

# Civil Asset Forfeiture

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**Civil asset forfeiture allows the government to seize cash, cars, real estate, or other property suspected of being connected to criminal activity. In civil forfeiture actions the property itself, rather than an individual, is believed to be connected to a crime.<sup>1</sup> In fact, under federal law (as well many state laws) property can be seized and forfeited even when criminal charges are never filed against a property owner, as is the case in a staggering 80% of civil asset forfeitures.<sup>2</sup> By contrast, criminal forfeitures occur against a person after conviction for an underlying criminal offense.**

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## Civil Asset Forfeiture and the War on Drugs

Prior to the initiation of the war on drugs, civil asset forfeiture was a rarely used legal mechanism. The Comprehensive Drug Abuse Prevention and Control Act of 1970, however, authorized the government to seize and forfeit drugs and drug equipment.<sup>3</sup> Though initially limited to actual contraband, as the commitment to the war on drugs increased, so did the reach of civil asset forfeiture. Congress expanded the range of property subject to forfeiture to include money, securities, and other proceeds traceable to drug transactions in 1978<sup>4</sup> and to real property in 1984,<sup>5</sup> and, in 1986, Congress authorized seizure of property equal in value to forfeitable property that is no longer available or accessible.<sup>6</sup> Cash, bank accounts, jewelry, cars, boats, airplanes, businesses, houses, and land all became fair game.

In 1984, Congress also allowed federal law enforcement agencies to retain the proceeds from asset forfeitures in a specially-created Department of Justice Assets Forfeiture Fund to be used exclusively for law enforcement, rather than requiring these assets to be deposited in the Treasury's General Fund.<sup>7</sup> At the same time, Congress initiated a federal "equitable

sharing" program that authorized state law enforcement to: (1) turn seized assets over to the Justice Department for federal "adoption" of the property, and (2) participate in joint investigations with federal agencies and benefit from federal forfeitures. Under so-called adoptive forfeitures, local agencies get back up to 80 percent of the assets' value, a substantially higher proportion than is allowed under many state forfeiture laws.<sup>8</sup>

Given the stricter asset forfeiture standards of many state laws, the equitable sharing program creates compelling incentives for state and local agencies to bypass state laws and work with federal agencies to receive the benefit of federal forfeiture standards. Seized funds are subject to relatively little oversight and can be used for, among other things, payments for law enforcement equipment, weapons, salaries and overtime, training, expenses for travel, informant reward money, and detention facilities.<sup>9</sup>

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Federal civil forfeiture legislation has been replicated across the country in the form of state forfeiture laws. Today, only seven states and Washington D.C direct the use of state forfeiture funds to non-law enforcement purposes.<sup>12</sup> In the remaining states, at least 50 to a 100 percent of forfeiture proceeds are used directly by law enforcement.<sup>13</sup>

One consequence of the changes in forfeiture laws is the dramatic increase of forfeiture activity that took place in their wake. In 1986, the second year after the creation of the Department of Justice Assets Forfeiture

Fund, the Fund took in \$93.7 million in proceeds from forfeited assets.<sup>14</sup> As of 2017, the Fund topped \$8.2 billion—a record.<sup>15</sup> The potential for law enforcement agencies to profit from the assets they seize is accordingly tremendous.

### Problems With Civil Asset Forfeiture

Civil asset forfeiture raises several important legal and public policy concerns.

*Violations of Constitutional Rights: Civil asset forfeiture imposes a degree of punishment associated with a criminal proceeding, without the constitutional protections guaranteed by a criminal trial.* In civil proceedings, the government usually only needs to prove the property’s connection to alleged criminal activity by a mere “preponderance of evidence” standard, rather than the “beyond a reasonable doubt” standard used in criminal cases.<sup>16</sup> Moreover, there is no presumption of innocence,<sup>17</sup> no right to an attorney,<sup>18</sup> and no hearsay objection. Few property owners, especially low-income individuals, can meet the burdens of civil forfeiture proceedings and often do not challenge seizures of their property.<sup>19</sup> Further, to the extent the government pursues both civil and criminal actions, it may violate the double jeopardy clause of the Fifth Amendment because criminal courts do not factor into the sentencing calculus the loss suffered from the forfeiture action and are accordingly inflicting punishing on offenders twice.<sup>20</sup>

