FEDERAL ASSET FORFEITURE: USES AND REFORMS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS

OF THE

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FEDERAL ASSET FORFEITURE: USES AND REFORMS

WEDNESDAY, FEBRUARY 11, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Chabot, Gohmert, Poe, Gowdy, Buck, Bishop, Conyers, Jackson Lee, Chu, Bass, and Richmond.

Staff Present: (Majority) Allison Halataei, Parliamentarian & General Counsel; Christopher Grieco, Counsel; Alicia Church, Clerk; (Minority) Joe Graupensperger, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will come to order. Without objection, the Chair will be authorized to declare recesses when there are votes in the House. And hearing no objection, so ordered.

The Chair will yield himself some time for an opening statement.

It is hard to believe this can happen in America. The Government is seizing billions of dollars of cash and property from Americans, often without charging them with a crime. With origins in medieval law, civil asset forfeiture is premised on the legal fiction that inanimate objects bear moral culpability when used for wrongdoing.

The practice regained prominence as a weapon in the modern drug war as law enforcement sought to disrupt criminal organizations by seizing the cash that sustains them. The practice, however, has proven a far greater affront to civil rights than it has been as a weapon against crime.

While forfeitures have received increased attention in recent months, they are still poorly understood. During her recent confirmation hearing, Loretta Lynch, President Obama's nominee to replace Eric Holder as Attorney General, testified that civil asset forfeiture is "done pursuant to supervision by a court, it is done pursuant to a court order, and I believe the protections are there."

As a United States attorney, Lynch was known for her aggressive use of forfeiture provisions. She was, however, wrong when she testified that forfeiture is done pursuant to supervision by a court and wrong again when she said it was done pursuant to a court order. One wonders if she would still believe that the protections were there if she properly understood how they worked.

After property is seized, its owner will usually have the option of challenging the seizure judicially with the Federal court system or administratively with the seizing agency itself. Seizures that are not challenged within 30 days of receiving notice are automatically forfeited.

A majority of Federal civil forfeitures are never contested largely because of the high cost of retaining counsel, which often exceeds the value of the property itself. Because of the expense and complexity of the Federal court system and the short timeframe, most owners who contest forfeitures do so administratively. Thus, contrary to Ms. Lynch's testimony, only a small percentage of Federal civil forfeitures have any involvement or supervision by a court or a judge.

I look forward to hearing from our witnesses today about whether these administrative processes provide property owners with sufficient protections. Better documented has been the Justice Department's use of adoption, which occurs when a Federal agency adopts a seizure from a State or local law enforcement and proceeds with Federal forfeiture.

Under the Equitable Sharing Program, DOJ returns up to 80 percent of the forfeited money to State agencies. Federal adoption allows police to ignore restrictions in State law by working with the Federal Government.

A 2011 study found that police were, in fact, more likely to rely on Federal equitable sharing in States where the law made forfeitures more difficult or less rewarding. This presents a profound federalism problem and opens law enforcement agencies to allegations that they are policing for profit.

After 5 last night, at the last minute before today's hearing, DOJ sent new guidance on the revised adoption procedures it issued last month. I look forward to learning more about the impact of these revised adoption guidelines.

Just last month, we learned that the DEA, through their cold consent searches, may have improperly searched citizens' belongings at transportation hubs throughout the country. During these searches, DEA seized cash based mainly on the suspicion that a large quantity of cash was indicative of illegal activity.

To make matters worse, according to the DOJ Inspector General, DEA did not always provide adequate information to those who had their cash seized. At times, people did not even know which agency had seized their money, making contesting the seizure extremely difficult.

Our Founders understood the virtues of limited government. The right to own property is enshrined in the Fifth Amendment, which says no person shall be deprived of life, liberty, or property without due process of law. Current forfeiture provisions mock the spirit and meaning of that passage and create serious issues under several other constitutional provisions.

It is no wonder why my former colleague, Henry Hyde, described civil asset forfeiture as "an unrelenting Government assault on property rights, fueled by a dangerous and emotional vigilante mentality that sanctions shredding the U.S. Constitution into meaningless confetti."

Hyde led an effort that culminated in the passage of the Civil Asset Forfeiture Reform Act, known as CAFRA. It was a noble effort, but it plainly fell short. In advancing CAFRA, Hyde noted that in 1993, DOJ forfeited $556 million. Post-CAFRA, in 2012, DOJ seized $4 billion.

Forfeiture's only defenders seem to be its beneficiaries, the law enforcement agencies entitled to keep the proceeds of their seizures. The conflict of interest so stark that it takes us to another stage, and adequate forfeiture reform is overdue.

I yield back the balance of my time and recognize the gentlewoman from Texas, the new Ranking Member of this Subcommittee, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I look forward to working with you, and I commend you for calling the first hearing of this Subcommittee in the 114th Congress to focus on the important issue of asset forfeiture.

I would also like to acknowledge my colleagues, the Ranking Member, Mr. Conyers, Ms. Chu, Ms. Bass, and the other Members of this Committee who will be working with us in this term on what I consider a very important Committee.

It is especially appropriate that we start with this topic because today's hearing concerns foundational principles with respect to the relationship between government and its citizens. We ask government, largely through law enforcement agencies, to help protect us from crime, and we also expect that the government will respect our rights and not harm us.

When we convict someone of a crime, often we deprive him or her of liberty. And for that, we put the burden on the government to prove guilt beyond a reasonable doubt. When the government seeks to use civil forfeiture laws to take someone's property, only needing to prove its case by preponderance of the evidence, the government is not putting the person in prison, but it may be taking someone's home or property that is critical to a person's survival or livelihood.

And of course, seizing even a relatively small amount of money may present a hardship for those of lesser means. The Government's practice of asset forfeiture involves the intake of substantial sums of money. The forfeiture funds maintained by the Department of Justice and Department of Treasury together take in over $2 billion per year.

The size of these amounts helps put into focus the tension between our property and due process rights on the one hand, and the Government's interests in maintaining this funding system on the other hand, often relying on civil forfeiture procedures involving the low standard of proof.

That is why we must ensure that the Federal laws that allow the forfeiture of money and other assets include necessary protections to ensure the innocent do not suffer from wrongful confiscation. Unfortunately, it is increasingly apparent that our laws are not sufficient in this regard.

The Chairman is right. We have looked at these issues over a period of time on this Committee and on our larger—on the full Committee. And I believe this is an important issue to take up at this time.

We must guarantee that innocent owners are given a clear, affordable mechanism to successfully challenge unwarranted forfeiture, and the burden should not be on them to prove their innocence. Or we must end the practice of adoptive forfeitures that motivate some State and local law enforcement agencies to engage in tactics such as highway interdictions for the purpose of seizing assets to raise money.

And while Federal law enforcement functions should be robustly funded through the normal appropriations process, we must eliminate any financial benefits that Federal law enforcement agencies may receive.

For a moment, Mr. Chairman, if I might take note of the fact that we are operating under a set of laws that we have had since 1789 and then the revised statutes of the United States approved on June 22, 1874, and a body of laws called the Code of Laws of the United States of America. And I only say that to stop for a moment and to acknowledge, as the Chairman indicated, my presence here as a new Ranking Member and my commitment to working with the Chairman.

But I must take note of the fact that over the last 2 years, we have had a tumultuous time operating under the Criminal Code. We have seen families raise questions about the transparency of grand juries. We know that there is a need for prison reform.

I want to thank the Chairman for his overcriminalization task force, working with Ranking Member Conyers and Chairman Goodlatte, and we know that there is a high rate of incarceration. I am hoping, as this Committee proceeds in its work, that we can work in a bipartisan manner to address the questions of mandatory minimums, prison reform, transparency in grand jury, and, yes, the use of lethal force.

America is a great country, and I am proud to be an American. I believe its laws are important laws that exude liberty and justice. But I know that we on this Subcommittee, working with the full Committee, can find a pathway that treats fairly those who lift the hand of the law, who must go out every day to protect and serve, and those who are subjected to the law.

My commitment is working with this Committee in a bipartisan manner to find that pathway and to give relief to mothers of persons such as Trayvon Martin, Eric Garner, Sean Bell, Tamir, and many others, who likewise are facing concerns that they would like to have addressed.

With that, Mr. Chairman, I yield back my time.

Mr. SENSENBRENNER. It is now my pleasure to recognize for his opening statement the Chairman of the full Committee, the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I thank Chairman Sensenbrenner for convening this hearing today on the important issue of civil asset forfeiture, and I, along with the gentleman from Wisconsin, the gentlewoman from Texas, Mrs. Jackson Lee; and the gentleman from Michigan,

Mr. Conyers; as well as others here today, were all serving on this Committee the last time Congress delved deeply into forfeiture.

In 2000, Congress passed CAFRA, the Civil Asset Forfeiture Reform Act. CAFRA came from a recognition by this Committee and by others that civil asset forfeiture is a useful law enforcement tool, but one that needs to be carefully monitored. That same recognition exists today, but with the understanding that perhaps we need to add to the protections of CAFRA.

Recent reports by The Washington Post, the New Yorker, and others have shown that there are systemic problems in the current system of civil forfeiture. We have heard of citizens losing their car or home when others in their family have been involved in small crimes. We have heard of traffic stops that result in innocent people losing the cash they were carrying to buy a car or for their small business.

These stories, along with the recent Department of Justice Inspector General report on DEA cold consent encounters, have also highlighted the long and complicated process that innocent owners must go through to get their property back. As the report noted, travelers may be under significant pressure to sign away their belongings because of the location of the cold consent encounters. The Inspector General also noted that many citizens are not even aware of which agency seized their property, making contesting the preceding forfeiture action extremely difficult.

I understand two of the witnesses today have represented these innocent owners and are familiar with the procedural morass of the current system. I look forward to hearing from them about how we can change the process to make sure that fewer innocent people are caught in the web of civil forfeiture while making it easier for those who are to be made whole.

I also look forward to hearing from law enforcement. As I said at the beginning, I believe that civil forfeiture, when used appropriately, is a useful law enforcement tool that helps to eliminate the profits from criminal enterprises. Like any law enforcement tool, if used improperly or without significant safeguards, it has the possibility of infringing on the rights of citizens.

The Justice Department, as the largest law enforcement agency in the country, has a vital role to play in this. We have heard a number of problems stemming from Federal adoptions of State seizures. I look forward to hearing from the department about how the recently announced changes to the department's adoption policy will impact the department's law enforcement responsibilities and how the new policy will impact law enforcement.

I also understand there are significant exceptions to the so-called ban on Federal adoptions and look forward to hearing why those exceptions are in place and how wide the exceptions really are and whether or not they are an effective reform.

I am also eager to hear from our local law enforcement officials. As the front line of all efforts to fight crime, it is imperative that we make sure that they have the tools they need to confront the criminal elements within their jurisdiction.

While there have been changes since the passage of CAFRA and many more States now have their own forfeiture laws, the resources of our State and local law enforcement to prosecute for-

feiture actions has not increased. I look forward to hearing from Mr. Henderson, a local prosecutor, about the resources at his disposal, how important Federal forfeiture is to policing and law enforcement in his county, and most importantly, how the recently announced DOJ policy will impact his ability to do his job.

I am thankful that we have this opportunity to learn more about current civil forfeiture. I am eager to hear about ways we can strengthen the procedures and policies to make sure that this law enforcement tool can be used without infringing on the rights of ordinary Americans.

I yield back. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The Chair now recognizes the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Goodlatte.

I, first of all, welcome all the witnesses, especially the witness from the Institute for Justice and our own witness, David Smith from Smith & Zimmerman.

Members of the Committee and Chairman Sensenbrenner, it has become increasingly apparent that the procedures in Federal law governing civil asset forfeiture are inadequate from the perspective of fundamental fairness. And that is the theme I am getting from much of the opening statements.

The unfairness of these laws and related procedures have recently been highlighted by revelations about abuses involving adoptive seizures. The practice of adoptive forfeiture allows the Federal Government to share the proceeds of the seizures with State and local law enforcement agencies and has motivated some of these agencies to engage in policing for profit.

The series of articles in the Washington Post last year, entitled "Stop and Seize," detailed how equitable sharing motivated some State and local police to engage in abusive and coercive traffic stops in order to find pretense to seize assets from motorists. I have been hearing about that for a long time before I even came to the Congress.

I commend the Attorney General Eric Holder, who apparently conservatives want to keep in that spot for as long as they can, for engaging in a review of Federal forfeiture policy. And specifically, last month, he was announcing significant changes to the Justice Department's procedures governing adoptive seizures.

The changes purport to cease this practice except when necessary to protect public safety. But I remain concerned that the new policy includes other exceptions, which would allow adoptive seizures to continue to a significant degree.

Yesterday, the Justice Department announces clarifications to its policy, and I hope the department's witness will provide us as much information about that today as he can. And I hope that other witnesses will offer comments on this policy as well.

We must address the fundamental flaws in Federal forfeiture law. The problem is much broader, and I think Ranking Member Jackson Lee of Texas made some comment in this direction. We must address the Federal fundamental flaws in forfeiture law. The problem is much broader in scope than the issue of adoptive seizures.

The vast majority of forfeitures processed under the Federal law are the result of seizures by Federal law enforcement, and we must do more than adjust policies. We must change Federal law so that the burden is on the Government to prove that a property owner is not innocent, to raise the burden of proof on the Government when bringing a case, to send the proceeds of forfeitures to the general treasury fund, and to codify the elimination of equitable sharing.

And finally, asset forfeiture reform has long been a bipartisan issue, raising serious concerns about fairness and due process on both sides of the aisle. We last enacted reform to the law in 2000 under the Civil Asset Forfeiture Reform Act, which I coauthored with its primary sponsor, the late Henry Hyde. And so, we have learned a lot since the passage of that law, and that is why I am working with the Chairman of this Subcommittee and its Ranking Member to develop legislation addressing these issues.

I thank the Chair, and I return the balance of my time.

Mr. SENSENBRENNER. Before introducing the witnesses, let me yield to the gentleman from Virginia, Mr. Goodlatte, for an introduction.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Actually, two brief personal points of privilege. One, I would like to note that this is the first hearing in which the brand-new portrait of the former Chairman of the Committee and current Ranking Member is hanging in the hearing room, and I want to again commend the gentleman from Michigan for such a wonderful portrait that we are proud to hang in the Committee. [Applause.]

Mr. SENSENBRENNER. He looks over us in many ways. [Laughter.]

Mr. GOODLATTE. Secondly, I would like to take note that in the audience today is a prosecutor who is here for a meeting of prosecutors from around the country. Many of them are in town, but I am privileged to have one who is the commonwealth attorney for the City of Lynchburg, Virginia, Mike Doucette. Welcome, we are glad to have you with us here today as well.

Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Thank you.

Without objection, other Members' opening statements will be made a part of the record.

Today's witnesses are, first, Mr. Kenneth Blanco. Mr. Blanco was appointed to the position of Deputy Assistant Attorney General of the U.S. Department of Justice in April of 2008. His supervisory responsibilities include the Asset Forfeiture and Money Laundering Section, Child Exploitation Section, Narcotic and Dangerous Drug Section, and matters relating to Colombia and Mexico.

Previously, Mr. Blanco served in various sections of the Miami-Dade County State Attorney's Office, including the Organized Crime Section, Public Corruption Section, and the Major Narcotics Section. He also served in the U.S. Attorney's Office for the Southern District of Florida as an assistant United States attorney, and served in numerous leadership positions.

He was also detailed to Washington, D.C., to serve as general counsel to the 1994 United States Attorney's Office in the Executive Office of United States Attorneys. He also served as the Chief

of the Narcotic and Dangerous Drug Section at DOJ prior to his current position. He earned his law degree from Georgetown Law Center.

Mr. Keith Henderson is the prosecuting attorney for Floyd County, Indiana. Prior to his four terms as Floyd County prosecutor, he was a Crawford County prosecutor and a former Indiana State trooper. He previously practiced private law and consulting.

He is a board member of the Indiana Prosecuting Attorneys Council and current Chairman of its Ethics Committee. He represents Indiana prosecutors on the National District Attorneys Board and has served on its Executive Committee since 2007, which means he is currently serving in his ninth year.

Mr. Henderson earned his undergraduate degree at Valparaiso University and his juris doctor at Brandeis School of Law.

Third is Darpana Sheth. She is an attorney with the Institute for Justice. Her responsibilities include litigating property rights cases, as well as economic liberty cases. Prior to her role at the Institute for Justice, Ms. Sheth served as assistant attorney general for the State of New York. She previously practiced law as a litigation associate at the New York City law firm of Chadbourne & Parke, LLP.

She also served as a law clerk to the Honorable Jerome A. Holmes of the U.S. Court of Appeals for the 10th Circuit. She received her undergraduate degree from the University of Pennsylvania and her law degree from Georgetown University Law Center.

Mr. David Smith is in private practice at the law firm of Smith & Zimmerman, PLCC. His areas of practice include civil and criminal forfeiture, white-collar defense, restitution, and fines and criminal appeals.

Prior to private practice, he was a prosecutor in the Criminal Division of the United States Department of Justice and at the U.S. attorney's office in Alexandria, Virginia. While at DOJ, Mr. Smith served in the Appellate and Narcotic Sections of the Criminal Division and as first deputy chief of the Asset Forfeiture Office.

He earned his undergraduate degree from the University of Pennsylvania, was a graduate student at Pembroke College, and earned his law degree from Yale Law School.

Without objection, each of the witnesses' statements will be entered into the record in its entirety.

I ask that each witness summarize his or her testimony in 5 minutes or less. You all know what the red, yellow, and green lights mean.

And Mr. Blanco, you are first.

TESTIMONY OF KENNETH A. BLANCO, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. BLANCO. Thank you, Chairman Goodlatte, Ranking Member Conyers, Chairman Sensenbrenner, and Ranking Member Jackson Lee, and other Committee Members.

I appreciate the opportunity to talk to you today about asset forfeiture and to discuss some recent misconceptions about our law enforcement efforts in this area.

As you know, asset forfeiture is designed to remove criminally tainted assets from circulation, thereby depriving criminals of the proceeds of crimes and the tools they have used to commit those crimes. By taking criminally tainted assets out of circulation and off the streets, we intend to break the financial backbone of organized criminal syndicates, terrorists, fraudsters, drug cartels, and use these assets to compensate victims and deter crime.

Over the past 15 years, the department has returned billions of dollars to victims as a result of forfeiture. Nearly half of that was recovered through civil forfeiture. The department is proud of its Asset Forfeiture Program.

However, we are keenly aware of certain concerns raised about certain seizures and forfeiture practices. The department takes seriously allegations of abuse of the forfeiture program, and we are constantly looking forward of ways to improve it.

Over the past year, the department has been conducting an internal review of the Asset Forfeiture Program and the first results, the strict limitations on adoptions, were announced last month. This means that while State law enforcement agencies may undertake asset forfeiture under State law, the department will not adopt State seizures to be forfeited under Federal law unless certain public safety exceptions exist. The review that led to this change in our practice is continuing.

Now I would like to address some of the most widespread misconceptions about civil forfeiture. We are acutely sensitive to the misconception and criticism that owners of seized property are presumed guilty and, thus, have the burden of proving their innocence to regain their property. This is not correct. In civil forfeiture, the burden is always on the Government. In order to seize an asset, the Government must show probable cause, linking that asset or that property to a crime.

Then if the seizure is contested, the Government has the burden of proving by a preponderance of the evidence the nexus of that property in question to a crime before the Government can forfeit that property. If the Government fails to meet this burden of linking the property to a crime, the Government loses its case.

In other words, the property's connection to a crime must be proven by the Government, not disproven by the owner. Only after the Government meets its burden of proving that the property is criminally tainted—that is, it represents the proceeds of a crime or has facilitated a crime—does the Government get the forfeited property. After the Government has met its burden and the property is adjudicated or determined to be forfeited, the law provides the property owner the opportunity to assert an innocent owner claim.

Critics also claim that civil forfeiture enables the Government to take possession of a person's property without charging or convicting that person of a crime. The criticism is that we can seize and forfeit property in the complete absence of a crime. This is not the case. The property seized, the Government must have probable cause to believe that it is connected to criminal misconduct.

To forfeit property in a civil proceeding, the Government has to prove by a preponderance of the evidence that that property was

tied to a crime. The Government must always demonstrate a nexus to a crime.

Now in many cases, the assets may be separated by design from their true owner and criminal. The tainted property may be in the possession of a third party other than the person who committed the crime.

Criminals may be located outside the United States and outside the reach of our jurisdiction. The defendant or criminal may also be deceased. In these cases, civil forfeiture is the only means by which the Government can take these criminally tainted assets out of circulation and repay the victims.

Finally, it is important to note that asset forfeiture enables the Government to assist and compensate victims of crime. In fact, asset forfeiture laws, including civil asset forfeiture laws, are the most effective tool in recovering the proceeds and property of crime for victims. Since 2000, the department has returned over $4 billion in assets to victims of crime through asset forfeiture, $1.87 billion of which was recovered through civil forfeiture and returned to victims.

Thank you.

[The prepared statement of Mr. Blanco follows:]

Department of Justice

TESTIMONY OF

KENNETH A. BLANCO
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

FEDERAL ASSET FORFEITURE: USES AND REFORMS

PRESENTED ON

FEBRUARY 11, 2015

Testimony of Kenneth A. Blanco
United States Department of Justice
Before the Subcommittee on Crime, Terrorism, Homeland Security and Investigations
Committee on the Judiciary
U.S. House of Representatives
February 11, 2015

Chairman Sensenbrenner, Vice-Chairman Gohmert, Ranking Member Jackson Lee, and distinguished members of the Committee. Thank you for the opportunity to appear before the Committee today to discuss the important topic of civil asset forfeiture. I am honored to represent the Department at this hearing and to address the Department's commitment to ensuring that federal asset forfeiture laws are appropriately and effectively used consistent with civil liberties and the rule of law.

Introduction

Asset forfeiture is a critical legal tool that serves a number of compelling law enforcement purposes. Asset forfeiture is designed to deprive criminals of the proceeds of their crimes, to break the financial backbone of organized criminal syndicates and drug cartels, and to recover property that may be used to compensate victims and deter crime. Over the course of the past 15 years, the Department has returned over $4 billion dollars to victims as a result of forfeiture.

While the Department is proud of its asset forfeiture program, we are keenly aware of concerns raised about certain seizure and forfeiture practices. The Department takes seriously any and all allegations of perceived or actual abuse of the forfeiture program, and I welcome the opportunity to address some of those concerns here today. While asset forfeiture plays a unique and multifaceted role in our legal system, the Department is constantly looking for ways in which the asset forfeiture program can be improved.

Against this backdrop, I would like to use today's hearing to explain the various types of asset forfeiture, with a particular focus on civil forfeiture and the extensive safeguards in place to protect innocent property owners. I will also highlight the various circumstances in which civil forfeiture is the best, and sometimes the only, legal mechanism to recover criminally-tainted assets. In the process, I will attempt to debunk some misconceptions about forfeiture law and practice that are routinely cited as justification for curtailing asset forfeiture authorities. Finally, I will discuss the Department's ongoing internal review of the asset forfeiture program, the first results of which were announced last month. My hope is that this hearing will foster a more common understanding of civil forfeiture and promote a constructive dialogue about sensible ways to improve the asset forfeiture program.

I. Overview of U.S Forfeiture Law

Forfeiture has been an integral part of American jurisprudence dating back to the Nation's founding. One of the first acts of Congress in 1789 was to enact a forfeiture statute

subjecting vessels and cargoes to civil forfeiture for violation of the customs laws. Congress codified the traditional maritime law principle that a ship involved in crime was subject to forfeiture even if the owner was not criminally charged or convicted. The vessel was civilly forfeited as an instrumentality of the offense so that it could not be reused in criminal activity. This explains why asset forfeiture law has its roots in admiralty law. Since that time, forfeiture has been broadened to a much wider range of criminal activity in an effort to deter criminal activity and compensate victims of crime.

Despite its long history, civil forfeiture is still considered by many to be an unusual legal concept. While we are all accustomed to criminal cases styled as *U.S. v. Jones*, civil forfeiture actions entitled *U.S. v. Approximately up to $15,253,826 in Funds Contained in Thirteen Bank Accounts, et al.* or *U.S. v. Two Gecko Lizards and Seven Offspring* sound peculiar. But while the terminology may seem strange, I hope that my testimony will demonstrate that the legal and policy basis for civil forfeiture is not.

1. Types of Asset Forfeiture

There are three types of asset forfeiture – criminal, civil, and administrative. While each is governed by different authorities and practices, all three require that the government bear the burden of proving that the asset in question is connected to criminal activity.

