was “clear and convincing” and shifted the burden of proof to the federal government. The House Judiciary Committee’s report on CAFRA included a defense of the higher evidentiary standard:⁵⁵

“Why ‘clear and convincing evidence’ and not ‘a preponderance of the evidence?’ The Justice Department used to argue that federal civil forfeiture provisions were not designed to punish anybody. Justice argued that forfeiture served purely remedial functions — such as to remove the instruments of the drug trade and thereby protect

52 Louis Nelson, “Trump invites sheriff to ‘destroy’ Texas state lawmaker who opposes asset forfeiture,” Politico, February 7, 2017 <https://www.politico.com/story/2017/02/trump-sheriff-asset-forfeiture-texas-234740>

53 Congressional Quarterly, “Lawmakers Make Changes To Laws Governing Seizure Of Assets in Criminal Cases,” 2000 <https://library.cqpress.com/cqalmanac/document.php?id=cqal00-834-24302-1082293>

54 Rep. Henry Hyde, “Forfeiting Our Property Rights: Is Your Property Safe from Seizure?,” Cato Institute, 1995 http://object.cato.org/sites/cato.org/files/articles/forfeting_our_property_rights.pdf

55 H. Rept. 106-192 (1999)

the community from the threat of continued drug dealing, and to compensate the government for the expense of law enforcement activity and for its expenditure on societal problems resulting from the drug trade. The Department made this argument in order to provide a rationale for not applying to civil forfeitures the Eighth Amendment's prohibition against excessive fines."

"One might ask, punishment for what? Clearly, the punishment is for a property owner's alleged involvement in drug trafficking. Civil forfeiture is being used to punish a property owner for alleged criminal activity. The general civil standard of proof — preponderance of the evidence — is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place. As the Supreme Court has said, civil forfeiture actions are in essence 'quasi- criminal in character' designed 'like a criminal proceeding...to penalize for the commission of an offense against the law.' Since civil forfeiture doesn't threaten imprisonment, proof beyond a reasonable doubt is not necessary. The intermediate standard — clear and convincing evidence — is more appropriate."

But, as is often the case in the legislative process, the bill was watered down. The standard of proof that the government must show was slightly raised to a preponderance of the evidence rather than the higher standard of clear and convincing and the burden to prove innocence remained on the property owner.

Still, Hyde insisted that CAFRA was a worthwhile endeavor.

"This bill is one we can all be proud of. It returns civil asset forfeiture to the ranks of respected law enforcement tools that can be used without risk to the civil liberties and property rights of American citizens," Hyde said while presenting the bill to the lower chamber.⁵⁶ "We are all better off that this is so."

Former Rep. Bob Barr (R-Ga.), one of the leading members behind the effort, noted that CAFRA was initially successful in limiting federal forfeitures. "The first year following CAFRA's passage did witness a significant drop in the value of assets seized by the federal government — from nearly \$313 million in 2000 to just under \$200 million in 2001," Barr recalled.⁵⁷

The success did not last. "As ever," Barr explained, "Uncle Sam has moved aggressively to make up that difference in recent years; raking in more than \$1.0 billion in forfeited civil assets in 2013 alone."

⁵⁶ 146 Cong. Rec. H2047

⁵⁷ Bob Barr, "Asset Forfeiture Reform Redux," Huffington Post, December 16, 2014 http://www.huffingtonpost.com/bob-barr/asset-forfeiture-reform-r_b_6333770.html

In January 2015, then-Attorney General Eric Holder announced new restrictions on adoptive seizures and the Justice Department's Equitable Sharing Program.⁵⁸ While the policy change received praise, it was a small move that did not significantly impact abuse of federal forfeiture laws because adoptive seizures are a small percentage of equitable sharing payments.

"[A]doptions, which the DOJ says represented about 3 percent of deposits, accounted for less than 14 percent of equitable sharing," Jacob Sullum explained.⁵⁹ "In other words, something like 86 percent of the loot that state and local law enforcement agencies receive through federal forfeitures will be unaffected by Holder's new policy."

In March 2015, the Department of Justice rolled out another new policy change, this one dealing with federal forfeiture in structuring offenses.⁶⁰ Federal prosecutors must have probable cause of some other federal crime before seizing a bank account involved in structuring.

