



## **LIMITING GOVERNMENT SEIZURE OF PRIVATE PROPERTY**

Every year, Americans lose billions of dollars in property collected by government agencies through civil asset forfeiture. Unlike criminal forfeiture that follows conviction of a crime, government authorities can seize and keep private property under civil forfeiture based on mere suspicion and facilitation of criminal activity. This has led to broad uses of civil forfeiture in law enforcement with few criminal convictions. Consequently, government agencies have an incentive to profit under expanded civil forfeiture authorities, and subvert constitutional protections provided Americans against improper search and seizure of property. Congress should eliminate any financial incentives for government agencies to seize property and constrain uses of property forfeiture powers only when there is substantial evidence of criminal activity.

### **BACKGROUND**

#### • **Civil forfeiture**

- Forfeiture law in the U.S. allows the government to seize property under both criminal and civil forfeiture authorities.
  - In criminal forfeiture, property (“proceeds” or “instrumentalities”) involved in a crime can be seized and forfeited, with forfeiture following conviction of a crime.<sup>1</sup> In uses of civil asset forfeiture authorities, however, government can take property from Americans with only the suspicion of criminal activity by law enforcement.
- The federal government has had civil forfeiture powers since its foundation in 1789 which was constrained “by a deep belief in the impropriety of taking property from those who inadvertently broke the law.”<sup>2</sup>
  - These enforcement powers were used in our nation’s early decades as a tool for border and customs enforcement and protection against maritime piracy, and later used against organized crime, most notably throughout the years of federal Prohibition between 1920 and 1930, and then in the 1970s and 1980s for enforcement against organized drug crime.<sup>3,4</sup>
  - In 2000, Congress marginally increased the standard of proof for property forfeitures under the Civil Asset Forfeiture Program Act (CAFRA) to include, among other protections, strengthened protections for compensation of damages to seized property, attorney fees, costs, and interest, as well as enhancement to seizure warrant requirements.<sup>5,6</sup> Many of these standards implemented in CAFRA were removed a year later when Congress expanded the uses of civil asset forfeiture of anyone suspected of being connected with terror activity.<sup>7</sup>
  - In 2019, President Trump signed the Taxpayer First Act (H.R. 3151) that limits federal civil forfeiture authorities against currency “structurings,” which had been used against small business owners to “evade” bank reporting requirements,<sup>8</sup> only when the funds in question stem from an illegal source or used to conceal illegal activity.<sup>9</sup> H.R. 3151 strengthened protections against the Internal Revenue Service (IRS) using civil forfeiture powers to confiscate cash seized from property owners and allow owners to challenge and initiate a prompt, post-seizure hearing.<sup>10</sup>
- Federal and state government data show that civil forfeitures predominate over criminal proceedings.
  - Between 2000 and 2019, only 16 percent of Department of Justice (DOJ) forfeitures were processed criminally, and 2 percent of forfeitures in the Treasury Department program were