The bulk of my testimony will focus on civil forfeiture, but for comparative purposes I would first like to provide a brief overview of criminal and administrative forfeiture.

a. Criminal Forfeiture:

Criminal forfeiture is an action against a defendant that includes notice of the intent to forfeit property in a criminal indictment. A criminal conviction is required and forfeiture is part of the defendant's sentence. Criminal forfeiture is limited to the property interests of the defendant, including any proceeds earned by the defendant's illegal activity. Further, criminal forfeiture is generally limited to the property involved in the particular counts on which the defendant is convicted. As part of sentencing, a court may order the forfeiture of a specific piece of property listed in the indictment, of a sum of money as a money judgment, or other property as substitute property. The government must establish by a preponderance of the evidence the requisite connection between the crime of conviction and the asset. After a preliminary order of forfeiture is entered, a separate, ancillary proceeding begins to determine any third-party ownership interests in the property the government seeks to forfeit. While the defendant himself cannot contest the forfeiture in this proceeding, often others connected to the defendant (such as family members and associates) do contest the forfeiture.

b. Administrative Forfeiture:

Administrative forfeiture, which is part of the civil forfeiture regime, refers to property forfeited to the United States without filing a case in federal court. Rather, the forfeiture process occurs before an administrative agency that has custody of the assets. There are many procedures in place, including strict time limits, governing administrative forfeiture designed to protect the interests and rights of property holders. First, any seizure of property subject to

administrative forfeiture must be based on probable cause. Any amount of currency can be administratively forfeited, although personal property can only be administratively forfeited if it is worth $500,000 or less. Administrative forfeiture cannot be used for real property.

Following seizure, the government is required to send direct written notice of the administrative forfeiture proceeding to every person who appears to have an interest in the seized property and whose identity is known to the government. To ensure notice to interested persons whose identities are not known to the government, the government publishes notice of the administrative forfeiture proceeding on a dedicated website www.forfeiture.gov. If anyone files a claim with the administrative agency contesting the forfeiture, the agency refers the case to a United States Attorney's Office, which then has to decide whether to proceed with a judicial forfeiture action or to return the property. There is no adjudication of the merits of a case by the administrative agency.

The primary benefit of administrative forfeiture is to avoid burdening the courts with judicial actions when no one claims an interest in seized property.

c. Civil Forfeiture:

Civil judicial forfeiture is an *in rem* proceeding brought against property that was derived from or used to commit an offense, rather than against a person who committed an offense. Unlike criminal forfeiture, there is no criminal conviction required, although the government is still required to prove that the property was linked to criminal activity.

The *in rem* form of the action allows the court to gather anyone with an interest in the property in the same case and resolve all the issues with the property at one time. In a civil forfeiture case, the government is the plaintiff, the property is the defendant, and any person who claims an interest in the property is a claimant. The civil forfeiture action proceeds like a normal civil action, except there are some special rules that apply only to forfeiture cases, which are set forth in the Federal Rules of Civil Procedure.

2. Phases of a civil forfeiture proceeding

a. Proving that an asset is subject to forfeiture:

In a civil forfeiture action, the government has the burden of proving by a preponderance of the evidence that a crime occurred, and that the seized property was related to that crime. If the government is seeking to forfeit the proceeds of an offense, it must establish that the property was obtained directly or indirectly as a result of the commission of the offense giving rise to forfeiture, and any property traceable thereto. 18 U.S.C. § 981(a)(2)(A). If the government is seeking forfeiture based on a facilitation or "involved in" theory, it must establish that there was a substantial connection between the property and the offense. 18 U.S.C. § 983(c)(3).

b. Innocent owner defense:

Even if the government meets its burden of establishing the nexus between the property and the offense that forms the basis for the forfeiture that does not necessarily end the inquiry.

The law entitles any individuals with standing to assert a claim that they are an innocent owner of the property at issue, after the government has proven its case. 18 U.S.C. § 983(d)(1). There are two types of innocent owner defenses: one applicable to persons who owned the property when the illegal activity was occurring, and the other applicable to persons who acquired their interest in the property after the illegal conduct occurred.

Persons asserting an innocent owner defense who owned an interest in the property as the illegal activity was occurring must prove, by a preponderance of the evidence, one of the following:

They did not know of the illegal conduct or, if they did know, that upon learning of the conduct they did all that reasonably could be expected, under the circumstances, to terminate the illegal use of the property, including giving timely notice of the conduct to law enforcement and revoking, or making a good faith attempt to revoke, permission of those engaged in the illegal conduct to continue using the property or taking other reasonable steps to discourage or prevent such illegal use. 18 U.S.C. § 983(d)(2).

Persons who acquired an interest in the defendant property after the illegal conduct occurred must prove that they qualify as a bona fide purchaser for value of the interest and that, at the time they acquired the interest, they did not know and were reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(3). The innocent owner defense is unavailable as to property that qualifies as contraband or other property that is illegal to possess. 18 U.S.C. § 983(d)(4).

3. Right to Counsel and Attorneys' Fees

As part of the comprehensive reforms included in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), a claimant in a civil forfeiture case may be entitled to counsel and/or attorneys' fees and costs. A claimant is entitled to appointed counsel if the claimant already has appointed counsel in a related criminal proceeding, or if the defendant property is the primary residence and the claimant is financially unable to obtain representation (18 U.S.C. § 983(b)(1) and (2)). CAFRA also provides that when a claimant substantially prevails in a civil forfeiture action, to the government is liable for his or her attorneys' fees and litigation costs. 28 U.S.C. § 2465(b).

II. Why Use Civil Forfeiture?

In order to demonstrate the real world utility of civil forfeiture, I would like to highlight certain circumstances and categories of cases that would not be possible without civil forfeiture.

Property in the possession of a third party:

- Either by design or accident, criminally-tainted property is often in the possession of someone other than the person who committed the crime. In such cases, civil forfeiture enables the government to recover property when criminal prosecution of the possessor of the property may not be appropriate or feasible.

> As Justice Kennedy observed of statutes authorizing civil forfeiture: "[these] statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property. The theory is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because either he uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property." *United States v. Ursery*, 518 U.S. 267, 294 (1996) (concurring opinion; internal citation omitted).

Criminals located outside the United States:

- **Terrorists** — In the *Bridge Investments* case, the government is seeking to forfeit a $6.5 million investment account owned by an al Qaeda operative who is located outside the United States.
- **Kleptocrats** — In the *Obiang* case, the government *secured the forfeiture* of $10.3 million in corruption proceeds from a sitting Vice President of Equatorial Guinea, Teodoro Nguema Obiang Mangue, as well as an additional $20 million to be given to a charitable organization for the benefit of the people of Equatorial Guinea.
- **Fugitives** — In the *Benitez* case, involving a $110 million Medicare fraud orchestrated by three brothers, the brothers escaped to Cuba, where they remain fugitives. Two civil forfeiture actions resulted in the recovery and civil forfeiture of millions of dollars of property, including a hotel, a water park, 30 vehicles, a car rental agency, houses, condos, and apartments.

Criminal defendant is deceased:

- In the *Enron* case, Kenneth Lay died after he was convicted by a jury but before he could be sentenced. Civil forfeiture was the only way to secure $2.5 million worth of Lay's assets for victims of the Enron fraud.

Living or perishable property:

- In the case of Michael Vick, the government was able to use civil forfeiture to move quickly to protect the abused dogs, rather than waiting for the criminal case to be fully resolved. The United States civilly forfeited 52 pit bulls, many of which were then adopted.

Impossible to identify a defendant:

- Stolen art and other items of cultural significance often appear in an auction house with no clear path to the person or group that originally stole the artifact. There are many such examples, including in the *Argentinean Sauropod* case involving three rare dinosaur eggs stolen from Argentina and brought to the United States. Despite being unable to identify the smugglers, the U.S. government was able to civilly forfeit the stolen eggs and return them to Argentina.

III. Assisting Victims of Crime:

Not only does asset forfeiture punish criminals by removing their tools and illicit proceeds, it also enables the government to compensate the victims of crime. In fact, asset forfeiture laws, including civil asset forfeiture laws, are the most effective tool in recovering the proceeds and property of crime for victims. Since 2000, the Department has returned over $4 billion in assets to the victims of crime through asset forfeiture, $1.87 billion of which was recovered through civil forfeiture.

There are two primary reasons why forfeiture is uniquely able to assist victims:

First, civil forfeiture laws allow for the seizure, after a judicial finding of probable cause that the property represents the proceeds of crime or in some instances a court order preserving assets pending a final resolution of the forfeiture case. Experience has shown that a criminal defendant rarely has any of his illicit proceeds available by the time he is charged, convicted, and sentenced when the court will order restitution. It is the pre-conviction phase where civil asset forfeiture tools provide what is often the only means of preserving property subject to forfeiture so that it can ultimately be returned to the victims of the crime.

Second, over the years, a very efficient forfeiture management and liquidation regime has developed in the U.S. Marshals Service to maintain and eventually sell forfeited property. In cases where there are victims of the offense giving rise to forfeiture, this results in a much higher return for the crime victim.

IV. Popular Misconceptions about Civil Forfeiture:

Because asset forfeiture is a complicated and often misunderstood body of law, it is understandable that public reporting often mischaracterizes fundamental features of forfeiture law and practice. I would therefore like to take this opportunity to address some of the most widespread misconceptions about asset seizure and civil forfeiture.

1. Asset Seizure:

The abuse of asset seizure, most notably during highway interdiction stops, is often cited as one of the most offensive features of civil forfeiture. In particular, it has been alleged that during routine traffic stops law enforcement officers are seizing assets of innocent citizens with no evidence of criminal wrongdoing. It is not uncommon to see press reports suggesting, if not flatly stating, that such seizures are permitted by law.

Assets can be seized by the government either pursuant to a seizure warrant, or pursuant to an exception to the warrant requirement. In either instance, however, the law requires that there be probable cause linking the asset directly to criminal activity. The probable cause requirement is a core tenet of our legal system, and there is nothing about the forfeiture process, civil or otherwise, that allows for the seizure of property in the absence of probable cause. That is not to suggest that warrantless seizures, like warrantless arrests, may not subsequently be determined to lack probable cause. But it does mean that any suggestion that property can be legally seized for forfeiture without probable cause is erroneous.

2. Burden of Proof

Another frequent criticism of civil forfeiture is that owners of seized property are presumed "guilty" and thus have the burden of proving their "innocence" to regain their property. This, it is said, turns the bedrock legal principle of "innocent until proven guilty" on its head.

As previously noted, in all forfeiture proceedings, including civil forfeiture, the burden is on the government. If the government fails to meet its burden of linking the property to criminality it loses the case, without the property owner having to make any affirmative showing of innocence. In other words, the property's connection to crime must be proved by the government, not disproved by the owner. And while the Supreme Court has held that the innocent owner defense is not constitutionally required, the law nonetheless provides a claimant the opportunity to demonstrate that despite the government having met its burden, the asset should nonetheless not be forfeited. As Justice Kennedy has observed, in civil forfeiture, "only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime." *United States v. Ursery*, 518 U.S. at 294 (concurring opinion; internal citation omitted).

3. Criminal Conviction:

Critics also point out that civil forfeiture enables the government to take possession of a person's property without charging or convicting that person of a crime, thereby suggesting that forfeiture in the absence of a conviction is illegitimate.

This criticism rests on the assumption that the government should only be authorized to seize and forfeit property in connection with a criminal conviction, which is indeed how criminal forfeiture functions. But as previously noted, there is a range of criminals, including terrorists, kleptocrats, and fugitives, for whom prosecution is not possible or, when the property is in the hands of a third party, appropriate. In such cases, the inability to prosecute should not affect the government's compelling interest in recovering the proceeds and instrumentalities of crime. Civil forfeiture is the only means by which the government can pursue those interests.

V. DOJ Review of the Asset Forfeiture Program:

As evidence of the Department's commitment to improving the asset forfeiture program, over the past year we have been engaged in a comprehensive review of forfeiture practices and policies. The goal of this review is to ensure that federal asset forfeiture authorities are appropriately and effectively used consistent with civil liberties and the rule of law.

As a result of that review, on January 16, 2015, the Attorney General issued an order strictly limiting when agency participants in the Department of Justice Asset Forfeiture Program are authorized to adopt assets seized by state or local law enforcement under state law. "Adoption" refers to when a state or local law enforcement officer seizes a piece of property under state or local legal authority and then gives that property to federal law enforcement so that the property can be forfeited under federal law. Pursuant to this recent order, federal agencies are only permitted to adopt assets seized by state and local law enforcement that directly

implicate public safety concerns, including firearms, ammunition, explosives, and property associated with child pornography. The adoption of all other property, including, but not limited to vehicles, valuables, and cash, is prohibited.

This policy went into effect immediately and is expected to significantly reduce the number of adoptions. It does not affect the ability of state and local authorities to seize and forfeit property under existing state laws, nor does it govern seizures made under a federal warrant or pursuant to a joint-federal investigation or task force. This new policy will ensure that asset forfeiture can continue to be used to take the profit out of crime and return assets to victims, while safeguarding civil liberties. At the same time, it will encourage joint investigations between federal and state and local law enforcement, to continue strong working relationships with state and local partners including the sharing of law enforcement intelligence.

The Department's review of asset forfeiture is still ongoing. And while I cannot predict what else it will produce, the adoption order should leave little doubt that, where appropriate, the Department will not hesitate to take action.

Conclusion

The Department of Justice remains committed to fighting crime and returning monies to victims while protecting civil liberties and ensuring due process through the asset forfeiture process. I look forward to working with the Congress to identify ways to improve the asset forfeiture program in a manner consistent with these ideals. I thank the Subcommittee for its interest in these critical issues, and am happy to answer any questions.

Mr. SENSENBRENNER. Thank you very much, Mr. Blanco.
Mr. Henderson?

TESTIMONY OF KEITH A. HENDERSON, PROSECUTING ATTORNEY, FLOYD COUNTY, IN

Mr. HENDERSON. Chairman Sensenbrenner, Chairman Goodlatte, Ranking Member Jackson Lee, and Ranking Member Conyers, Members of the Subcommittee, my name is Keith Henderson. I am the prosecuting attorney in Floyd County, Indiana, part of the Louisville, Kentucky, metro area.

I am also here today as a member of the Executive Committee for the National District Attorneys Association, NDAA, the largest and oldest organization representing prosecutors from across the country.

Civil asset forfeiture laws have changed substantially over the years, beginning with the Federal forfeiture program and now including forfeiture laws in most States. On Friday, January 16th, Attorney General Eric Holder announced changes to these civil forfeiture policies under the DOJ that would eliminate the ability of State and local law enforcement to seize assets and turn them over to Federal authorities for forfeiture.

NDAA as well as law enforcement have expressed concern that these policies have not adequately been studied as far as the impact on and the direction on State and local governments and that a key constituency has been left out of that process. Attorney General Holder indicated that State adoptions would be prohibited, and I quote, "except for property that directly relates to public safety concerns, including firearms, ammunition, explosives, and properties associated with child pornography."

While we applaud the continued inclusion of these types of property, we remain concerned that the decision is yet another step in the continued erosion of drug enforcement by the Federal Government.

Asset forfeiture is a tool. It is a tool used by law enforcement to go after the pocketbooks of drug dealers. If we take away the disincentive for these criminals to profit from their crimes, we could jeopardize the safety of our communities and drug enforcement.

Additionally, there is less of an incentive now for locals to partner with Federal officials. Agencies such as the FBI and DEA need participation from local law enforcement, as these Federal agencies rely heavily on local intelligence being gathered to aid in the broader investigations. Local police must now question the financial feasibility of embedding officers with Federal law enforcement with these changes.

As part of the recent decision, drug forfeitures would be severely limited, and adoptions would only be granted through very narrow exceptions. For example, under the new policy, DOJ will take an adoption if a firearm is involved but might not otherwise. This approach seems shortsighted, as very few cases involve just firearms.

The bottom line is this. Drug dealing remains a major crux of crime in this country. It is the root cause of many other crimes of violence. From murder to property crime to the endpoint of the increasing number of drug-ingested deaths, the human destruction attributable to drug dealing remains high.

Criticisms of the program have been offered with stories of individuals having assets seized and never returned, regardless of the outcome of any criminal charges. Let me be clear. Our members strongly support due process under the law and fully denounce any seizure of property and other assets of falsely accused individuals.

Several potential reforms could be examined in conjunction with a comprehensive study. We do not condone unfair and abusive practices, but we must have factual documentation of these abuses in order to properly understand what types of reform could make the current system more effective.

Recently, four national law enforcement organizations—the Major Cities Chiefs, the Major County Sheriffs, the International Association of Chiefs of Police, and the National Sheriffs—all signed a letter to the Attorney General regarding the Asset Forfeiture Program and included some major policy proposals for reforms. We stand with law enforcement in calling for these reforms to be reviewed as potential paths forward on the Asset Forfeiture Program.

Finally, NDAA believes that law enforcement and prosecutors should always avoid pursuing forfeiture actions when the primary purpose is to obtain assets rather than pursue a criminal prosecution. We remain hopeful that the Administration and DOJ will improve its communication with organizations that I have outlined and with NDAA as a means to develop sound, practical, and effective policy.

We stand ready to engage with the department on this issue and many others.

Thank you.

[The prepared statement of Mr. Henderson follows:]

Testimony of
Keith A. Henderson
Prosecuting Attorney
52nd Judicial District
New Albany, Indiana

Federal Asset Forfeiture: Uses and Reforms

Committee on the Judiciary

Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

Wednesday, February 11, 2015

Chairman Sensenbrenner, Ranking Member Jackson Lee, Members of the Subcommittee, my name is Keith Henderson and I am the Prosecuting Attorney in Floyd County, Indiana. I am also here today as a member of the Executive Committee for the National District Attorneys Association (NDAA), the largest and oldest organization representing elected and appointed prosecutors and assistant prosecutors from across the country. I appreciate the opportunity to testify before you today.

Background

Civil asset forfeiture laws have changed substantially over the years, beginning with a federal forfeiture program and now including forfeiture laws in most states. On Friday, January 16, Attorney General Eric Holder announced changes to civil asset forfeiture policies under the Department of Justice (DOJ) that would eliminate the ability of state and local law enforcement to seize assets and turn them over to federal authorities for forfeiture, with some exceptions.

These changes to "state adoptions" came as no surprise as we understood the Administration had been considering changes to the current policy for the past several months. We were disappointed that NDAA was not consulted prior to this decision, which directly impacts our members across the country.

We are concerned that DOJ has not adequately studied the impact of this new policy direction on state and local governments, has based its decision on assumptions without supporting data that wide abuse exists across the system, and left out a key constituency in the process.

Attorney General Holder also indicated that state adoptions would be prohibited, "except for property that directly relates to public safety concerns, including firearms, ammunition, explosives and property

associated with child pornography." While we applaud the continued inclusion of these types of property and the continuation of forfeiture by joint state and federal task forces, we remain concerned that the decision is yet another step in the continued erosion of drug enforcement by the federal government.

State Adoptions: Impacts and Uses

Asset forfeiture is a tool used by state and local law enforcement and prosecutors to go after the pocketbooks of drug dealers and drug traffickers. Going after these finances not only makes our communities safer because the money is no longer available to use for other criminal activities, but being able to access some of the proceeds from the seized assets goes back to agencies to enhance enforcement capabilities. Not having the ability, or reducing the ability to go after criminal proceeds ignores a huge component of sophisticated, modern transnational organized crime, particularly when it comes to money laundering operations. Forfeitures are a byproduct of strong enforcement and if we take away the disincentive for these criminals to deal and traffic drugs and profit from these crimes, we could jeopardize the safety of our communities.

Another component that must be considered is that of information sharing and intelligence gathering, largely occurring at the state and local level. Although the recent announcement did have an exception for task forces, there is less of an incentive now for locals to partner with federal officials. That means that local participation with federal law enforcement on task forces could essentially end in many jurisdictions. Agencies such as the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) need local participation from the county sheriffs, city and state police as these federal agencies rely heavily on local intelligence being gathered to aid in broader investigations. Local police now must question whether to continue to pay their officers to work with federal law enforcement

that often takes them out of their jurisdictions now that the civil asset forfeiture rules have changed. Furthermore, local departments rely on federal expertise when drug dealers use restaurants, barbershops, garages and other cash businesses as places of sale and to launder money. Forfeiture of businesses is a specialized task that most local agencies lack the expertise and resources to handle and have had to rely on the U.S. Marshall Service for assistance to date. This may include management of the business, real property and tools of the business.

As part of the recent decision, drug forfeitures would be severely limited and adoptions would only be granted through very narrow exceptions. For example, under the new policy, DOJ will take an adoption if a firearm is involved, but might not otherwise. The approach seems shortsighted as very few cases involve just firearms, or just relate to child pornography. In most of the cases we see, illegal drugs are an integral part of an operation, finance the purchasing of these firearms, and are part of larger criminal enterprises. Why limit the ability of state and local law enforcement to go after the worst of the worst? The bottom line is that drug dealing and trafficking remain a major crux of crime across this country—it is the root cause of many other crimes of violence. From violent crime to property crime to the end point of drug ingested deaths, the human destruction attributable to drug dealing remains high.

Also of concern is that the statutory language in state forfeiture laws varies widely across the country. In my state for example, forfeiture money goes directly to a school fund. In other states, forfeiture money is capped at a certain threshold depending on the seizure. This means that local prosecutors serving to protect citizens and victims have no choice but to access assets forfeited under federal law as a means to support programming for victims and valuable training to ensure that justice is adequately served. In my home state of Indiana, if the current

federal rules remain in place, state and local agencies will not be able to spend the resources to forfeit drug dealer profits.

Potential Reforms

As we have all seen over the past several months, critiques of the program have been offered and stories of individuals having assets seized and never returned, regardless of the outcome of any potential accusations or charges, have been in papers and on TV. Let me be clear. Our members strongly support due process under the law and fully denounce any seizures of property and other assets of falsely accused individuals. Now that most states have their own asset forfeiture laws, we also acknowledge that the potential for duplication with programs at both the state and federal level does exist.

Several potential reforms could be examined to determine their feasibility and operational impact on state and local law enforcement's ability to go after the worst of the worst in our communities. As part of these potential reforms, a comprehensive study should be conducted to actually document any abuse that we have seen alleged in the media. There are bad actors in every program, and we do not condone unfair and abusive practices, but we must have factual documentation of these abuses in order to properly understand what types of reforms could make the current system more efficient and effective.

Recently, four national law enforcement organizations, the Major Cities Chiefs Association (MCCA), Major County Sheriffs' Association (MCSA), International Association of Chiefs of Police (IACP) and the National Sheriffs' Association (NSA), all signed a letter to Attorney General Holder regarding the asset forfeiture program and included a policy proposal of potential reforms to be considered. We stand with our law enforcement partners in calling for these reforms to be reviewed as potential paths forward on the asset forfeiture program.

First, adoption cases by state and local law enforcement should be limited to cases involving serious crime that pose a threat to public safety. These include cases involving drug trafficking, human trafficking, firearms, terrorism, and gang activity just to name a few.

Second, DOJ should develop a more comprehensive and detailed process for forfeiture cases. This could include a manual on seizures to promote consistent practices across the program and promote best practices that are already being promulgated in the states. Requirements put into place by the Civil Asset Forfeiture Reform Act (CAFRA) should continue to be put into place and agencies participating in the asset forfeiture program should also develop manuals to make sure they are following procedures put into place by CAFRA. As is the case with many programs, adequate training is extremely important in ensuring fair and consistent practices are carried out.

Third, any seizures of assets must show a demonstrated criminal nexus, including tying the criminal activity to applicable statutes under state law. A report outlining these connections and rationale for seizing assets will address the critique that assets are unfairly seized without due process under the law.

Fourth, critics have attacked the threshold level for seizures. To address this concern, the threshold level for adoption cases should be raised to $10,000 in cases where there is no arrest. In certain circumstances, DOJ can approve exceptions to this rule when targeting criminal organizations and repeat offenders.

Fifth, a greater level of transparency will build additional trust among the public that legitimate seizures are occurring in the field. DOJ could require agencies to issue annual reports open to the public on these seizures or the reporting mechanism through the current equitable

sharing program could be strengthened. In addition to the previous recommendation that manuals be developed on policies and procedures regarding forfeitures, the procedures should be publicly published, as long as those materials do not jeopardize investigative techniques of a given agency.

These five areas of potential reform could go a long way in addressing concerns associated with the program and restoring public trust that state and local law enforcement are going after criminals and legitimately seizing assets that are being used to commit other criminal activities in our communities. Furthermore, law enforcement and prosecutors should avoid pursuing forfeiture actions when the primary purpose is to obtain assets rather than pursue a prosecutable case.

We remain hopeful that the Administration and DOJ will improve its communication with organizations such as ours as a means to develop sound, practical and effective policy. We stand ready to engage with the Department on this issue and many others, and I thank the subcommittee for their time today.

Mr. SENSENBRENNER. Ms. Sheth?

TESTIMONY OF DARPANA M. SHETH, ATTORNEY, INSTITUTE FOR JUSTICE

Ms. SHETH. Good morning, Mr. Chairman Sensenbrenner, Mr. Chairman Goodlatte, Ranking Member Jackson Lee, and Ranking Member Conyers, and Members of the Committee.