More recently, the Department of Justice under Jeff Sessions once again increased seizure rates in 2017. Using the same rhetoric as always, Sessions cited the need to increase rates of asset forfeiture to "defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed."⁶¹ When announcing the DOJ's new policy, Sessions even went so far as to praise the current system for its efficiency in seizing civilian assets, boasting, "[O]ver the last decade, four out of five administrative civil asset forfeitures filed by federal law enforcement agencies were never challenged in court."

Believing that increased seizure would "make us more effective at bankrupting organized criminals and safeguarding the property of law-abiding Americans," Sessions' aggressive policy tack has had the opposite effect: stealing property from law-abiding Americans. Merely two years after implementing the new policy, it's clear that Sessions' invocation of an "abundance of caution" around forfeiture was little more than pandering to civil rights organizations who rightfully opposed an expansion of forfeiture.

In September 2017, the House of Representatives approved three amendments to a consolidated appropriations bill, H.R. 3354, that took aim at the Attorney General Sessions' reversal of the forfeiture directive. One amendment, introduced by Rep. Justin Amash (R-Mich.),⁶² limited the practice of adoptive seizures in a manner consistent with the directive issued by Attorney General Holder. The other two

58 U.S. Department of Justice, "Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety," January 16, 2015

59 Jacob Sullum, "How the Press Exaggerated Holder's Forfeiture Reform," Reason, January 19, 2015 <http://reason.com/blog/2015/01/19/how-the-press-exaggerated-holders-forfei>

60 U.S. Department of Justice, "Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses," March 31, 2015 <http://www.justice.gov/opa/pr/attorney-general-restricts-use-asset-forfeiture-structuring-offenses>

61 U.S. Department of Justice, "Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement," July 19, 2017 <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state>

62 H. Amdt. 391 to H.R. 3354, 115th Congress (2017)

amendments, sponsored by Rep. Tim Walberg (R-Mich.) and Rep. Jamie Raskin (D-Md.),⁶³ reversed Attorney General Sessions' widely criticized directive.

All three amendments were approved by voice vote.⁶⁴ It is important to note that the scope of these amendments was limited to appropriations by prohibiting the use of funds in conjunction with the directive authored by Attorney General Sessions.⁶⁵ Any real reform would have needed to come through actual legislation.

Meanwhile, as the DOJ continues to the use of civil asset forfeiture, there are still some in Congress who believe in the right to due process. In the 116th Congress, Reps. Tim Walberg (R-Mich.) and Jamie Raskin (D-Md.)⁶⁶ have led the charge for reform.

Most recently, Rep. Walberg introduced an amendment to the Commerce, Justice, and Science division of H.R. 3055,⁶⁷ targeted at blocking Sessions' directive and limiting the practice of adoptive seizure. This amendment is similar to efforts to block the Sessions directive in September 2017.⁶⁸

Even more significant is Fifth Amendment Integrity Restoration (FAIR) Act.⁶⁹ Introduced by Reps. Walberg and Raskin, the FAIR Act has several important moving parts. First, it would raise the evidentiary standard for civil asset forfeiture proceedings from "a preponderance of the evidence" to "clear and convincing evidence." The bill would also mandate that any person whose primary residence is being sued under civil forfeiture statute be provided legal representation if they are unable to afford their own.

Additionally, under the FAIR Act, all revenue from federal civil asset forfeiture must be deposited into the General Fund of the Treasury rather than being kept by the seizing agency.

Finally, it would establish the presumption of innocence in civil asset forfeiture proceedings, bringing such cases back into line with the principles of due process outlined in the Bill of Rights. Although the FAIR Act has been stalled in the House Judiciary Committee, hopefully, it will gain further momentum as activists continue to bring these issues to the fore.

Another reform bill, the Deterring Undue Enforcement by Protecting Rights of Citizens

63 H. Amdt. 393 to H.R. 3354, 115th Congress (2017)

64 A bipartisan coalition of outside groups, including FreedomWorks, urged House appropriators to support these amendments in the legislative product sent to President Trump for his signature. https://www.aclu.org/sites/default/files/field_document/forfeiture_reform_coalition_letter_-_feb_1_2018.pdf

65 Such amendments are generally referred to as "policy riders" and are frequent during the consideration of the 12 appropriations bills considered by the House of Representatives. Such amendments are less frequent in the Senate, as the consideration of appropriations bills under regular order is rare.

