

POLICY BRIEFING

Asset Forfeiture

1999

“Unfortunately, I think I can say that our civil asset forfeiture laws are being used in terribly unjust ways, and are depriving innocent citizens of their property with nothing that can be called due process. This is wrong and it must be stopped.”

—Rep. Henry Hyde (R-Ill.)
Chairman, House Judiciary Committee

THE DRUG POLICY FOUNDATION
Washington, DC

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Asset Forfeiture

*by Scott Ehlers, Senior Policy Analyst
Drug Policy Foundation*

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mission is to broaden the public
dialogue on drugs, drug users, and
drug policy and to work toward
reasoned and compassionate
reforms of the current policy.

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The legal principle underlying civil asset forfeiture—that property can be guilty of wrong-doing and seized as punishment—has its ancient origins in the Bible and the “deodand.” Under English common law, a deodand (Latin for “given to God”) was a thing that was forfeited to the Crown for the good of the community.¹ If a person fell off a horse and was killed, then the horse or its value would be forfeited as a deodand to the Crown.

The law of deodands was extended to English admiralty and customs laws to seize vessels and cargo—a power so abused by the English Crown that it helped spark the American Revolution. Because of these abuses, the founding fathers included the Due Process Clause of the Fifth Amendment² in the Constitution to ensure that property not be taken from citizens without a judicial hearing. Unfortunately, this practice continues today.

Congress passed the first drug-related civil asset forfeiture law as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The forfeiture provision, 21 USC § 881, authorized the government to seize and forfeit illicit drugs, manufacturing and storage equipment, and conveyances used to transport drugs.³ In 1978 and throughout the 1980s, Congress passed a number of “anti-drug” laws that expanded the government’s power to seize and forfeit property.⁴ Ostensibly aimed at attacking the proceeds of illicit drug traffickers, civil asset forfeiture has become a corrupting cash cow for law enforcement, and a serious threat to Americans’ constitutional rights. What was once a means to an end, has become an end in itself.

How Asset Forfeiture Works

The government can take title to a person's property under criminal law or civil law. Under federal criminal forfeiture law, property forfeiture is contingent upon the conviction of the property owner.⁵

Civil forfeiture is based on the legal fiction that the property that facilitates or is connected with a crime has itself committed a wrong and can be seized and tried in civil court (e.g., *United States v. One 1974 Cadillac Eldorado Sedan*⁶). Such judicial hearings are referred to as *in rem* proceedings, meaning “against the thing.”⁷

Under civil forfeiture law, the government can seize a person's property on the basis of “probable cause,” which is the same minimal standard required for police to obtain

a search warrant.⁸ In order to get the property returned, an owner must prove by a “preponderance of the evidence”—a higher burden of proof—that his/her property was not used to facilitate a crime.⁹ Whereas under criminal law the defendant is innocent until proved guilty, in civil asset forfeiture proceedings, the property is presumed “guilty” and the owner has to prove otherwise to get it back.

At the federal level, a civil forfeiture can be administrative or judicial. Administrative forfeitures are carried out by the investigating agency that seized the property, without judicial involvement.¹⁰ Administrative forfeitures primarily take place under customs law, and include conveyances used to import, export, transport, or store any controlled substance.¹¹ Owners who wish to challenge a property seizure have 20 days to file a claim contesting

Supreme Court Cases

Calero-Toledo v. Pearson Yacht Leasing Co. (1974)

The court upheld the forfeiture of a leased yacht after a marijuana cigarette was discovered by Customs agents. Innocent owners can have their property forfeited without compensation under civil proceedings.

Austin v. United States (1993)

The Eighth Amendment's protection against excessive fines applies in civil forfeiture cases, as it is a form of punishment.

United States v. James Daniel Good Real Property et al. (1993)

Absent exigent circumstances, the government must afford an owner of real property (e.g., house, land) notice and a hearing prior to seizing the property per the Fifth Amendment.

United States v. 92 Buena Vista Avenue (1993)

The “innocent owner” defense applies to persons who unknowingly purchase goods with illegally obtained funds and may be invoked by owners even if they are not the bona fide purchasers.

Libretti v. United States (1995)

The requirement that a court ascertain a factual basis for a guilty plea does not extend to forfeiture, which represents a punishment.

Bennis v. Michigan (1996)

Upheld the forfeiture of a woman's car after her husband engaged in sexual activity with a prostitute inside the vehicle. The nature of the crime rather than the issue of ownership is what is relevant in civil forfeiture proceedings.

United States v.ajakajian (1998)

Established that a criminal forfeiture violates the Excessive Fines Clause when “the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense....”

an administrative forfeiture, and only 10 days if the forfeiture is initially brought in federal court.¹² The owner must also post a cost bond in the amount of 10 percent of the value of the property seized, not to exceed \$5,000 or be less than \$250.¹³

If the owner does not prove the innocence of the property and it is found “guilty,” it is then “punished”—forfeited to the government. The owner of the property does not have to be charged or convicted of the crime to which the property was purportedly connected. In fact, one recent study showed that more than 80 percent of persons who had their property seized by the federal government were never even charged with a crime.¹⁴



“Much like a drug addict becomes addicted to drugs, law enforcement agencies have become dependent on asset forfeitures. They have to have it.”