Thank you for inviting me to testify about the urgent need to reform our Federal forfeiture laws. There is an emerging consensus across the political spectrum that the time for reform is now. Even the Justice Department and the State and local law enforcement have conceded the need for reform.

In light of this overwhelming consensus, I will focus my remarks on two key aspects that Congress must address. First, the self-financing of law enforcement agencies, which inherently distorts law enforcement priorities. And second, the inadequate procedural protections afforded to property owners.

Current Federal law incentivizes forfeiture by allowing law enforcement agencies to keep 100 percent of the proceeds. At a time when government at all levels face serious budget shortfalls, it is no surprise that forfeiture has become ever more attractive. But directing forfeiture proceeds back to the very agencies responsible for the forfeiture is antithetical to our American constitutional system in three ways.

First, the self-funding of executive branch agencies violates the separation of powers. The Constitution gives Congress, the most representative branch of Government, the power over the purse. And it is past time for Congress to reclaim this power as an important check on the executive branch.

Second, it violates principles of federalism. Under the Equitable Sharing Program, State and local law enforcement can seize property for a Federal forfeiture action and then share in the proceeds. As Mr. Henderson even acknowledges in his written statement, this generous bounty encourages State and local law enforcement to evade their own stricter State laws in favor of more lax Federal rules.

The DOJ's new policy does not cure this problem, as it leaves almost three-quarters of all equitable sharing cases untouched.

Third, giving law enforcement a direct financial incentive in the seizure of property violates a central command of due process. The administration of justice must be impartial. The lack of impartiality is best seen in a single statistic. In the last 6 years, almost two-thirds of all Federal forfeitures were administrative with the process conducted by the seizing agency itself, without any judicial involvement.

But even when the judicial branch is involved in civil forfeitures, there are inadequate safeguards to protect property owners. My written testimony details these gaps, including the lack of counsel, the low burden of proof on the Government, and the absence of a prompt opportunity to contest the seizure of cash.

But I want to highlight a key deficiency. Contrary to Mr. Blanco's testimony, the process does, in fact, turn the presumption of innocence on its head. In administrative proceedings, the forfeiture

is presumed valid, and the property owner must make the case for its return.

In civil forfeiture proceedings, it is true that the Government must prove the property is connected to a crime. But under the innocent owner provision, the burden then shifts to the property owners to affirmatively prove they did not know of the illegal activity. Consequently, in civil forfeiture, while the property might be presumed guilty, property owners very much are.

The absence of adequate process, married to the perverse financial incentive, has led to widespread abuse, with a disproportionate impact on minorities. If only civil forfeiture were limited to the unusual situations like criminals overseas or criminals who are deceased, as highlighted by Mr. Blanco or in his written statement, like Michael Vick's pit bulls or rare dinosaur eggs, we could all pack up and go home. But civil forfeiture has treated countless of ordinary Americans worse than criminals.

Since 9/11, civil forfeiture has resulted in more than 61,000 cash seizures totaling $2.5 billion through highway interdictions, all without any search warrants or indictments. And there are many like my client Russ Caswell, who stood to lose his family-run motel to civil forfeiture, even though he did nothing wrong.

While convicted criminals should not benefit from their ill-gotten gains, no one in America should lose their property without being convicted of a crime. This is not about bad apples in law enforcement. This is fundamentally about bad incentives, flawed incentives.

The solution is not to better police the police. The solution is to end policies that distort their incentives. This financial incentive and the lack of process undermine our public trust in law enforcement and the belief that is so vital to our republic that we are a nation ruled by laws and not by men.

Thank you for your time and attention.

[The prepared statement of Ms. Sheth follows:]

Written Statement of

DARPANA M. SHETH
Attorney, Institute for Justice

before the

United States House of Representatives Committee on the Judiciary

Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

concerning

Civil Asset Forfeiture

February 11, 2015
10:30 A.M.
Rayburn House Office Building
Room 2141

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Chairman Goodlatte, Chairman Sensenbrenner, Ranking Member Conyers, Ranking Member Jackson Lee, and Distinguished Members of the Subcommittee:

Thank you for inviting me to testify about the growing problem of civil forfeiture, and specifically, how federal laws financially incentivize forfeiture of property from innocent Americans without providing adequate procedural safeguards. As documented by recent media coverage, this toxic mix has led to widespread abuse.

The Committee is to be commended for holding this hearing. The Institute for Justice hopes it is an initial step to proposing a comprehensive legislative reform package. As law-enforcement agencies at all levels of government have increasingly relied on the tool of civil forfeiture, it is imperative that our elected officials pay close scrutiny to its use and the effect it has on American property owners, most of whom are never charged with any wrongdoing.

My name is Darpana Sheth and I am an attorney with the Institute for Justice, a nonprofit, public-interest law firm dedicated to protecting Americans' rights to private property, economic liberty, free speech, and educational freedom. As the national law firm for liberty, IJ engages in cutting-edge litigation and advocacy both in the court of law and in the court of public opinion.

To further its mission to protect property rights, IJ has launched a nationwide initiative to reform forfeiture laws through strategic litigation, advocacy, and original research. On the litigation front, IJ represents individuals whose property has been threatened with civil forfeiture in both state and federal courts across the country.[1] IJ has also filed friend-of-the-court briefs on issues related to forfeiture.[2]

On the advocacy side, IJ has been involved in legislative efforts to reform civil-forfeiture laws across the nation.[3] Both Minnesota and Washington, D.C. have passed comprehensive

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[1] *See, e.g.*, *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars & Fifty-Six Cents*, No. C13-4102-LTS, 2015 WL 134046 (N.D. Iowa Jan. 9, 2015), *additional information available at* http://ij.org/iowa-forfeiture; *Sourovelis v. City of Philadelphia*, No. 2:14-cv-04687 (E.D. Pa. Aug. 11, 2014), *additional information available at* http://ij.org/philadelphia-forfeiture; *In the Matter of the Seizure of $446,651.11*, No. 2:14-mc-1288 (E.D.N.Y. dismissed Jan. 20, 2015), *additional information available at* http://ij.org/long-island-forfeiture; *Dehko v. Holder*, No. 13-14085, 2014 WL 2605433 (E.D. Mich. June 11, 2014), *additional information available at* http://ij.org/miforf; *United States v. 434 Main St., Tewksbury, Mass.*, 961 F. Supp. 2d 298 (D. Mass. 2013), *additional information available at* http://ij.org/massachusetts-civil-forfeiture; *United States v. 2601 W. Ball Rd.*, No. SACV 12-1345-AG (MLGx) (C.D. Cal. dismissed Oct. 10, 2013); *El-Ali v. State*, 428 S.W.3d 824 (Tex. 2014), *additional information available at* http://ij.org/state-of-texas-v-one-2004-chevrolet-silverado; *State ex rel. Cnty. of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. 228 (App. Div. 2004), *additional information available at* http://ij.org/state-of-new-jersey-v-one-1990-ford-thunderbird.

[2] *See, e.g.*, *Henderson v. United States*, 2014 U.S. App. LEXIS 1680 (11th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3234 (U.S. Oct. 20, 2014) (No. 13-1487); *Kaley v. United States*, 134 S. Ct. 1090 (2014), *additional information available at* http://ij.org/images/pdf_folder/amicus_briefs/kaley-amicus-brief_final.pdf; *Florida v. Harris*, 133 S. Ct. 1050 (2013), *additional information available at* http://www.ij.org/images/pdf_folder/amicus_briefs/fl-v-harris-amicus.pdf; *Alvarez v. Smith*, 558 U.S. 87 (2009), *additional information available at* http://ij.org/alvarez-v-smith-amicus; *Garcia-Mendoza v. 2003 Chevy Tahoe, VIN No. 1GNEC13V23R143453, Plate No. 235JBM*, 852 N.W.2d 659 (Minn. 2014), *additional information available at* http://ij.org/images/pdf_folder/amicus_briefs/danielgarciamendoza_2003chevytahoe_amicus.pdf.

[3] *See* INSTITUTE FOR JUSTICE, Model Criminal Forfeiture Law & Model Forfeiture Reporting Law, *available at* http://ij.org/cases/legislation.

forfeiture reform, in part, due to IJ's efforts.[4] IJ is also actively involved in forfeiture reform legislation in Maryland, Minnesota, New Hampshire, and Texas. And IJ is consulting with state legislators and advocates on forfeiture reform in Arizona, Arkansas, Colorado, Florida, Iowa, Kansas, Michigan, Montana, New Mexico, Oklahoma, Pennsylvania, Tennessee, Virginia and Utah.

IJ has also produced original research documenting the problem of civil forfeiture. IJ published the first comprehensive nationwide study, titled *Policing for Profit*, which evaluates each jurisdiction's civil-forfeiture laws.[5] The federal government earned a grade of D- for its civil-forfeiture laws. (An updated report on the federal government's forfeiture program is attached as Appendix A.) Particularly relevant for this hearing, IJ also studied how a particular federal forfeiture program—the Equitable Sharing Program—encourages local police and prosecutors to evade state civil-forfeiture laws to pad their budgets.[6] IJ also commissioned a study using experimental economics to test the incentives of civil forfeiture.[7] The results demonstrated that the financial incentives of civil forfeiture create a strong temptation for law enforcement agencies to seize property to pad their own budgets.[8] Most recently, IJ published a report highlighting the Internal Revenue Service's aggressive use of civil forfeiture to seize funds from individuals and small business owners making a series of cash deposits or withdrawals below $10,000, without any other evidence of wrongdoing.[9]

As these studies confirm, federal forfeiture programs must be reformed to end the distorted incentives for law enforcement and strengthen protections for property owners. After Section I explains the archaic origins of civil forfeiture, Section II discusses the ways in which modern federal civil-forfeiture laws have departed dramatically from their predecessors, causing an explosion in federal forfeiture activity. Next, Section III discusses the federal Equitable Sharing Program and the limited impact of the new Justice Department's policy change. Finally, Section IV explains how current federal law incentivizes forfeiture without providing adequate procedural safeguards to protect innocent property owners.

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[4] 2014 Minn. Sess. Law Serv. Ch. 201 (S.F. 874) (West); Civil Asset Forfeiture Amendment Act of 2014, B20-48, 20th Council (D.C. 2014). *See also* Robert O'Harrow, Jr., *D.C. Council votes to overhaul asset forfeiture, give property owners new rights*, WASH. POST, Nov. 18, 2014, *available at* http://www.washingtonpost.com/investigations/dc-council-votes-to-overhaul-asset-forfeiture-give-property-owners-new-rights/2014/11/18/d6945400-6f72-11e4-8808-afaa1e3a33ef_story.html; Abby Simons, *Civil forfeiture reform signed into law*, STAR TRIB., May 6, 2014, *available at* http://www.startribune.com/politics/statelocal/258156241.html.

[5] Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott G. Bullock, INSTITUTE FOR JUSTICE, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

[6] Dick M. Carpenter, Larry Salzman & Lisa Knepper, INSTITUTE FOR JUSTICE, *Inequitable Justice: How Federal Equitable Sharing Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* (Oct. 2011), *available at* http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.

[7] Bart J. Wilson & Michael Preciado, *Bad Apples or Bad Laws: Testing the Incentives of Civil Forfeiture* (Institute for Justice, 2014), *available at* http://ij.org/images/pdf_folder/private_property/bad-apples-bad-laws.pdf.

[8] *Id.*

[9] Dick M. Carpenter & Larry Salzman, INSTITUTE FOR JUSTICE, *Seize First, Question Later: The IRS and Civil Forfeiture* (2015), *available at* http://ij.org/images/pdf_folder/private_property/seize-first-question-later.pdf.

I. CIVIL FORFEITURE IS PREMISED ON AN ARCHAIC LEGAL FICTION.

Civil forfeiture is the power of law enforcement to seize and keep property suspected of being involved in criminal activity. With civil forfeiture—unlike criminal forfeiture—law enforcement can take cash, cars, homes, or other property without so much as charging the owners with a crime, let alone convicting them of one. Because these are civil proceedings, most of the constitutional protections afforded to criminal defendants do not apply to property owners in civil-forfeiture cases.

Civil forfeiture is based on the legal fiction that the property itself is "guilty" of a crime. Under this fiction, the proceeding is brought *in rem* ("against a thing"), or against the property itself, not against the owner (*in personam*), as criminal proceedings. This is why civil-forfeiture cases have unusual names like:

- *United States v. 434 Main Street, Tewskbury, Massachusetts*;
- *State of Texas v. One 2004 Chevrolet Silverado*; and
- *Commonwealth of Pennsylvania v. $520 in U.S. Currency*.

Of course, inanimate objects such as property, cars, and cash do not act or think, and therefore cannot possess the required criminal intent to be "guilty." The doctrine of *in rem* forfeiture originally arose from the medieval law of deodand under which chattel that caused death was forfeit to the King.[10] Deodand was premised on the superstitious belief that objects acted independently to cause death.[11]

In the United States, civil forfeiture traces its roots to the British Navigation Acts of the mid-17th century during England's vast expansion as a maritime power.[12] The Acts required imports and exports from England to be carried on British ships. If those Acts were violated, the ships and the cargo on board could be seized and forfeited to the Crown regardless of the guilt or innocence of the owner. Using these British statutes as a model, the first United States Congress passed forfeiture statutes to aid in the collection of customs duties, which provided 80 to 90 percent of the finances for the federal government during that time.[13] Civil forfeiture was introduced in American law through these early customs statutes.

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[10] Donald J. Boudreaux & A.C. Pritchard, *Civil forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 135 (1996).

[11] *Id.*

[12] *Id.*; Michael Schecter, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1150, 1151-1183 (1990); James R. Maxeiner, Note, *Bane of American Forfeiture Law: Banished at Last?*, 62 CORNELL L. REV. 768, 802 (1977).

[13] *See id.* at 782 n.86 (noting that customs provided much of the revenue for the federal government).

II. MODERN CIVIL FORFEITURE LAWS HAVE BECOME UNMOORED FROM THEIR ORIGINAL JUSTIFICATION ENVISIONED BY THE FOUNDING GENERATION, LEADING TO AN EXPLOSION OF FEDERAL FORFEITURE ACTIVITY.

Forfeiture at the time of our nation's founding was limited in justification and scope, in stark contrast to today's civil-forfeiture programs. For example, early laws authorizing forfeiture were based on the unquestioned ability of the government to seize contraband, in which no property rights existed. Contraband included not only *per se* illegal goods and stolen goods, but also goods that were concealed to avoid paying required customs duties.[14]

Forfeiture was justified only by the practical necessities of enforcing admiralty, piracy, and customs laws. As an *in rem* proceeding, civil forfeiture allowed courts to obtain jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of admiralty or piracy violations because they were overseas or otherwise outside the court's jurisdiction.[15] With civil forfeiture, the government could ensure that customs and other laws were enforced even if the owner of the ship or the cargo was outside the court's jurisdiction.

Throughout most of the 20th century, civil forfeiture remained a relative backwater in American law, with one exception. During the Prohibition Era, the federal government expanded the scope of its forfeiture authority beyond contraband to cover automobiles or other vehicles transporting illegal liquor.[16] However, the forfeiture provision of the National Prohibition Act was considered "incidental" to the primary purpose of destroying the contraband itself—"the forbidden liquor in transportation."[17]

Even then, the Supreme Court observed that these "forfeiture acts are exceedingly drastic."[18] Consequently, the Court cautioned that "[f]orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law."[19] As "drastic" as forfeiture laws may have appeared during Prohibition, they are quite limited in comparison to the forfeiture laws today, which trace their origins to the "War on Drugs."[20]

Today's federal forfeiture laws are much broader in scope, covering not only illegal drugs, contraband, and any conveyance used to transport them, but all manner of real and personal property involved in the alleged criminal activity. The Comprehensive Crime Control

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[14] *See* Act of July 31, 1789, 1 Stat. 29, 43 (providing that all "goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited").

[15] *See, e.g.*, *United States v. The Brig Malek Adhel*, 43 U.S. (2. How.) 210, 233 (1844) (justifying forfeiture of innocent owner's vessel under piracy and admiralty laws because of "the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong") (emphasis added); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (revenue laws); *United States v. The Schooner Little Charles*, 1 Brock. 347, 354 (1819) (Marshall, C.J.) (embargo laws).

[16] Boudreaux & Pritchard, *supra* note 9, at 101.

[17] *Carroll v. United States*, 267 U.S. 132, 155 (1925).

[18] *United States v. One 1936 Model Ford V-8 De Luxe Coach, Commercial Credit Co.*, 307 U.S. 219, 236 (1939).

[19] *Id.* at 226.

[20] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 42-45 (1998).

Act of 1984[21] authorized, for the first time, the forfeiture of property used (or intended to be used) to "facilitate" a drug offense.[22] Congress also has expanded forfeiture beyond alleged instances of drug violations to include myriad crimes. Today, 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.[23] Moreover, the creation of the federal "Equitable Sharing Program"[24] (discussed more fully in Section III) has expanded the use of civil forfeiture by state and local law enforcement by giving them the lion's share of forfeiture proceeds for simply referring forfeiture cases to federal authorities.[25]

Additionally, in contrast to most of American history, during which the proceeds from civil forfeitures went to a general fund to benefit the public at large, current federal forfeiture laws allow law-enforcement agencies responsible for seizing the property to keep proceeds from forfeiture. In 1984, Congress amended parts of the Comprehensive Drug Abuse and Prevention Act of 1970 to allow federal law-enforcement agencies to retain forfeiture proceeds in a newly created Assets Forfeiture Fund.[26] Initially, any forfeiture proceeds exceeding $5 million that remained in the Assets Forfeiture Fund at the end of the fiscal year were to be deposited in the Treasury's General Fund.[27] Moreover, the government's use of proceeds in the Assets Forfeiture Fund was restricted to a relatively limited number of purposes, such as paying for forfeiture expenses like storing the property or giving awards for information that led to forfeitures.[28] However, subsequent amendments eliminated both the $5-million cap and dramatically broadened the scope of expenses the government could pay for with the Assets Forfeiture Fund, including purchasing vehicles and paying overtime salaries.[29] In short, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds—subject only to very loose restrictions—giving them a direct financial stake in generating revenue from forfeiture.[30]

By allowing law-enforcement officials to retain forfeiture proceeds, federal forfeiture laws create a perverse financial incentive to maximize the seizure of forfeitable property. Consequently, unlike its early relatives in the Prohibition Era when forfeiture was merely incidental, with today's forfeiture laws, forfeiture of property is often the primary purpose of the seizure. As the former chief of the federal government's Asset Forfeiture and Money Laundering Offices observed, "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

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[21] Pub. L. No. 98-473, 98 Stat. 1976.

[22] *See* 21 U.S.C. §§ 881(a)(6)-(7).

[23] *See* Asset Forfeiture and Money Laundering Section, U.S. Dep't of Justice Criminal Div., SELECTED FEDERAL ASSET FORFEITURE STATUTES (2006), *available at* http://www.justice.gov/criminal/foia/docs/afstats06.pdf.

[24] *See* 21 U.S.C. § 881(e)(1)(A) & 19 U.S.C. § 1616a(c).

[25] Blumenson & Nilsen, *supra* note 19, at 44-45.

[26] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[27] *Id.* § 310, 98 Stat. at 2053 (previously codified at 28 U.S.C. § 524(c)(7)).

[28] *Id.* § 310, 98 Stat. at 2052 (previously codified at 28 U.S.C. § 524(c)(1)).

[29] 28 U.S.C. §§ 524(c)(1)(F)(i), (c)(1)(I).

[30] Although Congress enacted the Civil Asset Forfeiture Reform Act in 2000, none of those reforms changed how forfeiture proceeds are distributed or otherwise mitigated the direct pecuniary interest law-enforcement agencies have in civil forfeitures. *See* Pub. L. No. 106-185, 114 Stat. 202 (2000).

desire to effect fair enforcement of the laws."[31] Indeed, according to a July 2012 report by the United States Government Accountability Office, one of the three primary goals of the Assets Forfeiture Fund is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."[32]

These developments have caused forfeiture activity to increase exponentially. In 1986, the year after the Justice Department's Assets Forfeiture Fund was created, the Fund took in just $93.7 million in deposits.[33] Twenty years later, annual deposits of forfeited cash and property regularly topped $1 billion.[34] In 2013, the most recent year with publicly reported data, that figure had swollen to $2 billion, the second highest amount in the Fund's history.[35]

The amount of federal forfeiture activity can also be seen by a glimpse at the number of federal agencies participating in federal forfeiture programs. There are two main federal agencies that spearhead forfeiture activity at the federal level: the Justice Department and the Treasury Department. The Justice Department's Assets Forfeiture Program includes activity by:

- Asset Forfeiture and Money Laundering Section of the Criminal Division;
- Bureau of Alcohol, Tobacco, Firearms and Explosives;
- Drug Enforcement Administration;[36]
- Federal Bureau of Investigation;
- United States Marshals Service;
- United States Attorneys' Offices;
- Asset Forfeiture Management Staff;
- United States Postal Inspection Service;
- Food and Drug Administration's Office of Criminal Investigations;
- United States Department of Agriculture, Office of the Inspector General;
- Department of State, Bureau of Diplomatic Security; and
- Defense Criminal Investigative Service.[37]

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[31] Richard Miniter, *Ill-Gotten Gains*, REASON, Aug. 1993, at 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), *available at* http://reason.com/archives/1993/08/01/ill-gotten-gains.

[32] U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 6 (2012), *available at* http://www.gao.gov/assets/600/592349.pdf.

[33] Marian R. Williams, et al., *supra* note 5, at 31.

[34] U.S. Dep't of Justice, *FY 2013 Asset Forfeiture Fund Reports: Total Net Deposits to the Fund by State of Deposit as of September 30, 2013*, http://www.justice.gov/jmd/afp/02fundreport/2013affr/report1.htm; *see also* Rep. Tim Walberg, Op-Ed., *Stopping the Abuse of Civil Forfeiture*, WASH. POST, Sept. 4, 2014, http://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/c7b9d07a-3395-11e4-9e92-0899b306bbea_story.html.

[35] *Id.*

[36] The DEA's enforcement of federal drug laws has resulted in significant seizure and forfeiture activity. And a significant portion of DEA cases are adopted from state and local law enforcement agencies under the federal Equitable Sharing Program. U.S. Dep't of Justice, *Asset Forfeiture Program: Participants and Roles*, http://www.justice.gov/jmd/afp/05participants/ (last visited Feb. 8, 2015).

[37] *Id.*

The Treasury Department maintains its own robust forfeiture program[38] which includes participation by the:

- Internal Revenue Service;
- U.S. Immigration and Customs Enforcement;
- U.S. Customs and Border Protection;
- U.S. Secret Service; and
- U.S. Coast Guard.[39]

As detailed in Section IV, subpart A, the ability of these Executive branch agencies to self-finance through forfeiture proceeds endangers the balance of powers in our constitutional system.

In sum, no longer is civil forfeiture tied to seizing contraband or the practical difficulties of obtaining personal jurisdiction over an individual. Unmoored from its historical limitation as a necessary means of enforcing admiralty and piracy laws, civil forfeiture has morphed into a revenue-generating enterprise for law enforcement.

III. THE FEDERAL EQUITABLE SHARING PROGRAM

The federal government engages in forfeiture in two main ways. First, federal authorities seize property under federal law and pursue forfeiture of the property without any involvement by state or local law enforcement. Second, under the federal Equitable Sharing Program, federal authorities work with state or local law-enforcement agencies to seize property for a federal forfeiture action, and then "share" the proceeds.[40]

There are two ways state and local law enforcement can participate in the Equitable Sharing Program. Federal authorities can work with state and local law enforcement through joint investigations. Joint investigations may originate from: (a) participation on a federal task force; (b) a formal task force composed of state and local agencies; or (c) state or local investigations that are developed into federal cases.[41] Equitable-sharing agreements can be used to process and divide the proceeds of property seized during joint operations involving multiple law-enforcement agencies. The federal government takes over the property, handles the forfeiture case and then distributes the proceeds to each agency according to their role in the joint effort.

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[38] The Treasury Department's Forfeiture Fund has also grown from more than $270 million in deposits in 2004 to more than $1.6 billion in 2013. *See* Appendix A.

[39] U.S. Dep't of the Treasury, *Treasury Executive Office for Asset Forfeiture*, http://www.treasury.gov/about/organizational-structure/offices/Pages/The-Executive-Office-for-Asset-Forfeiture.aspx (last visited Feb. 8, 2015).

[40] For statutes authorizing equitable sharing, see 21 U.S.C. §§ 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a.

[41] U.S. Dep't of Justice, Criminal Div., Asset Forfeiture and Money Laundering Section, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 6 (April 2009), *available at* http://www.justice.gov/usao/ri/projects/esguidelines.pdf.

More controversially, the federal government can also "adopt" property seized by a state or local agency and then proceed with a federal forfeiture action. Federal agencies may "adopt" seized property for forfeiture where the conduct giving rise to the seizure is in violation of federal law and where federal law provides for forfeiture.[42] In adoptions, relatively lax federal standards apply and state and local agencies receive 80 percent of proceeds—even if state law is stricter and less generous. Thus, even if state law offers strong protections to property owners and bars law enforcement from keeping what they forfeit, state and local agencies can use equitable sharing to circumvent those rules and take and keep property anyway.