*Perverse Incentives: Law enforcement agencies have increasingly turned to asset seizures to compensate for budgetary shortfalls, at the expense of other criminal justice goals. “Policing for profit” is no secret. In 1990, for example, the U.S. Attorney General openly stated: “We must significantly increase forfeiture production to reach our budget target. Every effort must be made to increase forfeiture income . . . .”*<sup>21</sup>

A more recent study found that of the 770 police managers and executives surveyed, a full 40 percent considered civil asset forfeiture to be “necessary as a budget supplement.”<sup>22</sup> The result is that law enforcement over-enforces crimes that carry the possibility of forfeiture (most predominately minor drug offenses) to the neglect of other, more important law

enforcement objectives that actually impact public safety. Indeed, research has shown that in states where agencies get to keep the lion’s share of forfeiture proceeds, drug arrests constitute a significantly higher percentage of all arrests.<sup>23</sup> Ultimately, despite its wholesale and recognized failure, the drug war is perpetuated in the name of profit.

*“Equitable Sharing” Loophole:* With equitable sharing, state law enforcement can bypass more restrictive state laws and turn over seized assets to the federal government, or they may seize them jointly with federal officers. The property is then subject to *federal* civil forfeiture law—not state law. As noted above, state agencies then often receive a significantly higher percentage of the seized asset proceeds than they would under state forfeiture laws. Thus, the equitable sharing loophole provides a way for state and local law enforcement to profit from forfeitures that they may not be able to under state law.

### DPA: At the Forefront of Civil Forfeiture Reform

DPA calls for abolishing civil forfeiture entirely and supports efforts to substantially reform the practice, including:

- 1) requiring a criminal conviction as a prerequisite to forfeiture;
- 2) providing a meaningful defense for innocent owners;
- 3) requiring appointment of counsel in all forfeitures;
- 4) imposing a higher standard of proof in civil forfeiture cases;
- 5) directing civil forfeiture revenue into the general fund, or a neutral fund such as one for at-risk youth or community services;
- 6) abolishing or restricting equitable sharing arrangements between state and federal governments;
- 7) limiting the assets seized to property that has a direct connection to the alleged criminal act;
- 8) requiring a pretrial hearing to assess the validity of the seizure;
- 9) increasing transparency with respect to civil forfeiture revenue and distributions; and
- 10) amending sentencing laws to account for civil asset forfeiture in criminal sentencing.

DPA has a long history of forfeiture reform efforts. Between 1996 and 2002, ten states and the federal government enacted asset forfeiture reforms, with DPA playing an instrumental role in several of these efforts, including ballot initiatives in Utah and Oregon that prevailed by 2-to-1 margins in 2000. Most of the reforms, however, have been repealed by subsequent legislation.

In 2015, DPA helped pass a groundbreaking bill in New Mexico that enacted many reforms, giving the state some of the strongest protections against wrongful seizures in the country.<sup>24</sup> Although law enforcement in New Mexico continue to push for repealing the law, DPA continues to protect the reforms.

In 2017, DPA played a pivotal role in California's removal of financial incentives for law enforcement to seize property and pursue forfeitures with federal agencies in cases where no one is arrested, charged or convicted of a crime.<sup>25</sup>

In addition, DPA was part of a bipartisan coalition to enact forfeiture reporting requirements in Colorado and is supporting a bill in New Jersey which would establish reporting and transparency requirements in forfeiture practices. Many other states, including Florida, Maryland, Michigan, Minnesota, Montana, Nebraska, Tennessee, Virginia, and Wyoming, have reformed their forfeiture laws in recent years, while additional state legislatures are poised to take up this issue.<sup>26</sup>

Despite the momentum for reform at the state level, reforms at the federal level have stalled. In 2017, Senator Rand Paul (R-KY) in the Senate and Rep. Tim Walberg (R-MI) in the House introduced the Fifth Amendment Integrity Restoration (FAIR) Act.<sup>27</sup> The bill would eliminate the Department of Justice's Equitable Sharing Program. Unfortunately, this bipartisan effort has been put on the back burner during the Trump Administration. In 2017, then-Attorney General Sessions released a directive expanding the federal government's use of asset forfeiture.<sup>28</sup>

<sup>1</sup> Sandra Guerra, Reconciling Federal Asset Forfeitures and Drug Offense Sentencing, 78 Minn. L. Rev. 805, 815 (1994).