Gary Schons, former California
Deputy Attorney General

Asset Forfeiture in Practice

State-Level Forfeitures¹⁵

Forfeitures can take place under either state or federal law. Some states, such as Montana, Oklahoma, Oregon, and Pennsylvania, require all forfeiture proceeds to be used for drug enforcement activities, whereas

states like Indiana and Missouri require the proceeds to be given to the state public education system. Others, like Iowa and Vermont, require the proceeds to be deposited into the state's general fund to be used at the discretion of the legislature. Every state differs in how it distributes asset forfeiture proceeds and how such funds can be used.

Federal Forfeiture Funds

Prior to the passage of the Comprehensive Crime Control Act of 1984, funds derived from federal forfeitures were deposited into the General Fund of the U.S. Treasury.¹⁶ With the passage of this act, two asset forfeiture funds were established for the Department of Justice (DOJ) and the U.S. Customs Service.¹⁷

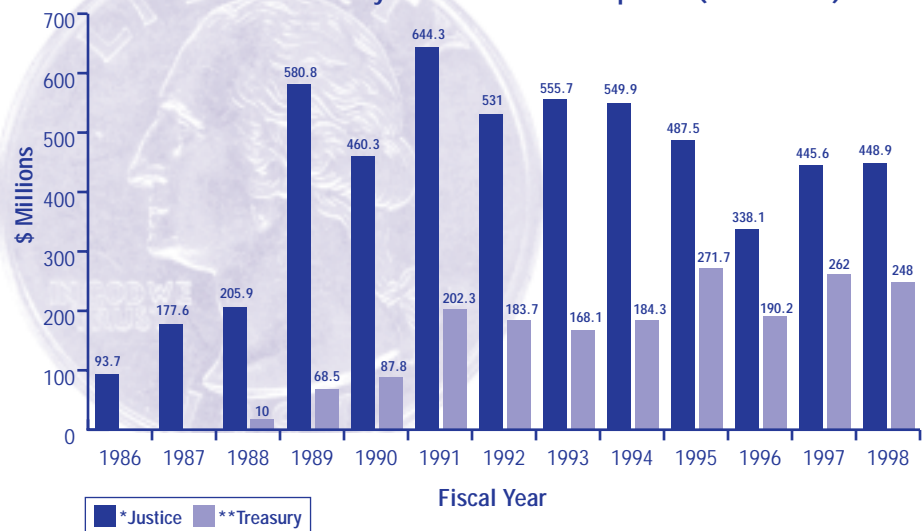
The Justice Department's Assets Forfeiture Fund receives forfeiture proceeds from cases involving DOJ agencies (Drug Enforcement Administration; Federal Bureau of Investigation; the Immigration and Naturalization Service; the U.S. Marshals Service; and the U.S. Attorneys' Office), as well as three non-Justice agencies (the U.S. Postal

Inspection Service; the Food and Drug Administration; and the U.S. Park Police).¹⁸ Between 1984 and 1993, a few Treasury Department law enforcement agencies (Bureau of Alcohol, Tobacco, and Firearms; Criminal Investigation Division of the Internal Revenue Service; and the U.S. Secret Service) participated in the DOJ Assets Forfeiture Fund as well, while the U.S. Customs Service maintained its own forfeiture fund. With the passage of the Treasury Forfeiture Fund Act of 1992, Congress established the Treasury Forfeiture Fund (TFF) to supersede the Customs fund,¹⁹ and all Treasury agencies began making deposits into it in October 1993.²⁰

In fiscal year 1998, \$448.9 million in drug- and non-drug-related deposits was placed in the DOJ Assets Forfeiture Fund,²¹ and \$248 million was deposited into the Treasury Forfeiture Fund.²² Since 1986, more than \$5.5 billion has been deposited in the DOJ Fund.²³ Over \$1.8 billion has been deposited in the TFF and Customs funds since 1988.²⁴ (See Figure 1)

FIGURE 1

Justice and Treasury Forfeiture Fund Deposits (1986-1998)



*Source: Annual Report of the Dept. of Justice Asset Forfeiture Program: Fiscal Year 1996, p. 1; National Drug Control Strategy: Budget Summary (1998, 1999), p. 98 and 107.

**Source: Treasury Forfeiture Fund Annual Report (1994-1998).

It should be noted that one other fund that used to receive forfeiture proceeds is the Special Forfeiture Fund (SFF) maintained by the White House Office of National Drug Control Policy (ONDCP). The Assets Forfeiture Amendments Act of 1988 established the fund to provide the ONDCP with additional resources to fund a variety of anti-drug activities. As originally established, deposits to the fund came from the DOJ and Treasury forfeiture funds after certain necessary expenses were met. Congress could provide direct appropriations to the fund as well.²⁵

Today, the Special Forfeiture Fund is not a forfeiture fund in the true sense. In 1998, the National Drug Control Policy Reauthorization Act re-established the SFF, but now Congress directly appropriates all monies in the fund.²⁶ The government is currently paying for the ONDCP's anti-drug media campaign through the SFF.