criminal.<sup>11</sup>

- **Subverting constitutional protections against improper property seizure**

- The constitution protects Americans against unlawful search and seizure of the person and private property, and against the imposition of excessive fines or forfeiture with underlying crime.
  - The Fourth Amendment of the United States Constitution states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>12</sup>
  - Further, the Fifth Amendment states that “[no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation,”<sup>13</sup> while the Fourteenth Amendment provides that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law”.<sup>14</sup>
  - The Eighth Amendment includes an “Excessive Fines Clause” ensuring that fines for forfeiture are not assessed disproportionately with the underlying crime.<sup>15</sup>
- These constitutional protections have been subverted under what is referred to as the “facilitation doctrine” that governs civil forfeiture.
  - The facilitation doctrine that guides civil forfeiture proceedings, if they are brought, can be done *in rem* (i.e., brought against or affecting “a thing”) instead of *in personam* (against or affecting a specific person) and on the presumption that the property or instrumentality facilitated the crime even if the property owner insists innocence and challenges the seizure.
  - Using the facilitation doctrine and civil forfeiture law, government enforcement agencies can carry out property search and seizure, even after property owners have challenged and insist their innocence and no crime has been charged. In these instances, the facilitation doctrine is available for law enforcement to use on grounds under civil forfeiture proceedings and empowers law enforcement to seize property for acquisitive purposes instead of alleged ill-gotten gain through criminal activity—the former a violation of individual constitutional rights.<sup>16</sup>
  - Because law enforcement at the federal level and most jurisdictions across the U.S. have the facilitation doctrine available, the threshold for abuses in civil forfeitures remains low and, if they decide to do so at all, places an improper burden on many Americans when deciding to challenge the presumption of guilt and retrieve seized property.<sup>17,18,19</sup>
- In practice, civil forfeiture means that far too many innocent Americans have been subject to unconstitutional search and seizure of property with only the suspicion of criminal activity. Even when no crime has been charged, owners fight to prove their innocence by challenging the civil forfeiture in court which requires substantial time, extra legal assistance and financial costs that, in some instances, may never be fully recovered.<sup>20</sup>
  - In *U.S.A. v. \$28,180,000*, federal law enforcement seized almost \$30,000 from Mr. Kermit Warren alleging drug activity, even though there was no evidence related to drug activity.<sup>21</sup> Mr. Warren presented direct evidence of using his life savings to buy a truck for a start-up business. If the Institute for Justice had not intervened, federal law enforcement would have practically stolen \$30,000 from Mr. Warren with no evidence or charge related to criminal drug activity.<sup>22</sup>
  - In *U.S. v. 434 Main Street, Tewksbury, Mass.*, the federal government, teamed up with local law enforcement, seized hotel property because there were 15 criminal arrests over 14 years and over 200,000 rooms rented.<sup>23</sup> There was basically one criminal incident a year with no allegations of owner involvement, but the federal government sought to rob the hotel owner of the property. There was direct evidence of the hotel owner trying to prohibit criminal activity and, with the Institute for Justice intervening, the forfeiture action was dismissed.<sup>24</sup>

- **Financial incentives for government to “police for profit”**

- Government agencies have used civil asset forfeitures to generate revenue, with the majority of proceeds supplementing the budgets of agencies involved in collecting forfeited property.<sup>25</sup>
  - According to a study by the Institute for Justice, the federal government, states, and the District of Columbia combined seized an estimated \$68.8 billion between 2000 and 2019,<sup>26</sup> which is likely an undercount of the entire scope of asset seizures since not all states provide full data.<sup>27</sup>