66 H. Amdt. 394 to H.R. 3354, 115th Congress (2017)

67 H. Amdt. 396 to H.R. 3055, 116th Congress (2019)

68 Jason Pye, "Omnibus Doesn't Include Prohibition on DOJ's Property Grab," FreedomWorks, March 22, 2018 <https://www.freedomworks.org/content/omnibus-doesn%E2%80%99t-include-prohibition-doj%E2%80%99s-property-grab>

69 H.R. 1859, 116th Congress (2019)

from Excessive Searches and Seizures (DUE PROCESS) Act, introduced by Rep. Jim Sensenbrenner (R-Wis.), would bring reforms similar to the FAIR Act.⁷⁰

The DUE PROCESS Act would raise the standard of proof required to permanently seize property from “a preponderance of the evidence” to “clear and convincing evidence.” Additionally, the bill places the burden of proof on the federal government, strengthens protections for claimants by requiring a right to counsel in civil asset forfeiture cases, makes it easier for the recovery of legal fees when the property owner prevails in court, and increases accountability and transparency by requiring a yearly audit of a representative sample of forfeitures conducted under federal law by the Department of Justice Inspector General.

The key difference between the FAIR Act and the DUE PROCESS Act is that the DUE PROCESS Act does not eliminate the Equitable Sharing Program. Some believe that the DUE PROCESS Act would be the best path forward on civil asset forfeiture reform for precisely this reason because of the political challenges that would come by dismantling a program popular with law enforcement.

A previous iteration of the DUE PROCESS Act was marked up by the House Judiciary Committee during the 114th Congress,⁷¹ although it was not brought to the House floor for consideration.

Supreme Court Revisits Forfeiture Through the Eighth Amendment

From time to time, the Supreme Court has visited federal and state civil asset forfeiture laws. Essentially, justices have established guidelines for the practice, albeit slowly. The High Court has established that a penalty or sanction against an individual can come through the form of a civil proceeding, including the forfeiture of property or cash alleged to be connected to an illicit activity.

Writing in a partial dissent in *United States v. James Daniel Good Real Property* (1993), Justice Clarence Thomas explained that he was “disturbed by the breadth of new civil forfeiture statutes...which subjects to forfeiture all real property that is used, or intended to be used, in the commission, or even the facilitation, of a federal drug offense.”⁷² He went further by pondering that “it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture,” adding in a footnote that “[s]uch a case may arise in the excessive fines context.”

Because the permanent seizure of property or cash in a civil proceeding is a form of retribution against an individual believed to be engaged in some criminal enterprise, the Supreme Court has rightly determined that the forfeiture may not be excessive.

⁷⁰ H.R. 2835, 116th Congress (2019)

⁷¹ H. Rept. 114-892 (2016)

⁷² 510 U.S. 43 (1993)

This is consistent with the Eighth Amendment of the Constitution, which states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

This precedent comes from *Austin v. United States* (1993),⁷³ a case that involved a South Dakota man, Richard Lyle Austin, who, in June 1990, sold two grams of cocaine at the body shop that he owned. A search of Austin’s body shop and his mobile home, from which he retrieved the cocaine for the illicit transaction, revealed small amounts of cocaine and marijuana, drug paraphernalia, a .22 caliber firearm, and nearly \$5,000 in cash. Austin pled guilty to possession with intent to distribute and was sentenced to seven years in state prison.

Law enforcement sought the permanent seizure of Austin’s mobile home and body shop under federal forfeiture laws, which Austin contested. Although Austin lost at the district court and the appellate court, the Supreme Court reversed the appellate court ruling and determined that a forfeiture is a punishment and, as Justice Harry Blackmun wrote, “is subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.” Essentially, the forfeiture may not be disproportionate.

The Supreme Court reaffirmed the *Austin* decision in *Hudson v. United States* (1997).⁷⁴ However, what constitutes an excessive fine in a forfeiture case was not determined until *United States v. Bajakajian* (1998).⁷⁵ This case involved a Syrian immigrant, Hosep Bajakajian, who was traveling from the United States to Italy with \$357,144 in cash. Customs agents were alerted to the cash by dogs.