Federal Forfeiture Adoption and Equitable Sharing

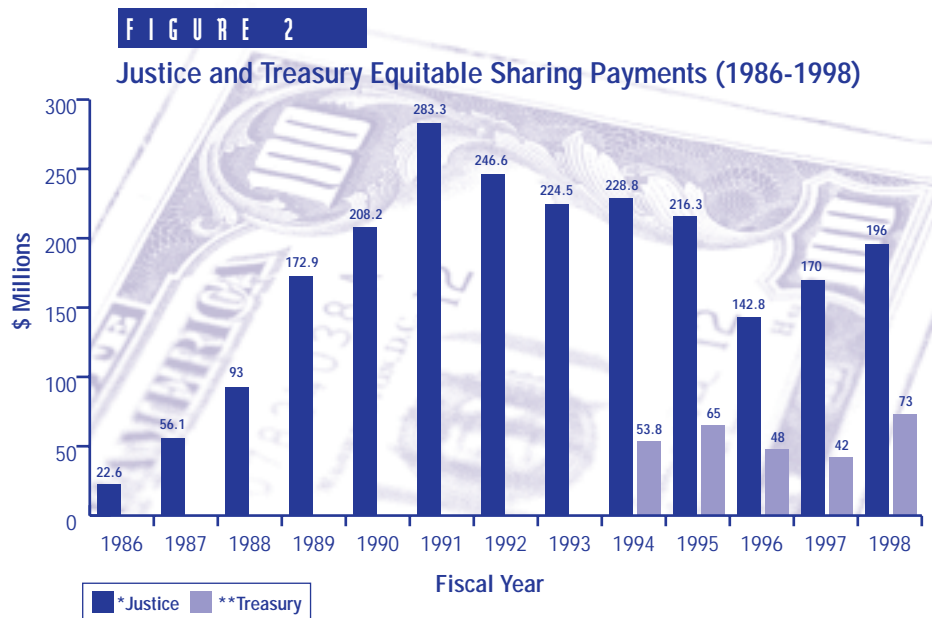
Under federal law, state and local law enforcement agencies can ask the federal government to “adopt” an asset seizure if the “conduct giving rise to the seizure is in violation of federal law and federal law provides for forfeiture,” as is the case with drug offenses.²⁷ The federal government can also adopt a forfeiture when local, state, and/or foreign law enforcement agencies work with federal agencies on a drug case.

After the property is forfeited to the federal government, the government can then give back up to 80 percent of the forfeiture proceeds to a

seizing law enforcement agency.²⁸ This is known as equitable sharing. The amount of money or property transferred back to the seizing agency depends on the degree to which the agency participated in the forfeiture effort.²⁹ Federal law requires that funds returned to the state be used for law enforcement purposes.³⁰

In 1998, an estimated \$196 million in cash payments and transferred property was shared with local, state, and foreign law enforcement agencies under the Department of Justice's equitable sharing program.³¹ In addition, the Treasury Forfeiture Fund paid out \$73.1 million in equitable sharing payments to local, state, and foreign agencies in 1998.³²

Since the Justice Department's equitable sharing program began in 1986, it has disbursed almost \$1.9 billion in cash and tangible property to state and local law enforcement, and over \$42.3 million in cash to foreign governments.³³ The Treasury Department's 1998 annual report noted that more than \$282.7 million in cash and proceeds had been distributed to local, state, and foreign law enforcement agencies since the fund's inception in fiscal year 1993.³⁴ (see Figure 2)



*Source: Annual Report of the Dept. of Justice Asset Forfeiture Program: Fiscal Year 1996, p. 3; Estimates for FY 1997 and 1998 taken from National Drug Control Strategy: Budget Summary (1997, 1998), p. 106 and 98.

**Source: Treasury Forfeiture Fund Annual Report (1994-1998).

Note: Figures only include payments to local, state, and foreign law enforcement agencies.

Problems with Civil Asset Forfeiture



While society certainly has an interest in taking away the ill-gotten gains of drug dealers and other criminals, today's civil asset forfeiture laws have done serious collateral damage to the property rights and due process rights of American

citizens, and have undermined the integrity of the criminal justice system in a variety of ways. The primary problems with civil asset forfeiture laws are:

Property Is Presumed Guilty

As previously mentioned, there is a big difference between civil and criminal forfeiture. In a criminal case the defendant is innocent until proved guilty, and the government must prove the defendant's guilt beyond a reasonable doubt. In a civil forfeiture proceeding in federal court and in many state courts, the tables are turned on the citizen: his/her property is presumed guilty and the burden of proof is on the property owner to prove by a preponderance of the evidence that the property was not involved in wrong-doing.³⁵

By placing the burden of proof on the property owner, the government has an unfair advantage over property owners in a lawsuit to get their property returned. As U.S. District Court judge Arlen Beam noted in a dissenting opinion: "The current allocations of burdens and standards of proof require that the [owner] prove a negative, that the property was not used in order to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of erroneous, irreversible deprivation [of property]...."³⁶

Such a fight is so costly that many property owners prefer to let the government keep the property rather than incur legal expenses that may exceed the value of the property itself.

Innocent Owners Are Inadequately Protected

Because it is the property that is accused of wrong-doing in a civil asset forfeiture proceeding, innocent owners can have their property seized when it is used by someone else to commit a drug crime without the owner's permission or knowledge. The constitutionality of such actions in a drug case was first upheld in the U.S. Supreme Court's 1974 decision, *Calero-Toledo v. Pearson Yacht Leasing Company*.³⁷ In that case a marijuana cigarette was found on board a yacht rented by the Pearson Yacht Leasing Company. The yacht was forfeited to the government because it was seen as a conveyance used to transport a controlled substance. The Supreme Court upheld the forfeiture, establishing that the government can constitutionally take an innocent owner's property in civil proceedings.

Despite the passage of the Asset Forfeiture Amendments Act of 1988, which included some forfeiture exceptions for innocent owners and violations involving the possession of personal-use quantities of drugs,³⁸ innocent owners are still having their property seized and forfeited to the government. The Supreme Court approved the practice again in 1996 in *Bennis v. Michigan*, by upholding the forfeiture of Ms. Bennis' car after her husband was caught soliciting a prostitute in it.

