

CHAPTER 2

ASSET FORFEITURE

THE ISSUE

Asset forfeiture has become an important part of our legal framework and it can be a powerful crime control weapon. But due to the steady erosion of procedural protections, forfeiture powers often skew law enforcement priorities in ways that threaten individual rights.

In particular, statutes that give law enforcement agencies a direct financial stake in forfeiture proceeds invite abuse. For law-abiding citizens, the consequences are severe: innocent property owners are harassed and deprived of their property without due process; law enforcement policies that explicitly or implicitly encourage racial profiling take root; and public confidence in law enforcement deteriorates. In the area of civil asset forfeiture, the most important reform to address the abuse of civil asset forfeiture is relatively simple: Congress should amend the federal equitable sharing laws¹ under which state police circumvent state forfeiture laws by turning over the forfeiture to federal law enforcement authorities in exchange for a percentage of the proceeds.

By contrast, the scope of *criminal* asset forfeiture laws has expanded in recent years, while procedural protections have eroded. Comprehensive reform of criminal asset forfeiture laws, which can impair the accused's ability to retain counsel as well as the rights of third parties, is long overdue. Paramount among the needed reforms are changes to the Federal Rules of Criminal Procedure that would safeguard the accused's right to a fair procedure for determining the amount of any criminal forfeiture and, in particular, provide a right to challenge *ex parte* restraining orders that are permitted under federal law.²

HISTORY OF THE PROBLEM

1. Civil Asset Forfeiture

In 2000, Congress unanimously enacted the Civil Asset Forfeiture Reform Act (CAFRA),³ the only major reform of our nation's forfeiture laws in over 200 years. CAFRA had strong bipartisan support, reflecting the public's concern that individual property rights were in danger from overzealous enforcement of forfeiture laws.⁴ The Act delivered several meaningful and overdue reforms. For example, it placed the burden of proof on the government by using a "preponderance of the evidence" standard in all civil forfeiture cases covered by the Act. It also abolished the cost bond, the fee that claimants were required to pay before they could proceed legally for return of their own property. Unfortunately, many

¹ See 21 U.S.C. § 881(e) (2006), 18 U.S.C. § 981(e)(2) (2006), and 19 U.S.C. § 1616a (2006).

² See 21 U.S.C. § 853(e) (2006).

³ Pub. L. No. 106-185, 114 Stat. 202-225 (2000).

⁴ See *U.S. v. James Good Real Property*, 510 U.S. 43 (1993) ("Individual freedom finds tangible expression in property rights").

of the law's important reforms have been undermined by statutory loopholes or judicial decisions.

Several states enacted similar reforms to address concerns regarding civil asset forfeiture laws.⁵ Indeed, some states enacted even broader reforms, in some cases requiring criminal conviction prior to any asset forfeiture. However, federal law has frustrated some of these reforms. For instance, under the federal equitable sharing law, if state police want to circumvent state forfeiture laws — for example, because the state law allocates forfeited assets to the state's education fund rather than the state police — they simply turn the forfeiture proceeding over to federal law enforcement authorities. Federal authorities keep 20% of the proceeds of the forfeiture and return roughly 80% to the state police. Federal legislation or regulation to halt this circumvention of state law and fiscal policy should garner strong bipartisan support, as it would serve to protect "states' rights," allowing states to enact their own reforms without federal interference.⁶

In addition to the issues described above, judicial opinions have thwarted efforts of those who would seek full relief from the wrongful seizure of assets. Specifically, remedies available to those persons whose assets were wrongly seized by asset forfeiture have been limited by judicial decisions, which have undermined the rights of prevailing parties to obtain attorney fees and damages from the government.⁷ Legislation addressing this issue could provide a useful tool to protect an individual's property rights.

2. Criminal Asset Forfeiture

CAFRA did not contain any reforms of the criminal forfeiture laws, due in part to the need to streamline the already complex negotiation process over civil forfeiture reforms. As a result, changes to the Federal Rules of Criminal Procedure and judicial decisions have greatly expanded the government's power to obtain criminal forfeitures. Many of these changes are at odds with the language and intent of the criminal forfeiture statutes enacted by Congress. In short, criminal forfeiture procedure has become less fair to defendants and third parties,

⁵ See *e.g.*, OR. CONST. ART. XV, § 10 (Oregon Property Protection Act of 2000); 2001 Mo. SB 5 (codified in MO. REV. STAT. §§ 513.605, 513.607, 513.647 and 513.653 (2010)); 2010 MINN. LAWS 391 (codified in scattered sections of MINN. STAT.).