Consequently, the Equitable Sharing Program poses a federalism problem by encouraging state and local law enforcement to evade state civil-forfeiture laws in favor of federal rules.[43] In a 2011 study published in the *Journal of Criminal Justice*, researchers Jefferson Holcomb, Tomislav Kovandzic and Marian Williams examined the relationship between state civil-forfeiture laws and equitable-sharing receipts by state and local law enforcement.[44] They found that in states where civil forfeiture is more difficult and less rewarding, law-enforcement agencies take in more equitable-sharing payments. In other words, police and prosecutors use equitable sharing as an easier and more profitable way to secure forfeiture funds.

On January 16, Attorney General Holder announced a new policy prohibiting "certain" kinds of adoptive seizures under the federal Equitable Sharing Program.[45] Contrary to some exaggerated media reports,[46] the new policy does not end civil forfeiture. Federal and state government can still take property for civil forfeiture without even charging, much less convicting owners of a crime.

The policy also does not abolish the Equitable Sharing Program. Seizures under joint task forces or coordinated federal-state investigations are still allowed, and indeed encouraged. This includes many of the drug task forces conducting "highway interdictions" exposed by the *Washington Post* in its six-part investigative series.[47] According to a 2012 GAO report, approximately 83 percent of equitable-sharing cases are from joint investigations.[48] An Institute

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[42] *Id.*

[43] *See generally* Carpenter, et al., *supra* note 6.

[44] Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 JOURNAL OF CRIMINAL JUSTICE 3, 273-285 (June 2011).

[45] U.S. Dep't of Justice, Office of the Attorney General, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies*, Order No. __, Jan. 16, 2015, *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf.

[46] *See, e.g.*, Charlotte Alter, *Feds Limit Law that Lets Cops Seize Your Stuff*, TIME (Jan. 16, 2015), http://time.com/3672140/civil-forfeiture-assets-holder/ (stating that under order "state and local officials would no longer be allowed to use federal law to seize private property such as cash or cars without evidence that a crime had occurred"); *see also* Jacob Sullum, *How the Press Exaggerated Holder's Forfeiture Reform*, REASON (Jan. 19, 2015), http://reason.com/blog/2015/01/19/how-the-press-exaggerated-holders-forfei.

[47] Michael Sallah, Robert O'Harrow Jr. & Steven Rich, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST, Sept. 6, 2014, *available at* http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/#.

[48] U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 43 (2012), *available at* http://www.gao.gov/assets/600/592349.pdf.

for Justice review of data obtained from the Justice Department reveals that from 2008 to 2013, only a quarter—25.6 percent—of properties seized under the federal Equitable Sharing Program were from adoptions. The rest were from joint investigations, exempt from the new rule. In terms of value, of the roughly $6.8 billion in cash and property seized under equitable sharing from 2008 to 2013, adoptions accounted for just 8.7 percent. (A breakdown of the impact of the Justice Department's new policy is attached as Appendix B, *By the Numbers: What Does the Department of Justice's New Forfeiture Policy Really Mean*?).

The policy also does not cover seizures if there is a federal seizure warrant. It remains to be seen whether federal authorities will simply be able to adopt the seizure or classify the seizure as a joint investigation if they secure a federal seizure warrant. Obtaining a federal seizure warrant is a relatively easy task as they are done *ex parte*—without notice or a hearing—and consist of a one-sided presentation of evidence. Supreme Court Justice Felix Frankfurter famously criticized the fairness of *ex parte* proceedings:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[49]

IJ has successfully defended four small-business owners who have had their bank accounts seized pursuant to *ex parte* federal seizure warrants for making a series of less-than-$10,000 deposits, even though there was no allegation of money laundering, or other criminal activity. Unfortunately, these clients are not alone. From 2005 to 2012, the Internal Revenue Service, in cooperation with U.S. Attorney's Offices, seized more than $242 million in more than 2,500 cases.[50] In at least one third of these cases, the seizure is based on nothing more than a series of transactions under $10,000, with no other criminal activity, such as fraud, money laundering, or smuggling, alleged by the government.[51]

Finally, even within adoptions, the policy carves out an exception for public safety.[52] The order spells out four non-exhaustive categories: firearms, ammunitions, explosives, and property related to child pornography. Seizures not falling within these four categories may still be adopted at the sole discretion of the Assistant Attorney General for the Criminal Division. Indeed, the new *Request for Adoption of State or Local Seizure* form merely asks the state or local agency to "explain the compelling circumstances and public safety concerns justifying approval of adopting these assets."[53] Precisely how this public-safety exception will be enforced remains to be seen and should be the subject of Congressional oversight.

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[49] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

[50] Dick M. Carpenter & Larry Salzman, INSTITUTE FOR JUSTICE, *Seize First, Question Later: The IRS and Civil Forfeiture* 4, *available at* http://ij.org/images/pdf_folder/private_property/seize-first-question-later.pdf.

[51] *Id.*

[52] *Supra* note 45.

[53] Dep't of Justice & Dep't of the Treasury, *Request for Adoption of State or Local Seizure*, http://www.justice.gov/criminal/afmls/forms/pdf/request-for-adoption-form.pdf.

The Justice Department itself has acknowledged the limited reach of this policy change, noting that "[o]ver the last six years, adoptions accounted for roughly three percent of the value of forfeitures in the Department of Justice Asset Forfeiture Program" which includes both criminal and civil forfeitures.[54] And according to Justice Department data reviewed by IJ, adoptions only accounted for about 10 percent of overall Justice Department seizures from 2008 to 2013.[55]

While this policy change is certainly a step in the right direction to reforming federal forfeiture laws, much more needs to be done, as explained in the following section.

IV. THE FEDERAL GOVERNMENT EARNS AN ALMOST FAILING GRADE FOR ITS CURRENT FORFEITURE LAWS.

Under the metrics used by IJ's *Policing for Profit* study, the federal government earns a grade of D- for its forfeiture laws.[56] Like the worst jurisdictions in IJ's study, the federal government incentivizes forfeiture by returning 100 percent of the proceeds to law enforcement while also failing to provide adequate procedural safeguards to protect innocent property owners.

A. Federal Forfeiture Law Perversely Incentivizes Seizing Forfeitable Property, While Circumventing Legislative Oversight and Violating the Constitution.

Perhaps the most troubling aspect of federal forfeiture law is that it gives police and prosecutors a substantial budgetary stake in forfeiture, while short-circuiting legislative oversight by directing all proceeds from forfeited property back to law-enforcement agencies that seize the property. As the author of a seminal treatise on forfeiture notes, forfeitures are a "windfall for law enforcement."[57] While all of this money may sound like a positive, law enforcement's retention of forfeiture proceeds violates two key constitutional principles: separation of powers and the impartiality requirement of due process.

First, funding agencies outside the legislative appropriations process violates the separation of powers. The Appropriations Clause of the Constitution assigns to Congress the role of final arbiter of the use of public funds.[58] In his *Commentaries on the Constitution of the United States*, Joseph Story famously explained the vital role the Appropriations Clause plays in preserving the separation of powers and our system of checks and balances:

> [T]o preserve in full vigor the constitutional barrier between each department . . . that each should possess equally . . . the means of self protection. And the [legislature] has, and must have, a controlling influence over executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable.

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[54] Press Release, Dep't of Justice, Office of Public Affairs, *Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety* (Jan. 16, 2015), http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law.

[55] *See* Appendix B.

[56] *See* Appendix A.

[57] Steven Kessler, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE, §1.1 page 1-2.

[58] U.S. Const. art. I, § 9, cl. 7.

> ***It possesses the power over the purse of the nation and the property of the people.*** It can grant or withhold supplies; it can levy or withdraw taxes; it can unnerve the power of the sword by striking down the arm that wields it.[59]

And James Madison characterized this "power over the purse" as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[60] However, current federal forfeiture law disarms the legislative branch. With forfeiture funds, police departments and prosecutors' offices—members of the executive branch—become self-financing agencies, unaccountable to members of Congress or the public at large.

Second, giving law enforcement a direct financial stake in the seizures violates the basic due-process requirement of impartiality. Impartiality in the administration of justice is a bedrock principle of the American legal system, enshrined in the Due Process Clauses of the Constitution. By allowing law enforcement to retain forfeiture proceeds, federal forfeiture law dangerously shifts law-enforcement priorities from fairly and impartially administering justice to generating revenue.

Indeed, the judiciary has sounded the alarm about the government's aggressive use of forfeiture particularly in light of its "direct pecuniary interest in the outcome of the proceeding."[61] Courts "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil-forfeiture statutes and the disregard for due process that is buried in those statutes."[62]

More broadly, the Supreme Court has closely scrutinized the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings and has repeatedly struck down regulatory schemes that create an impermissible conflict of interest. For example, in *Tumey v. Ohio*, the Supreme Court overturned a fine where the mayor also sat as a judge and personally received a share of the fines.[63] However, it is not just the prospect of personal gain that merits vigilance; institutional gain also runs afoul of due process. In *Ward v. Village of Monroeville*, the Supreme Court found a due-process violation where a substantial portion of the town's revenues came from fines imposed by the mayor sitting as a judge.[64]

Direct and substantial financial incentives for police and prosecutors are also impermissible under the Due Process Clause. For instance, in *Young v. United States ex rel. Vuitton et Fils S.A.*, a judge appointed the lawyers for the Vuitton Company as special prosecutors in a contempt action against other companies for violating a court order against trademark infringement.[65] If the companies were found guilty of contempt, the Vuitton

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[59] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 530 (Boston & Cambridge 1833) (emphasis added).

[60] THE FEDERALIST NO. 58 (James Madison).

[61] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993).

[62] *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

[63] 273 U.S. 510 (1927).

[64] 409 U.S. 57 (1972).

[65] 481 U.S. 787 (1987).

Company stood to recover liquidated damages in the underlying action. The Court held that, despite judicial supervision of the prosecution, the financial incentives for prosecution were too direct and created an improper conflict of interest.[66] And in *Marshall v. Jerrico, Inc.*, the Supreme Court cautioned about the "possibility that [the official's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."[67] In discussing due-process constraints on prosecutors, the Court noted:

> Prosecutors are also public officials; they too must serve the public interest. . . . Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.[68]

Direct profit incentives for officials charged with enforcing the law can lead to improper conflicts of interest or the appearance of improper conflicts, and are therefore unconstitutional.

In sum, incentivizing forfeiture by creating a direct financial incentive is not only bad public policy, but also unconstitutional. The weak procedural safeguards in current federal law exacerbate this problem.

B. Federal Forfeiture Laws Provide Inadequate Procedural Safeguards to Protect Innocent Property Owners.

In addition to incentivizing forfeiture, federal law makes forfeiture all too easy for law enforcement by providing few procedural safeguards. As an initial matter, most federal forfeitures are accomplished through administrative proceedings by the seizing agency itself, without any judicial involvement. Based on an IJ review of data from the Justice Department, from 2008 to 2013, 64 percent of all forfeitures were administrative, while only 22 percent were civil. But even civil-forfeiture judicial proceedings fail to provide adequate process.

Because it is a civil proceeding, civil forfeiture does not provide all the legal rights guaranteed to individuals charged with a crime, such as the right to counsel. This difference can best be seen in the different burdens of proof. The individual charged with a crime enjoys the presumption of innocence and the government must prove the crime beyond a reasonable doubt. Property owners enjoy no such procedural protections in civil-forfeiture proceedings. Under federal law, the government must prove that property is subject to forfeiture only by a preponderance of the evidence more or more likely than not.

Once the government meets this low hurdle, the burden shifts to the property owner to either rebut this showing or prove that the owner did not know of the illegal conduct. In this upside-down world of forfeiture, property is presumed "guilty" and owners must prove a

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[66] *Id.* at 805-07.
[67] 446 U.S. 238, 250 (1980).
[68] *Id.* at 249-50 (internal citations omitted).

negative—the absence of knowledge—to recover what is rightfully theirs. This turns the presumption of innocence—a hallmark of the American justice system—on its head.

Moreover, property owners who have had their money seized have no opportunity to contest the seizure until the forfeiture trial itself, which can be months or even years away. Failing to provide a prompt hearing at which property owners can contest the validity of the seizure can prevent innocent individuals from securing counsel for the forfeiture trial. It can also deprive an individual "of the very means by which to live while he waits" for the forfeiture trial.[69] Holding onto seized funds until final adjudication without a preliminary hearing can harm the ability of those of more modest means "to obtain essential food, clothing, housing, and medical care";[70] to make mortgage[71] or car payments; or pay utility[72] and other bills. Moreover, the restraint can damage a person's credit rating, reducing the ability to obtain a loan to pay for these necessities.[73] The Supreme Court has repeatedly recognized that the Due Process Clause requires a hearing before the government can deprive individuals of property needed to pay for living expenses.[74]

Even if the property owner ultimately prevails at the civil-forfeiture trial and the property is returned, the interim deprivation works an irreparable injury. The Supreme Court has repeatedly cautioned that a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented."[75] The availability of an eventual trial "is no recompense for losses caused by erroneous seizure." *Id.*

> This Court has . . . repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.[76]

Just as in these cases, retaining property without affording the owner an opportunity to be heard inflicts an irreparable injury.

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[69] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) ("[The] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . . .").

[70] *Id.*

[71] *Connecticutt v. Doehr*, 501 U.S. 1, 11 (1991) ("[A]ttachments, liens, and similar encumbrances" can "place an existing mortgage in technical default where there is an insecurity clause.")

[72] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of times may threaten health and safety.").

[73] *Doehr*, 501 U.S. at 11.

[74] *See, e.g.*, *Craft*, 436 U.S. at 22 (holding that due process requires notice of availability of procedures for disputing utility bill and administrative procedure for customer complaints prior to termination of services); *Goldberg*, 397 U.S. at 266 (holding that New York's termination of welfare benefits without prior evidentiary hearing denied due process).

[75] *James Daniel Good*, 510 U.S. at 56; *see also Doehr*, 501 U.S. at 15 ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Craft*, 436 U.S. at 20 ("Although utility services may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

[76] *Comm'r of Internal Revenue v. Shapiro*, 424 U.S. 614, 629 (1976).

In sum, both the individual's right to property and the irreparable injury caused by the length of the deprivation before trial necessitates a prompt preliminary hearing not only for some kinds of property, but all property, including cash.

CONCLUSION

It is beyond dispute that federal forfeiture laws have been abused and require reform. Two former Justice Department officials involved in the creation of the current forfeiture regime recently opined that forfeiture "has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits."[77] Even the Justice Department has conceded as much by changing its policy and commencing an "internal, top-to-bottom review of its entire asset forfeiture program."[78] And 26 editorial boards from newspapers in 15 states and Washington, D.C. have criticized civil-forfeiture. (A list of these editorials is attached as Appendix C).

Legitimate law-enforcement objectives can be satisfied through criminal forfeiture. However, short of abolishing civil forfeiture, the following measures must be part of any comprehensive effort to reform federal forfeiture:

- Eliminate the profit incentive by requiring forfeiture proceeds be deposited into the Treasury's General Fund or another neutral fund;
- Abolish the Equitable Sharing Program;
- Increase the burden of proof on the government;
- Restore the presumption of innocence by placing the burden to prove actual knowledge of the criminal activity on the government;
- Provide counsel for the indigent; and
- Provide for prompt post-seizure hearing for seizures of currency.

These commonsense reforms will go a long way toward restoring our public trust in law enforcement, and the belief—so vital to our republic—that we are a nation ruled by laws and not by men.

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[77] John Yoder and Brad Cates, *Op-Ed: Government Self-Interest Corrupted a Crime-Fighting Tool Into An Evil*, WASH. POST, Sept. 19, 2014, http://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html.

[78] Robert O'Harrow Jr., *Lawmakers Urge End to Program Sharing Forfeited Assets With State and Local Police*, WASH. POST, Jan. 9, 2015, http://www.washingtonpost.com/investigations/lawmakers-urge-end-to-program-sharing-forfeited-assets-with-state-and-local-police/2015/01/09/8843a43c-982f-11e4-8005-1924ede3e54a_story.html.

APPENDIX A

FEDERAL GOVERNMENT

D-

FORFEITURE[1] LAW GRADE

FORFEITURE LAW

As the numbers below indicate, the federal government has a very aggressive civil forfeiture program. Federal law enforcement forfeits a substantial amount of property for its own use while also teaming up with local and state governments to prosecute forfeiture actions, whereby all of the agencies share in the bounty at the end of the day.

Outrage over abuse of civil forfeiture laws led to the passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000. Under these changes, the government now must show by a preponderance of the evidence why the property should be forfeited. The Act also created an innocent owner defense that lets individuals keep their property if they can show either that they did not know that it was being used illegally or that they took reasonable steps to stop it.

But while CAFRA heightened some procedural protections, it failed to address the largest problem in the federal civil forfeiture system: the strong pecuniary interest that federal law enforcement agencies have in the outcome of the forfeiture proceeding. For the past 25 years, federal agencies have been able to keep all of the property that they seize and forfeit. And that has led to explosive growth in the amount of forfeiture activity at the federal level.

U.S. DEPARTMENT *of* JUSTICE ASSETS FORFEITURE FUND[2]

		Deposits to Fund		
	Net Assets in Fund	Cash and Cash Equivalents	Property	Total Deposits
FY 2005	$448,000,000	$514,900,000	$80,600,000	$595,500,000
FY 2006	$651,100,000	$1,009,200,000	$115,700,000	$1,124,900,000
FY 2007	$734,200,000	$1,409,000,000	$106,700,000	$1,515,700,000
FY 2008	$1,000,700,000	$1,222,600,000	$63,400,000	$1,286,000,000
FY 2009	$1,425,883,000	$1,376,423,000	$68,145,000	$1,444,568,000
FY 2010	$1,687,400,000	$1,502,466,000	$70,864,000	$1,573,330,000
FY 2011	$1,760,544,000	$1,580,584,000	$157,381,000	$1,737,965,000
FY 2012	$1,620,387,000	$1,194,465,000	$120,245,000	$1,314,710,000
FY 2013	$1,855,767,000	$1,826,480,000	$185,769,000	$2,012,249,000
Total		$14,636,118,000	$968,804,000	$15,604,922,000
Average per Year		$1,626,235,333	$107,644,889	$1,733,880,222

1. Following the academic methodology for scores from Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D., & Scott D. Bullock, Policing For Profit: The Abuse Of Civil Asset Forfeiture (Institute for Justice, 2010), *available at* http://www.ij.org/policeprofit
2. Data retrieved from Assets Forfeiture Fund Annual Financial Statements: http://www.justice.gov/jmd/afp/01programmanuals/index.html

U.S. DEPARTMENT *of* TREASURY FORFEITURE FUND[1]

		Deposits to Fund		
	Net Assets in Fund	Cash and Cash Equivalents	Property	Total Deposits
FY 2004	$194,100,000	$228,905,000	$42,660,000	$271,565,000
FY 2005	$255,300,000	$209,139,000	$49,497,000	$258,636,000
FY 2006	$236,800,000	$167,919,000	$46,732,000	$214,651,000
FY 2007	$361,400,000	$207,956,000	$52,611,000	$252,192,000
FY 2008	$426,800,000	$412,151,000	$44,236,000	$464,762,000
FY 2009	$594,513,000	$479,494,000	$37,242,000	$516,736,000
FY 2010	$986,071,000	$914,227,000	$45,540,000	$959,767,000
FY 2011	$1,452,922,000	$763,378,000	$53,776,000	$817,154,000
FY 2012	$1,555,895,000	$344,789,000	$52,213,000	$397,002,000
FY 2013	$2,486,628,000	$1,560,460,000	$51,901,000	$1,612,361,000
Total		$5,288,418,000	$476,408,000	$5,764,826,000
Average per Year		$528,841,800	$47,640,800	$576,482,600

[1] Data reviewed from Treasury Forfeiture Fund Annual Accountability Reports: http://www.treasury.gov/resource-center/terrorism-illicit-finance/Asset-Forfeiture/Pages/annual-reports.aspx

APPENDIX B

By the Numbers:
What Does the Department of Justice's New Forfeiture Policy Really Mean?

On January 16, U.S. Attorney General Eric Holder issued an order curtailing some Department of Justice forfeiture practices. The order suspended most "adoptive" forfeitures, where property seized by state and local law enforcement is turned over to ("adopted" by) the federal government for forfeiture. Under the DOJ's equitable sharing program, the state or local agencies that seized the property can receive up to 80 percent of the proceeds, even if state law bars agencies from keeping forfeiture proceeds or limits how much they may keep. But adoption is only part of the equitable sharing program. The new policy exempts equitable sharing seizures made by state and local law enforcement working with federal agents on joint task forces or as part of joint investigations. It also does not address seizures by federal agents outside the equitable sharing program.

The Institute for Justice reviewed six years of DOJ forfeiture data, from 2008 through 2013, to estimate how much forfeiture activity could be affected by the new policy.

Most Equitable Sharing Seizures Continue

Only about a quarter—25.6 percent—of properties seized under equitable sharing were adoptions. The rest resulted from joint task forces or joint investigations exempt from the new rules. In terms of value, of the roughly $6.8 billion in cash and property seized under equitable sharing from 2008 to 2013, adoptions accounted for just 8.7 percent.

$6.8 Billion Seized Under Equitable Sharing, 2008-2013

All Department of Justice Seizures, 2008-2013

Most DOJ Seizures Continue

Adoption for equitable sharing also made up a small share of overall DOJ seizures, about 10 percent. And as the DOJ acknowledged, adoptive seizures accounted for just three percent of the value of all seized properties in the DOJ system.

Forfeitures Without Convictions Continue

The new policy also does not address the lax legal standards in federal civil forfeiture law. Civil forfeiture allows law enforcement to take property without convicting or even charging the owner with a crime, and it sets a low evidentiary bar for forfeiture. Most properties in the DOJ system—78 percent—were seized for civil forfeiture. Only 22 percent were seized for criminal forfeiture, which requires a conviction. And the new policy does not change state forfeiture laws, most of which permit forfeitures without convictions or charges and allow law enforcement to keep some or all of the proceeds.

Properties Seized for Civil vs. Criminal Forfeitures, 2008-2013

Source: Institute for Justice analysis of DOJ forfeiture data obtained from a Freedom of Information Act request. Equitable sharing seizures are those where a share of a property's proceeds was requested by a state or local agency.

APPENDIX C

Since the Institute for Justice launched its "End Forfeiture" initiative in July 2014, there have been 32 editorials calling for civil forfeiture reform in 26 newspapers in 15 states and Washington, D.C.

The Washington Times

"Stopping police asset-forfeiture predators," *The Washington Times*, (July 25, 2014), http://www.washingtontimes.com/news/2014/jul/25/editorial-stopping-police-predators/ (last visited Feb. 6, 2015).

"Civil Asset Forfeiture Looks Like A Criminal Enterprise," *Investor's Business Daily*, (Aug. 13, 2014), http://news.investors.com/ibd-editorials/081314-713180-policing-for-profit-needs-to-be-ended.htm (last visited Feb. 6, 2015)

"Not-very-civil forfeiture," *Philadelphia Daily News*, (Aug. 15, 2014), http://articles.philly.com/2014-08-15/news/52850730_1_forfeiture-personal-property-personal-property (last visited Feb. 6, 2015).

The Philadelphia Inquirer

"Presumed innocent," *Philadelphia Inquirer*, (Aug. 18, 2014), http://www.philly.com/philly/opinion/inquirer/20140818_Presumed_innocent.html (last visited Feb. 6, 2015).

THE WALL STREET JOURNAL.

"What's Yours Is Theirs," *Wall Street Journal*, (Sept. 4, 2014), http://www.wsj.com/articles/whats-yours-is-theirs-1409702898 (last visited Feb. 6, 2015).

Deseret News

"A cause for concern if civil forfeiture goes unchecked," *Deseret News*, (Sept. 9, 2014), http://www.deseretnews.com/article/865610518/A-cause-for-concern-if-civil-forfeiture-goes-unchecked.html (last visited Feb. 6, 2015).

The Washington Post

Police rake in bonanzas from people who have committed no crime," *The Washington Post*, (Sept. 10, 2014), http://www.washingtonpost.com/opinions/police-rake-in-bonanzas-from-people-who-have-committed-no-crime/2014/09/10/d9d5a51a-386d-11e4-8601-97ba88884ffd_story.html (last visited Feb. 6, 2015).

StarTribune

State has a solid start on 'policing for profit' reform," *Minneapolis Star Tribune*, (Sept. 12, 2014), http://www.startribune.com/opinion/editorials/274964171.html (last visited Feb. 6, 2015).

The Des Moines Register

"Lawmakers need to fix 'forfeiture' law in 2015," *Des Moines Register*, (Oct. 19, 2014), http://www.desmoinesregister.com/story/opinion/editorials/2014/10/18/lawmakers-must-fix-forfeiture-law/17522001/ (last visited Feb. 6, 2015).