Most recently, in March 1999, Jim and Amba Patel had their motel forfeited and sold because drugs had been sold on the property. Despite the motel owners' attempts to keep drug dealers off the premises by installing floodlights and fences and calling the police, their property was taken. No criminal charges were ever filed against the Wichita, Kansas, couple, because, as U.S. Attorney Jackie Williams noted, "the most effective way to deal with the Patels [the motel owners] themselves was to go the civil route, where the burden of proof is somewhat less than a criminal case."³⁹



Standard of Proof is Too Low

In order for the police to seize a person's property and begin forfeiture proceedings, they need only show probable cause—the lowest standard of proof—that the property was used to “facilitate” a drug crime. As Henry Hyde notes in his book, *Forfeiting Our Property Rights*, “Probable cause can be established by little more than rank hearsay, gossip, or rumor.”⁴⁰

Such hearsay evidence is often provided by informants who receive a portion of the forfeiture proceeds, giving them an incentive to lie about property owners in order to receive a cut of the potential proceeds. Donald Scott's Malibu, California, property was targeted after a confidential informant accused him of growing marijuana. Scott was shot dead in front of his wife after 30 local, state, and federal agents invaded his home on October 2, 1992. No marijuana was found, but the Ventura County district attorney did determine that “the Los Angeles County Sheriff's Department was motivated, at least in part, by a desire to seize and forfeit the ranch for the government.”⁴¹

The Gerhardt family's waterfront home in Fort Lauderdale, Florida, was seized after a confidential informant claimed that George Gerhardt was paid to allow cocaine shipments to be unloaded at his dock. The informant could not recall when it happened or the names of the drug dealers, but the government proceeded anyway. Three months after Gerhardt died, the house was seized and his relatives were kicked off the property. No arrest warrant was ever issued and no charges were ever filed against a living person.⁴²

Disproportionate Impact on the Poor, Minorities

In a variety of ways, civil asset forfeiture laws disproportionately impact the poor and minority communities. To contest a federal forfeiture, a property owner must post a bond equal to 10 percent of the value of the property, money that many property owners do not have. Additionally, defendants in civil asset forfeiture proceedings are not appointed counsel, as is guaranteed by the Sixth Amendment for criminal trials.

Because ethnic minorities are targeted more often by drug enforcement agents, their property is more often subject to civil forfeiture. Recent cases in New Jersey⁴³ and

“We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws....”

Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture Office

Maryland⁴⁴ have shown that highway patrol officers in those states use racial profiling in its drug enforcement activities to stop motorists along busy highways. This “offense” is known as “Driving While Black” by its critics.

Under the Florida Contraband Forfeiture Act, police in Volusia County (near Daytona Beach) have seized property and cash on the basis of “probable cause,” which was defined by the Sheriff as possessing \$100 or more in cash. The *Orlando Sentinel* analyzed more than 1,000 traffic stops and found that more than 70 percent of the cars were driven by blacks or Hispanics; 80 percent of autos searched had minority drivers; and ninety percent of the drivers from whom cash was seized without arrest were black or Hispanic.⁴⁵

Seattle's City Attorney, Mark Sidran, has targeted minority businesses and homes under the city's “drug nuisance abatement” program, a civil forfeiture scheme. Of 28 available drug abatement cases that were reviewed, only one involved a white property owner. Ninety-six percent of drug abatement cases were prosecuted against minorities, who make up 25 percent of Seattle's population.⁴⁶

Inadequate Due Process Protections

When forfeiture proceedings are brought in civil court rather than criminal court, property owners are denied a variety of due process protections. In addition to the fact that owners bear the difficult burden of proving that their

property is not guilty by a preponderance of the evidence, they also are prevented from questioning their accusers. When property can be seized on the word of informants, accused criminals, and profit-seekers who can be rewarded for their testimony, then due process protections of the accused are seriously undermined.

Even if a property owner was to win back his/her property, there is no guarantee that it will return in the same condition in which it was seized. William Munnerlynn had his Learjet seized by the DEA after he unknowingly flew a drug dealer from Arkansas to California. Criminal charges against Munnerlynn were dropped after 72 hours, but the DEA refused to turn over his plane. After five years of litigation and tens of thousands of dollars in legal fees, Munnerlynn got his plane back with \$100,000 in damages and numerous Federal Aviation Administration citations accrued by the DEA.⁴⁷ Munnerlynn is virtually powerless because the Federal Tort Claims Act exempts the federal government from liability.⁴⁸

The Punishment Doesn't Fit the Crime

Since civil asset forfeiture has become a major weapon in the war on drugs, numerous cases have arisen where the punishment exacted through property forfeiture is disproportionate to the underlying crime. The premier ship of an oceanographic research institute was seized after 1/100th of an ounce of marijuana was found in a crewman's shaving kit, and a luxury yacht was confiscated after 1/28th of an ounce of marijuana was found aboard.⁴⁹ Joseph and Frances Lopes had their Maui home seized after a detective scouring old police records found out their son grew marijuana in the backyard four years before the seizure.⁵⁰

The Supreme Court finally addressed the issue of whether such civil forfeitures could be considered excessive fines under the Eighth Amendment in 1993. The case, *Austin v. United States*, involved James Austin, whose mobile home and auto body shop were civilly forfeited on the grounds that these properties "facilitated" the sale of two grams of cocaine. The Supreme Court ruled that the civil forfeiture constituted punishment for a crime and should be subject to the constraints of the Eighth Amendment's prohibition on "excessive fines." It did not,

however, decide that the forfeiture was necessarily excessive in Austin's case. Instead it remanded the case back to the Appellate Court, leaving the "excessive standard" for civil forfeitures up in the air.