⁶ See MARIAN R. WILLIAMS, ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, INST. FOR JUSTICE (2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

⁷ See, *e.g.*, *United States v. Khan*, 497 F.3d 204 (2d Cir. 2007) (denying attorneys fees under CAFRA for representation of individuals whose property was not properly subject to forfeiture under federal law); *Foster v. United States*, 522 F.3d 1071 (9th Cir. 2008) (holding that CAFRA re-waiver of sovereign immunity for damage to goods detained by the government applies only to property seized solely for the purpose of forfeiture); *Adeleke v. United States*, 355 F.3d 144, 154 (2d Cir. 2004) (holding that sovereign immunity bars monetary rewards for property lost or destroyed by the government being held in anticipation of forfeiture); *Diaz v. United States*, 517 F.3d 608 (2d Cir. 2008) (claims for seized currency are similarly jurisdictionally barred by the principle of sovereign immunity).

while civil forfeiture has become fairer as a result of CAFRA. Not surprisingly, the government has decided to use criminal forfeiture instead of civil forfeiture whenever it is able to do so.

While Congress was drafting the civil forfeiture reform legislation, the Advisory Committee on Criminal Rules, promulgated Federal Rule of Criminal Procedure 32.2 on December 1, 2000.⁸ Rule 32.2 substantially curtailed the statutory right of a defendant to have the forfeiture issue decided by a jury, abolished the prior rule that the Federal Rules of Evidence apply at a forfeiture hearing, and abrogated the prior rule that the government must specifically allege what it seeks to forfeit in the indictment. It also fails to address an individual's right to challenge protective orders sought by the government in *ex parte* proceedings and substantially restricts the rights of third parties, often innocent of any crime, in criminal forfeiture proceedings.

In addition, the increased use of so-called personal "money judgments" in lieu of orders forfeiting specific property has created a completely separate, judicially-created schema apart from the policies that Congress has sought to implement.⁹ These money judgments allow the government to seek money beyond those assets that would otherwise be subject to forfeiture, increasing the threat that an individual could be unfairly deprived of property.

RECOMMENDATIONS

1. Civil Asset Forfeiture Reform

A. *Continued Abuse of Civil Asset Forfeiture*

Many of the Civil Asset Forfeiture Reform Act's important reforms have been undermined by statutory loopholes or judicial decisions.

⁸ FED. R. CRIM. P. 32.2.

⁹ See, e.g., Ginsburg at 801-802 (money judgment requires the defendant to pay the total amount derived from the criminal activity, "regardless of whether the specific dollars received from that activity are still in his possession"); *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (forfeiture order may include a money judgment for the amount of money involved in the money laundering offense, which acts as a lien against the defendant personally); *United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985) (because criminal forfeiture is in personam, it follows defendant; the money judgment is in the amount that came into his hands illegally; government not required to trace the money to any specific asset); *United States v. Amend*, 791 F.2d 1120, 1127 (4th Cir. 1986) (same); *United States v. Robilotto*, 828 F.2d 940, 949 (2d Cir. 1987) (following Conner and Ginsburg, court may enter money judgment for the amount of the illegal proceeds regardless of whether defendant retained the proceeds); *United States v. Voigt*, 89 F.3d 1050, 1084, 1088 (3d Cir. 1996) (government entitled to personal money judgment equal to the amount of money involved in the underlying offense); and *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (ordering entry of money judgment for the amount derived from a RICO offense).

B. *Curb the Abuses of Federal and State Forfeiture Powers and Fulfill the Original Intent of the Bipartisan Civil Asset Forfeiture Reform Act and Related State Reforms.*

Legislative

Congress should pass comprehensive legislation to curb abuses of federal and state forfeiture powers and fulfill the original intent of the bipartisan Civil Asset Forfeiture Reform Act and related state reforms. Amending the United States Code and Federal Rules of Civil Procedure as outlined below could provide meaningful solutions to curb abuse of civil asset forfeiture laws.