Bajakajian did not declare that he was traveling with more than \$10,000, as required by law, and he lied to the customs agents, claiming that he and his wife had a total of \$15,000 in cash between them. The customs agents discovered the cash after a search.

Bajakajian was not involved in a criminal enterprise. As Roger Pilon noted, “The money had been earned legally through Mr. Bajakajian’s gas-station business and was meant for repaying relatives who had helped him get started.”⁷⁶ Still, Bajakajian pled guilty to the charge of failing to report the cash in excess of \$10,000 and the charge of making a false statement was dropped. The federal government sought to take permanent possession of the \$357,144 that Bajakajian had in his possession.

Although Bajakajian won at trial, the presiding judge allowed for the forfeiture of \$15,000, a fine of \$5,000, and three years of probation. The appellate court upheld the district court judge’s ruling. The federal government, in its effort to take the full \$357,144, appealed to the Supreme Court.

73 509 U.S. 602 (1993)

74 522 U.S. 93 (1997)

75 524 U.S. 321 (1998)

76 Roger Pilon, “High Court Reins in Overweening Government,” Cato Institute, June 23, 1998 <https://www.cato.org/publications/commentary/high-court-reins-overweening-government>

In the majority opinion, Justice Thomas reaffirmed *Austin* and expanded on the principle by outlining an excessive fine. “Until today...we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive,” Justice Thomas wrote. “We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”

Although the Court determined that the forfeiture of the \$357,144 would have been unconstitutionally excessive, issues have arisen in post-*Bajakajian* jurisprudence, as Yan Slavinskiy has explained.⁷⁷

“The two main problems that have emerged from the way lower courts have applied *Bajakajian* are intricately linked. First, courts refuse to consider factors not applied by the *Bajakajian* Court. This is rarely a problem when courts consider cases factually similar to *Bajakajian*, but is amplified when courts consider the forfeiture of facilitating property, such as the family home, and are unable to adequately quantify the ‘value of the forfeiture.’ This rigidity in applying *Bajakajian* has led only 4 out of 150 Federal Courts of Appeals that have relied on *Bajakajian* in conducting an excessiveness inquiry to find an excessive forfeiture. Second, because the factors used in *Bajakajian* are linked to the specific facts of *Bajakajian*, courts considering the excessiveness of forfeiture go to great lengths to distinguish the facts of a particular case from those in *Bajakajian*. Because *Bajakajian*’s facts were particularly sympathetic to the claimant, involved a victimless crime, and featured a strict liability standard of fault, virtually the only time that excessiveness has been found by courts applying the *Bajakajian* standard is when the facts of a particular case were remarkably similar to those of *Bajakajian*.”

The Supreme Court recently revisited *Austin* and *Bajakajian* in *Timbs v. Indiana* (2019).⁷⁸ The question in *Timbs* was whether the Eighth Amendment’s Excessive Fines Clause should be incorporated against the states through the selective incorporation doctrine.⁷⁹

To this point in American history, most of the liberties protected by the Bill of Rights have been incorporated against the states.⁸⁰ Of the three clauses of the Eighth

⁷⁷ Yan Slavinskiy, “Protecting the Family Home by Understanding *United States v. Bajakajian*,” *Cardozo Law Review*, April 2014 <http://cardozolawreview.com/wp-content/uploads/2018/08/SLAVINSKIY.35.4.pdf>

⁷⁸ 586 U.S. ____ (2019)

⁷⁹ Some legal scholars believe the more appropriate path to incorporate the Bill of Rights against the states is through the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause of the Fourteenth Amendment, or selective incorporation. The Privileges or Immunities Clause states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The clause was rendered moot by the Supreme Court in the *Slaughter-House* cases (1873), but it has had a revival in recent years, with its most notable adherents being Justice Thomas and Justice Gorsuch.

⁸⁰ Some may question why the Supreme Court has to incorporate any part of the Bill of Rights to the states. This goes back to *Barron v. Baltimore* (1833). The Court ruled that the Bill of Rights applied only to federal citizenship, not state citizenship. However, the approach has changed since the late 19th century and more rapidly in the 20th century. The Supreme

Amendment, only the Excessive Fines Clause had not been incorporated.⁸¹

The plaintiff in the case, Tyson Timbs, became addicted to prescription drugs because of pain in his foot. After his prescription ended, Timbs turned to heroin to self-medicate. He sold about \$400 worth of heroin to undercover police officers in Indiana and was arrested. He pled guilty and was sentenced to one year of home confinement and five years of probation. Timbs was also required to complete a drug treatment program and pay around \$1,200 in court costs and fees.