Richmond Times-Dispatch

"Thieves in Suits," *Richmond Times-Dispatch*, (Oct. 29, 2014), http://www.richmond.com/opinion/our-opinion/editorial-thieves-in-suits/article_aaac41c4-8e8c-5db5-9a8f-c1e67790b7fd.html (last visited Feb. 6, 2015).

The Des Moines Register

"Congress must end abuses of seizures by feds," *Des Moines Register*, (Nov. 8, 2014), http://www.desmoinesregister.com/story/opinion/editorials/2014/11/08/congress-must-stop-seizures/18728827/ (last visited Feb. 6, 2015).

ORANGE COUNTY REGISTER

"Time is now to fix asset forfeiture," *Orange County Register*, (Nov. 13, 2014), http://www.ocregister.com/articles/law-642041-forfeiture-asset.html (last visited Feb. 6, 2015).

LAS CRUCES SUN-NEWS

"Comments draw scrutiny to city seizure ordinance," *Las Cruces Sun-News*, (Nov. 16, 2014), http://www.lcsun-news.com/las_cruces-opinion/ci_26944825/editorial-comments-draw-scrutiny-city-seizure-ordinance (last visited Feb. 6, 2015).

The Times-Tribune

"Rein in asset forfeitures," *Scranton Times-Tribune*, (Nov. 17, 2014), http://thetimes-tribune.com/opinion/rein-in-asset-forfeitures-1.1789042 (last visited Feb. 6, 2015).

USA TODAY
A GANNETT COMPANY

"When police play bounty hunter," *USA Today*, (Nov. 20, 2014), http://www.usatoday.com/story/opinion/2014/11/19/police-civil-asset-forfeiture-profit-drug-trafficking-editorials-debates/19299879/ (last visited Feb. 6, 2015).

THE WALL STREET JOURNAL.

"Loretta Lynch's Money Pot," *Wall Street Journal*, (Nov. 21, 2014), http://www.wsj.com/articles/loretta-lynchs-money-pot-1416615114 (last visited Feb. 6, 2015).

ABQ JOURNAL

"No conviction? Give back assets seized by agencies," *Albuquerque Journal*, (Dec. 3, 2014), http://www.abqjournal.com/504543/opinion/no-conviction-give-back-assets-seized-by-agencies.html (last visited Feb. 6, 2015).

The Times

"Broad use of civil forfeiture law by N.J. law enforcement needs scrutiny," *Times of Trenton*, (Dec. 9, 2014), http://www.nj.com/opinion/index.ssf/2014/12/editorial_broad_use_of_civil_forfeiture_law_by_nj_law_enforcement_needs_scrutiny.html (last visited Feb. 6, 2015).

The Des Moines Register

"IRS to give back cash, but it's not enough," *Des Moines Register*, (Dec. 21, 2014), http://www.desmoinesregister.com/story/opinion/editorials/2014/12/21/register-editorial-irs-give-back-cash-enough/20747663/ (last visited Feb. 6, 2015).

The Dallas Morning News

"Texas' asset forfeiture laws require changes," *Dallas Morning News*, (Dec. 30, 2014), http://www.dallasnews.com/opinion/editorials/20141230-editorial-texas-asset-forfeiture-laws-require-changes.ece (last visited Feb. 6, 2015).

The Philadelphia Inquirer

"Forfeiting their rights," *Philadelphia Inquirer*, (Jan. 3, 2015), http://articles.philly.com/2015-01-03/news/57615181_1_forfeiture-property-federal-suit (last visited Feb. 6, 2015).

The Press of Atlantic City

"Asset forfeiture / Legal robbery." *Press of Atlantic City*, (Jan. 13, 2015), http://www.pressofatlanticcity.com/opinion/editorials/asset-forfeiture-legal-robbery/article_76f7c0de-bf74-5635-90da-74d670fd9a55.html (last visited Feb. 6, 2015).

THE WALL STREET JOURNAL.

"Eric Holder's Good Deed," *Wall Street Journal*, (Jan. 19, 2015), http://www.wsj.com/articles/eric-holders-good-deed-1421680450 (last visited Feb. 6, 2015).

The Gainesville Sun

"Legal stealing," *Gainesville Sun*, (Jan. 20, 2015), http://www.gainesville.com/article/20150122/OPINION01/150129966?p=2&tc=pg (last visited Feb. 6, 2015).

U-T San Diego

"First step toward reining in 'policing for profit,' *U-T San Diego*, (Jan. 21, 2015), http://www.utsandiego.com/news/2015/jan/21/first-step-toward-reining-in-policing-for-profit/ (last visited Feb. 6, 2015).

LAS VEGAS REVIEW-JOURNAL

"State's asset forfeiture law needs makeover," *Las Vegas Review-Journal*, (Jan. 23, 2015), http://www.reviewjournal.com/opinion/editorial-state-s-asset-forfeiture-law-needs-makeover (last visited Feb. 6, 2015).

The Augusta Chronicle

"Highway robbery," *Augusta Chronicle*, (Jan. 25, 2015), http://chronicle.augusta.com/opinion/editorials/2015-01-25/highway-robbery#gsc.tab=0 (last visited Feb. 6, 2015).

The Star-Ledger

"Holder taps the brakes on civil forfeiture," *Star-Ledger*, (Jan. 26, 2015), http://www.nj.com/opinion/index.ssf/2015/01/holder_puts_the_breaks_on_civil_forfeiture_editori.html (last visited Feb. 6, 2015).

The Philadelphia Inquirer

"Seize the moment," *Philadelphia Inquirer*, (Jan. 28, 2015), http://articles.philly.com/2015-01-28/news/58513069_1_forfeiture-property-williams (last visited Feb. 6, 2015).

The Detroit News

"Reform civil forfeiture laws," *Detroit News*, (Jan. 29, 2015), http://www.detroitnews.com/story/opinion/editorials/2015/01/28/edit-reform-civil-forfeiture-michigan/22487387/ (last visited Feb. 6, 2015).

THE DAYTONA BEACH NEWS-JOURNAL

"State must limit 'policing for profit,' *Daytona Beach News-Journal*, (Jan. 31, 2015), http://www.news-journalonline.com/article/20150131/OPINION/150209980/1040?p=1&tc=pg (last visited Feb. 6, 2015).

CASPER Star Tribune

"Raise threshold for confiscation of assets," *Caspar Star-Tribune*, (Feb. 5, 2015), http://trib.com/opinion/editorial/editorial-board-raise-threshold-for-confiscation-of-assets/article_59e70f95-386b-5f3f-8bbf-5df-254d66c7b.html (last visited Feb. 6, 2015).

Mr. SENSENBRENNER. Thank you very much.
Mr. Smith?

TESTIMONY OF DAVID B. SMITH, ATTORNEY, SMITH & ZIMMERMAN, PLLC

Mr. SMITH. Thank you, Mr. Chairman.

I only have 5 minutes, and I have been asked to focus my remarks on administrative forfeitures, an area that most people don't know that much about. And we have heard a little bit about it this morning, but I am hoping that the Subcommittee will focus some of the reforms on the much-neglected administrative process.

As my colleague Ms. Sheth just mentioned, the vast majority of civil forfeiture cases begin and end as administrative forfeitures. So a judge never sees those cases.

I explain in my written statement how Congress vastly expanded the scope of administrative forfeitures in two pieces of legislation way back in 1984 and 1990. Before 1984, only property valued at less than $10,000 was subject to administrative forfeiture. The two amendments in 1984 and 1990 made almost all property subject to administrative forfeiture.

The main exceptions to that are real estate and property valued at over $500,000. And incidentally, currency, which is frequently seized, there is no—there is no limit on the amount of currency that can be administratively forfeited.

So considering that I think Ms. Sheth said 67 percent of all forfeiture cases are administrative, it deserves a lot more attention than it has gotten. And it is largely an invisible process, so invisible, indeed, that neither the press nor the Justice Department has really focused on what is wrong with it because it is very hard—as some Members of this Committee have found out, it is very hard to actually find out the facts about administrative forfeiture.

Gathering, I know letters—there have been Washington Post stories about letters that Mr. Sensenbrenner has submitted to the DEA and other branches of the Government asking for some statistics, and they still haven't been answered, months later. And that gives you an idea of how difficult it is for anyone to find out what is really going on.

But I know what is going on because I deal with these cases constantly, and believe me, it is not a pretty picture. Contrary to Mr. Blanco's written statement, administrative forfeitures are not surrounded by all sorts of procedural protections designed to protect a property owner. He doesn't mention what those protections are, and I am not aware of them. And I think I would be if they were there.

He mentions the fact that there is a probable cause requirement that is a legal requirement for any forfeiture, and it is also a constitutional requirement in the Fourth Amendment. But who actually is enforcing that probable cause requirement? That is the real issue.

In an administrative forfeiture, essentially no one is enforcing it. There is no judge involved. There is no prosecutor involved. The only people who are involved are law enforcement agency employees, both on the State and local level and that is in adoptive cases, and on the Federal level, the Federal seizing agencies are involved

in they are supposed to assess whether there is probable cause for the forfeiture.

Unfortunately, I find that in case after case, they fail to do so, and it is a systematic failure. It is not just a few bad apples, which is the typical explanation you will get from the Justice Department or the law enforcement community. It is not just a few bad apples. It is a systematic failure to enforce this probable cause requirement.

I want to be discriminating. These seizing agencies are vastly different from each other. I find that the DEA and Customs and Border Patrol are probably the worst in terms of doing their job here. The FBI is one of the best. So I don't want to lump everybody in the same boat.

But you know, DEA and Custom and Border Patrol do an enormous percentage of the forfeitures in this country, the administrative forfeitures as well. And there is a culture in the general counsel's offices of those agencies, which I am familiar with, and it is a very bad culture for individual property rights.

The attorneys in these counsel's offices are underworked, overpaid, and not committed to enforcing constitutional rights. What they are committed to is doing as many administrative forfeitures as quickly as possible and thereby eliminating those cases from what goes into court.

And it is a very bad culture, and it is illustrated by all sorts of—you don't have to take my word for it. You just have to look at some of the cases that have been litigated. I see I am over my time already.

But it is all in there, and I would be happy to answer questions about this. I suggested a number of reforms, the detailed reforms of the administrative process, and I have also submitted an unrelated——

Mr. SENSENBRENNER. The gentleman's time has expired by a minute and a half.

Mr. SMITH. Thank you. I apologize.

[The prepared statement of Mr. Smith follows:]

Written Statement of

DAVID B. SMITH

Before the U.S. House of Representatives
Subcommittee on Crime, Terrorism, Homeland Security
and Investigations

Re: Civil Asset Forfeiture

February 11, 2015

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Introduction

The vast majority of civil forfeiture cases begin and end as administrative forfeitures. Only civil forfeiture cases involving real property or very high dollar amounts are required to be adjudicated by a court. The use of the administrative forfeiture procedure was greatly expanded by Congress in 1984 and 1990. Prior to 1984, only property valued at less than $10,000 was subject to administrative forfeiture under 19 U.S.C. § 1607. The purpose of administrative forfeiture is to allow the government to avoid the need of filing suit and obtaining a default judgment in uncontested cases. Because most property owners cannot afford to retain counsel, or the cost of litigation exceeds the value of the property, the vast majority of civil forfeiture cases are uncontested. The DoJ's statistics show that 80% of the cases that are initiated administratively are not contested. So these uncontested cases never go to court and are never seen by a judge.

During her recent confirmation hearing before the Senate Judiciary Committee, Senator Mike Lee (R. Utah) asked Ms. Loretta Lynch about the fairness of civil forfeiture procedure. Ms. Lynch replied that civil forfeiture is "done pursuant to supervision by a court, it is done pursuant to court order, and I believe the protections are there." This statement is woefully incorrect. As Ms. Lynch should know, the vast majority of civil forfeitures, including many of the most abusive ones, are never brought to the attention of a court. They are accomplished administratively by the seizing agency which stands to benefit from the funds obtained through that forfeiture process, thus creating a blatant conflict of interest. There is tremendous, daily abuse and unfairness in the administrative forfeiture procedure, where most property owners lack counsel. Even if they have counsel, the lawyer is generally unfamiliar with the technicalities of the process and many fatal errors are made by counsel --- such as failing to file a claim on time. There are only about ten lawyers ***in the entire United States*** who regularly defend civil forfeiture cases. They practice largely on the East and West Coasts. So even if you have the ability to retain counsel, you often can't find a qualified lawyer.

Ms. Lynch's U.S. Attorney's Office in Brooklyn and Central Islip, Long Island, has the largest staff of prosecutors who do nothing but forfeiture cases in the country. She typically has around ten such specialized forfeiture prosecutors and they are very aggressive (as in almost all U.S. Attorneys' offices). If even ***she***

does not understand the basics of the forfeiture process, how many U.S. Attorneys are there who do? How many U.S. Attorneys really care what is going on in their district with regard to forfeiture? I can tell you: very few. Their main focus in on how much property their office forfeits, since their office is graded on the basis of how much money it brings in, not on the quality of their cases. There is no grade for how many just results they achieve. The situation at Main Justice is even worse. Very few high-level Justice officials know much, if anything, about forfeiture. It has always been that way, unfortunately. So decisions get made by the attorneys in the Asset Forfeiture and Money Laundering Section of the Criminal Division. Those career attorneys resemble independent counsel who have only a single target: they become overly focused on forfeiture as a remedy. If you only have one tool, a hammer, then everything looks like a nail that needs to be hammered.

What follows are some suggestions for improving the administrative forfeiture process. I am also separately submitting a paper that will be published by The Heritage Foundation entitled "A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?"

Suggestions for Improving the Administrative Forfeiture Process

A. STOP FEDERAL SEIZING AGENCIES FROM REJECTING ADMINISTRATIVE CLAIMS BASED ON ARBITRARY INTERPRETATIONS OF THE 30 DAY "FILING" DEADLINE.

(1) STOP THE ABUSE BY THE FEDERAL SEIZING AGENCIES OF THE 30 DAY TIME LIMIT FOR RECEIPT OF ADMINISTRATIVE CLAIMS.

This type of abuse was supposed to be stopped by the CAFRA reforms. But the seizing agencies continue to play these games in order to prevent as many claimants as possible from being able to pursue their cases in court.

(2) ALLOW FOR EQUITABLE TOLLING OF THE DEADLINE FOR REASONS SUCH AS A LENGTHY DELAY IN DELIVERING THE CLAIM LETTER BY THE U.S POSTAL SERVICE.

The U.S. Postal Inspection Service is one of many federal seizing agencies authorized to administratively forfeit property. Why should a long delay of the claim letter's delivery by the U.S. Postal Service itself result in the automatic forfeiture of the owner's assets to the government? Yet, incredibly, the courts have approved such arbitrary actions by the seizing agencies. This is but one example of the games the seizing agencies lawyers play to deny the property owner a fair opportunity to contest the forfeiture. These issues are discussed in 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, 6.02[4][b], 6-30 to 6-35 (Matthew Bender, Dec. 2014 ed.).

See *Okafor v. U.S.*, 2014 U.S. Dist. LEXIS 91339, *16-19 (N.D. Cal. July 3, 2014) ("Equitable tolling of the statutory period [for filing a claim] is appropriate where the claimant (1) diligently pursues his rights, and (2) some extraordinary circumstance stood in his way and prevented timely filing." The court observes that the government made the absurd argument that "even the equivalent of a force majeure for the period from notice to the claims deadline would not excuse a late claim."); *In re Return of Seized $11,915 in U.S. Currency*, 2012 U.S. Dist. LEXIS 99154 (S.D. Cal. July 17, 2012) (same).

(3) REQUIRE THE AGENCY'S NOTICE LETTER TO INCLUDE A STREET ADDRESS FOR OVERNIGHT MAIL OR COURIER DELIVERY AND MAKE AGENCIES PROVIDE A FAX NUMBER AND ACCEPT FAXED CLAIM LETTERS. REQUIRE THE AGENCIES TO PROVIDE CLEAR NOTICE THAT THE CLAIM MUST BE ***RECEIVED*** BY THE AGENCY BY THE DUE DATE. ALSO REQUIRE NOTICE OF HOW LATE THE SEIZING AGENCY IS OPEN TO RECEIVE MAIL OR COURIER DELIVERIES. MANY CLAIMS ARE DENIED BECAUSE THE PROPERTY OWNER DOES NOT KNOW HOW DIFFICULT IT IS TO "FILE" A CLAIM CLOSE TO THE TIME DEADLINE.

B. BRING THE REMISSION AND MITIGATION PROCESS UP TO DATE.

(1) PROVIDE FOR JUDICIAL REVIEW OF THE MERITS OF REMISSION AND MITIGATION DECISIONS. JUDICIAL REVIEW IS CURRENTLY AVAILABLE ONLY WITH RESPECT TO SERIOUS PROCEDURAL ERRORS SUCH AS A FAILURE TO RULE ON A PETITION OR THE DENIAL OF A PETITION AS UNTIMELY WHEN IT IS IN FACT TIMELY.

(2) IN ORDER TO FACILIATE JUDICIAL REVIEW AND MORE JUST DECISIONS, REQUIRE AGENCIES TO PROVIDE A DETAILED EXPLANATION WHEN A PETITION IS DENIED.

Customs already requires "a written statement setting forth the decision of the matter and the findings of fact and conclusions of law upon which the decision is based" but only if the petition for relief relates to violations of certain statutes. 19 C.F.R. 171.21.

(3) PROVIDE FOR FEE AWARDS TO PERSONS WHO PREVAIL IN THE COURTS AFTER BEING DENIED REMISSION OR MITIGATION BY THE AGENCY.

(4) MAKE REMISSION DECISIONS PUBLICLY AVAILABLE TO ALLOW OVERSIGHT AND A BODY OF PRECEDENTS FOR LAWYERS TO REVIEW.

(5) EXPAND REMISSION'S CURRENT NARROW SCOPE SO ONE CAN CONTEST THE FACTUAL AND LEGAL BASIS FOR FORFEITURE, NOT JUST RAISE AN INNOCENT OWNERSHIP ISSUE. THIS CAN BE ACCOMPLISHED BY ABOLISHING THE OUTDATED, TRADITIONAL RULE THAT "REMISSION PRESUMES A VALID FORFEITURE." MOST PERSONS SEEKING REMISSION ARE NOT AWARE OF THAT RULE.

Customs has long allowed a petitioner to seek remission or mitigation on the ground that "the act or omission forming the basis of a penalty or forfeiture claim did not in fact occur." 19 C.F.R. 171.31. The other seizing agencies should be required to adopt the same rule.

(6) THE REMISSION PROCESS SHOULD PROVIDE AN INEXPENSIVE AVENUE FOR PROPERTY OWNERS TO CONTEST THE FORFEITURE. AT PRESENT IT IS LARGELY AN ILLUSORY REMEDY, AT LEAST IN CASES HANDLED BY THE DEA WHERE RELIEF IS ALMOST NEVER OBTAINED BY INDIVIDUAL PETITIONERS. **AT A MINIMUM, REQUIRE THE DEPARTMENT OF JUSTICE SEIZING AGENCIES TO ADOPT CUSTOMS' LONG ESTABLISHED PRACTICE OF ALLOWING A PROPERTY OWNER TO FILE A CLAIM (REQUIRING A JUDICIAL PROCEEDING) *AFTER* HER PETITION FOR REMISSION OR MITIGATION IS DENIED**.

(7) REQUIRE AGENCIES TO INCLUDE A DETAILED EXPLANATION OF THE ADMINISTRATIVE RELIEF PROCESS IN THE NOTICE OF SEIZURE. FEW PETITIONERS OR THEIR ATTORNEYS UNDERSTAND HOW IT WORKS.

All of these issues are discussed in Chapter 15 of my two volume forfeiture treatise, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender, Dec. 2014 ed.).

The "culture" of the forfeiture lawyers in some of the seizing agencies' counsel's offices is a significant problem. Their actions bespeak indifference to elementary fairness and justice; their only interest appears to be in declaring property administratively forfeited as quickly as possible. Without new leadership, these abuses will persist in the face of congressional reform efforts. I would also urge Congress to pay more attention to

the importance of the judicial nomination process to ensure that nominees will not be afraid to rule against the government. An independent judiciary is one thing that distinguishes our society from most other countries. Judges are our first line of defense against Executive Branch overreach, including law enforcement abuses.

A COMPARISON OF FEDERAL CIVIL AND CRIMINAL FORFEITURE PROCEDURES: WHICH PROVIDES MORE PROTECTIONS FOR PROPERTY OWNERS?

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A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?

David B. Smith

Abstract

Forfeiture reform efforts have focused on civil forfeiture, not criminal forfeiture. Most states only have civil forfeiture statutes or criminal forfeiture statutes that are seldom used. The most obviously abusive seizures typically occur at the state and local level; many of those bad seizures get "adopted" by federal law enforcement agencies, which commence civil forfeiture proceedings and return 80% of the forfeited money or other property to the state or local police department under the Department of Justice's much criticized "Equitable Sharing Program." Few of those state originated cases end up as criminal forfeitures because they are so weak that no prosecutor would bring a criminal charge. This partly explains why reform groups, the media and Congress have focused their attention on civil forfeiture reform and neglected the even more pressing need for criminal forfeiture reform. This paper will compare federal civil and criminal forfeiture procedure and evidentiary rules, showing that the current civil forfeiture procedural protections for property owners are actually much better than in criminal forfeiture cases. The biggest problem with civil forfeiture is that most people cannot afford to retain a competent attorney --- or any attorney for that matter --- to defend a federal civil forfeiture case. That, plus the bounty-hunter system, where all forfeited property is earmarked for law enforcement agencies, is why there is so much civil forfeiture abuse. However, if one can afford to pay for a competent attorney, the reformed civil forfeiture process is considerably more protective of property owners than the unreformed criminal forfeiture process. Thus, reformers should focus at least as much of their efforts on long overdue reforms of the criminal forfeiture process.

Key Points

- Groups supporting forfeiture reform, the media and Congress have focused their attention on abuses of civil forfeiture and produced proposals for its legislative reform, while ignoring the problems with, and abuses of, federal criminal forfeiture, which are at least as serious.

- Criminal forfeiture affords two very important protections that civil forfeiture does not: the requirement of a criminal conviction of the offense giving rise to the forfeiture and the right to appointed counsel for defendants facing criminal forfeiture. (However, third parties seeking to contest a criminal forfeiture of their property are not entitled to court-appointed counsel even if they are indigent.)

- In every other way, the procedural protections available to the property owner are much greater in a civil in rem forfeiture proceeding than in a criminal forfeiture proceeding under current federal law, as this paper will demonstrate.

- Prosecutors often use both civil and criminal forfeiture proceedings in the same case in a way that deprives the property owner of important procedural protections. The courts have tolerated these abuses.

- Civil forfeiture procedure was modernized and substantially reformed in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), but criminal forfeiture has steadily become less fair as a result of rules changes promulgated by a committee of very conservative judges selected by the Chief Justice of the Supreme Court and improper judicial decisions that have greatly expanded the scope of criminal forfeiture without congressional approval.

- Accordingly, reform groups, the media and Congress should focus their attention on criminal forfeiture reform at least as much as on further --- and much needed --- civil forfeiture reform. Reforming civil forfeiture alone will not end forfeiture abuse but merely shift it further into criminal forfeiture proceedings.

Introduction

Unlike civil forfeiture, our criminal forfeiture laws have never been reformed. Chairman Hyde decided to focus solely on civil forfeiture reform in order to avoid a whole new round of fights with the DoJ that would hold up enactment of his reform bill, first introduced in 1993. CAFRA actually greatly expanded the scope of criminal forfeiture as part of the compromise with the DoJ necessary to secure passage of the bill in both houses of Congress through the unanimous consent procedure. Not coincidentally, the DoJ pushed major changes in criminal forfeiture procedure (found in Rule 32.2 of the Federal Rules of Criminal Procedure) through the Advisory Committee on Criminal Rules in 2000, just as CAFRA was nearing enactment. Those rules changes consistently reduced or eliminated procedural rights and protections for defendants --- including the right to have the forfeiture issue decided by a jury --- and innocent third parties with interests in the property subject to criminal forfeiture. These rule changes tilted the criminal forfeiture "playing field" sharply in favor of the prosecution. Since then, criminal forfeiture has steadily become more oppressive thanks to other rules changes in 2009 and unwarranted judicial lawmaking sought by DoJ prosecutors. Rather than interpreting statutes, federal judges have systematically usurped legislative prerogatives by rewriting criminal forfeiture statutes to expand prosecutorial power. The Supreme Court has checked such judicial lawmaking in other spheres but not with regard to criminal forfeiture.[1] In fact, the High Court has simply declined to review most of these criminal forfeiture issues, so the erroneous lower court decisions have stood.