- Amend the federal equitable sharing law, 21 U.S.C. § 881(e), under which state police circumvent state forfeiture laws by turning over the forfeiture to federal law enforcement authorities in exchange for a percentage of the proceeds. Any amendment should restrict the Attorney General’s authority to transfer forfeited property in such a manner, particularly in cases in which the property was originally seized by state or local law enforcement and state law would otherwise prohibit or limit law enforcement’s retaining the property.
- Clarify CAFRA’s fee shifting provision, 28 U.S.C. § 2465(b)(1), which has been undermined by case law, to fully enforce the government’s obligation to pay attorney fees to prevailing claimants.
- Close loopholes – created by judicial decisions – in the statutory right to sue the government (i.e., waiver of sovereign immunity) for negligent or intentional damages to or loss of seized property in its custody by amending 28 U.S.C. § 2680(c).
- Explicitly waive sovereign immunity where the government forfeits property without proper notice to the owner or destroys, sells, or loses property without having forfeited it by amending Federal Rule of Civil Procedure 41(g).

In addition to these legislative solutions, Congress could prohibit or restrict the use of Department of Justice (DOJ) funds to forfeit property under the equitable sharing law.

Executive

Absent congressional action to amend federal civil asset forfeiture law, the President should issue an executive order or the Department of Justice should revise its regulations and policies to limit or forbid the use of equitable sharing designed to circumvent state law.

2. Criminal Asset Forfeiture Reform

A. *Criminal Forfeiture Rules are Unfair to Defendants and Third Parties*

The government increasingly relies on criminal forfeiture proceedings, which are less protective of property owners than civil forfeiture proceedings. Furthermore, court decisions have modified criminal forfeiture procedures in ways that unfairly tip the balance in favor of the government, in ways that circumvent and undermine the purposes of the Civil Asset Forfeiture Reform Act.

B. *Safeguard the Rights of Defendants and Third Parties with Basic Procedural Reforms*

Legislative

Congress should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and to curtail the government’s use of criminal forfeiture as an end run around civil asset forfeiture reforms. The reforms proposed below fall into three broad categories. The first category is comprised of three proposals that would help safeguard the accused’s rights to a fair procedure for determining what is subject to criminal forfeiture. The second category contains four proposals that would limit the use of so-called personal “money judgments” in lieu of orders forfeiting specific property. Such money judgments are a judicially-crafted remedy that was never authorized by Congress. The third category of proposed reforms is intended to safeguard the rights of third parties who have an interest in the property subject to forfeiture.

Amending the Federal Rules of Criminal Procedure and United States Code, as suggested below, could provide meaningful solutions to the issues identified above.

i. *Amend Rules 7 and 32.2 of the Federal Rules of Criminal Procedure*

Congress should safeguard the accused’s right to a fair procedure for determining the amount of any criminal forfeiture by: (i) requiring fair notice through a bill of particulars; (ii) providing the right to challenge ex parte restraining orders; and (iii) restricting the use of hearsay.

ii. *Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 85*

Congress should amend these provisions to limit the use of money judgments in lieu of forfeiture of specific property by: (i) providing the right to a jury trial; (ii) limiting the use of joint and several liability; (iii) clarifying that the relation back principle does not apply to

substitute (i.e., “clean”) assets; and (iv) limiting the amount of money judgments to the defendant’s known current assets, unless the government proves that the defendant has concealed assets. Short of abolishing the money judgment, Congress needs to rein in the abuses that have arisen in connection with the use of money judgments.

iii. ***Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 85***

Congress should seek to safeguard the rights of third parties with interests in the property the government seeks to forfeit by: (i) providing the right to a jury trial, (ii) allowing a third party with standing to contest the forfeiture on the merits; (iii) requiring a finding that the defendant has some forfeitable interest in the property before a preliminary order of forfeiture is entered; and (iv) treating both court-ordered child support obligations and claims for compensation by the defendant’s employees like secured interests, with priority over the government’s forfeiture claims.

APPENDICES**Experts**

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Further Resources

DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (2010).

MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK,
POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, INST. FOR JUSTICE (2010)
http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

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