Law enforcement used a private law firm initiate forfeiture proceedings against Timbs' Land Rover because, they claimed, he used the vehicle to transport a controlled substance. He had purchased the Land Rover for \$42,000 with cash that he received from a payout from his father's life insurance policy. Needless to say, the car was not the fruits of a criminal enterprise and the seizure was excessive compared to the punishment.

A trial court rejected the forfeiture of Timbs' Land Rover on the grounds that the permanent seizure of the vehicle was disproportionate to the crime. The trial court's judgment was upheld on appeal. The Indiana Supreme Court, however, reversed the lower court rulings because the Excessive Fines Clause of the Eighth Amendment had not been incorporated against the states.

When the case was appealed to the U.S. Supreme Court, Timbs' attorney presented a compelling case for the Court to incorporate the Excessive Fines Clause against the states. Indiana Solicitor General Thomas Fisher struggled during his rebuttal. Fisher attempted to pivot to the merits and seemingly urged the Court to overrule *Austin*. Justice Gorsuch confidently responded, "Let's say this Court's not inclined to revisit *Austin*. You're going to lose not just the incorporation question but the merits question too."

In perhaps the most infamous moment of the oral arguments, Solicitor General Fisher demonstrated the potentially abusive nature of forfeiture laws during an exchange with Justice Stephen Breyer. Justice Breyer asked if a Bugatti was "forfeitable" if the driver was five miles per hour over the speed limit. "Yes, it's forfeitable," Solicitor General Fisher said. "The *Louisa Barber* case, one person over the — the passenger limit and the entire ship is forfeit. This is — history shows us *in rem* forfeiture."

In February 2019, the Supreme Court incorporated the Excessive Fines Clause of the

Court has incorporated parts of the Bill of Rights through the Fourteenth Amendment. One of the more notable, and more recent, cases were *McDonald v. Chicago* (2010), which incorporated the individual right to keep and bear arms, as held by the Court in *Distric of Columbia v. Heller* (2008), established by the Second Amendment to the states.

⁸¹ The Supreme Court has not explicitly incorporated Excessive Bail Clause of the Eighth Amendment against the states through selective incorporation, although it was stated as dicta in *Schilb v. Kuebel* (1971). Justice Blackmun wrote it as a matter of assumption, citing a case, *Pilkinton v. Circuit Court* (1963), out of the U.S. Court of Appeals for the Eighth Circuit, in which the opinion of the lower appellate court noted that "the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment." The Cruel and Unusual Punishment Clause was incorporated against the states in *Robinson v. California* (1962).

Eighth Amendment against the states. Justice Ruth Bader Ginsburg wrote, “We... decline [Indiana]’s invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.”

When it came to incorporation, the matter was consistent with how the oral arguments played out. “As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures,” Justice Ginsburg noted. “We disagree.”

Although he disagreed with the way the majority incorporated the Excessive Fines Clause against the states, Justice Thomas concurred in the judgment. “The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment’s prohibition on excessive fines applies in full to the States.”

Although limited progress has been made on forfeiture at the Supreme Court, much legal work is left to be done. For example, the Court missed an opportunity to limit forfeitures in *Bennis v. Michigan* (1996).⁸² In this instance, Justice Thomas sided with the majority to validate the forfeiture of a jointly owned vehicle that was, as Justice John Paul Stevens phrased it, “used as little more than an enclosure for a one-time event,” in this instance, sex with a prostitute.

Justice Thomas has expressed a desire to revisit forfeiture, directly. In 2017, the Supreme Court denied certiorari in *Leonard v. Texas*.⁸³ Justice Thomas respected the denial, but he took aim at forfeiture laws, the impact of those laws, and their abuse by law enforcement.

“This system — where police can seize property with limited judicial oversight and retain it for their own use — has led to egregious and well-chronicled abuses. According to one nationally publicized report, for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights.