Despite the many problems with civil forfeiture, it is now provides considerably more due process safeguards to a property owner than criminal forfeiture. The rest of this paper explains this gap in due process safeguards point by point. The biggest problem with civil forfeiture is that most owners cannot afford --- or cannot even find --- competent counsel or any counsel to defend the

[1] *E.g., United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts…"); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985) ("It is the legislature, not the Court, which is to define a crime.").

case.[2] In criminal forfeiture cases an indigent defendant (but not an indigent third party) is entitled to appointed counsel. However, few appointed counsel are competent or have the time and resources to litigate complex criminal forfeiture issues. They are easily buffaloed by AUSAs who are forfeiture specialists into signing plea agreements that include Draconian forfeiture provisions that waive all of the defendant's rights to resist an overly broad or excessively punitive forfeiture order.

Many years ago, when criminal forfeiture procedures were much fairer than today, the Supreme Court observed that "broad [criminal] forfeiture provisions carry the potential for Government abuse and 'can be devastating when used unjustly.'" *Libretti v. U.S.*, 516 U.S. 29, 43 (1995) (quoting *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 634 (1989)).[3] Unfortunately, the government is abusing criminal forfeiture on a daily basis --- to raise money earmarked for law enforcement, to deprive defendants of the wherewithal to retain counsel and to bully defendants into harsh and unfair plea agreements --- and no one but under-resourced defense counsel is trying to stop it.

What follows is a comparison of the procedural protections and substantive rights available to property owners facing civil and criminal forfeiture proceedings. With the major exceptions of whether a conviction is required and right to appointed counsel, civil forfeiture offers superior protections for the property owner.

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[2] Few people realize that there are only about a dozen lawyers in the entire country who regularly defend civil forfeiture cases. People ask why that is so. There are probably many reasons. One is that law school professors are not familiar with forfeiture law, either criminal or civil. So this important subject is not covered in any criminal law classes. Professors would rather teach a course on the insanity defense, which is interesting but rarely encountered in the actual practice of criminal law. The author is not aware of a single law school that has a course on forfeiture law. Many law school libraries, full of obscure material no one reads, do not have a single book on the subject either.

[3] Ironically, this pious statement was made in a decision that deprived defendants of their Sixth Amendment right to a jury trial on the forfeiture issue and lowered the burden of proof from beyond a reasonable doubt --- clearly intended by Congress --- to a mere preponderance of the evidence.

Comparison

1. Procedural Rights.

(a) Time limits for the prosecution to provide notice of the seizure and to commence forfeiture proceedings.

If the property is seized pursuant to a warrant of seizure under 21 U.S.C. § 853(f), there is no time limit except the criminal statute of limitations (typically five years) for seeking criminal forfeiture. If the property is restrained under 21 U.S.C. § 853(e)(1)(B), the order is effective for not more than 90 days, unless extended by the court "for good cause shown or unless an indictment or information…has been filed."

In a "*nonjudicial* civil forfeiture proceeding"[4] under the CAFRA, by contrast, the government must comply with two separate deadlines. First, under 18 U.S.C. § 983(a)(1)(A)(i), the government must send written notice to interested parties "as soon as practicable, and in no case more than 60 days after the date of the seizure."[5] A supervisory official in the headquarters of the seizing agency may extend the 60 day period for up to 30 days and thereafter a court can grant further extensions of time under certain conditions, on an *ex parte* basis. 18 U.S.C. §§ 983(a)(1)(B)-(D). The courts have been overly liberal in granting such extensions, thereby undermining the effectiveness of the 60 day notice provision. Moreover, the government suffers no real penalty if it misses the 60 day deadline.

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[4] A "nonjudicial" proceeding is one commenced through the administrative forfeiture process, as opposed to the judicial forfeiture process. The vast majority of civil forfeiture cases are commenced nonjudicially. Because Congress, through an oversight, failed to provide specific time limits for a civil forfeiture commenced **judicially** (typically the cases with high value properties), the DoJ takes the position, so far approved by the courts, that there are no time limits other than the statute of limitations for filing the civil complaint. Thus, this important CAFRA reform has been rendered nugatory with respect to the more significant civil forfeiture cases. This is a problem Congress can readily fix. The issue is discussed in my forfeiture treatise in section 9.02[4].

[5] The "as soon as practicable" requirement has never been complied with by the federal seizing agencies but claimants' counsel have rarely raised an issue about it --- so there is little or no reported case law on the point.

If a claimant, in response to the notice of seizure, sends an administrative claim to the seizing agency, the government has 90 more days from the date when the claim is received in which to file a complaint for civil forfeiture in court **or** to obtain a criminal indictment alleging that the property is subject to criminal forfeiture. 18 U.S.C. § 983(a)(3).

(b) Right to appointed counsel.

In a criminal forfeiture case an indigent defendant has a right to appointed counsel under the Criminal Justice Act (CJA). An indigent third party who wishes to contest the forfeiture in an "ancillary proceeding" under 21 U.S.C. § 853(n) has no right to appointed counsel. If the third party claimant prevails against the government, CAFRA does not authorize a fee award for the third party.

In a civil forfeiture case an indigent property owner has no statutory right to appointed counsel except in one narrowly defined situation: where the government is seeking to forfeit the owner's "primary residence." 18 U.S.C. § 983(b)(2).[6] A court has **discretion** to appoint an attorney already representing a criminal defendant under the CJA to be counsel in a related civil forfeiture case under § 983(b)(1). This authority appears to be seldom exercised by our courts, perhaps because defense counsel commonly are unaware of the statutory provision in question and therefore fail to ask for an appointment. The court may also appoint *pro bono* counsel for an indigent claimant under 28 U.S.C. § 1915(d) but few claimants are aware of this statutory provision and courts have rarely used it in civil forfeiture cases. If the claimant prevails against the government, the CAFRA requires that the government pay the "reasonable" attorney fees of the claimant. 28 U.S.C. § 2465(b)(1). This fee-shifting provision is no substitute for appointed counsel, a critical reform provided in the House-passed CAFRA bill in 1999 that was removed from the final Senate bill in order to obtain passage by unanimous consent of both houses in 2000.

[6] There is a good argument that, at least in some situations, the interests at stake, including protection against self-incrimination, may require appointment of counsel for an indigent claimant under the Due Process Clause. 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, 11.02[1] (Matthew Bender, June 2014 ed.) (examining due process cases).

(c) Discovery and opportunity to obtain dismissal of the proceedings at an early time.

It is well known that discovery is severely and unduly limited in federal criminal cases, while some states have far more generous criminal discovery rules. So a defendant who is faced with a boilerplate, wholly opaque criminal forfeiture allegation in the indictment, cannot use criminal discovery to determine what the government's contentions really are and what evidence the government has to support them.

In civil forfeiture cases discovery proceeds under the Federal Rules of Civil Procedure, which allow a party to discover everything relevant to the case unless it is privileged. Because the government typically has much greater investigative resources than a private party, civil discovery serves to level the playing field, at least where a claimant can afford competent counsel. A claimant can require the government to state all of the evidence known to the government that supports each detailed allegation in the civil forfeiture complaint. All of the government's witnesses can be deposed prior to trial. The discovery process often produces evidence that leads to an early settlement or to a successful motion for summary judgment, thereby avoiding the expense of a trial. By contrast, it is seldom possible to obtain dismissal of criminal forfeiture charges prior to their trial. And it is practically impossible to settle a criminal forfeiture charge before trial, outside of a plea agreement.

(d) A timely and meaningful opportunity to be heard.

In a criminal forfeiture the defendant does not have a meaningful opportunity to be heard on the forfeiture aspect of the case until after he is convicted. Third parties are barred by statute from intervening in the criminal forfeiture case until after there is a preliminary order of forfeiture against the defendant and notice of that order is sent to them by the government. 21 U.S.C. § 853(k)(1).[7] They are also barred from "commencing an action at law or equity against the United States concerning the validity of [their] alleged interest in the property," § 853(k)(2). The Senate Report says that this provision "is not intended

[7] The courts have recognized that if delay in getting heard would cause irreparable harm to a third party, due process may require that he be permitted to intervene in the criminal case at an earlier time, but the courts are very reluctant to find that such an exigent situation is present.

to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however."[8]

In a civil forfeiture proceeding, all persons with an interest in the property may appear as parties and be heard in a timely fashion once the complaint for forfeiture is filed. A claimant may quickly file a motion to dismiss the complaint or a motion for summary judgment. Even before then, a person with a possessory interest in property suffering substantial hardship from the seizure may seek the release of the property pursuant to 18 U.S.C. § 983(f) --- under certain conditions. However, this provision has so many exceptions that it has not served its intended purpose.

(e) Right to trial by jury.

The criminal forfeiture statutes clearly contemplated trial by jury of the forfeiture issue and requiring the government to prove its case beyond a reasonable doubt. That is the way the statutes were interpreted and applied for many years. Under former Rule 31(e), the jury was also required to find that the defendant was the owner of the property. However, everything was changed for the worse by the very pro-law enforcement Advisory Committee on Criminal Rules in 2000, without any input from Congress. The Committee rubber stamped amendments submitted to it by "experts" at the DoJ that sharply tilted the "playing field" in favor of the government. After initially deciding to abolish jury trial altogether, the Committee reached a compromise whereby the former jury trial right embodied in Rule 31(e) was substantially cut back. These amendments were codified in the new Rule 32.2. Under Rule 32.2(b)(5)(B), the jury is restricted to determining "whether the government has established the requisite nexus between the property and the offense committed by the defendant." There is no right to a jury trial if the government seeks what is known as a "money judgment" instead of the forfeiture of specific property. And the jury no longer determines whether the defendant or someone else owns the property. That is determined by the court in the ancillary proceeding if some third party requests that the court adjudicate its rights. The government seeks a "money judgment" in the vast majority of forfeiture cases today because it affords the government many advantages over a traditional

[8] S. Rep. at 206 n. 42. However, many courts have ignored this legislative history and barred third parties from seeking relief from the burdens imposed by a restraining order affecting their property. And almost all courts have prohibited the third party from litigating the issue of who owns the property until the ancillary hearing following the preliminary order of forfeiture.

forfeiture of specific property items. Avoiding a jury trial is only one of those advantages. As explained below, there is no statutory basis for "money judgments" in criminal forfeiture cases. It is an improper piece of judicial legislation that has extended the scope and harshness of criminal forfeiture and diminished the defendant's procedural protections.

It is well established by a long line of cases that a party in a civil forfeiture case has a right to trial by jury under the Seventh Amendment to the Constitution. Indeed, the abrogation of that jury trial right in civil forfeiture cases by King George III was listed in the Declaration of Independence as one of the infringements on American liberty justifying the break with Britain.

2. Applicability of the Rules of Evidence.

As already noted, the criminal forfeiture statutes contemplate --- although they do not explicitly state --- that the forfeiture issue will be tried by a jury under the traditional "beyond a reasonable doubt" burden of proof. They likewise contemplated that the Federal Rules of Evidence would apply to the forfeiture trial. When the Advisory Committee on Criminal Rules abolished those rights, it also opened the door to otherwise inadmissible evidence. Rule 32.2(b)(1)(B) allows forfeiture to be proven by any "information" the court considers "relevant and reliable." The Rule does not say whether such "information" is also admissible *before the jury* when it is hearing evidence, but that is the way the government interprets Rule 32.2.

In a civil forfeiture case, the Federal Rules of Evidence are fully applicable.

3. Burden of Proof.

Although Congress plainly intended that the government have to prove criminal forfeiture beyond a reasonable doubt, and that burden was originally applied by the courts, the courts later decided that, because forfeiture is part of the sentence in a case, the burden of proof should logically be by a preponderance of the evidence, the normal burden on the government at sentencing. In so holding,

the courts simply ignored congressional intent --- as if it did not matter.[9] Those decisions were embodied in Rule 32.2 in 2000.

In civil forfeiture cases covered by the CAFRA reforms, the government's burden of proof is by a preponderance of the evidence as well. However, in the many Customs cases exempted from the CAFRA reforms (see 18 U.S.C. § 983(i), the "Customs carve-out" provision of the CAFRA), the pre-CAFRA and blatantly unfair burden of proof codified in 19 U.S.C. § 1615 still applies. Under that statute, which dates back to colonial times (1740), the government merely has the burden of showing probable cause for the forfeiture and may use otherwise inadmissible hearsay evidence to do so. Then the property owner has the burden of proving by a preponderance of the evidence (no hearsay allowed for the owner's case) that the property is **not** subject to forfeiture. A number of courts had concluded that this absurd allocation of the burden of proof violated due process, but the issue has not gotten the attention it deserves after the enactment of the CAFRA in 2000, despite its continuing presence in Title 19 and 26 cases "carved out" of the CAFRA reforms.

[9] This line of cases was affirmed by the Supreme Court in *Libretti v. United States*, 516 U.S. 29 (1995). The Court rejected Libretti's cogent argument that forfeiture was not simply an aspect of sentencing but rather a unique hybrid that shares elements of both a substantive charge and a punishment. The *Libretti* decision also held that a defendant has no Sixth Amendment right to jury trial with respect to the factual basis for a forfeiture. The decision has now been completed undermined by the *Apprendi-Booker* line of cases. In *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), the Court held that, where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, *Apprendi* applies in full and requires the jury to determine, beyond a reasonable doubt, any facts that set a fine's maximum amount. The Court held that there was no principled basis under *Apprendi* to treat criminal fines differently than imprisonment or a death sentence. 132 S. Ct. at 2350. At oral argument, Deputy Solicitor General Dreeben conceded that there was no basis for distinguishing criminal forfeitures from fines for *Apprendi* purposes. Tr. Of Oral Argument at 37. So it is just a matter of time until the Court gets around to explicitly overruling *Libretti*. Until that time, the lower courts will continue to apply *Libretti* because of the rule that only the Supreme Court may overrule one of its own decisions that is directly on point. *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005). Congress could in the meantime enact legislation restoring the rights that *Libretti* took away.

4. Substantive Law.

(a) Whether a conviction is required.

A criminal forfeiture requires that the defendant be convicted of the crime triggering the forfeiture. However, innocent third parties (*i.e.*, persons claiming a property interest in the assets who have not been charged with a crime) may have their property forfeited although they have done nothing wrong. Ironically, the third party has even fewer protections than the criminal defendant.

In a civil forfeiture proceeding there is no requirement that anyone be charged with a crime or convicted. This opens the door to abuse since the government is able to civilly forfeit property where it could not possibly charge someone with a crime. But complete abolition of civil forfeiture --- sought by many reformers such as the Institute for Justice --- would undoubtedly lead to an increase in otherwise unwarranted criminal prosecutions solely for the purpose of obtaining forfeitures. That is a big price to pay, particularly when criminal forfeiture procedures and substantive law remain so unfair to property owners.

(b) Availability of substitute assets.

One important difference between criminal and civil forfeiture is the prosecution's ability to criminally forfeit **untainted** (clean) "substitute assets" if, "as a result of any act or omission of the defendant" the directly forfeitable tainted property (1)"cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty." 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m).[10]

[10] The Fourth Circuit, contrary to all other circuits, has held that the forfeiture of substitute assets "relates back" to the time when the criminal offense was committed. This incorrect interpretation of the statute has had a devastating effect on defendants' ability to retain counsel and support their families during their struggle with the government. It gives the prosecution the ability to pauperize many white collar defendants at the outset of the case.

In a civil forfeiture proceeding, by contrast, there is no authority to substitute "clean" property for "dirty" property that is not available for forfeiture.[11] It is believed that the very nature of an *in rem* forfeiture proceeding, where the tainted property is the defendant, does not allow for substitute asset forfeiture.

(c) Availability of money judgments.

Despite Congress' enactment of the substitute asset provision in 1986, courts continued to allow their earlier invention of the concept of "money judgments" in lieu of the forfeiture of specific property, to be used to further expand the government's criminal forfeiture powers.[12] The concept of a personal money judgment, which looks and acts like a criminal fine, departs from the basic nature of a forfeiture, whether civil or criminal. It is deemed a "forfeiture" of sorts but no specific property is forfeited. More importantly, this judicial lawmaking violates the principle of separation of powers[13] as well as an important rule of statutory construction.[14] As discussed below, money judgments allow the government to

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[11] There is one important exception, provided by 18 U.S.C. § 984, which allows the civil forfeiture of "any identical property found in the same place or account" as the tainted property involved in the offense. This provision was designed to deal with cases in which a bank account containing forfeitable money has been "zeroed out," thereby preventing tracing of the tainted money under the "lowest intermediate balance" test adopted by the courts. The use of § 984 is circumscribed by a special one year statute of limitations found in § 984(c).

[12] The case that invented the money judgment is *U.S. v. Conner*, 752 F.2d 566, 575-77 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985). The decision predates Congress' creation of the similar, but more limited, substitute asset remedy by one year.

[13] "The authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO*, 451 U.S. 77, 95 (1981). *See also Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886, 1893 (2009) ("concerns about practical enforceability are insufficient to outweigh the clarity of the text"); *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written --- even if we think some other approach might 'accord with good policy.'").

[14] There is a long line of Supreme Court cases holding that "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional [judicially inferred] remedies." *Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO*, 451 U.S. 77, 93-94 (1981). *Accord, e.g., National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (same). At least

avoid the need to trace. They provide a way for the government to exaggerate the amount of proceeds generated by the offense of conviction through erroneous extrapolations. They allow for joint and several liability among co-defendants thorough an additional judicial invention. They produce forfeiture judgments that hang over a defendant for the rest of his life, regardless of his ability to pay --- thus interfering with his rehabilitation.

The use of a money judgment also has the advantage of precluding the need for a jury to determine the facts on which the forfeiture rests because Rule 32.2 arbitrarily denies the jury any role in determining the amount of a money judgment.

(d) Tracing requirement.

In a civil forfeiture case the government bears the sometimes heavy burden of tracing the seized property back to the crime that triggers the forfeiture. For example, if a car is used to smuggle narcotics, then sold to a bona fide purchaser, and sale proceeds are used to buy furniture and a computer, the government will only be able to forfeit the furniture and the computer --- assuming it wants those items --- and it must prove that the money from the sale of the car was used to purchase those things.

In a criminal forfeiture case, the government used to have to trace the property it wants to forfeit back to the crime, *i.e.*, show that the money used to buy the property was the proceeds of the crime. Even if the government attempts to forfeit "substitute assets" it must still prove that the directly forfeitable ("tainted") property, which is no longer available, is traceable to the crime of conviction. But through the magic of a money judgment, abracadabra, the government no longer has to trace the proceeds of the crime into any particular property. It just has to estimate the amount of proceeds that the defendants obtained from the offenses of

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two circuits initially recognized that it was impermissible to authorize "money judgments" after the 1986 enactment of the more limited, but similar substitute asset remedy, but those circuits later ignored their own decisions with no explanation as to why they had become "inoperative." *See U.S. v. Ripinsky*, 20 F.3d 359, 365 n.8 (9th Cir. 1994) (*Conner* line of cases creating money judgment remedy cannot be relied on after enactment of substitute asset provision); *U.S. v. Voigt*, 89 F.3d 1050, 1085-86 (3d Cir. 1996) (same). None of the decisions that continue to authorize money judgments makes the slightest effort to explain what authority the courts have to engage in judicial lawmaking in this criminal area, in which Congress has created a comprehensive remedial scheme.

conviction. These estimates can be wildly exaggerated by the use of faulty extrapolation techniques.[15]

(e) Joint and several liability.

The imposition of joint and several liability on co-conspirators and co-schemers is another improper judicial invention that has grown progressively more oppressive. As in the case of the money judgment, the first court to legislate this harsh additional punishment was the Eleventh Circuit, in 1986.[16] Employing the same result-oriented analysis as in *Conner*, the money judgment case, the court of appeals declared that joint and several liability was necessary --- at least in some cases --- to carry out the purpose of RICO's criminal forfeiture provision. Without delving into their authority for imposing joint and several liability absent any statutory basis to do so, other circuits have authorized this remedy in the mill-run criminal forfeiture merely by citing prior decisions that have done so. That is also the way in which money judgments have been judicially legislated. While this remedy was initially thought of as discretionary, a few of the later decisions appear to treat joint and several liability as something that a court **must** impose on all co-conspirators and co-schemers, regardless of the facts or the unfairness of doing so.[17] This is what the prosecutors tell district court judges and few of the courts or defense counsel know enough to resist the prosecutor's demand for full and automatic joint and several liability. Some courts hold that the actions of co-schemers generating the proceeds must be reasonably foreseeable to the defendant

[15] *E.g., United States v. Morrison*, 656 F. Supp.2d 338 (E.D.N.Y. 2009) (government sought $172 million money judgment from wholesale marketer of untaxed cigarettes based on erroneous extrapolation from unrepresentative same and erroneous theory that all proceeds generated by enterprise were subject to forfeiture, whether or not they were derived from racketeering activity; court awarded forfeiture of only $6,120,268, a tiny fraction of the amount sought by the government, which claimed that its estimate was "conservative.").

[16] *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986).

[17] Few defense counsel or courts realize that the restitution statute, 18 U.S.C. § 3664(h), **does** have a joint and several liability provision but it sensibly makes the remedy discretionary and allows the court to "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant."

in order to hold him jointly and severally liable for all of the proceeds obtained; other courts reject even that limitation.[18]

(f) Fee-shifting provision for prevailing owners.

The original version of the CAFRA, which was approved by the House overwhelmingly in 1999, had a very important provision requiring the appointment of counsel, under the Criminal Justice Act, for indigent claimants in every civil forfeiture case. This provision was anathema to the Department of Justice, as it would have leveled the playing field, so it was removed by the Senate in order to reach a compromise with the Department of Justice that could be adopted by unanimous consent in 2000, an election year. The Senate crafted a good fee-shifting provision as a substitute for Chairman Henry Hyde's much more effective appointment of counsel provision. The fee-shifting provision, like the CAFRA as a whole, only applies to *in rem* civil forfeiture cases. 28 U.S.C. § 2465(b). It has been held not to apply to third party claims in the ancillary hearing, which is treated as a civil proceeding. But the unsatisfactory and ineffective Equal Access to Justice Act fee-shifting provision (28 U.S.C. § 2412(d)) still applies to third party claims in criminal forfeiture cases.

(g) Damage remedy for prevailing owners.

The CAFRA also amended 28 U.S.C. § 2680(c), a provision of the Federal Tort Claims Act, to provide a damage remedy for property owners who prevail in a civil forfeiture case where the law enforcement agency has lost, destroyed or damaged the property.

There is no such remedy in criminal forfeiture cases. Even the civil forfeiture remedy has been rendered nugatory by absurd court decisions holding that the damage remedy is available only if the property was seized **solely** for the

[18] *E.g., United States v. Browne*, 505 F.3d 1229, 1277-82 (11th Cir. 2007); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (declining to impose any reasonable foreseeability limitation); *but see United States v. Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012) (actions generating the proceeds must be reasonably foreseeable to the defendant); *United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) (same).

purpose of civil forfeiture and not as possible evidence of a crime or for some other reason.[19]

Conclusion

Both civil and criminal forfeiture need many reforms. The most critical reform --- and the one that is the most difficult to get through Congress due to the vested interests of law enforcement agencies --- is the abolition of the notorious bounty-hunting system that provides an irresistible incentive for law enforcement to pursue unjust and frequently unlawful seizures of property. It would be a mistake to enact reforms of the federal civil forfeiture laws while leaving our criminal forfeiture laws untouched. That would merely shift the abuse further into the criminal forum. Although the requirement of a criminal conviction and the right to appointed counsel are very important procedural safeguards lacking in civil forfeiture, federal criminal forfeiture is otherwise less protective of property rights than civil forfeiture.

[19] *E.g., Foster v. United States,* 522 F.3d 1071, 1075 (9th Cir. 2008); *Smoke Shop, LLC v. United States,* 2014 U.S. App. LEXIS 14990 (7th Cir. Aug. 4, 2014).

Mr. SENSENBRENNER. We will now to go questions under the 5-minute rule. The Chair yields himself 5 minutes.

Mr. Henderson, in your submitted testimony, you wrote, "Law enforcement and prosecutors should avoid pursuing forfeitures actions when the primary purpose is to obtain assets rather than pursue a prosecutable case." Now there is a lot of evidence to the contrary, and let me just mention three of them.

In Volusia County, Florida, the sheriff's department set up a forfeiture trap to stop motorists traveling Interstate 95 and seized over $5,000 a day from motorists over a 3-year period, over $8 million total. In three-quarters of the seizures, no criminal charges were filed.

In Shelby County, Texas, court records from 2006 to 2008 showed nearly 200 cases in which Tenaha police seized cash and property from motorists. Again, 75 percent of the time, no charges were filed.

A local Nashville TV station found that by about a 3-to-1 ratio, the police were pulling over suspected drug couriers as they were leaving Nashville rather than when they were entering the city. This suggests that there is more interest in seizing cash than keeping drugs off the street.

Now, if the goal is to pursue prosecutable cases, why isn't criminal forfeiture sufficient? Mr. Henderson?