In a 1998 case, *United States v. Bajakajian*,⁵¹ the Court determined that a criminal forfeiture violated the Excessive Fines Clause when "the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense...." However, the Court was very careful to distinguish this case as being criminal, not civil, thus leaving open the question as to the standard of excessiveness for a civil forfeiture proceeding.

The Integrity of the Police, Criminal Justice System Is Undermined

One of the biggest problems with civil asset forfeiture policy today is its propensity to corrupt the motives of law enforcement. Sometimes police are more interested in seizing assets than taking drugs off the streets;⁵² other times, as was the case among U.S. Attorneys in 1989 and 1990, resources are diverted from prosecuting more serious crimes to increasing forfeitures.⁵³ When such activities are exposed by the press, then the integrity of the criminal justice system comes into question.⁵⁴

In the early 1990s, the *Pittsburgh Press* (now the *Pittsburgh Post-Gazette*) exposed how the police subvert the rule of law, target minorities, and kill small businesses to fund the war on drugs through the use of civil forfeiture. The *Orlando Sentinel* showed how lax civil forfeiture laws helped create the Volusia County Sheriff's Department extortion racket along Interstate 95. And CBS's *60 Minutes* stunned the nation with the story of Donald Scott, who was killed in a botched drug raid by local, state, and federal police who hoped to seize his \$5 million ranch.⁵⁵

In the late 1990s, local law enforcement in Louisiana fabricated drug crimes to seize innocent people's property, only to use the proceeds for ski trips to Aspen, Colorado.⁵⁶ In January 1999, the *Kansas City Star* exposed how Missouri law enforcement agencies subvert the state constitution by turning over forfeiture cases to the federal government so the police, rather than Missouri schoolchildren, can reap the rewards.⁵⁷

All of these individual department actions have a

cumulative effect: the integrity and trust in the American criminal justice system is undermined, thus threatening the rule of law.

Federal Forfeiture Adoption Subverts State Law

The recent case in Missouri is a prime example of how federal civil forfeiture adoption subverts the authority of state law and undermines our federalist system of government. Under the Missouri state constitution, forfeiture proceeds are to be directed to the state school system, and it is a breach of state law for local and state law enforcement to turn over asset seizures to the federal government for adoption. This has not stopped the police from breaking the law, however, as they continue to direct forfeiture cases to the federal government so they can get up to 80 percent of the forfeiture proceeds returned as part of the equitable sharing program.

Nebraska police have caught on to this practice as well. In April 1999, the *Omaha World-Herald* reported that police in that state were having the federal government adopt forfeitures so they can get a bigger cut of the proceeds. Under the state constitution, 50 percent of forfeiture proceeds go to public education and the other 50 percent is placed in a county anti-drug fund that is disbursed through an independent board. The money can be used for policing, but also goes to drug education programs.

Nebraska State Senator Ernie Chambers of Omaha charged, “The federal government should not help these agencies evade the state constitution.”⁵⁸

Inadequate Legislative Oversight of Forfeiture Funds⁵⁹

One of the reasons states like Nebraska do not allow forfeiture proceeds to go directly to police agencies is that legislators and citizens believe there should be some legislative oversight of the funds. To allow police agencies to be self-financing entities means that they do not have to justify their activities to the legislature through the budgetary process. Philadelphia city council member Joan Specter described it best when she said: “The happy result for the police is that every year they get what can only be called drug slush funds....”⁶⁰

Not only are self-financed police forces a threat to society, but they are also potentially unconstitutional.

Although the courts have not ruled that “independent, self-financing law enforcement agencies violate both the Appropriations Clause and the separation of powers framework that the clause was designed to support,”⁶¹ it is a policy that needs to be addressed.

Federal Agencies Poorly Manage Seized Property

Every year since 1990, the General Accounting Office has designated the Justice and Treasury Departments’ Asset Forfeiture Programs as being high risks for waste, fraud, and mismanagement. The programs have been cited for poor management of seized real property, including instances where property deteriorated because of inadequate maintenance, ineffective monitoring and reporting of seized/forfeited cash and property, and poor accounting procedures.⁶²

The GAO has also criticized the Departments of Treasury and Justice for maintaining separate programs for managing and disposing of forfeited property, creating bureaucratic overlap and inefficiencies. The 1988 Anti-Drug Abuse Act requires the Attorney General and the Secretary of the Treasury to develop a joint plan on coordinating and consolidating the administration of seized property, yet a plan still has not been developed. The GAO has estimated that program administration costs would be reduced 11 percent if Justice and Treasury consolidated some elements of their programs as required by law.⁶³

Civil Forfeiture Forces Property Owners To Be Agents of the State

For innocent property owners to protect themselves from becoming victims of civil asset forfeiture, they are essentially expected to become government agents, spying on their tenants and customers to protect their property. Charged with a dangerous and impossible task, many innocent owners have lost their property because they could not do a job that the police themselves cannot do. People like Jesse Bunch, who owned a bar and residential apartments in a drug-trafficking area in upstate New York, have their property seized even after they do all that is reasonably expected of them to stop illicit activity.⁶⁴ If the police cannot stop people from selling illicit drugs, how can we expect private citizens to do so?