“In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. In another, they seized a black plant worker’s car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to

82 516 U.S. 442 (1996)

83 No. 16-122, Statement of Justice Thomas respecting the denial of certiorari, March 6, 2017

sign away his property, and then released him on the side of the road without a phone or money. He was forced to walk to a Wal-Mart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up."

"These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home."

Federal courts may serve as an avenue to address forfeiture, but Congress, to quote a letter by Sen. Mike Lee (R-Utah), "need not wait for Supreme Court censure before reforming these practices."⁸⁴ It is possible that this may happen sooner rather than later. Recently, a South Carolina circuit court judge, Steven H. John, ruled that the state's civil asset forfeiture laws are unconstitutional, noting that the laws violate the Excessive Fines Clause of the Eighth Amendment and the Due Process clauses of the Fifth and Fourteenth amendments.

Post-*Timbs* Concerns

Perhaps it is too early to gauge the impact of *Timbs*, but there is some limited insight into how states may navigate the decision. One example comes from Prosecuting Attorneys' Council of Georgia, which, immediately after *Timbs* was decided, published a one-pager on the case.⁸⁵

"The Court's decision in *Timbs* should not have any effect on Georgia law. Relying on *Austin*, our Supreme Court held in 1994 that the prohibition against excessive fines of the Eighth Amendment applies to civil *in rem* forfeitures. Trial courts are required to use the three-part 'gross disproportionality' test found in *Howell v. State* for deciding if a forfeiture is unconstitutional under the Eighth Amendment."

This assumes that a forfeiture proceeding will be taken to trial. Although Georgia passed legislation to require uniformity and greater transparency,⁸⁶ the reforms were not far-reaching. Jurisdictions are required to report certain information on forfeited cash and property to the Carl Vinson Institute of Government at the University of Georgia, including a description of seized items, the value of the items, and the

84 The Honorable Mike Lee, "Senators from Both Parties Call on DOJ to Reform Civil Asset Forfeiture Policies," May 31, 2017 <https://www.lee.senate.gov/public/index.cfm/2017/5/senators-from-both-parties-call-on-doj-to-reform-civil-asset-forfeiture-policies>

85 Prosecuting Attorneys' Council of Georgia, "FYI: *Timbs v. Indiana*," February 20, 2019 https://pacga.org/wp-content/uploads/2019/02/fyi_2_20_19_Timbs_v_Indiana.pdf

86 HB 233, Georgia General Assembly (2015) <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/233>

distribution or disposition of the items.

Jurisdictions are not required, however, to disclose whether the cash or property was obtained after a jury trial, either criminal or civil, or whether the individual from whom the property was taken was charged or convicted of a crime. Because of the lack of this data, it is extraordinarily difficult to determine how many civil forfeiture cases went to trial.

However, other states have hinted at how they may be able to circumvent *Timbs*. For example, the American Civil Liberties Union of Pennsylvania published a report on seizures in Philadelphia.⁸⁷ The report notes that the Philadelphia district attorney office fails to give proper notice of forfeiture proceedings, such as publishing an ad in the local paper, a third of the time. Property owners must appear in court several times to contest forfeitures, and any failure to appear results in administrative forfeiture.

Even when innocent property owners do everything that is required of them, there is no guarantee that they will get back cash seized from the local government. The report explained that though most people whose cash is seized are charged with a crime, 32 percent are never convicted. Additionally, nearly 74 percent of forfeiture cases involved sums of \$400 or less. Such low monetary amounts seized make the economics of challenging a forfeiture unappealing because the cost of contesting the seizure may be greater the amount that was taken.

Indeed, the report explains that 3 percent of the estimated 2,950 forfeiture cases from 2011 through 2013 for amounts greater than \$201 were disputed. These cases represented roughly 53 percent of all forfeiture cases during this time period. Although the percentage of those contesting seizure rises as the monetary amount grows, only 26 percent of cases involving sums greater than \$400 were disputed.

Granted, the data in the report is antiquated, and Pennsylvania has since passed significant forfeiture reforms.⁸⁸ Still, the behavior of law enforcement identified in the report, such as targeting smaller sums, as well as the intimidation tactics that could be employed, such as threatening to bring criminal charges if an individual contests a seizure, provide convenient ways to circumvent *Timbs*.