Mr. HENDERSON. Yes, the cases you have cited, again going back to NDAA, the policy of the national prosecutors, State and local prosecutors, as well as my home State of Indiana, there is a difference between chasing the money and chasing the criminals. But the priorities in those particular cases—and I don't want to speak specifically about the facts because I am not that familiar with them. But in those cases where the primary purpose is to chase the money, that would not be supported by prosecutors.

I think the priorities in those particular examples have been turned upside down. I think that that is why we need an open discussion on reform.

But I don't want to confuse that with, Chairman, with the idea that people who deal in illicit drugs should be allowed to profit from it as well because it is a tool that can be used to discourage those that deal drugs for profit.

And if I could finally say is that drugs would not be dealt, but for profit. That is why they are on the street from the top all the way down.

Mr. SENSENBRENNER. Okay.

Mr. HENDERSON. And that is how they end up in those hands.

Mr. SENSENBRENNER. Well, you also testified, "Local prosecutors have no choice but to access assets forfeited under Federal law" to get around what you see is an unwise State limitations on forfeiture. Now I guess there are two ways for us to go about reform, and I am not advocating either one of them at this time.

You know, one is to simply repeal the possibility of adoption as a way of getting around State law and send you back to Indianapolis to try to get the State law changed, and other prosecutors have their own State capitals. The other thing is to completely repeal civil asset forfeiture and require it to be criminal asset forfeiture, which means that you have got to indict somebody or file a charge.

Can you tell me how you would reform this so as to avoid either of those possibilities being discussed around here?

Mr. HENDERSON. I believe that there are some States that have gotten it right, and I believe there is judicial review. You know, I am always concerned when the review is only administrative. I think judicial review would go a long way toward due process.

I believe some States——

Mr. SENSENBRENNER. Would you advocate mandatory judicial review, meaning that the property is seized, and it automatically goes to court rather than any type of administrative review when somebody's property is seized and they don't know what agency seized them, and there is only 30 days for them to contest it?

Mr. HENDERSON. I would be much more comfortable with a judge making the decision under whatever law is applicable in that State or in the case of Federal law versus an administrative. However, I am certain there are logistic issues when it comes to the Federal——

Mr. SENSENBRENNER. Of course, there are. Because it is so simple do it and keep the money and let the time limit expire.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, thank you very much.

Let me as well express my appreciation to the witnesses today.

Mr. Chairman, I would like to ask unanimous consent to submit into the record a letter from the ACLU, dated February 11, 2015, regarding the endorsement of the Fifth Amendment Integrity Restoration Act.

Mr. SENSENBRENNER. Without objection.

[The information referred to follows:]

February 11, 2015

The Honorable Jim Sensenbrenner
Chairman, House Judiciary Crime Subcommittee
2138 Rayburn House Office Building
Washington, DC 20515

AMERICAN CIVIL LIBERTIES UNION

OFFICERS AND DIRECTORS

The Honorable Sheila Jackson Lee
Ranking Member, House Judiciary Crime Subcommittee
B-351 Rayburn House Office Building
Washington, DC 20515

Re: ACLU Endorsement of the Fifth Amendment Integrity Restoration (FAIR) Act

Dear Chairman Sensenbrenner and Ranking Member Jackson Lee:

The American Civil Liberties Union (ACLU) is pleased that the House Judiciary Crime Subcommittee is convening today's hearing on Federal Asset Forfeiture: Uses and Reforms. As the Subcommittee considers reforms to civil asset forfeiture, the ACLU would like to highlight its support of the Fifth Amendment Integrity Restoration (FAIR) Act offered by Representative Tim Walberg (R-MI) and Senator Rand Paul (R-KY). These bipartisan bills (H.R. 540 and S. 255) are consistent with the ACLU's nearly 100 year old mission to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. As the nation's guardian of liberty, and with more than a million members, activists, and supporters nationwide, the ACLU advances the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The current federal civil asset forfeiture program undermines civil liberties and violates due process rights. Civil asset forfeiture provides law enforcement with the power to take property from someone who has not been convicted of a crime. Innocent citizens are deprived of their property

without due process of law, often without an arrest or a hearing. Property owners bear the burden and the costs of demonstrating a property's "innocence" and are not entitled to a lawyer.

As outrageous as this sounds, civil asset forfeiture is used by federal, state, and local law enforcement throughout the country. The practice is driven by the billions of dollars it generates annually for law enforcement at all levels because law enforcement is permitted to keep the assets it seizes. Since 2008, state and local police have made more than 55,000 seizures of cash and property worth $3 billion dollars with the help of the federal government.[1]

Far greater than these billions, however, is the price that people pay when their homes, businesses, cars, cash, and other property have been seized. Civil asset forfeiture has long been used to carry out the ineffective and abusive War on Drugs. Just as the War on Drugs disproportionately impacts people and communities of color, so has civil asset forfeiture. For decades, Blacks and Latinos have had their property seized based on mere suspicion of drug activity as a consequence of racial profiling. In the 1990's, in one Florida county, 90% of the drivers from whom cash was confiscated without arrest were Black or Latino. [2]

In response to such suspicionless seizures, the ACLU supported efforts that resulted in the Civil Asset Forfeiture Reform Act of 2000. We found that in "traffic stops, airport searches, and drug arrests … minorities are hardest hit."[3] This continues to be the case more than a decade later. In 2012, the ACLU settled a lawsuit on behalf of African American and Latino drivers in two East Texas counties where police seized $3 million dollars between 2006 and 2008. None of these people were ever arrested or charged with a crime.[4] And had it not been for the ACLU's intervention, these drivers with low and modest incomes would have never seen justice. Very few people have the resources to take on the government, especially when the deck is stacked against property owners as it is in civil asset forfeiture cases.

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[1] Robert O'Harrow, Jr., Sari Horwitz, and Steven Rich, Holder limits seized-asset sharing process that splits billions with local, state police, WASH. POST (Jan. 16, 2015), http://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html.

[2] Jeff Brazil and Steve Berry, Tainted cash or easy money?, ORLANDO SENTINEL (June 14, 1992), http://articles.orlandosentinel.com/1992-06-14/news/9206131060_1_seizures-kea-drug-squad.

[3] Letter from the ACLU and NAACP to the U.S. House of Representatives on the Civil Asset Forfeiture Reform Act of 1999 (June 10, 1999), available at https://www.aclu.org/racial-justice/letter-house-civil-asset-forfeiture-act-1999.

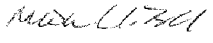
[4] Press Release, ACLU Announces Settlement in "Highway Robbery" Cases in Texas (Aug. 3, 2012), https://www.aclu.org/criminal-law-reform/aclu-announces-settlement-highway-robbery-cases-texas.

Civil asset forfeiture is also fueling police militarization, another byproduct of the War on Drugs. Police departments are able to purchase military weapons and equipment using the profits they reap from forfeitures. They can do so with little oversight or accountability. In one Georgia town, police used forfeiture funds to purchase a $230,000 armored personnel carrier. Across the country, police have spent more than $175 million on weaponry with funds acquired through federal and local partnering on civil asset forfeiture. [5]

The FAIR Act responds to community concerns by addressing three aspects of the civil asset forfeiture program. First, it eliminates the profit incentives driving civil asset forfeiture at all levels by ending federal and state/local partnerships known as "equitable sharing" that have been used to circumvent state civil forfeiture reforms. It also tackles the perverse profit incentives by sending forfeiture proceeds to the U.S. Treasury's General Fund for congressional spending on any purpose instead of to the Department of Justice (DOJ) Asset Forfeiture Fund that pads only the DOJ budget. Second, the legislation increases the burden of proof from a "preponderance of the evidence" to "clear and convincing evidence" before the government can take someone's property believed to be connected to a crime. Finally, the FAIR Act provides property owners with the right to counsel in all civil forfeiture proceedings. As a result, the FAIR Act reforms should help minimize civil asset forfeiture's disproportionate impact on people of color and low-income people.

This hearing is an important first step in addressing the problems with the current civil asset forfeiture program. We encourage Members of Congress to support the FAIR Act as part of any federal reform effort. If you have any questions or comments, please feel free to contact Kanya Bennett, Legislative Counsel, phone: (202) 715-0808 or email: kbennett@aclu.org.

Sincerely,



Michael W. Macleod-Ball
Acting Director

Kanya Bennett
Legislative Counsel

[5] Nick Sibilla, Federal forfeiture program: what's it funding?, FORBES (Oct. 22, 2014), http://www.forbes.com/sites/instituteforjustice/2014/10/22/how-civil-forfeiture-fuels-police-militarization-and-lets-cops-buy-sports-cars-and-hire-clowns/.

cc: Chairman Robert W. Goodlatte, U.S. House Judiciary Committee
Ranking Member John Conyers, Jr., U.S. House Judiciary Committee
Members of the U.S. House Judiciary Committee

Ms. JACKSON LEE. If I might, and to the witnesses, our time is short. Questions may be long. If you can be pithy in your answers, I would appreciate it.

The new policy announced by the Attorney General in January purports to end the Federal adoption of State seizures except in limited circumstances. This practice involves Federal law enforcement sharing up to 80 percent of the proceeds of these seizures for State and local law enforcement agencies, which has raised concerns that these agencies are motivated to engage in seizures for profit.

Mr. Blanco, if you will, the new policy, under this policy, adoptive seizures and equitable sharing may take place if a State or local law enforcement agent seizes assets while participating in joint operations with Federal agencies. But doesn't this exemption still allow a huge volume of adoptive seizures to continue if the Federal agents are added to task forces only to serve in minor roles to call them "joint operations."

And I am just going to give you a subset. And then under this new policy, adoptive seizures may take place if the seizures take place pursuant to warrants issued by Federal courts. Doesn't this allow States with Federal agents to subvert the new policy by simply having more seizures done through the Federal warrants?

You can just be brief in your answer.

Mr. BLANCO. Thank you, Congresswoman, for the opportunity to answer that question and to address that issue head on.

As the Congresswoman has so aptly pointed out, the new adoption policy issued by the Federal Government really takes out all of those adoptions that I think the Congresswoman had talked about. What the Congresswoman is talking about now are what was never adoptions.

When Federal agencies do joint investigations or are on task forces with State and locals, which is critical to law enforcement, those are not adoptive cases. Those are cases that are done under the supervision and under the authority of Federal Government, and our Federal policies and guidelines apply. So those are not adoptions in those instances.

And let me go further by saying that with respect to the seizure of those assets, when you talk about equitable sharing at the end of the day, two very different things. One is the forfeiture of the property, which we must go through the procedures in order to forfeit it. Once that property is forfeited, then there is a potential that that law enforcement agency may get some money back or some asset back.

There is no guarantee that they will. And in fact, many instances these task forces operate, for example, with the fraud task forces or task forces having to do with anything other than narcotics, they get no money back.

Ms. JACKSON LEE. Let me just leave on the table, if I might, the underlying point of the question was couldn't there be sidestepping of these orders? I am not going to pursue it with you. I am going to leave it on the table, if you will, sidestepping by dragging in, if you will, of Federal officers?

And so, we have a lot to consider. Let me move on to Mr. Henderson. But I thank you for hitting the question straight on.

Mr. Henderson, first of all, we count on prosecutors in local jurisdictions to be the people's lawyer. We understand the responsibilities, and as I indicated in my opening remarks, there are a number of issues that I hope the prosecutors will join us on in trying to explore.

In this instance, might I say why should we allow State and local law enforcement agencies to ignore the asset forfeiture laws of their own States, which may be more restrictive than Federal law, and pursue seizures by in essence dragging in or bringing in Federal agencies in order to receive the proceeds? Let me have a subset to that.

The Washington Post, in recent articles about adoptive forfeitures and highway interdictions by State and local police, the Post examined 400 cases in which people challenged seizures and received some money back. And the majority were Black, Hispanic, or another minority.

Of course, this raised the serious issue of racial profiling and concerns that minorities are being disproportionately targeted. Would you comment on that, those two questions, please?

Mr. HENDERSON. Yes, Congresswoman. Every State is different, and certainly in a State like Indiana, there would be very few, if any, seizures under the old law. And it is part of the Indiana constitution, and so as it stands, none of those monies would be returned into the general fund, nor would those funds be returned to law enforcement. It would go into a some sort of guaranteed fund for school——

Ms. JACKSON LEE. But if your law were more restrictive, would you want to be under that law just for the rights of the citizens involved? If—apparently, your State law is not, but if it was?

Mr. HENDERSON. Well, I believe there would be no incentive at that point to spend the resources to pursue these, especially these larger adoption cases. And if I may just give one brief example?

Ms. JACKSON LEE. And what about the racial profiling?

Mr. HENDERSON. Well, clearly, a separate issue. But there is no room for racial profiling anywhere in this country, nor should it be occurring. And that is with proper supervision and proper training.

And to the extent that that is happening, that should be dealt with at that local jurisdiction or with that particular State agency. Our laws are such in this country and in all States that that would be strictly forbidden. So, again, that would be a particular department issue.

Mr. SENSENBRENNER. The time of the gentlewoman has expired.

Ms. JACKSON LEE. I thank you.

Mr. SENSENBRENNER. The gentleman from Virginia, Chairman Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Blanco, one of the key points from the Inspector General's report on cold consent searches is that the general public doesn't know their rights when confronted in seizure situations and often turns over money because they are pressured or believe they have to do so. And they are, as I noted in my opening statement, in an uncomfortable situation.

What can the Justice Department do to fix this?

Mr. BLANCO. Thank you, Chairman, for that question.

I am not familiar with the OIG's report. I am not familiar with that instance, but I can tell you what the Federal Government can do in order to——

Mr. GOODLATTE. Let me back up. You are not familiar with the Inspector General's report on——

Mr. BLANCO. I have not read that report, no.

Mr. GOODLATTE. Well, don't you think it would have been a good idea to read that before you came here today?

Mr. BLANCO. I am happy to read it, Mr. Chairperson.

Mr. GOODLATTE. Please do.

Mr. BLANCO. But I can tell you two things. One is the Federal Government can definitely get involved by training individuals, by training officers, and by supervision. By providing in place, or putting in place, guidelines for them in how they approach individuals and how they do their job, which we do on a regular basis.

I think there is also a way to make sure that the public knows what their rights are, and I think the Federal Government can do those things in lockstep, as well as training its law enforcement officers.

Mr. GOODLATTE. What about not adopting cases in which certain Federal guidelines have not been followed?

Mr. BLANCO. Well, I think, Chairman, that at this point, if you take a look at the adoptions which has been much of the criticism that has come out, at least our first step in reviewing our process. And as you know, we are taking a very extensive top-to-bottom review of the process.

Federal adoptions of State cases have been eliminated, Chairperson. What you have right now are for specific exceptions, and those are public safety exceptions. So that is not even on the table.

Mr. GOODLATTE. Let me stop you, because I have limited time, and go to Ms. Sheth. In his written testimony, Mr. Blanco quotes Justice Kennedy and states, "No interest of any owner is forfeited if he can show he did not know of or consent to the crime." How realistic of a statement is that in practice?

Ms. SHETH. Practically speaking, that is not a realistic statement. As I explained, many forfeitures, 64 percent, are administrative. And in that circumstances, the forfeiture is presumed valid.

So property owners—maybe it is helpful to walk through how ordinary seizures work. Initially, the seizure must be based on probable cause.

Mr. GOODLATTE. Better walk fast because I only have a limited amount of time. Go ahead. [Laughter.]

Ms. SHETH. Initially, the seizure must be based on probable cause, and that is usually an on-the-ground determination by police officers. There is no check on that. The only check in administrative forfeitures is by the seizing agency itself.

To the extent it even gets to a civil forfeiture, which is only when a property owner files a claim, then they still face these burdens of needing to hire counsel because there is no guarantee to counsel. They need to affirmatively prove that they are innocent of a crime and that they did not know of the illegal activity.

Mr. GOODLATTE. Okay.

Ms. SHETH. So it is very difficult, and this process stacks the deck against innocent property owners.

Mr. GOODLATTE. Let me follow up with Mr. Smith on that. You note in your testimony that few attorneys or petitioners understand the administrative process to recover seized assets and ask that agencies include a detailed description of the process within their notice of seizure. However, you also note the technicalities of this process make it difficult for attorneys to properly file an appeal.

What changes can we make to the process for administrative forfeitures that will make it more understandable for petitioners and attorneys alike?

Mr. SMITH. Thank you for that question.

In my written materials, I have made a number of suggestions. And actually, I have even further suggestions for reforming the administrative forfeiture process that are not included here, but which the Members of the Committee are aware of.

I chose to focus here because I figured I had very little time——

Mr. GOODLATTE. You have very little time because I have got one more question to ask Mr. Henderson.

Mr. SMITH. But basically, the ones that are in my written submission here fall into two categories, Mr. Goodlatte. One is a particular——

Mr. GOODLATTE. You are going to have to submit them in writing. I am sorry.

Mr. Henderson, do you have the manpower to prosecute forfeiture cases in your county in the absence of DOJ adoption policies, and what will happen to the cases that DOJ would have taken under the previous policy?

Mr. HENDERSON. In my county, no. I do not have those resources, especially in the instances where there are criminal enterprises, if you will. In my written comments, I spoke of, you know, garages, barber shops, cash businesses that are being used as fronts. That is one of the areas that local—generally local authorities and a majority of prosecutors offices in this country are not major metropolitan areas and have a very difficult time handling those kinds of assets and in that type of procedure.

There is a provision to allow outside counsel to take contingency fees, if you will. Personally, I have never been a fan of that and have not made use of that. But I know there are some instances of that occurring.

Mr. SENSENBRENNER. The time of the gentleman has expired.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Before recognizing Mr. Conyers, let me say, Mr. Blanco, I am going to reserve the right to recall you.

Mr. BLANCO. Thank you.

Mr. SENSENBRENNER. You know, I am absolutely shocked that you have come as a Justice Department witness to this hearing without reading the Inspector General's report that is directly on point. You know, IG's reports are designed to give the department an opportunity to clean up its own act, rather than having Congress to give you a kick in the behind to do that.

Now, apparently, a kick is necessary. And you know, I will be honest to say that you came up here without being prepared with the major point that the Inspector General's report is making.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you.

Attorney Sheth, let us talk about a very unpleasant subject, racial profiling, which we got laws against it, and everybody has preached about it. But it is still happening, and I think to a greater extent than many of us are aware.

And I just want to see how you and Attorney Smith think this thing plays into more problems when we come to asset forfeiture?

Ms. SHETH. Sure. Unfortunately, there are no hard statistics on the disproportionate impact of civil forfeiture on minorities and those of lower income. But a study or examination by the Washington Post revealed that in 400 Federal court cases they examined in which people contested seizures and received their money back because there was absolutely no grounds for the seizure, the majority were Black, Hispanic, or another minority.

And even the DOJ itself has implicitly acknowledged that cold consent encounters are more often associated with racial profiling than contacts based on previously acquired information, and that is revealed in the OIG report from January 2015.

If I may just briefly address some of the points that Mr. Henderson raised? There is no better way to ensure that the primary purpose of asset forfeiture is not to benefit from those assets than simply to eliminate the ability of law enforcement to retain those assets.

Also, a point of clarification. Mr. Henderson is, unfortunately, wrong on the point about Indiana law. While the Indiana constitution does require forfeitures to go to the common school fund, Indiana statute allows for law enforcement expenses of forfeiture to be paid out of forfeiture proceeds, and indeed, the Indiana attorney general has taken the formal legal position that because these are civil and not criminal proceedings, civil forfeitures are not required to go to the common school fund.

Mr. CONYERS. Thank you.

Do you have anything to add to that, David Smith?

Mr. SMITH. Yes. Yes, Mr. Conyers. I appreciate that fact that we do have some statistics on racial disparities in this area. But you don't need a report or statistics to know that that is the case because we have seen dozens and dozens of newspaper stories for decades now, since the—since the late '80's when forfeiture abuse first came to the attention of the public through the press. And time after time, the stories have focused on that theme that minorities are targeted by the highway patrols for these outrageous stops where they are just looking for money. They are not trying to enforce the law through these stops.

You know, they talk about we are looking for terrorists on the highway. That is what they actually tell some of the—the Virginia State Police will stop a motorist and say, you know, we are out here looking for terrorists and drug dealers, and then they get around to saying, by the way, do you have any cash in your car? And that is what they are really after.

So it is really a disgraceful situation. And by the way, I want to compliment Mr. Henderson for bringing up the very distasteful subject of how many DAs in Indiana actually hire private outside counsel to do all of their civil forfeiture cases, all of them. It is like a contract.

Mr. CONYERS. Other States do that, too, do you know?

Mr. SMITH. I am not aware of it happening in any State except Indiana. And there is no statute saying that, you know, go ahead and do this. It is just a practice that has developed, and I compliment Mr. Henderson for saying he doesn't approve of it.

But apparently, it is a practice that most DAs in Indiana do follow.

Mr. CONYERS. Okay. Thank you.

Ms. SHETH. Well, to clarify, the Indiana statute specifically authorizes prosecutors to hire private attorneys. The contingency fee agreement is what it is, by practice, and it is usually up to 30 percent.

To answer your question, what can be done for the racial profiling is to require the DOJ to actually track statistics. Greater transparency in reporting about how it is affecting minorities and how many stops are minorities.

Mr. CONYERS. Thank you.

Mr. Chairman, I would like to close by asking unanimous consent to put The Washington Post series by Robert O'Harrow in the record.*

Mr. SENSENBRENNER. Without objection.

The gentleman from Colorado, Mr. Buck.

Mr. BUCK. Thank you, Mr. Chairman.

Mr. Blanco, quick questions for you. You mentioned in your opening statement that asset forfeiture is designed to break the financial backbone of organized criminal syndicates and drug cartels. Correct?

Mr. BLANCO. That is correct, sir.

Mr. BUCK. And I take it you were in the Southern District of Florida. My memory was that there were huge minimums in order to justify prosecution, especially in the cocaine area. I don't know if it was 50 kilos or 100 kilos, but it was large quantities that you folks were dealing with.

Mr. BLANCO. It varied, sir, depending on whether you were a State prosecutor or a Federal prosecutor.

Mr. BUCK. Oh, I am talking about Federal. You were in the U.S. attorney's office.

Mr. BLANCO. We had mandatory minimums, yes, on those cases.

Mr. BUCK. Okay. And they were huge?

Mr. BLANCO. Yes.

Mr. BUCK. All right. It would take a very large forfeiture to break the backbone of the drug cartels that you were dealing with in the Southern District of Florida?

Mr. BLANCO. Congressman, let me answer that question in this way——

Mr. BUCK. Well, it is kind of a yes or no question. I take it, these drug cartels deal with huge amounts of cash. You are not talking about taking $10,000 from somebody and being able to put—and this is your quote. "Break the financial backbone of a drug cartel."

Mr. BLANCO. That is right.

Mr. BUCK. It has got to be a large forfeiture to break the financial backbone.

***Note:** The submitted material, an investiative series by The Washington Post, is not reprinted in this record but is on file with the Subcommittee, and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=102930.

Mr. BLANCO. Congressman, but sophisticated drug cartels and syndicates don't keep their money in one place. They keep them in different places, and they have different people moving the money around. They do it either through smurfs, or they do it through couriers, or they do it through bank accounts and other third-party gatekeepers.

So when you find a stash, the amount that you are talking about, yes, it can happen. But what really drives them is the way that they can move their money and hide their money. And when you take that—when you take that possibility——

Mr. BUCK. So a series of small forfeitures could also break the financial backbone?

Mr. BLANCO. That is correct, Congressman.

Mr. BUCK. All right. How many backbones have these adoptive forfeitures broken?

Mr. BLANCO. Pardon me, sir?

Mr. BUCK. Name a drug cartel. Name an organization, a syndicate that adoptive forfeitures from States, name one that has been broken by those forfeitures.

Mr. BLANCO. I can tell you there have been several, particularly with the Mexican cartels, who move their money with smurfs and couriers. Every amount of money you take from them is money that they cannot reinvest in their organization.

Mr. BUCK. Can you tell me about one that has been broken with these stops——

Mr. BLANCO. Yes, I can. The Zeta Cartel is a cartel that we take money from on a regular basis. And in many instances, it is very difficult for their gatekeepers on the border to continue. They have to pay their people.

Mr. BUCK. And these are adoptive forfeitures. These are not Federal forfeitures?

Mr. BLANCO. I am talking about forfeitures in general, sir. Adoptive forfeitures, which no longer exist in the Federal Government without exceptions with public safety——

Mr. BUCK. We are going to get to the exceptions. But I am asking you, it seems to me that the adoptive forfeitures tend to be much smaller than the Federal forfeitures, and I am asking you. You are talking about forfeitures, the purpose is to break backbones. Do adoptive forfeitures break backbones, or do they just supplement funding for local law enforcement agencies?

Mr. BLANCO. I believe, Congressman, that they do break the backbone of these cartels and these organizations. For example, in my experience——

Mr. BUCK. Let me ask you this. What is the percentage of adoptive forfeitures that are over, say, $100,000?

Mr. BLANCO. Depends on where you live, Congressman. I can tell you in my district, in Miami, when I was both a State and Federal prosecutor, it wasn't that unusual to open the trunk of a car and find $50,000 to $100,000 of which no one knew who owned that money. And that would probably be an adoptive forfeiture, sir.