- At the federal level and across most states, law enforcement agencies carrying out forfeitures retain anywhere between 80 to 100 percent of proceeds, revenue that these agencies can use to supplement their budgets.<sup>28</sup>
  - Government forfeiture revenue is mostly collected in seized currency (68 percent) and vehicles (16 percent).<sup>29</sup>
    - Most currency forfeitures collect less than \$2,000 with the average forfeited amount at about \$1,300 which, in both instances, is well below the estimated cost of hiring an attorney to challenge a state forfeiture case.<sup>30</sup>
  - Because the cost to challenge non-criminal forfeiture often far exceeds the value of seized property, it is unsurprising that most forfeitures are processed administratively and without contest.
    - In several states that collect and report data on claims, about 20 percent of owners file a claim for return of property—19 percent in Arizona, 18 percent in Oregon, and 22 percent in Minnesota—and only one percent do so in Colorado.<sup>31</sup>
  - Most states have established a low bar to take and keep private property under civil asset forfeiture laws.
    - According to analysis compiled by researchers at the Institute for Justice, thirty-five states fail to provide adequate protection against forfeiture, and perversely extend incentives for large financial stakes in civil forfeiture proceeds.<sup>32</sup>
    - In these states and under federal law, owners bear the burden of proving their innocence in order to “win” back property that has been seized—which violates Americans constitutional rights of the presumption of innocent until proven guilty.
- **“Equitable sharing” Treasury program circumvents state forfeiture rules**
  - The federal “equitable sharing” program was established under the Comprehensive Crime Control Act of 1984 that authorized a profit-sharing arrangement between the federal government and state and local law enforcement agencies.<sup>33</sup>
    - Under the “equitable sharing” program, the federal government shares proceeds of seized and forfeited property with state and local governments, allowing these local agencies to receive up to 80 percent of the proceeds from seized assets.
    - Each year “equitable sharing” pays out several hundred million dollars. Between 2000 and 2019, the Institute for Justice estimates that the federal government paid out over \$8.8 billion in total to state and local governments.<sup>34</sup>
  - In recent years, some states have enacted reforms that limit the financial incentives for the government to use civil forfeiture, while others have increased the financial incentive.
    - In the past decade, a few states have ended the financial incentive in civil asset forfeitures, barring law enforcement agencies from using proceeds and, in some states, directing proceeds to certain designated funds (Wisconsin and Missouri require forfeiture proceeds go to school funds).<sup>35</sup>
    - New Mexico has also eliminated civil forfeiture and, relying only on criminal forfeiture, ended the financial incentives for law enforcement by directing any proceeds to go to the state’s general fund. One study of the 2015 reform in New Mexico eliminating civil forfeiture finds that there was no increase in crime in the two years following the reform, showing neither a substantial change in both offense and arrest rates.
    - Two states in recent years have increased the financial stakes in civil forfeiture, where Colorado created the Law Enforcement Community Services Grant Program, funded by 25 percent of forfeiture proceeds, and under a 2018 statutory reform (and upheld by the Indiana Supreme Court in 2019), Indiana established that up to 93 percent of forfeiture revenue can be retained by police, prosecutors and government-contracted contingency-fee lawyers.

## POLICY SOLUTIONS

- **Restore Fifth Amendment Integrity**
  - Congress should pass reforms that restore due process protections against unlawful search and seizure of private property, while ensuring government authorities maintain adequate powers to stop crime.
    - The Fifth Amendment Integrity Restoration (FAIR) Act of 2023<sup>36</sup> would remove the financial incentive to use civil forfeiture in law enforcement by ending the federal “equitable sharing” program and making sure forfeited property proceedings go to a general fund. The Fair Act of 2023 would also restore integrity of due process protections for Americans against asset retention

without demonstrable evidence of a crime.