IRS Abuse of Forfeiture

The seizure of Americans' property without due process is not limited to train stations or traffic stops. The Internal Revenue Service has also used federal forfeiture statutes to seize bank accounts engaged in a practice known as "structuring:" the illegal process of setting up financial records in such a manner as to intentionally avoid

87 American Civil Liberties Union of Pennsylvania, "Guilty Property How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year— and Gets Away with It," June 2015 https://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf

88 SB 8, Pennsylvania General Assembly (2017) <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2017&slnd=0&body=S&type=B&bn=8>

reporting requirements for banks and other financial institutions.

The Bank Secrecy Act, a 1970 law meant to combat money laundering operations used to fund drug traffickers and terrorists, requires financial institutions to report to the federal government cash deposits of \$10,000 or more.⁸⁹ Banks also report frequent deposits under the reporting threshold. Combined with the Racketeer Influenced and Corrupt Organizations Act (RICO) statutes, these two laws were grouped together to provide new tools for law enforcement to combat a surge of organized crime centered around the drug trade. Unfortunately, these statutes that used to be used sparingly are now being applied erroneously to innocent citizens.

Andrew Clyde, a Navy veteran and gun store owner in Athens, Georgia, fell victim to abuse of federal forfeiture laws by the IRS when \$950,000 was seized from his bank account in April 2013 because he purportedly structured his deposits to evade the reporting requirement.⁹⁰

In 2012 and 2013, Clyde Armory saw a boom in business due to concern that the administration and Congress would enact more stringent gun control laws. He made frequent deposits under \$10,000, below the federal reporting requirement, because, “his business insurance policy only covered off-premises losses up to \$10,000.”

Clyde, who told his story in a February 2015 House Ways and Means subcommittee hearing, wrestled with the IRS over his money.⁹¹ He was never charged or convicted of a crime, but his livelihood was still in jeopardy. “I did not serve three combat tours in Iraq only to come home and be extorted,” he told the committee. He eventually reached a settlement that required him to forfeit \$50,000, not including the \$100,000 he paid in legal fees, to get the remainder of his money back.

This ploy became routine for the IRS. In a February 2015 report, the Institute for Justice noted that the IRS seized \$242 million in approximately 2,500 structuring cases.⁹² In roughly a third of these cases, no criminal activity other than structuring was suspected.

The Institute for Justice noted that the IRS was rather overzealous in its actions. “Nearly half of the money seized by the IRS was not forfeited,” the report explained, “raising concerns that the IRS seized more than it could later justify to forfeit the cash.”

The U.S. Treasury’s own Inspector General for Tax Administration (TIGTA) provided

89 U.S. Department of the Treasury, “History of Anti-Money Laundering Laws,” Accessed July 2, 2019 http://www.fincen.gov/news_room/aml_history.html

90 Jim Thompson, “Athens gun shop owner testifies to Congress on asset seizure,” Athens Banner-Herald, February 13, 2015 <http://onlineathens.com/local-news/2015-02-12/athens-gun-shop-owner-testifies-congress-asset-seizure>

91 The Honorable Kenny Marchant, “Ways & Means Oversight Subcommittee to Address IRS Abuse of Small Businesses,” February 9, 2015 <http://marchant.house.gov/news/documentsingle.aspx?DocumentID=398041>

92 Dick M. Carpenter II and Larry Salzman, “Seize First, Question Later: The IRS and Civil Forfeiture,” Institute for Justice, February 3, 2015 <http://www.ij.org/seize-first-question-later>

another stunning statistic in a 2017 investigation. Out of a sample size of 278 structuring cases that TIGTA examined, they found that 91 percent of cases they “did not find evidence that the structured funds came from an illegal source or involved any other illegal activity.”⁹³ Although the IRS had supposedly changed its policies to avoid pursuing forfeiture of legally acquired cash, TIGTA found that they clearly failed to follow their own guidelines - which meant that the laws on the books would have to change.

Fortunately, in 2019 Congress passed the Taxpayers First Act,⁹⁴ which included a provision to affirmatively ban the practice of cash seizures because of structuring unless the IRS can prove the cash was related to illegal activity.

There are many other examples of abuse of federal forfeiture laws against innocent people. There are, of course, victories in law by those who fought back against this pernicious form of government overreach. But these victories often come after the innocent property owner spends thousands of dollars to fight the seizure and get their property back in a system where the odds are stacked against them.