Mr. BUCK. And that would go through—the State would work with the Federal Government on that?

Mr. BLANCO. Depending on whether the Federal Government was involved, and it can go through two ways, Congressman. It can

go through the administrative forfeiture procedure, where it gets forfeited administratively because no one in their right mind is going to go claim $100,000——

Mr. BUCK. Especially if it has white powder on it.

Mr. BLANCO. Well, or it is in the trunk of a car, or it is stuck in a dashboard, or it is stuck in other areas of the car. Or it can go judicial, which means the U.S. attorney's office is then reviewing that matter and will file a civil forfeiture claim. Or indict the money along with an individual, or decide to give that money back.

Mr. BUCK. I understand the different types of forfeiture. Let me ask you something. What is the burden of proof in a forfeiture case? I think you mentioned preponderance of the evidence.

Mr. BLANCO. It is preponderance.

Mr. BUCK. What is the burden of proof if no one shows up, if it is uncontested?

Mr. BLANCO. If it is uncontested, there is no need to have a burden of proof because, more often than not, Congressman, in my experience, the reason that they don't show up is because they want to distance themselves from the tainted money or the tainted action.

Mr. BUCK. Your experience is different than mine. If someone can't afford a lawyer, they don't show up to court to contest, do they?

Mr. BLANCO. I think, Congressman, in some instances, that may be true.

Mr. BUCK. And that tends to be in the lower amounts. In other words, $1,000 is found, and that money is the subject of a forfeiture action. Someone doesn't show up to contest that, there is no burden of proof.

Mr. BLANCO. Congressman, I don't have that statistic in front of me. I can tell you that I think it is across the board. I am not so sure it is just the small denominations of money.

But I understand your point, and I have to tell you, I empathize with your concern. And that is one of the concerns that we are taking with us when we do our review.

I don't think that what you are saying is outrageous, Congressman. I think it is right, and I think we need to take a look at it. And I think it is important to look at it.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from California, Ms. Bass.

Ms. BASS. I want to thank the Chair and the Ranking Member for this hearing, and I am really glad that the Committee is going to look into this issue.

And I just have to tell you, years ago I remember when some of these laws were being passed around—asset forfeiture—that many folks in communities were hoping that some of the resources would actually go for drug treatment or other resources in the community. And clearly, that hasn't happened.

I did want to ask you about one particular area. I would like for you to talk about what happens to forfeitures related to the prosecution of child sex traffickers? So a recent report on the issue says that Federal prosecutors aren't aggressively pursuing restitution for victims of sex trafficking, even though it is required under TVPA.

And I am wondering if Mr. Blanco could answer that, and perhaps Mr. Smith can comment?

Mr. BLANCO. Thank you, Congresswoman.

That is something very important to me, as you might imagine, in what I supervise at the Department of Justice. I have to tell you that the Federal Government, particularly in child exploitation cases and child trafficking, is trying to do everything that we can.

If what you are saying is a concern out there, I am happy to take it back. But I got to tell you, that is an area that we must take a closer look at, and it is an area that we must begin either seizing those funds. And not only funds, but assets, in the facilities that are carrying out such a horrendous kind of crime, whether there are buses that are used, cars that are used. All the assets and the whole weight of the Federal Government should really come into that plan.

Ms. BASS. And it is my understanding that one of the reasons why there is some confusion around this is because in some jurisdictions, the girls are still charged as criminals when, in my opinion, if you are a child, you should never be charged as a prostitute if you are under the age of consent. That doesn't seem to make sense at all.

So I don't know if you have any suggestions. You know, one, if any of the panel is familiar with confusion around this, what kind of reforms you might suggest that we make because, clearly, these girls need resources. One of the reasons why they stay with pimps is because they have no place else to go, nothing else to do.

Mr. BLANCO. I agree. I can tell you, federally, I don't recall a case where we have indicted a child. That is generally done on the State side.

Ms. BASS. I didn't mean indict the child.

Mr. BLANCO. Oh, okay.

Ms. BASS. I meant that because the child was considered a criminal.

Mr. BLANCO. Oh, okay.

Ms. BASS. Not that, you know, so you are going to give money to somebody who is a criminal when that person should have never been considered a criminal.

Mr. BLANCO. I got you. I got you.

Ms. BASS. Anybody else want to comment on that?

Ms. SHETH. I will just note that I know one of the justifications asserted for civil forfeiture is to compensate the crime victims, and Mr. Blanco has said that the DOJ has returned over $4 billion to crime victims, and $1.87 billion of that was recovered through civil forfeiture. Presumably, hopefully, some of that money would help victims like of sex trafficking.

But in fact, that $4 billion represents approximately only 13 percent of seizure and forfeiture values, and that is from 2000 to August 2014. So it is a very minor portion of the revenue being generated.

Ms. BASS. Is there a way that the revenue that is seized could be used for resources for girls, victims? Could money be targeted that way? Is it ever targeted as to——

Ms. SHETH. Well, that could be, and that is exactly the role of Congress that when forfeiture proceeds come in, it shouldn't go

back to the law enforcement agencies for them to unilaterally decide how it should be spent. It should go to Congress.

Now Congress can allocate that money as it sees fit, and that is exactly where it should go and to eliminate that profit incentive and compensate crime victims and do other revenue-neutral kind of things. And to be fair, as law enforcement agencies do need the money and do need resources, they should be adequately funded to fight crime.

Ms. BASS. Sure.

Ms. SHETH. But that is the role of Congress or the legislative branch to ensure.

Mr. BLANCO. Congresswoman, we have in the past used these funds to compensate victims of sex crimes. And there also is a provision——

Ms. BASS. Child sex trafficking——

Mr. BLANCO. I can say sex crimes, I am not sure—but I can certainly look at that. There is also a provision in those agencies that are part of the equitable sharing that they can use these proceeds that they receive back for community projects and services. That may be one of them that they could use that for, and I will look into that.

Ms. BASS. And maybe, you know, to my colleagues, as we are considering reforms in this area, maybe that is something that we could consider as well.

And looks like I am out of time. Yield back my time.

Mr. SENSENBRENNER. Thank you.

The gentleman from South Carolina, Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman.

Ms. Sheth, I have been out of the courtroom for a long time, and I think the whole world has changed since I was last there. I want to give you a chance to tell me how much of it has changed. Can you still waive your right to remain silent and confess, even to the most heinous of crimes?

Ms. SHETH. I am sorry?

Mr. GOWDY. Can you still waive your Fifth Amendment right and confess?

Ms. SHETH. Yes. Yes, that is correct.

Mr. GOWDY. Can you still waive your right to a jury trial and plead guilty?

Ms. SHETH. Yes.

Mr. GOWDY. Can you still waive your right to a jury trial and have a bench trial?

Ms. SHETH. Yes.

Mr. GOWDY. Can you still waive your right to counsel and proceed pro se, no matter how stupid that may be?

Ms. SHETH. Yes.

Mr. GOWDY. Can you still waive your right to appeal for everything except ineffective assistance of counsel?

Ms. SHETH. Yes.

Mr. GOWDY. Can you still waive your right to appeal even in a capital case and expedite your own execution?

Ms. SHETH. Yes.

Mr. GOWDY. I am just wondering why you can't waive whatever property interest you may have in a piece of forfeited property. If

you can do all of that, then you ought to be able to waive your right—I will let you think about that for a second because I want to go to the two district attorneys.

Mr. District Attorney, I will bet you did not go to law school and become a district attorney because you had an interest in being a revenue producer for your county or your State?

Mr. HENDERSON. That is correct, Congressman.

Mr. GOWDY. And the same would be true for Mr. Blanco. So what strikes me as a pretty easy remedy here—well, before we get to the remedy, Mr. Blanco, are you aware of any States that don't have asset forfeiture laws?

Mr. BLANCO. I believe all States have considered and all States have passed some form of an asset forfeiture law.

Mr. GOWDY. All right. And being the good lawyer that you are, you are sitting there wondering, well, if a State already has asset forfeiture laws, why are they coming to the Feds? What is it about the Federal system that makes it more attractive than pursuing your own State remedy?

So the remedy I would propose to the two of you all is I would get the Attorney General or the new Attorney General to sit down with the district attorneys. I would take the financial incentive out of it for district attorneys and law enforcement. I don't know a single cop or prosecutor that went into the business to be a revenue producer. Let the money go to the general fund.

If that is the hang-up, if that is the issue is that cops and prosecutors are somehow going to benefit financially from this forfeiture, then just take that away and send it to the general fund because I don't know a prosecutor or a cop that majored in business or economics. They don't want to be in that business.

But I do want to ask you, Mr. District Attorney, in Indiana, who provides the funding for your office?

Mr. HENDERSON. The counties provide most of the funding for our offices in Indiana.

Mr. GOWDY. And it is the exact same way in South Carolina. Now how many of your State laws are passed in the capital of Indiana? How many are passed by the State legislature?

Mr. HENDERSON. All the States laws are passed by the State legislature.

Mr. GOWDY. All of them. Same in South Carolina. All the laws are passed in Columbia, but not all the funding comes from Columbia. So all the laws are passed at the State level in Indiana, but all your funding doesn't come from the State level.

Mr. HENDERSON. That is correct.

Mr. GOWDY. So it strikes me that if you want to take the money out of prosecution and out of law enforcement, they should fully fund your office.

Mr. HENDERSON. Certainly, Congressman, that would be the case. But let me also say that the money generally would go back to the criminal with the money. Because if you are asking the prosecutor or the police to devote resources toward forfeiting money and taking that limited resource that the county or State has given us in order to pursue civil actions, I would hazard a guess that that just wouldn't happen.

And I put in my paper, too, the practice of embedding officers with the Feds. So you have county sheriffs and chiefs of police that are paying their officers, taking them out of the community, and lending them, if you will, to the Federal authorities so that they could work together so that they can produce intelligence.

I believe and, in fact, the chiefs and sheriffs in my area made sure to tell me this before I came here today, in that they will have to pull those people back because they can't justify that to the community. And so, and if that is the outcome, that is the outcome. But I do not see any widespread forfeiture of drug funds or any other illegally obtained funds if there is not an incentive.

And if I could just quickly say finally——

Mr. GOWDY. Well, I am almost out of time. But there are two things that are going to kill us, and I am talking to you as a former DA, not as a fledgling Member of Congress.

The two things that are going to kill us is if we ever start trading prison time for asset forfeiture and if we are perceived as being more interested in the finances than the enforcement. So I would tell your State reps and my State reps fully fund your office and let you do your job and get you out of the revenue producing business.

Mr. HENDERSON. I agree.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from California, Ms. Chu.

Ms. CHU. Mr. Blanco, just yesterday there was the directive issued, and it required the Federal prosecutor to justify in writing whether there should be a joint task force. But it seemed that the new directive doesn't prescribe the importance of any particular factor.

Could you describe a situation in which a Federal prosecutor may find one, but not all of the factors to be present and still find insufficient Federal law enforcement oversight or participation? For example, could you walk us through how a prosecutor would determine whether Federal forfeiture should apply in situations where Federal authorities are not involved in the investigation leading up to the seizure but were only pulled in at the time of the actual seizure?

Mr. BLANCO. Tthank you, Congresswoman, for that question. I think it is an important issue to discuss.

Obviously, every case is very fact specific. So I can't give you a cookie-cutter of what might happen. But for instance, in what you just described, there could be a situation where there is a Federal investigation going on for which the Federal Government may not want to tip its hand that these individuals are being investigated.

For example, that there is either a confidential source or a wiretap on individuals. We know they have a car filled with cocaine or money, and it is traveling. We may contact a State and local law enforcement officer and either tip off that this car has the contraband in it or let them know that they should be on the lookout for this car, and they will then determine their own probable cause to stop that vehicle.

At that instance, that becomes a State and Federal investigation. They are assisting the Federal Government. As the Congresswoman knows, Federal agencies, as great as they are, and we are—

Federal investigative agencies are the best in the world. There is no question about it. Can't do their jobs without their State and local partners.

The element of a task force situation, which I have been involved with in many instances, is critical to law enforcement not just in this area, but law enforcement in general. So that would be an area where I would look at.

And I, as a Federal prosecutor, and what I would expect for that assistant United States attorney to do is to look at that scenario and determine is this a situation where their participation was necessary? Is this a situation in which they were asked to participate? Or is this a situation where that State and local law enforcement officer on her own decided, or his own, decided to use State laws to either stop that car or create their own investigations?

Ms. CHU. So let me ask, the new directive places a great deal of discretion on the Federal prosecutors to determine whether the seizure by State and local law enforcement should be treated as Federal forfeiture. Will there be a review process of these decisions?

Mr. BLANCO. That is a good question, Chairperson. That is something that I will take back to the department with me, and we will certainly talk about it. I won't commit to it, but it sounds very fair to me.

Ms. CHU. Thank you.

Ms. Sheth, there is this incredible incentive for State and local law enforcement to do these seizures, and it is troubling that someone with the authority to seize property should be incentivized to do so. Could you walk us through reforms that could balance the monetary needs of local and State law enforcement for these assets while reducing the negative incentives that the Equitable Sharing Program creates?

Ms. SHETH. Sure. As an initial matter, the Equitable Sharing Program should be abolished. To give you an idea of the scope of the Equitable Sharing Program, since 9/11, the amount of cash seizures have totaled $2.5 billion.

Now the ability of State and local law enforcement to generate that revenue, they should, as Representative Gowdy suggested, should be adequately funded, and that should come from the State level or through maybe other revenue-neutral Federal grants. But it should not come from civil forfeiture by seizing property owners' property without any adequate process.

One of the examples should be to abolish adoptive seizures in their entirety. The additional, it should be—there is no—I am not saying that we shouldn't have joint task forces, but that monetary incentive should be abolished. And similarly, at the Federal level, the profit incentive should be abolished.

And by increasing different procedural safeguards, like the right to counsel or like increasing the burden of proof on the Government from preponderance of the evidence to clear and convincing or restoring the presumption of innocence on property owners, to put the burden rightly on the Government to prove knowledge.

Also the ability to have a prompt opportunity to contest the seizure. Right now, under Federal law, that is only allowed for for other kinds of property, but not cash, and that should be provided for cash seizures as well.

Finally——

Mr. SENSENBRENNER. Excuse me. Go ahead.

Ms. SHETH. Oh, okay. Sorry. Finally, increased transparency and reporting would also go a long way. For example, putting the CATS database online or how property is distributed under equitable sharing requests.

Mr. Blanco had said something about whether or not State and local law enforcement actually receive any of the proceeds. I would question how many equitable sharing requests were denied.

Mr. SENSENBRENNER. The time of the gentlewoman has expired.

This concludes today's hearing, and thanks to all witnesses and Members for attending.

Without objection, all Members will have 5 legislative days within which to submit additional written questions for the witnesses or additional materials for the record.

And without objection, the hearing is adjourned.

[Whereupon, at 12:01 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

COMMITTEE ON
FINANCIAL SERVICES
SUBCOMMITTEES
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
MONETARY POLICY AND TRADE

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STEVAN PEARCE
Second District, New Mexico

February 24, 2015

The Honorable Bob Goodlatte
Chairman
House Committee on the Judiciary
2138 Rayburn HOB
Washington, DC 20515

The Honorable Jim Sensenbrenner
Chairman House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
2449 Rayburn HOB
Washington, DC 20515

Chairman Goodlatte and Chairman Sensenbrenner,

I write today concerning civil asset forfeitures and the ongoing constitutional issues related to these forfeitures.

This past month, a constituent within my district was denied the right of due process in a forfeiture proceeding, despite the efforts and assistance of the local county sheriff. I respectfully request your Committee examine the attached document, and conduct an oversight hearing with the Department of Justice over the issue.

The Constitution affords American citizens with the right of due process; I am concerned that in the case of civil asset forfeitures, this right is being significantly infringed upon. I greatly appreciate your assistance in this matter, and welcome your feedback on directions forward to assist American citizens in the same situation.

Sincerely,

Steve Pearce
Member of Congress

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A message from the Sheriff
For Immediate Release
February 19, 2015

(to find out how to contact your legislators in DC, follow the links below)
http://www.house.gov/representatives/
http://www.senate.gov/reference/reference_index_subjects/Directories_vrd.htm

(Carlsbad, NM) I'm Scott London, Sheriff of Eddy County New Mexico. In light of all that has transpired recently here in Eddy County surrounding my opposition to the IRS seizure and sale of Mr. Kent Carter's properties here in Carlsbad, I felt obligated to disclose what happened, what I learned and what ultimately lead to my decision to stand down and allow the sale to occur.

First, let me be clear of my intentions and my stance. I was never taking a stand against the original order, nor am I even opposing the legitimacy of the IRS. The US Marshals are not my enemy. I believe, at least in part, the calm demeanor of our interactions are the results of the positive working relationship the Sheriff's Office and the Marshals have had in the past.

I never intended to say whether or not Mr. Carter was right or wrong in this case. I have intentionally tried to stay ignorant of the facts of the case. It's not my place to judge the facts of the case. I am not the trier of fact. I was simply trying to protect the process. I wanted to see that Mr. Carter received his inalienable right of due process as articulated in both the constitutions of the United States and the State of New Mexico. That was my purpose... defend the Constitution.

Let me briefly explain the series of events that has brought us to this month. Last fall, Mr. Carter approached me and asked if I would protect his right of due process. He was engaged in a dispute with the IRS. The IRS had won a case in the US District Court in Las Cruses. The judge had issued an order to seize and sell three of his personal properties located here in Carlsbad. Mr. Carter had filed an appeal with the Tenth Circuit Court of Appeals in Denver. However, he feared the IRS may try to seize and sell his property before exhausting his due process. I confirmed the appeal was filed and pending and agreed to protect his rights.

In December, the US Marshals came to Eddy County with the court order to seize and secure Mr. Carter's properties. I was called to intervene in that situation. After going out and talking with all parties, Mr. Carter and his tenants on their own chose to voluntarily move out.

During that encounter it was learned that Mr. Carter had failed to file a motion for a stay. A motion for a stay is a procedural process to pause the process. This was a procedural oversight by Mr. Carter who was handling the case pro se, which means he was representing himself. He therefore filed a motion for a stay that week. That motion was denied. I'll talk more about that denial in just a moment.

Fast forward to February. After learning that the IRS intended to proceed with the sale of Mr. Carter's properties on February 19th, I confirmed that Mr. Carter's appeal was still pending. Therefore, I issued the letter to the IRS informing them that Mr. Carter's due process had been neither exhausted nor waived.

Acting Chief Grover Hartt III with the US Department of Justice Tax Division responded to my letter with a letter. In his letter, he noted the original judgment and the order to seize and sell the properties. I am not disputing those. He also mentioned Mr. Carter's appeal, noting that he also filed for a motion to stay which was denied. He then goes on to cite various "case law".

Before I continue, let me clarify something. Case law is not actually legislated law. It's case precedent. Precedent is used to clarify laws and establish procedure. It can also be used to overturn previously established case precedent or legislated law if that precedent or law is unconstitutional (basically an illegal law or precedent). My point being, precedent is not law, it's... precedent.

Back to the topic at hand. Mr. Hartt cites four different cases: US v. Rodgers (1983) which deals with innocent third parties to a suit; US v. Poteet (2011) a similar tax case which dealt with jurisdiction; Christopher LaSalle & Co. v. Heller Financial (1990) which addresses a party's right to request a stay and an appellate review in a civil suit not involving the government; and Miami Intern Realty Co. v. Paynter (1986) which deals with right to ask the courts to reduce a defendant's appeal bond in a civil suit not including the government.

I was unable to find the relevance of US v. Rodgers to this case. US v. Poteet did seem relevant to Mr. Carter's case, but was completely irrelevant to my stance of due process. Finally, let me dismiss the last two as irrelevant. We are not dealing with two non-governmental parties disputing who owes or who owns. The Fifth Amendment is there to protect the citizens from governmental overreach. I have recently paraphrased an excerpt of the Fifth many times, "Life, Liberty or Property cannot be taken without due process of law". Let me take a moment and read the entire Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

Right to a grand jury except for military during war time.

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

Double jeopardy.

nor shall be compelled in any criminal case to be a witness against himself,

Self incrimination... Miranda rights.

nor be deprived of life, liberty, or property, without due process of law;

That's what we're talking about today.

nor shall private property be taken for public use, without just compensation.

Obviously not what we're talking about today.

What we're talking about today was that second to the last phrase, "*nor be deprived of life, liberty, or property, without due process of law*". That's pretty clear. The government cannot take for itself your personal property without due process of law. The law allows for Mr. Carter to appeal the judgment and order. Therefore, they cannot sell his property until he exhausts his due process. Not to mention, if he wins his appeal and the government has sold his property, he has no recourse to regain that property, because the government has now sold it to someone else. And we're not talking about money that can be put into a banking account and they can just right him a check later if they lose. We're talking about the land that he lived on, real property.

The only thing I was trying to get the IRS to do is set aside the sale until the appeal was exhausted. Once exhausted, if they won, proceed with the sale. But if they lost, Mr. Carter would still have his property.

Now, is it possible for an individual to drag out a case for years, delaying the inevitable; tying up the courts; costing taxpayers' money; just to lose? Yes. As a government employee, and even a taxpayer, can that be frustrating? Yes. Does it seem like the deck is stacked against the government? Yes. That's because it is. The Constitution and the Bill of Rights were designed to stack the deck in the favor of We The People, not We The Government. We all know the government will work to make their jobs easier, faster, and try to stack the deck so that they can get the justice they think they should. But that's not the way it's set up. The Constitution and Bill of Rights were designed to protect We The People.

So now, let's look at the order denying the motion to stay. This is, after all, the linchpin to their whole argument that due process was afforded.

The motion for a stay was filed in the Tenth Circuit Court of Appeals and was presented before Justices Holmes and Matheson. In their order, they cited four criteria they considered before deciding on this motion: 1. likelihood of a successful appeal; 2. threat of irreparable harm if the stay is not granted; 3. absence of harm to the opposing party if the stay is granted; and 4. any risk to public interest. And of course, they referenced this criteria from court precedent established in a case titled Homans v. City of Albuquerque (2001). Based on this criteria, they denied the motion. One could certainly argue at this point, the writing is on the wall. They're saying right there in their order that he's going to lose the appeal. The problem is, he hasn't lost his appeal. It is still pending. The Fifth Amendment doesn't say you have a right to due process in only cases you're likely to win. It doesn't say you have a right to due process if it's convenient. And it doesn't say your right to due process can be waived if there is no argument for irreparable harm. It doesn't even say you're right to due process is waived if you miss a procedural step, or fail to post a bond securing your own personal property. It says, no person can be deprived of life, liberty, or property, without due process of law [period], no qualifiers or exceptions.

Therefore, it is obvious that the IRS, the US Department of Justice, and the Tenth Circuit Court of Appeals are violating Kent Carter's Fifth Amendment rights.

So, why have I backed down to allow the sale of the property. You have a right to know. I have been receiving many letters, phone calls and emails of support and encouragement. I have also been threatened with arrest, which I was prepared to peaceably surrender to. I received many offers to travel to New Mexico to stand against the Feds. Unfortunately, there were also offers prepared to do violence against the government. I recognize that most changes in government come at the hand of violence. I, however, was not prepared to lead explicitly or implicitly in a

violent revolution. Mr. Carter, a God-fearing man, also did not want blood on his hands. He said, "We decided to do what's best for safety of the crowd and all involved, because we don't want any death on our hands. We chose God's peaceful way." Therefore, we agreed to allow the oppression of his inherent right to due process for the sake of public safety. This was not an easy decision, and resulted in a very sad day.

I do not want this evil to prevail. I am seeking congressional review of the DOJ, the IRS, and the Justices that were involved in the violation of Mr. Carter's rights. "Is it a futile effort?" you may ask. If we were to rely on odds of success in all our decisions, we would not be walking on two feet today.

Article III, Section 1 of the US Constitution says, "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior". It's safe to say, violating someone's inalienable rights is not good behavior. The judges need to be held accountable for their decisions. Hiding behind unconstitutional precedents is no excuse.

So, what can you do? Don't be afraid to get involved. Contact your legislators in DC. Let them know where you stand. Call them. Email them. Send them a letter. Go see them if you can. It's easy to lose one voice in the crowd. But when the crowd speaks in one voice, it cannot be ignored.

Would you like to see a plan for a true, non-violent revolution to change our government? Here's one I recently heard. Don't ignore who you send to DC, but focus most of your efforts into your local elections first. Get involved locally. Truth be told, this is where you have the most influence. Know your mayor. Know your city council. Know your sheriff. Know your county commission. And get involved in those elections. Then get involved with your state representatives. When you can get your local elected officials and your state elected officials to collaborate and work for you, you are then, with the help of your local and state officials, ready to take on DC.

I plead with you, get involved. Get to know this republic that is supposed to represent you. Care more about your liberties than your benefits.

From Eddy County New Mexico, I'm Sheriff Scott London.

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