Reforming Asset Forfeiture



To address the aforementioned problems with state and federal civil asset forfeiture policy as it currently exists, the following legal reforms should be implemented:⁶⁵

Shift Most Civil Forfeitures to Criminal Forfeitures⁶⁶

Civil forfeiture should be used as it was intended when the United States was formed: to permit the government to exact civil judgments and penalties against persons outside the jurisdiction of the United States. Persons within the United States should not be deprived of their property unless they are first convicted of a crime, and the property can be shown to be substantially involved in facilitating the crime or purchased with proceeds from criminal acts.

Deposit Forfeiture Proceeds into the General Treasury

In both civil and criminal law, all forfeited assets should be deposited into the general treasury at the state and federal levels. This simple reform would: 1) remove the incentive for police to target people's assets rather than criminal acts, and 2) provide legislative oversight of forfeiture proceeds to establish accountability.

The National Conference of Commissioners on Uniform State Laws has made this same recommendation: "The UCSA [Uniform Controlled Substances Act] requires that money realized from forfeitures be deposited in general operating funds subject to ordinary appropriation requirements."⁶⁷ The commissioners rightly noted that "giving seizing agencies direct financial incentives in forfeiture is an unsound policy that risks skewing enforcement priorities."⁶⁸

Shift the Burden of Proof to the Government

For property seized under civil law, the burden of proving the "guilt" of the property should shift to the government. Our system of justice was built on the principle that citi-

zens are "innocent until proven guilty," and civil asset forfeiture proceedings should be no different.

Raise the Standard of Proof in Civil Takings

Evidentiary standards of proof range from the minimal "probable cause" to a "preponderance of the evidence" to "clear and convincing evidence," and then to the stringent "beyond a reasonable doubt."⁶⁹ As proof beyond a reasonable doubt is traditionally reserved for criminal proceedings, then the next highest standard of proof should be required for civil forfeiture proceedings. The government should have to prove by clear and convincing evidence that a person's property is "guilty" of wrongdoing.

Redefine "Facilitation"

Property "which is used, or intended to be used, in any manner or part, to ... *facilitate* the commission" of a drug offense is subject to forfeiture under current drug laws.⁷⁰ Facilitation has been interpreted to mean "substantial connection," but unfortunately this has not prevented the forfeiture of property with only a tenuous relationship to the crime. "Facilitation" should be strictly interpreted by the courts and generally only applied to conveyances used to transport commercial quantities of drugs. Real property—land, homes, and other structures—should rarely be considered facilitators of a drug crime.

Strengthen the "Innocent Owner" Defense

Although an innocent owner defense technically exists for drug offenses at the federal level, courts have eroded the protection by requiring owners both to have no knowledge of the offense *and* to not consent to the illegal use of the property. Thus, the owner who knows about drug activity on his/her property, but can't stop it, can still have his/her property seized.

If a property owner makes a reasonable attempt to prevent illegal activity, then his/her property should not be subject to forfeiture.

Create a Statutory Proportionality Test

While the Supreme Court has established that a criminal forfeiture is unconstitutionally excessive if it is “grossly disproportional to the gravity of a defendant’s offense,” it has not established a standard for civil forfeitures and seems reluctant to do so.

If forfeitures are to become proportional to the offense, then Congress and state legislatures must establish, by statute, a proportionality test. Citizens’ homes, vehicles, and property should not be seized for minor drug offenses.

Restrict Adoptive Forfeiture and Equitable Sharing

Local and state police are subverting the law when they turn over seized assets to the Department of Justice for federal forfeiture adoption.

If the federal government is not involved at the time the seizure is made, then it should not be allowed to adopt the property. Seizures that involve both state and federal police could still be forfeited under federal law.

Also, funds transferred to the states under equitable sharing should be disbursed according to state law. This was tried in 1988, when Congress briefly passed a provision stating, “The Attorney General shall assure that any [forfeited assets] transferred to a State or local law enforcement agency ... is not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies.”⁷¹ It was repealed the next year due to political pressure from law enforcement interest groups.

Reduce the Burden of Contesting a Forfeiture

Creditors and lien holders who have an interest in a forfeited property have few due process rights under current law as they technically have no claim to the property. They should have more procedural protections against losing their investment in such forfeited property. Other reforms that need to take place include: abolishing the 10 percent cost bond required to contest a forfeiture, providing legal counsel to indigent claimants, extending the property claim filing time, and allowing property owners to sue the government if it damages a person’s seized property while in possession of it.

Congressional Reform Efforts

Because state and local police can have the federal government adopt a forfeiture and reap the financial rewards through the equitable sharing program, the effectiveness of state-level forfeiture reform is limited. For this reason, it is imperative that federal forfeiture policy be significantly reformed.

Representative Henry Hyde (R-Ill.) has led the fight in Congress for civil asset forfeiture reform, sponsoring a Civil Asset Forfeiture Reform Act in every session of Congress since 1993.⁷² His bills have included practically all of the previously mentioned reforms, including: changing the burden of proof; appointing counsel for indigents; protecting innocent owners; eliminating the cost bond requirement; extending the period for challenges to 60 days; and returning seized property pending a decision if the loss of the property is causing a substantial financial hardship for the owner.

Another civil asset reform leader in Congress is Representative John Conyers (D-Mich.), who sponsored H.R. 3515 in the 103rd Congress. In 1997 and 1999, he joined forces with Hyde to co-sponsor the Civil Asset Forfeiture Reform Act.