Principles for Forfeiture Reform

Ideally, any federal civil asset forfeiture reform would require a criminal conviction. This would require the government to prove beyond a reasonable doubt that the accused is guilty of a crime in order to forfeit property connected to illicit activity. This standard, however, may prove too difficult to gain enough political support.

At the very least, the standard of proof should be significantly raised, perhaps to “clear and convincing evidence,” which requires proof that a claim is substantially more likely to be true than false. The presumption of innocence should be fully restored for property as well as for its owners, and the burden of proof should fall on the government.

The process by which property owners dispute forfeitures should be made easier and allow for innocent owners to recoup any legal expenses after successful proceedings. What’s more, the right to an attorney should extend to civil forfeiture proceedings as another check against government overreach. It is essential that citizens be informed of their rights surrounding civil asset forfeiture and that the means of protection against unjust, unconstitutional, and unacceptable government seizure be available to all.

93 Treasury Inspector General for Tax Administration, “Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses,” March 30, 2017, Pg. 9 <https://www.treasury.gov/tigta/auditreports/2017reports/201730025fr.pdf>

94 H.R. 3151, 116th Congress (2019)

Finally, the perverse profit motive often behind seizures should be removed. The Department of Justice's Equitable Sharing Fund should be dissolved and all funds obtained under federal forfeiture law should be placed into a neutral account, such as the General Fund of the United States.

These reforms would restore the due process rights guaranteed by the Fourth, Fifth, and Sixth Amendments and protect the property rights of law-abiding citizens from government overreach.

Appendix

ASSET FORFEITURE REVENUES, FY 2003-FY 2018 (IN THOUSANDS)

YEAR	REVENUES	YEAR	REVENUES
2003	\$500	2011	\$1,804
2004	\$571	2012	\$4,222
2005	\$612	2013	\$2,085
2006	\$1,207	2014	\$4,473
2007	\$1,662	2015	\$1,629
2008	\$1,421	2016	\$1,921
2009	\$1,450	2017	\$1,643
2010	\$1,793	2018	\$1,379

Source: Government Accountability Office, "Justice Assets Forfeiture Fund: Transparency and Controls Over Equitable Sharing Should be Improved," July 2012; Department of Justice

DOJ EQUITABLE SHARING PAYMENTS OF CASH AND SALE PROCEEDS, FY 2004-FY 2018 (IN THOUSANDS)

FISCAL YEAR	PAYMENTS	FISCAL YEAR	PAYMENTS
2004	\$270,327	2012	\$453,814
2005	\$257,071	2013	\$658,095
2006	\$297,524	2014	\$433,180
2007	\$416,769	2015	\$492,779
2008	\$439,441	2016	\$316,890
2009	\$398,171	2017	\$309,655
2010	\$389,901	2018	\$404,184
2011	\$438,357		

Source: Department of Justice

FEDERAL FORFEITURE FUND NET ASSETS, FY 2001-FY2017 (IN THOUSANDS)

FY	JUSTICE	TREASURY	TOTAL
2001	\$525,800	\$237,300	\$763,100
2002	\$485,200	\$173,000	\$658,200
2003	\$528,400	\$177,231	\$705,600
2004	\$427,900	\$194,103	\$622,000
2005	\$448,000	\$255,307	\$703,300
2006	\$651,100	\$236,757	\$887,900
2007	\$734,200	\$361,387	\$1,095,600
2008	\$1,000,700	\$426,779	\$1,427,500
2009	\$1,425,883	\$594,513	\$2,020,396
2010	\$1,687,400	\$986,071	\$2,673,471
2011	\$1,760,544	\$1,452,922	\$3,213,466
2012	\$1,620,387	\$1,555,895	\$3,176,282
2013	\$1,855,767	\$2,486,628	\$4,342,395
2014	\$2,560,848	\$1,903,622	\$4,464,470
2015	\$1,549,919	\$6,067,853	\$7,617,772
2016	\$1,460,226	\$2,590,444	\$4,050,670
2017	\$1,935,830	\$2,248,198	\$4,184,028

*Sources: Department of Justice Assets Forfeiture Fund Annual Financial Statements;
Department of Treasury Forfeiture Fund Accountability Reports*