<sup>2</sup> Kyla Dunn, Reigning in Forfeiture: Common Sense Reform in the War on Drugs, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html>.

<sup>3</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. § 881).

<sup>4</sup> Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title III, 301(a), 92 Stat. 3777 (1978) (codified at 21 U.S.C. § 881(a)(6)).

<sup>5</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat 2050 (1984) (codified at 21 U.S.C. § 881(a)(7)).

<sup>6</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. §853(p)).

<sup>7</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat 2052 (codified at 28 USC § 524).

<sup>8</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2052 (1984) (codified at 21 U.S.C. § 881(e)(1)(A), 19 U.S.C. § 1616a(c), 18 U.S.C. § 981(e)(2)); see also Department of Justice, A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies 7-8 (March 1994).

<sup>9</sup> Eric Blumenson & Eva Nilsen, Article, Policing for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35, 53 n.64 (Winter 1998).

<sup>10</sup> Marian Williams et al., "Policing for Profit: The Abuse of Civil Asset Forfeiture," Institute for Justice, March, 2010, [https://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](https://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf).

<sup>11</sup> Office of the Inspector General, U.S. Department of Justice, "Assets Forfeiture Fun and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2017" available at <https://oig.justice.gov/reports/2017/a1805.pdf>.

<sup>12</sup> 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>. See also Dick M. Carpenter et al., "Policing for Profit: The Abuse of Civil Asset Forfeiture 2<sup>nd</sup> Edition," Institute for Justice, November, 2015, <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>;

<sup>13</sup> 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>.

<sup>14</sup> Williams et al., supra note 10, at 11.

<sup>15</sup> Office of the Inspector General, U.S. Department of Justice, "Assets Forfeiture Fun and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2017" available at <https://oig.justice.gov/reports/2017/a1805.pdf>.

<sup>16</sup> Williams et al, supra note 10, at 13.

<sup>17</sup> Though most states and the federal government provide an "innocent owner" defense, the burden is on property owners to prove their innocence instead of placing the burden of proof on the government. See Williams et al, supra note 10, at 14.

<sup>18</sup> Appointment of counsel is limited to those who are already represented by appointed counsel "in connection with a related criminal case" or to indigents if the property subject to forfeiture is real property used by the indigent person as a primary residence. See Brant C. Hadaway, Comment, Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture, 55 U. Miami L. Rev. 81, 106 (2000).

<sup>19</sup> Williams et al., supra note 10, at 14.

<sup>20</sup> Guerra, supra note 1, at 839-40.

<sup>21</sup> Williams et al, supra note 10, at 18.

<sup>22</sup> Id.

<sup>23</sup> B.D. Mast et al., Entrepreneurial Police and Drug Enforcement Policy, 104 Public Choice 285-308 (2000).

<sup>24</sup> New Mexico Legislature, HB 560, <https://nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=560&year=15>.

<sup>25</sup> Theshia Naidoo, "California Says No To Asset Forfeiture Abuse," Huffington Post, October 3, 2016, [https://www.huffingtonpost.com/entry/california-says-no-to-asset-forfeiture-abuse\\_us\\_57f2a00ee4b095bd896a1572](https://www.huffingtonpost.com/entry/california-says-no-to-asset-forfeiture-abuse_us_57f2a00ee4b095bd896a1572).

<sup>26</sup> Senate, No.1963, State of New Jersey, 218<sup>th</sup> Legislature, February, 2018, [https://www.njleg.state.nj.us/2018/Bills/S2000/1963\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/S2000/1963_I1.HTM).

<sup>27</sup> S.642, Congress.gov, <https://www.congress.gov/bill/115th-congress/senate-bill/642/text>.

<sup>28</sup> Drug Policy Alliance, "Attorney General Sessions Expands Police powers to Take Cash and Other Property in the Name of Fighting War on Drugs," <http://www.drugpolicy.org/news/2017/07/attorney-general-sessions-expands-police-powers-take-cash-and-other-property-name-fight>.