Conclusions

Although asset forfeiture can play an important role in taking the profit out of the illicit drug trade, today’s civil forfeiture laws have seriously undermined property rights, civil liberties, and the integrity of the police and the criminal justice system. There is a strong argument for all but eliminating civil asset forfeiture because criminal forfeiture already exists, with procedures designed to protect the rights of the innocent. If Americans are to believe in the honesty of the police and the sanctity of the rule of law, then the abusive police tactics spawned by the war on drugs and unjust civil forfeiture laws must be addressed by policy-makers in Washington and in the state legislatures. Only then will the American people “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁷³

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Leonard W. Levy, *A License to Steal: The Forfeiture of Property* (Chapel Hill: Univ. of North Carolina Press, 1996).

Organizations

American Civil Liberties Union

122 Maryland Ave. NE
Washington, DC 20002
Ph: (202) 544-1681
Fax: (202) 546-0738
Web: www.aclu.org

Forfeiture Endangers American Rights

P.O. Box 15421
Washington, DC 20003
Ph: (202) 546-4381
Fax: (202) 546-7873
Web: www.fear.org

Liberty Project


P.O. Box 25063
Alexandria, VA 22313
Ph: (877) 474-3200
Web: www.libertyproject.org

National Association of Criminal Defense Lawyers

1025 Connecticut Ave. NW, Suite 901
Washington, DC 20036
Ph: (202) 872-8600
Fax: (202) 872-8690
Web: www.criminaljustice.org