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- <sup>1</sup> Roger Pilon and Trevor Burrus. Civil Forfeiture Reform. Cato Institute. 2022. <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/civil-asset-forfeiture-reform>
- <sup>2</sup> Kevin Arlyck. The Founders' Forfeiture. Columbia Law Review. October 2019. <https://columbialawreview.org/content/the-founders-forfeiture/>
- <sup>3</sup> Christopher J. Coyne and Yuliya Yatsyshina. Police State, U.S.A.. The Independent Review. Fall 2021. [https://www.independent.org/pdf/tir/tir\\_26\\_2\\_03\\_coyne.pdf](https://www.independent.org/pdf/tir/tir_26_2_03_coyne.pdf)
- <sup>4</sup> Katie Spence. Civil Forfeiture: How the Government Makes Billions by Taking Americans' Private Property. The Epoch Times. August 22, 2023. <https://www.theepochtimes.com/article/civil-forfeiture-how-the-government-makes-billions-by-taking-americans-private-property-5475314>
- <sup>5</sup> Public Law 106-185 – Civil Asset Forfeiture Reform Act of 2000. <https://www.congress.gov/106/plaws/publ185/PLAW-106publ185.pdf>
- <sup>6</sup> Roger Pilon and Trevor Burrus. Chapter 12 - Civil Forfeiture Reform – In Cato Handbook for Policymakers. Cato Institute. 2017. <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/12-civil-asset-forfeiture-reform>
- <sup>7</sup> Public Law 107-56 – Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001. <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.htm>
- <sup>8</sup> See example where a small business owner in Iowa, to be sure prior to H.R. 3151, had an entire bank account seized by the federal government under a claim that the owner had been “structuring” cash bank deposits below the \$10,000 reporting requirement threshold. With the help of extra legal assistance, she was able to challenge the property seizure in court, even though she was not able to recover the full damages because the government (and the U.S. court of appeals upheld) refused to accept responsibility and deny her the opportunity to recover the attorneys' fees, costs, and interest due under CAFRA. Iowa Forfeiture. Institute for Justice. <https://ij.org/case/iowa-forfeiture/>
- <sup>9</sup> H.R. 3151 – Taxpayer First Act. 116<sup>th</sup> Congress. <https://www.congress.gov/bill/116th-congress/house-bill/3151/text>
- <sup>10</sup> J. Justin Wison. Trump Signs Bill to Protect Small-Business Owners from IRS Seizures. Institute for Justice. July 2, 2019. <https://ij.org/press-release/trump-signs-bill-to-protect-small-business-owners-from-irs-seizures/>
- <sup>11</sup> DOJ criminal forfeitures, while a small share of overall forfeitures, have increased since 2006, with an increasing number of firearm and white-collar forfeitures. The former increasing substantially around 2010 with the Obama administration's focus on firearms.
- <sup>12</sup> Constitution of the United States. <https://constitution.congress.gov/constitution/amendment-4/>
- <sup>13</sup> <https://constitution.congress.gov/constitution/amendment-5/>
- <sup>14</sup> <https://constitution.congress.gov/browse/amendment-14/>
- <sup>15</sup> <https://ij.org/report/policing-for-profit-3/>
- <sup>16</sup> <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/12-civil-asset-forfeiture-reform>
- <sup>17</sup> Civil asset forfeiture: seven horror stories. Americans for Prosperity. August 30, 2021. <https://americansforprosperity.org/civil-asset-forfeiture-horror-stories/>
- <sup>18</sup> <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf>
- <sup>19</sup> <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/civil-asset-forfeiture-reform>
- <sup>20</sup> The Institute for Justice is one organization that has brought extra legal assistance in certain civil forfeiture cases and they highlight some of these cases at their website. <https://ij.org/case/?pillar=civil-forfeiture>
- <sup>21</sup> Kermit Warren Forfeiture. Institute for Justice. <https://ij.org/case/kermit-warren-forfeiture/>
- <sup>22</sup> *Id.*
- <sup>23</sup> Massachusetts Forfeiture. Institute for Justice. <https://ij.org/case/massachusetts-civil-forfeiture/>
- <sup>24</sup> <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf>
- <sup>25</sup> *Id.*
- <sup>26</sup> This figure accounts for about “23 billion [forfeited] under state law and \$46 billion under federal.” *Id.*
- <sup>27</sup> Lisa Knepper, Jennifer McDonald, Kathy Sanchez, and Elyse Smith Pohl. Policing for Profit. Institute for Justice. December 14, 2020. *Id.*
- <sup>28</sup> *Id.*
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.*
- <sup>31</sup> *Id.*
- <sup>32</sup> The Institute for Justice given 35 states a D+ rating or lower for giving law enforcement large financial stakes in forfeiture proceeds and failing to extend adequate protections to property owners against improper search and seizure. *Id.*
- <sup>33</sup> H.R. 5963 – Comprehensive Crime Control Act of 1984. 98<sup>th</sup> Congress. <https://www.congress.gov/bill/98th-congress/house-bill/5963/titles>
- <sup>34</sup> <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf>
- <sup>35</sup> P. 34-35, <https://ij.org/report/policing-for-profit-3/>
- <sup>36</sup> H.R. 1525 – FAIR Act of 2023. 118<sup>th</sup> House of Representatives. <https://www.congress.gov/bill/118th-congress/house-bill/1525/text?s=1&r=2>