End Notes

- ¹ Leonard W. Levy, *A License to Steal* (Chapel Hill: Univ. of North Carolina Press, 1996), p. 7.
- ² "No person shall be ... deprived of life, liberty, or property, without due process of law...." Due Process Clause, Fifth Amendment to the U.S. Constitution.
- ³ Eric Blumenson and Eva Nilsen, "Policing for Profit: The Drug War's Hidden Economic Agenda," 65 *U. Chicago L. Rev.* 35 (1998), p. 44.
- ⁴ Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USC § 881); Psychotropic Substances Act of 1978 (21 USC § 881(a)(6)); Comprehensive Crime Control Act of 1984 (21 USC § 881(e)); Comprehensive Forfeiture Act of 1984, PL 98-473 (21 USC § 881(a)(7)); Anti-Drug Abuse Act of 1986 (21 USC § 853); Money Laundering Control Act of 1986 (18 USC § 981); Anti-Drug Abuse Act of 1988 (21 USC § 881)
- ⁵ 21 U.S.C. § 853; see Sandra Guerra, "Reconciling Federal Asset Forfeitures and Drug Offense Sentencing," 78 *Minn. L. Rev.* 805 (1994), p. 805.
- ⁶ *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F2d 421, p. 423 (2d Cir. 1977).
- ⁷ Henry Hyde, *Forfeiting Our Property Rights* (Washington, D.C.: Cato Institute, 1995), p. 18, n. 55.
- ⁸ *Ibid.*, p. 6, n. 11.
- ⁹ *Ibid.*, p. 7, n. 12.
- ¹⁰ U.S. Department of Justice (DOJ), *Asset Forfeiture: Law and Practice Manual* (June 1998), p. 3-1.
- ¹¹ *Ibid.*, pp. 3-1, 3-2.
- ¹² Hyde, *Forfeiting Our Property Rights*, p. 8 and *Errata*, n. 1.
- ¹³ *Ibid.*, p. 82.
- ¹⁴ Andrew Schneider and Mary Pat Flaherty, "Presumed Guilty: The Law's Victims in the War on Drugs," *Pittsburgh Press*, reprint of articles appearing August 11-16, 1991, p. 3.
- ¹⁵ See Blumenson and Nilsen, "Policing for Profit," p. 52-53, n. 66.
- ¹⁶ Hyde, *Forfeiting Our Property Rights*, p. 29.
- ¹⁷ General Accounting Office (GAO), *Asset Forfeiture: Historical Perspective on Asset Forfeiture Issues* (GAO/T-GGD-96-40, March 19, 1996), p. 3.
- ¹⁸ DOJ, *Annual Report of the Department of Justice Asset Forfeiture Program: Fiscal Year 1996*, p. 2-3.
- ¹⁹ P.L. 102-393; 31 U.S.C. § 9703; GAO, *Asset Forfeiture: Historical Perspective*, p. 3.
- ²⁰ GAO, *Asset Forfeiture: Historical Perspective*, p. 3.
- ²¹ Office of National Drug Control Policy (ONDCP), *The National Drug Control Strategy, 1999: Budget Summary*, p. 107.
- ²² U.S. Department of the Treasury (DOT), *Treasury Forfeiture Fund Annual Report: 1998*, p. 5.
- ²³ DOJ, *Annual Report: 1996*, p. 1; ONDCP, *The National Drug Control Strategy, 1998: Budget Summary*, p. 98.
- ²⁴ DOT, *Treasury Forfeiture Fund Annual Report: 1998*, p. 5.
- ²⁵ ONDCP, *1998 Budget Summary*, p. 156.
- ²⁶ ONDCP, *1999 Budget Summary*, pp. 173-4.
- ²⁷ DOJ, *Law and Practice Manual*, pp. 10-10, 10-11.
- ²⁸ Blumenson and Nilsen, "Policing for Profit," p. 51, n. 64.
- ²⁹ DOJ, *Annual Report: 1996*, p. 4.
- ³⁰ Blumenson and Nilsen, "Policing for Profit," p. 51, n. 64.
- ³¹ ONDCP, *1998 Budget Summary*, p. 98.
- ³² DOT, *Annual Report: 1998*, p. 5.
- ³³ DOJ, *Annual Report: 1996*, p. 4.
- ³⁴ DOT, *Annual Report: 1998*, p. 5.
- ³⁵ Hyde, *Forfeiting Our Property Rights*, p. 55.
- ³⁶ *United States v. \$12,390, 956 F2d at 811*; cited in Hyde, p. 57, n. 181.
- ³⁷ 94 S. Ct. 2080 (1974); DOJ, *Asset Forfeiture: Protection of Third-Party Rights*, January 1992, p. 8-9.
- ³⁸ P.L. 100-690, Title VI, Subtitle B.
- ³⁹ Roxana Hegeman, "Agencies split motel sale proceeds, former owners cry foul," Associated Press, March 20, 1999.
- ⁴⁰ Hyde, *Forfeiting Our Property Rights*, p. 57, n. 182.
- ⁴¹ *Ibid.*, pp. 14-15.
- ⁴² *Ibid.*, p. 31.
- ⁴³ American Civil Liberties Union (ACLU), "ACLU of New Jersey Calls for 'Early Warning System' to Discourage Racial Profiling by State Troopers" (Press Release), March 1, 1999.
- ⁴⁴ ACLU-Maryland, " 'Driving While Black' I" and "Driving While Black, Continued." Located at <http://www.aclu-md.org/new/legal.htm>
- ⁴⁵ Hyde, *Forfeiting Our Property Rights*, pp. 38-9.
- ⁴⁶ Michelle Malkin, "Seizure Disorder: Seattle's 'drug nuisance abatement' program is a menace to law-abiding property owners," *Reason*, March 1999, p. 56.
- ⁴⁷ Peter D. Lepsch, "Wanted: Civil Forfeiture Reform," *The Drug Policy Letter* (Summer 1997), p. 12.
- ⁴⁸ Hyde, *Forfeiting Our Property Rights*, p. 82.
- ⁴⁹ Guerra, "Federal Drug Asset Forfeiture," pp. 829-30, n. 100.
- ⁵⁰ Schneider and Flaherty, "Presumed Guilty," p. 3.
- ⁵¹ Case No. 96-1487.
- ⁵² Hyde, *Forfeiting Our Property Rights*, p. 39.
- ⁵³ Blumenson and Nilsen, "Policing for Profit," pp. 63-4, n. 103.
- ⁵⁴ For an extensive discussion of the corrupting force of civil asset forfeiture on law enforcement, see Blumenson and Nilsen's "Policing for Profit"; for an analysis of how civil forfeiture laws disproportionately skew law enforcement activities toward seizing assets and drug enforcement instead of preventing violent crime, see Donald J. Boudreaux and Adam C. Pritchard, *Civil Forfeiture as a 'Sin Tax'*, The Independent Institute, 1996.
- ⁵⁵ Schneider and Flaherty, "Presumed Guilty"; Jeff Brazil and Steve Berry, "Tainted Cash or Easy Money?" *Orlando Sentinel*, June 14-17, 1992; CBS Television Network, *60 Minutes*, April 5, 1992.
- ⁵⁶ NBC News, *Dateline NBC* (Transcript), August 22, 1997, p. 15.
- ⁵⁷ Karen Dillon, "Police keep cash intended for education," *Kansas City Star*, January 2, 1999.
- ⁵⁸ Patrick Strawbridge, "Drug Seizure Money Bypassing Schools," *Omaha (Neb.) World-Herald*, April 4, 1999.
- ⁵⁹ Blumenson and Nilsen, "Policing for Profit," Sec. III, "The Accountability Objections to Self-Financing Police Agencies," pp. 84-100.
- ⁶⁰ Hyde, *Forfeiting Our Property Rights*, p. 53.
- ⁶¹ Blumenson and Nilsen, "Policing for Profit," p. 84.
- ⁶² GAO, *Major Management Challenges and Program Risks: Department of Justice and Department of Treasury* (GAO/OCG-99-14, January 1999).
- ⁶³ GAO, *Asset Forfeiture: Historical Perspectives*, pp. 7-8.
- ⁶⁴ Hyde, *Forfeiting Our Property Rights*, p. 62.
- ⁶⁵ Many of these suggested reforms are in Hyde, *Forfeiting Our Property Rights*, ch. 4.
- ⁶⁶ This reform was not suggested by Rep. Hyde. Similar, though not quite as far-reaching reforms are recommended by Guerra, "Federal Drug Asset Forfeitures," pp. 840-7.
- ⁶⁷ National Conference of Commissioners on Uniform State Laws, *Uniform Controlled Substances Act* (1994), p. 5.
- ⁶⁸ *Ibid.*, p. 166.
- ⁶⁹ Hyde, *Forfeiting Our Property Rights*, p. 59.
- ⁷⁰ 21 U.S.C. § 881(a)(7).
- ⁷¹ Asset Forfeiture Amendments of 1988, P.L. 100-690, § 6077(a), 102 Stat 4325, codified at 21 U.S.C. § 881(e)(3) (1988). As cited in Blumenson and Nilsen, "Policing for Profit," p. 107, n. 277.
- ⁷² H.R. 2417 (1993); H.R. 1916 (1995); H.R. 1835 (1997).
- ⁷³ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment to the U.S. Constitution.



*The Drug Policy Foundation
4455 Connecticut Avenue NW
Suite B-500
Washington, DC 20008-2328
Phone: (202) 537-5005
Fax: (202) 537-3007
Web: www.dpf.org*